State Responsibility for Genocide and the Lens of State Crime: An Interdisciplinary Case Study of the Rohingya of Myanmar

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CONTENT WARNING

This thesis deals with the real-world reports of mass killing, torture and rape of civilians.

ABSTRACT

The ethnic Rohingya civilian population of Myanmar have been murdered, raped and tortured by the state's official military. This human rights crisis is being addressed by the law through two differing avenues of responsibility: action concerning individual criminal responsibility has arisen in the International Criminal Court (ICC) and action concerning state responsibility in the International Court of Justice (ICJ). If the ICJ action against Myanmar is successful, this would mark the first time a state has been found to breach its obligation to not *commit* genocide—as opposed to failing to prevent and punish genocide.

This thesis questions whether state responsibility for committing genocide should be attributed to Myanmar. To answer this question, it engages with the theory of state crime from critical criminology. This was carried out through an interdisciplinary approach, which does not aim to alter the law, or solve its problems, but to understand the development of the law in a different light. From this perspective, the use of individual criminal responsibility is applauded for its ability to address the role of the military's high-ranking officials. This addresses the authorisation of the attacks and routinisation of violent conduct in the military, by placing the onus on the high-ranking officials to ensure that criminal acts of this nature are not carried out within their ranks. However, dealing with the situation solely through individual criminal responsibility is not the most appropriate way forward.

In this situation, the concept of deviance can be applied to the state's longstanding organisational goal of removing the Rohingya from its territory. Similarly, the discriminatory rhetoric embedded in Myanmar's culture has left the Rohingya dehumanised, enabling the direct perpetrators to carry out the attacks with no moral objection. A successful action in the ICC would fail to recognise the state as a deviant actor, or to impact the underlying organisational goals and discriminatory rhetoric.

Alternatively, acknowledging the state's involvement through a judgment of state responsibility in the ICJ would allow the institutional dimension of the crimes to finally be recognised. The symbolic value of the decision would provide the foundation for deep reflection, re-consideration of the state's deviant goals, and an impact on the narrative concerning the dehumanised victim population. Attributing state responsibility to Myanmar for committing genocide is not only appropriate, but a necessary step forward in the longstanding fight against international crimes with state involvement.

To best address state crimes, these two avenues of responsibility must operate in tandem, with individual criminal responsibility addressing the tangible aspects of the crimes, and state responsibility addressing the symbolic, narrative-driven aspects of the crimes.

DECLARATION

I certify that this thesis:

1. does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university

2. and the research within will not be submitted for any other future degree or diploma without the permission of Flinders University; and

3. to the best of my knowledge and belief, does not contain any material previously published or written by another person except where due reference is made in the text.

Signed: Thomas Jupe Date:1 June 2023

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I INTRODUCTION

A *Research Questions and Importance*

The international community is currently faced with a humanitarian crisis in Myanmar,[1] which has expanded to neighbouring states.[2] The national military's 'clearance operations' involved the murder, rape, detention and torture of the 'Rohingya' ethnic group.[3] Since August 2016, 10,000 civilians have been killed in the attacks,[4] and between 600,000 and 1 million victims are estimated to have been forcibly displaced from Myanmar to Bangladesh.[5]

This humanitarian crisis is being addressed through two notable avenues: the International Criminal Court (ICC) and the International Court of Justice (ICJ).[6] Firstly, the Office of the Prosecutor of the

[1] Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/39/CRP.2 (17 September 2018) ('*Detailed Findings 2018*'); Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, UN Doc A/HRC/34/67 (1 March 2017); Penny Green, Thomas MacManus and Alicia de la Cour Venning, *Countdown to Annihilation: Genocide in Myanmar* (International State Crime Initiative, 2015) 53–5; Navine Murshid, 'Bangladesh Copes with the Rohingya Crisis by Itself' (2018) 117(798) *Current History* 129, 130; Jobair Alam, 'The Current Rohingya Crisis in Myanmar in Historical Perspective' (2019) 39(1) *Journal of Muslim Minority Affairs* 1; Catherine Renshaw, 'Myanmar's Genocide and the Legacy of Forgetting' (2020) 48(2) *Georgia Journal of International and Comparative Law* 425, 465–6.

[2] Such as, but not limited to, Bangladesh. International Criminal Court, 'ICC Judges Authorise Opening and Investigation into the Situation in Bangladesh/Myanmar' (Media Release ICC-CPI-20191114-PR1495, 14 November 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>.

[3] Human Rights Council, *Detailed Findings 2018* (n 1) [1069]–[1095]; *Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v Myanmar)* (*Judgment)* [2022] ICJ Rep 178, [28] ('*The Gambia v Myanmar (Judgment)*').

[4] In the period 2017–18, it is estimated that approximately 10,000 Rohingya were killed, out of a population of more than 1 million. Human Rights Council, *Detailed Findings 2018* (n 1) [1008], [1275], [1395], [1437], [1482]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Verbatim Record)* [2019] ICJ Rep 178, 37 [47]; Catherine Renshaw, 'The Numbers Game: Substantiality and the Definition of Genocide' (2021) *Journal of Genocide Research* (advance), 15.

[5] International Criminal Court, 'ICC Judges Authorise Opening and Investigation into the Situation in Bangladesh/Myanmar' (n 2); Md Ali Siddiquee, 'The Portrayal of the Rohingya Genocide and Refugee Crisis in the Age of Post-truth Politics' (2019) 5(2) *Asian Journal of Comparative Politics* 89; 'Rohingya Genocide is Still Going on, Says Top UN Investigator', *The Guardian* (online, 24 October 2018) <https://www.theguardian.com/world/2018/oct/24/rohingya-genocide-is-still-going-on-says-top-un-investigator>.

[6] It is noted that there is also action on this being undertaken in the Argentinian courts, through an action of universal jurisdiction. However, due to the scope of this thesis, the ICC and ICJ actions will remain the focal points. Burmese Rohingya Organisation UK, 'Historic Decision By Argentinian Courts To Take Up Genocide Case Against Myanmar' (Media Release, 28 November 2021) <https://www.brouk.org.uk/historic-decision-by-argentinian-courts-to-take-up-genocide-case-against-myanmar/>; Jennifer Keene-McCann and Aakash Chandran, 'Identifying "Other Argentinas": Variables in Considering Universal Jurisdiction Forum States' in Manzoor Hasan, Syed Mansoob Murshed and Priya Pillai (eds), *The Rohingya Crisis* (Routledge, 2022) 132;

International Criminal Court has opened an investigation into allegations of crimes against humanity,[7] concerning individual criminal responsibility.[8] Secondly and potentially most controversially,[9] The Gambia has recently initiated proceedings against Myanmar in the ICJ, which includes allegations that Myanmar has *committed* genocide.[10]

The previous landmark ICJ case dealing with this issue, the *Bosnian Genocide Case*, has shown that states parties to the *Genocide Convention* can be found to have breached their obligation to not commit genocide.[11] However, due to the specific nuances of the case, such a judgment was not

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Kristýna Urbanová, 'The Situation in Myanmar and the Territorial Jurisdiction of the ICC' in Pavel Šturma and Milan Lipovský (eds), *The Crime of Genocide: Then and Now* (Brill Nijhoff, 2022) 234, 246. See Section C 'Scope' for further details.

[7] International Criminal Court, 'ICC Judges Authorise Opening and Investigation into the Situation in Bangladesh/Myanmar' (n 2); *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (Authorization of Investigation)* (International Criminal Court, Pre-Trial Chamber 3 ICC-01/19-27, 14 November 2019); Douglas Guilfoyle, 'The ICC Pre-trial Chamber Decision on Jurisdiction Over the Situation in Myanmar' (2019) 73(1) *Australian Journal of International Affairs* 2.

[8] The ICC has jurisdiction over 'natural persons' and those who are found in breach of the *Rome Statute* are individually liable for punishment: *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 25 ('*Rome Statute*').

[9] Concerns have been raised in the General Assembly in the past on this issue. This concerns the institutional redundancy between the ICJ and the ICC, as the ICC possesses the specific function of dealing with international crimes. The contradiction that the attribution of state responsibility for international crimes has with the fundamental understanding of individual criminal responsibility that international criminal law has been based upon has also been noted: *State Responsibility Comments and Observations Received by Governments*, UN GAOR, 50th sess, Agenda Item 2; UN Doc A/CN.4/488 and Add 1–3 (25 March, 30 April, 4 May, 20 July 1998) 120–1. Furthermore, even within the *Bosnian Genocide Case*, judges Shi and Koroma delivered a dissenting statement on the issue, citing similar concerns: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Joint Declaration of Judges Shi and Koroma)* [2007] ICJ Rep 4, [1].

[10] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Application Instituting Proceedings and Request for Provisional Measures)* (International Court of Justice, General List No 178, 11 November 2019) 4; *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('*Genocide Convention*'). States are often accused of failing to prevent and punish genocidal acts on their territory, but not of committing genocide. It is noted that a determination that a state has committed genocide does not state that the state has committed a 'crime'. Rather, state responsibility in this setting indicates that an 'internationally wrongful act' has occurred.

[11] In the *Bosnian Genocide Case*, the majority determined that the *Genocide Convention* imposes an obligation on signatory states to not commit genocide, stating: '[T]he Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III. Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred': *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro (Judgment)* [2007] ICJ Rep 4, [179] ('*Bosnian Genocide Case*').

reached.[12] If the ICJ were to find that Myanmar has committed genocide, this would mark the first time a state has been held responsible in the ICJ for committing criminal conduct—a finding not to be taken lightly.[13]

There has been a longstanding focus on the attribution of individual criminal responsibility[14] for dealing with humanitarian crises of this nature,[15] and this is an important point in any discussion of international criminal law's approach to the situation in Myanmar.[16] This focus assumes that international criminal law[17] can adequately address the situation on its own.[18] But, in the current day, it must be questioned whether this perspective still holds true.[19]

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[12] Ibid (n 11) [385]–[415]. The ICJ in this instance was primarily concerned with attributing state responsibility to Serbia for the genocidal actions of the Army of Republika Srpska (VRS). Deeper analysis by the Court found that the VRS was not a de jure or de facto organ of Serbia, nor was it acting under the instructions of Serbia.

[13] A finding that a state is capable of, and has committed, the 'crime of crimes' is likely to rouse a considerable degree of controversy, especially when considering the above-mentioned discussion in the General Assembly and the dissenting judges in the *Bosnian Genocide Case*; *State Responsibility Comments and Observations Received by Governments* (n 9) 120–1; *Bosnia and Herzegovina v Serbia and Montenegro (Joint Declaration of Judges Shi and Koroma)* (n 9) [1].

[14] The final judgment of the Nuremberg Military Tribunal was able to determine a definitive position regarding responsibility that has formed the basis for the focus on individual criminal responsibility that is still seen today: 'Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced': *Judgment of the International Military Tribunal, Trial of the Major War Criminals* (1 October 1946), reprinted in 'Judicial Decisions Involving Questions of International Law' (1947) 41 *American Journal of International Law* 172, 221.

[15] Such as those involving 'atrocity crimes': crimes against humanity, war crimes, genocide and aggression.

[16] Which deals with the attribution of individual criminal responsibility: *Rome Statute* (n 8) art 25. It is noted that the ICC case focusses on crimes against humanity, and not genocide, due to jurisdictional issues. However, the actions in the two courts still provide differing forms of responsibility based upon the same humanitarian crisis. International Criminal Court, 'ICC Judges Authorise Opening and Investigation into the Situation in Bangladesh/Myanmar' (n 2).

[17] In this case, through action in the ICC.

[18] *State Responsibility Comments and Observations Received by Governments* (n 9) 114, 115, 121; Steven Freeland, 'A Prosecution too Far? Reflections on the Accountability of Heads of State Under International Criminal Law' (2010) 41 *Victoria University of Wellington Law Review* 179, 183–90.

[19] Academics have questioned this reliance on individual criminal responsibility for some time. For example, Backer argues that international law in its current form is not equipped to deal with the forms of evil the 21st century has brought forth. Balint argues that the focus on individual responsibility in international law renders it ill-equipped to address state crime. Asuncion argues that 'Individual liability is not a substitute for state responsibility', suggesting that the state should not absolved of its contribution to criminal conduct through the prosecution of a small number of individuals. Furthermore, Alvarez finds a focus on individual criminal responsibility as problematic due to the fact that international crimes such as crimes against humanity and genocide are inherently institutional. This is because, these crimes naturally require government involvement or acquittal due to their scope and scale. Larry Backer, 'The Fuhrer Principle of International Law' (2002) 21 *Penn State International Law Review* 509, 569; Jennifer Balint, 'Transnational Justice and State Crime' (2014) 13 *Macquarie Law Journal* 147; Amabelle Asuncion, 'Pulling the Stops on Genocide: The State or the Individual?' (2009) 20(4) *European Journal of International Law* 1195, 1220; Jose Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda' (1999) 24 *Yale International Law Review* 365, 367.

The primary aim of this thesis is to analyse whether state responsibility should, or should not, be attributed to Myanmar for committing genocide. In a legally centric approach, this thesis could be framed in a way that solely focusses on the reform, potential future and application of international law. This thesis, however, aims to distinguish itself from the existing discussions that have been constantly rehashed since the 1940s.[20] By adopting an interdisciplinary approach and borrowing the lens of 'state crime' from critical criminology,[21] this thesis provides an alternative understanding of whether state responsibility should be attributed in this situation.

From the perspective of state crime, human rights violations committed by public officials or governments,[22] with the intention of achieving organisational goals or state gain,[23] can be analysed through a broader, non-legal perspective. Concepts such as 'organisational deviance' versus 'individual deviance'[24] and 'operative goals'[25] become relevant in establishing the wrongdoing of a particular state. Furthermore, this perspective assesses the many factors that have enabled state crimes to be carried out, providing a broader picture on how the situation has truly developed.[26] Through this broader understanding of the situation in Myanmar the question of attributing state responsibility[27]

[20] The notion of state responsibility for international crimes has been discussed many times in the past. Notable examples can be seen within the Nuremberg Trials and the discussion on draft article 19 in the late 1990s: *Judgment of the International Military Tribunal, Trial of the Major War Criminals* (n 14) 221; *State Responsibility Comments and Observations Received by Governments* (n 9) 114, 115, 121.

[21] Penny Green and Tony Ward, *State Crime* (Pluto, 2004) 5; Penny Green and Tony Ward, 'State Crime, Human Rights, and the Limits of Criminology' (2000) 27(1) *Social Justice* 101, 110; William Chambliss, 'State-Organized Crime' (1989) 27(2) *Criminology* 183, 184; David Friedrichs, 'Rethinking the Criminology of Crimes of States: Monumental, Mundane, Mislabelled and Miscalculated Crimes' (2015) 4(4) *International Journal for Crime, Justice and Social Democracy* 106; Ronald Kramer and Raymond Michalowski, 'War, Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq (2005) 45(4) *British Journal of Criminology* 446, 469; Alan Doig, *State Crime* (Willan Publishing, 2011); Nerida Chazal and Marinella Marmo, *Transnational Crime and Criminal Justice* (Sage, 2016) 190–1.

[22] Doig (n 21) 233.

[23] Green and Ward, *State Crime* (n 21); Chambliss (n 21) 184; Kramer and Michalowski (n 21) 459.

[24] Green and Ward, *State Crime* (n 21) 5; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 21) 110; Chambliss (n 21) 184.

[25] Green and Ward, *State Crime* (n 21) 6; Ronald Kramer and James Jaksa, *The Space Shuttle Disaster: Ethical Issues in Organizational Decision-Making* (ERIC, 1987), citing Charles Perrow, 'The Analysis of Goals in Complex Organizations' (1961) 26 *Sociological Review* 854.

[26] Through the crimes of obedience lens, such as authorisation, routinisation and dehumanisation. Herbert Kelman and V Lee Hamilton, *Crimes of Obedience* (Yale University Press, 1989); Herbert Kelman, 'The Social Context of Torture: Policy Process and Authority Structure' (2005) 87 *International Review of the Red Cross* 123, 131; V Lee Hamilton, 'Chains of Command: Responsibility Attribution in Hierarchies' (1986) 16(2) *Journal of Applied Social Psychology* 118; Brunilda Pali, 'Crimes of (Dis)Obedience: Radical Shifting of the Criminological Gaze', *Security Praxis* (Web Page, 1 October 2018) <https://securitypraxis.eu/crimes-of-disobedience/>; Alette Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (2019) 17 *Journal of International Criminal Justice* 105; Stanley Cohen, 'Human Rights and Crimes of the State: The Culture of Denial' (1993) 26 *Australia and New Zealand Journal of Criminology* 97, 110.

[27] For failing to uphold its obligation to not commit genocide.

can be understood in a different context. This leads to the overarching research question and sub-questions.

The overarching research question for this thesis is:

- *From the perspective of state crime, should sate responsibility be attributed to Myanmar for committing genocide?*

To answer this overarching research question, the following sub-questions will be answered:

- *Who, if anyone, is an action in the ICC likely to involve?*
- *Can genocidal conduct be attributed to Myanmar in the ICJ, and if so what remedies may follow?*
- *How does the lens of state crime approach the Rohingya crisis?*
- *From the lens of state crime, is individual criminal responsibility sufficient to address the Rohingya crisis? Or can an action for state responsibility provide a meaningful alternative solution?*

By determining whom an action in the ICC is likely to involve, it becomes possible to use this state crime perspective to comment on whether individual criminal responsibility is sufficient to deal with the humanitarian crisis—or whether state responsibility is perhaps a necessary step forward.

On a similar note, determining whether genocidal conduct can legally be attributed to Myanmar in the ICJ, and the type of remedies that may follow, can provide further assistance to this discussion. Understanding whether an action for state responsibility in the ICJ[28] provides a meaningful alternative solution to the humanitarian crisis than that achieved in the ICC is a valuable consideration when assessing the necessity of state responsibility.[29]

The lens of state crime provides the ability to draw from a deep theoretical background to determine whether individual criminal responsibility is enough to address the situation on its own, and whether an action for state responsibility in the ICJ[30] can provide a meaningful alternative solution to the crisis that is not offered by the ICC.

This thesis contends the age-old sole reliance on individual criminal responsibility has its limits, and explains why it is important for the law to evolve in a manner that encompasses the totality of state

[28] For failing to uphold its obligation to not commit genocide.
[29] For failing to uphold its obligation to not commit genocide.
[30] For failing to uphold its obligation to not commit genocide.

crimes.[31] This thesis ultimately argues that there is a strong need for state responsibility for committing genocide in the space of international law. This would enable the law to recognise the institutional dimension of the crimes and address the discriminatory state goals and rhetoric that lead to the commission of the crimes—all of which cannot be addressed through the attribution of individual criminal responsibility.

Potential concerns about the use of non-legal principles and ideals within a legal setting from the eyes of a legal purist are acknowledged. But this thesis by no means aims to serve as the authority for 'solving' the Rohingya crisis through use of the law.[32] This thesis merely aims to provide an enhanced understanding of the development of the law within the academic setting and highlight the value in doing so. Through this alternative understanding, it aims to provide a new viewpoint to be considered when considering the inevitable question of the attribution of state responsibility[33]—both in relation to the upcoming case,[34] and beyond.[35]

B *Methodology*

This project took the form of interdisciplinary research, using the qualitative method of exploratory case study to address the complexities of the law and theory being discussed in a practical manner. Given this, there are three major aspects to the approach of the thesis that need to be outlined in further depth: the use of interdisciplinary research, the use of an exploratory case study and use of evidence. With this process explained, the structure, scope and use of evidence within this methodology will then be outlined.

[31] By approaching the problem through the lens of state crime, it becomes evident that there are further factors involved that cannot be addressed through a sole focus on individual responsibility.

[32] It is acknowledged that there are many viewpoints on the appropriateness of attributing state responsibility for criminal acts, the practicalities of doing so, and the difficulties created in setting such a precedent. Providing an alternative viewpoint for consideration as well as weighing up these considerations is beyond the scope of this thesis.

[33] For Myanmar failing to uphold its obligation to not commit genocide.

[34] *The Gambia v Myanmar (Judgment)* (n 3).

[35] As of writing, further allegations concerning state responsibility for committing genocide have been brought to the ICJ, indicating the potential relevance of this discussion in the future: *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (*Order of 7 October 2022)* [2022] ICJ Rep 182; Andreas Kulick, 'Provisional Measures After Ukraine v Russia (2022)' (2022) 13(2) *Journal of International Dispute Settlement* 323; Andrew Sanger, 'False Claims of Genocide have Real Effects: ICJ Indicates Provisional Measures in Ukraine's Proceedings Against Russia' (2022) 81(2) *Cambridge Law Journal* 217; Prabhash Ranjan and Achyuth Anil, 'Russia-Ukraine War, ICJ, and the Genocide Convention' (2022) 9 *Indonesian Journal of International & Comparative Law* 101.

1 *Interdisciplinary Research*

Within the discipline of international law, whether state responsibility should be attributed for international crimes such as genocide is considered a doctrinal question first and foremost. From this perspective, the most important consideration is whether the legal framework permits doing so. In saying this, the discipline of international has been open to considering further, non-legal considerations when discussing the idea of attributing state responsibility for international crimes. A prime example of this is the discussion on the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, which applied political and moral considerations to reform of the responsibility of states in international law.[36] In a similar vein, this thesis will bring into the discussion further arguments and considerations of this alternative nature. But rather than re-visiting the mostly political and moral arguments that have been discussed in the past, this thesis will bring forth further points of this nature that have not been considered within the discipline of international law. This will be achieved through the interdisciplinary approach.

By extending beyond the discipline of international law, this project has entered the realm of what is often referred to as 'interdisciplinary research'.[37] Interdisciplinary research allows an array of alternative material such as approaches, theories, methodologies and even sources to be 'borrowed' for analytical and thought-provoking purposes.[38]

Whilst a somewhat related discipline, the field of criminology differs immensely from the field of international law. The concept of state crime, in the strictly criminological sense that has been discussed in this chapter, is not present within the discipline of international law.[39] There are no procedures to punish states for 'state crimes', as the concept in this sense lies solely within the

[36] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 53rd sess, ILC Report A/56/10 (2001). The concerns about draft article 19 included the institutional redundancy between the ICC and ICJ, the contradiction with the principle of individual responsibility, the question of who, if anyone, can and should bring an action to the ICJ, and the appropriateness of collective responsibility. *State Responsibility First Report on State Responsibility, by Mr. James Crawford, Special Rapporteur*, UN GAOR, 50th sess, Agenda Item 2; UN Doc A/CN.4/490 and Add 1–7 (24 April, 1, 5, 11 and 26 May, 22 and 24 July, 12 August 1998).

[37] Martha Siems, 'The Taxonomy of Interdisciplinary Research: Finding the Way out of the Desert' (2009) 7(1) *Journal of Commonwealth Law and Legal Education* 5; Jeffrey Dunoff and Mark Pollack, 'International Law and International Relations: Introducing an Interdisciplinary Dialogue' in Jeffrey Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2013) 3; Anne-Marie Slaughter, Andrew Tulumello and Stepan Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92(3) *American Journal of International Law* 367; Douglas Vick, 'Interdisciplinarity and the Discipline of Law'(2004) 31(2) *Journal of Law and Society* 163, 170–3, 181–91.

[38] Outi Korhonen, 'Within and Beyond Interdisciplinarity in International Law and Human Rights' (2017) 28(2) *European Journal of International Law* 625.

[39] Balint (n 19).

discipline of criminology. Whilst international law deals with violations of human rights through various international instruments such as the *Rome Statute*[40] and *Genocide Convention*,[41] overlap between international law and state crime in its criminological sense only exists by coincidence, not design. International law and state crime exist independently, as a product of their respective disciplines' schools of thought and are based upon entirely separate principles and backgrounds.

Although the idea of state crime holds no legal value, the differences between state crime and international law should not cause state crime to be looked down upon as an inferior approach to a similar issue. Rather, the major differences between the two disciplines could be embraced and utilised as an opportunity to understand the current iteration of international law in an entirely different light. It is within these disparities between international law and state crime that the key to the further development of international law may be found. This highlights the major difference between the two disciplines that this project will focus on, namely the approach to the issue of responsibility for international crimes.

(a) How the Concept of State Crime Can be Used to Reflect on International Law's Approaches to Responsibility

This wider or alternative viewpoint will be incorporated by analysing the way in which the theory of state crime approaches the issue of responsibility. This will provide a point for comparison between the two disciplines, ultimately enabling further discussion and understanding. Given this, the use of this theory for such purposes will now be explained.

From the perspective of state crime, the legally centric basis for determining responsibility under stringent legal framework can be criticised because only a narrow range of perpetrators are addressed by the law.[42] Drawing from the idea that laws are created by the 'powerful', with the self-interests of such powerful actors in mind, relying on the legally mandated methods of attributing responsibility may allow bias toward certain states or governments.[43] The takeaway from this critique of the legal perspective's approach to responsibility is that critical criminologists advocate assessing the situation in its entirety. This places an emphasis on considering an array of actors and factors—as opposed to the legally mandated approach constructed by powerful actors.[44]

[40] *Rome Statute* (n 8).
[41] *Genocide Convention* (n 10).
[42] Balint (n 19).
[43] David Friedrichs, 'Crimes of the Powerful and the Definition of Crime' in Gregg Barak (ed), *The Routledge International Handbook of the Crimes of the Powerful* (Routledge, 2015) 39; Friedrichs, 'Rethinking the Criminology of Crimes of States' (n 21) 107; Chazal and Marmo (n 21) 192–4.
[44] Ethan Nadelmann, 'Global Prohibition Regimes: The Evolution of Norms in International Society' (1990) 44(4) *International Organization* 479, 526; Kramer and Michalowski (n 21) 469; Dianne Otto, 'Rethinking the

Of value to the development of international law and the discussion at hand is the way in which critical criminologists view actors as 'deviant'. Whereas international law follows strict legal guidelines in determining *who* is responsible for committing a crime,[45] state crime scholars follow a framework of their own. Most notably, state crime scholars determine *who* has committed a crime based on a discussion of 'organisational deviance' versus 'individual deviance'.[46] These scholars argue that it is possible that deviance can be a product of the state itself, and by looking at the broader, underlying 'operative goals'[47] the true extent of the state's deviance can be revealed.

Furthermore, state crime scholars utilise the 'crimes of obedience' framework to shed light on how a situation has developed over time.[48] By exposing the factors that have enabled 'manifestly unlawful' acts to be carried out,[49] this perspective is able to highlight the most appropriate way to prevent further instances of state crime in a region.

The current understanding of international law may be able to benefit from the insights of this alternative approach. These concepts of 'organisational deviance'[50] and 'crimes of obedience'[51] can provide a further, wider context to international law's discussion on state responsibility for genocide, with the aim of ensuring that the law is advancing in the right direction.

(b) Concerns about Bringing Alternative Theories into the Legal Discipline

At this point, one concern needs to be noted. The acceptance of the ideas and principles of an alternative discipline into the base discipline naturally comes with the territory of interdisciplinary

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Universality of Human Rights Law' (1997) 18 *Australian Year Book of International Law* 1; Mrinalini Sinha, *Feminisms and Internationalisms* (Blackwell Publishers, 1999).

[45] See, eg, the *Rome Statute* which outlines the specific criteria for each offence: *Rome Statute* (n 8).

[46] Green and Ward, *State Crime* (n 21) 5; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 21) 110; Chambliss (n 21) 184.

[47] Green and Ward, *State Crime* (n 21) 6.

[48] Kelman and Hamilton (n 26). Within the realm of criminology, many scholars have adopted this crimes of obedience framework for the purpose of explaining instances of state crime in greater depth: Frank Neubacher, 'How Can it Happen That Horrendous State Crimes Are Perpetrated? An Overview of Criminological Theories' (2006) 4(4) *Journal of International Criminal Justice* 787, 791; Herbert Kelman, 'The Policy Context of International Crimes' in André Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press, 2009) 26; Edward Day and Margaret Vandiver, 'Criminology and Genocide Studies: Notes On What Might Have Been and What Still Could Be' (2000) 34(1) *Crime, Law and Social Change* 43; Roxana Marin, 'Structural and Psychological Perspectives on the Perpetrator of Genocide' (2012) 12(2) *Studia Politica: Romanian Political Science Review* 235, 242; Pali (n 26); Smeulers (n 26) 113; Herbert Kelman, 'Dignity and Dehumanization: The Impact of the Holocaust on the Central Themes of My Work' in Herbert Kelman, *Resolving Deep-Rooted Conflicts*, ed Werner Wintersteiner and Wilfried Graf (Routledge, 2016) 38, 44.

[49] Smeulers (n 26) 106.

[50] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 21) 110; Chambliss (n 21) 184.

[51] Kelman and Hamilton (n 26) 46; Pali (n 26); Smeulers (n 26) 113.

research.[52] This can meet resistance when one of the disciplines is law. Legal purists inevitably advocate against such an alternative approach. Laws, after all, are created by and cases are decided upon the basis of legal precedent and advice which arise strictly within the legal discipline. Upon this basis alone it becomes easy to overlook the importance of interdisciplinary legal research, as any such research ultimately carries zero legal value. Academics adhering to a strictly purist approach to legal research may be reluctant to consider any arguments from an alternative discipline.

On the other hand, it is this reluctance to allow external influences that provides the interdisciplinary approach with an ability to understand the law (and its development) in a way that is not otherwise possible. Legal research by academic lawyers is strictly confined to the content of actual law, and what lawmakers 'actually do'.[53] As a result, this may be limiting when attempting to understand the law from a wider perspective.[54] Although useful in many situations, traditional legal research is arguably too narrow to provide answers to the 'macro questions' concerning principles, general concepts and problems that the law in its current form may possess.[55] By widening the research scope and adopting specific aspects of criminology, interdisciplinary research in the legal space enables the ability to answer the macro questions in a way that the narrow confines of strict legal research would simply be unable to.[56] Given that the issues surrounding the responsibility of international law require researchers to question the principles, general concepts and problems of modern international law,[57] it appears that interdisciplinary research may hold the key to advancing the discipline of international law in this area.[58]

That is not to say that the arguments of the legal purists are not without merit. But pondering the appropriateness of legal principles in the academic setting does not aim to overstep these boundaries. This thesis by no means aims to serve as the authority for 'solving' the Rohingya crisis through use of the law. Nor does it attempt to advocate an immediate amendment to the legal principles concerning

[52] Dunoff and Pollack refer to this as 'the realist challenge': Dunoff and Pollack (n 37) 6.

[53] Siems (n 37); Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2016) 8(3) *Erasmus Law Review* 130.

[54] Cotterrell describes strictly doctrinal research as 'intellectual tunnel-vision' and Collier uses the expression placing 'an intellectual strait-jacket on understandings of law and society' in describing doctrinal research. Roger Cotterrell, 'Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies' (2002) 29 *Journal of Law and Society* 632, 633; Richard Collier, 'The Changing University and the (Legal) Academic Career—Rethinking the Relationship Between Women, Men and the "Private Life" of the Law School' (2002) 22(1) *Legal Studies* 1, 27; Vick (n 37); Siems (n 37).

[55] Siems (n 37).

[56] Ibid.

[57] Ibid.

[58] This line of thought can be supported by the way in which Goldsmith and Posner have approached the criticism of international law, which has been achieved through the use of principles and concepts from the discipline of international relations: Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford University Press, 2005).

the attribution of responsibility. Accepting that interdisciplinary research lacks legal value in this regard, this thesis acknowledges that any real change on the relevant issue of state responsibility lies primarily with the ICJ in the upcoming case of *The Gambia v Myanmar*. With this in mind, this thesis merely aims to provide an enhanced understanding of the law and its current evolution as the case in question progresses, while highlighting the value of utilising such an approach to understand the law from an alternative, wider viewpoint.

2 *Exploratory Case Study*

In order to adequately express and explore the complexities and nuances of adopting an alternative approach to analysing the laws and principles of international law, a qualitative exploratory case study method was adopted. This form of case study utilises the in-depth exploratory analysis of real-world events in order to understand why a situation occurred the way it did.[59] In this regard, the focus is on the 'how' and 'why' in providing further context to understand a phenomenon.[60] Scholars have praised case studies of this nature for their ability to produce detailed qualitative accounts that can both explore data in a real-life context and provide an explanation of the various complexities of such situations.[61]

In terms of understanding the question at hand, the relevant phenomenon is the humanitarian crisis in Myanmar. The lens of state crime helps to explain *how* and *why*[62] the humanitarian crisis in Myanmar has developed. Understanding the entirety of the situation in this way ultimately enables an alternative perspective to a longstanding question in international law to be developed.

As Zainal suggests, the case study method serves as a backdrop for asking general questions on an overarching topic, to which a deep exploration into the case at hand will open the door for further examination.[63] General questions at the early stages include: How do the differing avenues of international law approach the situation? And how does the lens of state crime show the situation has developed? Asking these general questions and exploring how these different perspectives approach the situation opens the door for further examination.[64] For example, if the state crime lens suggests that the Rohingya crisis is a 'crime' that has been committed by the state itself, but international law is only able to recognise the deviance of a limited number of individuals, then further, deeper discussion

[59] Winston Tellis, 'Application of a Case Study Methodology' (1997) 3(3) *Qualitative Report* 1, 19.
[60] Robert Yin, *Case Study Research: Design and Methods* (Sage, 1990) 21; Kay Chopard and Roger Przybylski, *Methods Brief: Case Studies* (Justice Research and Statistics Association, November 2021) <https://www.jrsa.org/pubs/factsheets/jrsa-research-methods-brief-case-studies.pdf>.
[61] Shana Ponelis, 'Using Interpretive Qualitative Case Studies for Exploratory Research in Doctoral Studies (2015) 10(1) *International Journal of Doctoral Studies* 535, 550.
[62] Yin (n 60) 21; Chopard and Przybylski (n 60).
[63] Zaidah Zainal, 'Case Study as a Research Method' (2007) 5 *Jurnal Kemanusiaan* 1.
[64] Ibid.

is warranted on the appropriateness of the law's focus on individuals. By asking these general questions and exploring the real-world application of the law, this thesis investigates whether attributing state responsibility to Myanmar for failing to uphold its obligations to not commit genocide is appropriate.

The Rohingya situation has been chosen as the subject of this case study to demonstrate the differing practical impacts of the different approaches to responsibility. This relatively unique instance of both ICC and ICJ action being explored will provide the space for a valuable discussion on the appropriateness of the different forms of responsibility that international law has to offer. Analysing a case that involves both individual and state responsibility will bring to light the real-world impacts of the use of these alternative avenues.

3 *Use of Evidence: The Fact-Finding Mission on Myanmar*

Alleging that a state has committed a 'state crime' is a heavy accusation to make. As with any situation involving allegations of state involvement in such horrific circumstances, the reliability of the evidence used throughout this thesis is of paramount importance. Only the most reliable and detailed accounts of the situation in Myanmar must be relied upon when asserting that the state itself has committed a crime. This includes the evidence of the United Nations Human Rights Council's Independent International Fact-Finding Mission on Myanmar (Fact-Finding Mission) in its briefings to the UN General Assembly[65] and UN Security Council.[66]

The relevant events are the clearance operations, which have caused such harm to a civilian population that states themselves have gone to the extent of filing a case against Myanmar over the operations.[67] The most notable source of evidence of the clearance operations occurring is the Fact-Finding Mission. The Fact-Finding Mission is an independent body established to investigate and formulate the facts regarding the allegations of human rights violations.[68] The Fact-Finding Mission has produced numerous detailed reports on the issue, providing lengthy details on the human rights violations carried out as part of the clearance operations.[69]

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[65] *Situation of Human Rights in Myanmar*, UN GAOR, 73rd sess, Agenda Item 74(c); UN Doc A/C.3/73/L.51 (31 October 2018) 4.

[66] United Nations, 'Head of Human Rights Fact-Finding Mission on Myanmar Urges Security Council to Ensure Accountability for Serious Violations against Rohingya' (Media Release SC/13552, 24 October 2018).

[67] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Order)* (International Court of Justice, General List No 178, 18 May 2020) ('*The Gambia v Myanmar (Order)*').

[68] 'Independent Fact-Finding Mission on Myanmar', *United Nations Human Rights Council* (Web Page, 2019) <https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx>.

[69] Ibid.

The first occasion on which these findings were discussed at the international level was the 73rd session of the UN General Assembly.[70] The facts outlined in these findings provided the required evidence to 'remain seized of the matter' and to call upon the UN Security Council to respond to the crisis.[71] In reference to the 2018 detailed findings of the Fact-Finding Mission,[72] the UN General Assembly:

> Expresses grave concern at the findings of the independent international fact-finding mission on Myanmar, that there is sufficient information to warrant investigation and prosecution so that a competent court may determine liability for genocide in relation to the situation in Rakhine State.[73]

The legitimacy of the findings of the Fact-Finding Mission were further discussed with relation to its briefing to the UN Security Council.[74] For the council to accept these findings for briefing purposes, a vote was held at the council's 8380th meeting.[75] There were 9 votes in favour, 3 opposed (China, Russian Federation and Bolivia) and 3 abstaining (Equatorial Guinea, Ethiopia, Kazakhstan),[76] which led to the briefing of the Security Council on these Fact-Finding Mission's 2018 reports.[77]

The most notable objection to the briefing came from the Russian Federation, which argued that the report was 'not based on reliable information' and was 'raw and biased', without expanding any further.[78] These issues concerning reliability of information were not discussed by any other countries in the voting process. The objections to the briefing by China and Bolivia were based on issues of procedure, the role of the UN Security Council in country-specific matters and the precedent for discussion of human rights matters in the council.[79]

Speaking on behalf of the countries that requested the briefing from the Fact-Finding Mission, Karen Pierce, delegate of the United Kingdom, stated that the mission's report is 'the most authoritative account of the human rights violations occurring in Myanmar'.[80] Within this discussion, Nikki Haley from the United States confirmed the accuracy of the Fact-Finding Mission from the United States'

[70] *Situation of Human Rights in Myanmar* (n 65).
[71] Ibid 8.
[72] Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/39/64 (12 September 2018).
[73] *Situation of Human Rights in Myanmar* (n 65) 4.
[74] United Nations, 'Head of Human Rights Fact-Finding Mission on Myanmar Urges Security Council to Ensure Accountability for Serious Violations against Rohingya' (n 66).
[75] Ibid.
[76] See United Nations, 'Head of Human Rights Fact-Finding Mission on Myanmar Urges Security Council to Ensure Accountability for Serious Violations against Rohingya' (n 66).
[77] Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (n 72).
[78] United Nations, 'Head of Human Rights Fact-Finding Mission on Myanmar Urges Security Council to Ensure Accountability for Serious Violations against Rohingya' (n 66).
[79] Ibid.
[80] Ibid.

point of view, stating that the crimes described in the report parallel the findings of an investigation into the situation from the United States, and that 'Such facts cannot be avoided by those who deny them.'[81] Furthermore, Olof Skoog of Sweden highlighted the importance and value of the Fact-Finding Mission, stating that 'all avenues must be pursued to ensure accountability for crimes committed' and 'emphasizing that the Fact-Finding Mission's report should be a turning point'.[82]

As a result, it appears that the Fact-Finding Mission—an independent investigation set up by the UN Human Rights Council—provides the most valuable source of evidence concerning the events that have transpired for the purposes of this thesis. These materials are the primary sources for the relevant events in Myanmar being discussed within the United Nations. Of course, other materials will be engaged with throughout this thesis. But, especially in the legal analyses, emphasis will be placed on the use of the Fact-Finding Mission to ensure that the material being considered is consistent with the facts being used as evidence by the international community.

C *Scope*

Due to the limited length of an academic piece of this nature, the scope of this thesis is limited in two areas: 1) which human rights violations are considered under the state crime perspective, 2) which attacks on the Rohingya are considered.

1 *The Broad Nature of Human Rights Violations from the State Crime Perspective*

One issue that may lead to the project becoming too wide in scope relates to the many human rights violations that can be discussed under the broad heading of state crime. From the view of criminologists, a 'state crime' could be any breach of human rights.[83] Events referred to and analysed by state crime scholars often (but not always) involve situations which could be considered to constitute serious violations, such as crimes against humanity, war crimes, genocide and aggression.[84] In saying this, the broad lens that this discipline has to offer does not place such a threshold for which acts or omissions could be considered to meet such a definition—a threshold Green and Ward suggest is debatable and would benefit from further research.[85] This broad position allows many further questions to be raised: What violations of human rights would this lens advocate being dealt with by the international community? Does this position assume that more minor, 'banal' human rights violations should be dealt with in institutions such as the ICC, as they would effectively be considered

[81] Ibid.
[82] Ibid.
[83] Green and Ward, 'State Crime, Human Rights and the Limits of Criminology' (n 21) 110.
[84] Kramer and Michalowski (n 21) 459; Green, MacManus and de la Cour Venning (n 1).
[85] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 21) 114.

an individual 'crime'? Does accepting the state crime lens open the floodgates for a critique of international law with regard to all human rights violations?

Such questions appear to be relevant and may provide the grounds for further critique to be undertaken, or at the very least, begin the discussion on limiting the application of this lens in international law. Despite this, entering such a conversation appears to be racing ahead too far at this point of time. It is important to keep in mind the primary aim of the project at hand: to determine the value of critiquing international law from the state crime perspective. This deep discussion to determine the threshold for which human rights violations should be dealt with by the international community as state crimes is beyond what is required for reaching this aim. Once the value and viability of adopting the lens of state crime for the purposes of critiquing international law and advancing the discipline has been established, then this discussion involving the refining or limiting of the application of this lens would appear to be the next logical step. For now, the limited size of a project of this nature will require a non-controversial placeholder threshold to be drawn, which is left open to be extended through further research if deemed necessary.

For this reason, the project will only attempt to deal with human rights violations that are the most serious and horrific in nature and on the highest end of the spectrum of importance. Of all human rights violations, 'grave' human rights violations are considered by the international community to be the most heinous.[86] From the state crime perspective, this includes human rights breaches which amount to crimes against humanity,[87] genocide[88] and war crimes.[89] By limiting the human rights violations considered by the project to those that could be considered 'grave' violations, it appears to be reasonable to assume that international law scholars would be willing to accept the state crime position that perpetrators of such heinous actions should be held accountable in one way or another. By limiting the scope of the project in this way, this will enable the discussion surrounding limiting the application of this lens to be avoided, enabling the project's main focus to be placed on discussions relevant to the project's aim. This 'placeholder threshold' will provide a stepping-stone for further research on the threshold of human rights violations that could be considered for critiquing international law through the state crime lens—if the lens of state crime appears to be a viable tool for the discipline of international law to adopt.

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[86] Ward Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (2009) 7(4) *Journal of International Criminal Justice* 723.

[87] Juan Pablo Pérez-León Acevedo, 'The Close Relationship Between Serious Human Rights Violations and Crimes Against Humanity: International Criminalization of Serious Abuses' (2017) 17 *Anuario Mexicano de Derecho Internacional* 145.

[88] Ferdinandusse (n 86).

[89] Chile Eboe-Osuji, 'Grave Breaches' as War Crimes*: Much Ado about … 'Serious Violations'?* (International Criminal Court) <https://www.icc-cpi.int/NR/rdonlyres/827EE9EC-5095-48C0-AB04-E38686EE9A80/283279/GRAVEBREACHESMUCHADOABOUTSERIOUSVIOLATIONS.pdf>.

2 *Focus on the Clearance Operations*

Secondly, it is noted that, due to the complex nature of the Rohingya situation, the allegations of human rights violations towards the Rohingya population date back many decades. Similar instances of directed violence have been suggested to have occurred on at least two large-scale instances prior, with 'Operation Dragon King'[90] and the concerningly named 'Operation Clean and Beautiful Nation',[91] often cited as examples of the mistreatment of the Rohingya population.[92] Although these events may be addressed to highlight the background issues associated with the more recent operations, it must be stated that the clearance operations will be a focus of the exploratory case study. While the severity of these events is in no means being downplayed by such a narrow focus, it is important to note the scope of the project at hand. The primary aim of the project is to aid in the development of international law, focussing on the differing avenues of responsibility available in the International Criminal Court and International Court of Justice. The Rohingya situation has been chosen for exploration for these purposes, as the clearance operations are currently being dealt with in both courts.[93] For this reason, a narrow focus on the way in which international law and state crime deals with the clearance operations will provide the greatest value for analytical purposes within the discipline of international law.

D *Structure*

As outlined earlier in this chapter, this thesis will answer the question whether, using the lens of state crime, state responsibility should be attributed to Myanmar for *committing* genocide.

To determine this, the previously identified research sub-questions will need to be answered. To reiterate, these sub-questions are:

1) Who, if anyone, is an action in the ICC likely to involve?
2) Can genocidal conduct be attributed to Myanmar in the ICJ, and if so what remedies may follow?
3) How does the lens of state crime approach the Rohingya crisis?

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[90] Mahbubul Haque, 'Rohingya Ethnic Muslim Minority and the 1982 Citizenship Law in Burma' (2017) 37(4) *Journal of Muslim Minority Affairs* 454.

[91] Ibid.

[92] For example, see Green, MacManus and de la Cour Venning (n 1); Human Rights Watch, *Historical Background* (Report, 2000) <https://www.hrw.org/reports/2000/burma/burm005-01.htm#P112_25491>.

[93] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (Authorization of Investigation)* (n 7); *The Gambia v Myanmar (Application Instituting Proceedings and Request for Provisional Measures)* (n 10).

4) From the lens of state crime, is individual criminal responsibility sufficient to address the Rohingya crisis? Or can an action for state responsibility provide a meaningful alternative solution?

In answering these research questions, there are a number of discussion points which need to be addressed, which can be broken down into three parts: *Part I: Introduction and Background*, *Part II: Legal Approaches to the Humanitarian Crisis in Myanmar*, and *Part III: The State Crime Approach to the Humanitarian Crisis in Myanmar*.

1 *Part I: Introduction and Background*

Part I of this thesis comprises three chapters which will set the scene for the later discussion on the topic of responsibility. This part aims to establish the requisite background information for the legal and state crime analyses to be carried out in subsequent parts.

This introductory chapter, Chapter I, has provided the research question, methodology and scope for discussion. This chapter has emphasised the focus of this thesis on obtaining an understanding on the appropriateness of state responsibility for committing genocide, which will eventually be answered through the lens of state crime.

With the research questions established, Chapter II examines the underlying principles of this lens of state crime, outlining what this theoretical concept fully entails. This discussion explains the origins and definition of the term 'state crime', before outlining the various frameworks that can provide further context to the research question. These include concepts used for determining whether a crime has occurred, whether a state's conduct is considered deviant, and how to identify the many factors that have enabled harm to develop.

Upon establishing the theoretical background for this thesis, the background of the case study becomes relevant. Chapter III outlines the extent of the humanitarian crisis taking part within Myanmar, before introducing the legal proceedings that have been instigated as a result. During this discussion, the background to the relevant ICC and ICJ cases is outlined, establishing a deeper understanding of the progress that has been made as of December 2022.[94]

2 *Part II: Legal Approaches to the Humanitarian Crisis in Myanmar*

Before the lens of state crime can be used to assess the appropriateness of the outcomes of each legal avenue for dealing with the humanitarian crisis in Myanmar, the potential outcomes of each case must first be determined. It is for this reason that Part II of this thesis moves the discussion to a strictly

[94] Events that have taken place after this date have not been factored into the overall discussion.

legal analysis. This is carried out with the aim of developing an understanding of how the differing avenues approach the situation, opening the door for further commentary in Part III.

The legal discussion begins with Chapter IV, which assesses whether the situation in Myanmar is considered by international criminal law to constitute crimes against humanity. This analysis sets out to answer the first research question: *Who, if anyone, is an action in the ICC likely to involve?* The ICC case is an important part of the discussion concerning the question of extending responsibility to the state. This is because, if the sole focus of international criminal law is individual responsibility, then the ICC case would be the primary avenue for dealing with the relevant crimes.[95] Determining who might receive a verdict of individual criminal responsibility provides a valuable insight for future discussions concerning whether international responsibility is enough to deal with the humanitarian crisis on its own.

Moving forward to the topic of state responsibility, Chapter V discusses the ways in which the ICJ could provide a differing solution to the humanitarian crisis than that achieved in the ICC. This chapter asks the second research sub-question: *Can genocidal conduct be attributed to Myanmar in the ICJ, and if so what remedies may follow?* Chapter V discusses whether the humanitarian crisis in Myanmar involves the crime of genocide, and whether state responsibility can be attributed to Myanmar for committing these acts of genocide. Furthermore, the way remedies are approached is explained, clarifying the use of the International Law Commission's (ILC's) *Responsibility of States for Internationally Wrongful Acts*.[96]

At the end of Part II, the crossroads in the development of international law is brought to light, highlighting that the pathway forward concerning the appropriateness of attributing state responsibility for genocide is unclear. It is at this point that the theory of state crime can assist by providing further context to the issue.

3 *Part III: The State Crime Approach to the Humanitarian Crisis in Myanmar*

Entering Part III, the legal analysis has provided a clear determination on the ways in which the differing avenues of international law approach the situation in Myanmar. With this established, Part III provides further context to the discussion. This is achieved by showing how the lens of state crime

[95] It is noted that there is also action on individual criminal responsibility in the Argentinian courts under an action of universal jurisdiction. However, given the overlap of the perpetrators, this was considered outside the scope of this thesis. Burmese Rohingya Organisation UK (n 6); Keene-McCann and Chandran (n 6); Urbanová (n 6) 246.

[96] *Resolution on the Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN Doc A/RES/56/83 (12 December 2001). While the ILC's *Responsibility of States for Internationally Wrongful Acts* may have no binding effect on the members of the ICJ, international courts and tribunals have relied upon ILC outputs for a significant degree of decisions.

approaches the situation and using this to comment on whether individual criminal responsibility is sufficient to deal with the humanitarian crisis—or whether state responsibility is a necessary step forward.

Chapter VI builds upon the theoretical framework from Part I to ask the third research sub-question: *How does the lens of state crime approach the Rohingya crisis?* Answering this involves three key determinations. The first is whether the situation in Myanmar is considered a 'crime' from this perspective. The second is whether this 'crime' has been carried out as a product of deviance of the state itself. Thirdly, this chapter highlights the factors that enabled the crime to develop, ultimately establishing a foundation for commentary on international law's approaches to the situation.

This foundation is leveraged in Chapter VII to provide reflection on the appropriateness of international law's approach to the situation. Chapter VII asks the fourth research sub-question: *From the lens of state crime, is individual criminal responsibility sufficient to address the Rohingya crisis? Or can an action for state responsibility provide a meaningful alternative solution?* This discussion analyses whether the ICC and ICJ actions are able to address the underlying factors that have enabled the situation to develop over time, and to correctly recognise the state's involvement in the creation of the humanitarian crisis.

With the potential outcomes of the two avenues of international law determined in Part II, and the way in which the situation should be approached according to the theory of state crime established in Part III, it becomes possible to finally answer the question of the appropriateness of state responsibility for committing genocide in Chapter VIII. This chapter will conclude by summarising the findings of this thesis, while highlighting areas for further research and observing the limitations of the approaches taken.

II THEORETICAL BACKGROUND

Whilst the manner in which international law approaches the case study will be addressed in subsequent chapters, determining the appropriateness of this approach to the issue requires a theoretical framework to measure it against. It is for this reason that the neighbouring discipline of criminology will be engaged with, borrowing the theory of 'state crime'. By analysing the way in which the theory of state crime advocates that the Rohingya situation should be dealt with, the critique of international law's approach to the situation and, by extension, international law itself becomes possible.

The theory of state crime originates from the sub-discipline of 'critical criminology', located under the overarching banner of criminology.[1] Critical criminology can be considered a theoretical perspective, or manner of thinking, as opposed to a distinct category of explicit ideas.[2] Aligning with the aims of this thesis, this theoretical perspective advocates a focus on challenging traditional understandings in the quest to advance thought in the areas of crime and criminal justice.[3] Critical criminology accepts the position that law, and by extension punishment, are interconnected in a system that has led to social inequality between the powerful and powerless.[4] It is through this critique of the law that the perspective of the critical criminologist appears to be most relevant to the advancement of international law.

This phenomenon of power is described from the perspective of critical criminology by Friedrichs, who explains that laws are created by those in power.[5] On a domestic level, law and 'crime' are defined and developed by individuals of high societal standing: politicians and political party members, who are often both wealthy and educated.[6] On an international level, international agreements, or treaties, are developed by states. Some states are more powerful than others, leading to a focus on certain issues when these treaties and instruments are made.[7] But most important to the discussion at hand, international law is created by governments and rulers of states, individuals who are representing the interests of the most powerful

[1] Dawn Rothe and David Friedrichs, 'The State of the Criminology of Crimes of the State' (2006) 33(1) *Social Justice* 147.

[2] Majid Yar, 'Critical Criminology, Critical Theory and Social Harm' in Steven Hall and Simon Winlow (eds), *New Directions in Criminological Theory* (Routledge, 2012) 70; Walter DeKeseredy and Molly Dragiewicz, *Handbook of Critical Criminology* (Routledge, 2011); Pamela Ugwudike, *An Introduction to Critical Criminology* (Policy Press, 2015).

[3] Ibid.

[4] Ibid.

[5] David Friedrichs, 'Crimes of the Powerful and the Definition of Crime' in Gregg Barak (ed), *The Routledge International Handbook of the Crimes of the Powerful* (Routledge, 2015) 39; David Friedrichs, 'Rethinking the Criminology of Crimes of States: Monumental, Mundane, Mislabelled and Miscalculated Crimes' (2015) 4(4) *International Journal for Crime, Justice and Social Democracy* 106, 107.

[6] Ibid.

[7] Ibid.

individuals and institutions of that state.[8] Friedrichs argues that, as the law is developed by powerful individuals, laws are inherently created with the interests of the powerful in mind.[9]

With this thought process, critical criminology is able to bring critique to the powerful 'state', by highlighting the fact that, much like the common criminal who often springs to mind in the discussion of 'crime', the state itself is also capable of causing harm to an individual, or society.[10] This is where the theory of state crime becomes relevant.

The underpinning theoretical aspect to this theory is that states themselves can be deviant.[11] It is now well established in criminology that organisations, as well as individuals, can be deviant actors.[12] This theory suggests that some deviant actions are the product of the state as an organisation operating as the deviant actor, as opposed to individual deviance.[13] Through this thought process, the state itself is considered to have caused harm.[14]

While this simple explanation is only surface level, developing a theoretical framework for comparative purposes requires a deeper understanding of the theory of state crime.[15] Such exploration will place emphasis on determining which of the various approaches to state crime was adopted for the purposes of this project, along with an outline of how a state can be considered 'deviant' and how the underlying factors that have enabled a state crime to be developed can be identified. This discussion will identify the applicable elements that can be utilised for determining the existence of state crime in a particular situation. These elements will then provide the opportunity to analyse the Rohingya situation from the state crime perspective, enabling the existence of a state crime to be determined. Following this logic, this chapter will be structured as followed:

A *Approaches to State Crime*

B *Organisational Deviance*

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[8] Ibid.

[9] This is not to say that no law is created with the benefit of the 'less powerful' members of society in mind. Many laws around the world have passed with the interests of the 'less powerful' in mind, including those concerning health care, disability pensions and the protection of the rights of employees. Rather than providing the extreme viewpoint that all laws are made in the interests of the powerful members of society, the theoretical perspective of critical criminology argues that there is a *bias* in lawmaking that favours the powerful; Friedrichs 'Crimes of the Powerful and the Definition of Crime' (n 5); Friedrichs, 'Rethinking the Criminology of Crimes of States' (n 5) 107.

[10] Penny Green and Tony Ward, *State Crime* (Pluto, 2004) 5; Penny Green and Tony Ward, 'State Crime, Human Rights, and the Limits of Criminology' (2000) 27(1) *Social Justice* 101, 110; William Chambliss, 'State-Organized Crime' (1989) 27(2) *Criminology* 183, 184.

[11] Ibid.

[12] Green and Ward, *State Crime* (n 10) 5.

[13] Ibid 5; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 110; Chambliss (n 10) 184; Maurice Punch, *Police Corruption: Exploring Police Deviance and Crime* (Willan, 2013) 2; Mike Grewcock, 'State Crime: Some Conceptual Issues' in Thalia Anthony and Chris Cunneen (eds), *The Critical Criminology Companion* (Hawkins Press, 2008) 146, 150–1.

[14] Green and Ward, *State Crime* (n 10) 5; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 110; Chambliss (n 10) 184.

[15] Azadeh Osanloo and Cynthia Grant, 'Understanding, Selecting, and Integrating a Theoretical Framework in Dissertation Research: Creating the Blueprint for Your "House"' (2016) 4(2) *Administrative Issues Journal* 12.

C *Crimes of Obedience*

A *Approaches to State Crime*

The term ‘state crime’ has a special meaning in this context and, when discussed through the lens of critical criminology, must be understood in a distinct manner. On face value, or for the purposes of simple explanation, the term refers to an instance in which a state has committed a crime.[16]

However, when taking into account the logic of Friedrichs, discussed above, use of the term ‘state crime’ in its ordinary meaning can be considered to undermine the very foundations on which the term, through the perspective of critical criminology, is built.[17] The term ‘crime’ in its plain English definition instantly provides the linkage to legal structures and systems developed by the powerful, in which the aforementioned bias is ever present.[18] While these legal structures and systems can be, in many circumstances, an appropriate way to define deviant actions or prevent further harm within a relevant community, the nature of the critical criminology background to the theory suggests that further indications should be considered for determining the deviant actions of a state.[19] On this basis, many scholars in this particular field have suggested that the ‘harm’ that has been caused should be considered for such purposes.[20] Some scholars have expanded on this, with the suggestion that human rights should be considered when determining whether a state has caused this ‘harm’.[21]

As with any discipline or school of thought, there are opposing viewpoints. Some scholars within the discipline of criminology are of the view that the legal discipline should be engaged in determining the existence of a crime, noting the inherent drawbacks, but choosing to rely on the previously established foundations for certain elements nonetheless.[22] With the existence of differing viewpoints on what the theory of state crime actually entails, it is necessary to delve deeper into the two approaches to highlight what the term ‘state crime’ will mean for the purposes of this thesis. Given this, both the legal approach and the human rights-based approach to state crime will now be analysed in greater detail, with the aim of selecting the most appropriate approach for the critique of international law.

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[16] Alan Doig, *State Crime* (Willan Publishing, 2011) 233; Chambliss (n 10) 184; Green and Ward, ‘State Crime, Human Rights, and the Limits of Criminology’ (n 10) 101–15; Ronald Kramer and Raymond Michalowski, ‘War, Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq (2005) 45(4) *British Journal of Criminology* 446, 448.

[17] Friedrichs ‘Crimes of the Powerful and the Definition of Crime’ (n 5); Friedrichs, ‘Rethinking the Criminology of Crimes of States’ (n 5) 107.

[18] Friedrichs ‘Crimes of the Powerful and the Definition of Crime’ (n 5); Friedrichs, ‘Rethinking the Criminology of Crimes of States’ (n 5) 107.

[19] Nerida Chazal and Marinella Marmo, *Transnational Crime and Criminal Justice* (Sage, 2016) 190.

[20] Green and Ward, ‘State Crime, Human Rights, and the Limits of Criminology’ (n 10) 111–12.

[21] Ibid 103.

[22] Kramer and Michalowski (n 16) 469.

1 *The Legal Approach to State Crime*

The legal approach taken by Kramer and Michalowski is that state crime refers to 'governmental activities which are in violation of international law, even if they are consistent with that state's own domestic law'.[23] Initially, the legal approach to state crime and its explicit reference to international law appears very similar to an analysis of a situation through the lens of international law. It must be noted that, although this approach utilises legal structures for identifying the existence of state crime, the legal approach to state crime must be distinguished from international law itself. The legal approach to state crime still stems from the discipline of criminology and relies on logic based on this discipline; the legal approach only 'borrows' certain logistical points from the discipline of international law.[24] There are still significant differences.

A significant difference between the legal approach to state crime and the application of international law is the way of determining the state's contribution to a particular act. While international law focusses on the specific elements laid out within the relevant treaties or cases that have arisen from the analysis of such, the legal approach to state crime does not follow this approach. Rather, the legal approach to state crime only appears to 'borrow' the physical elements set by the law. To determine whether a state has committed a crime, the legal approach to state crime considers whether the crimes have been undertaken as a product of 'organisational deviance'[25]—a concept that will be explained in far greater depth shortly.

One example of this concept in practice can be seen in Kramer and Michalowski's article on the United States' invasion of Iraq.[26] By adopting the legal approach to state crime, as opposed to analysing the situation from an explicit point of international law, these scholars are able to assert that the United States likely committed a crime of aggression.[27] Rather than focussing on the relevant legal criteria, Kramer and Michalowski based this determination on a discussion as to whether the invasion was in furtherance of state goals.[28] While this from a criminological standpoint was considered a 'state crime', from a practical and entirely legally based discussion on the other hand, the two scholars noted that there is no likelihood of formal sanction arising from international law with respect to the same acts.[29]

It is important, then, to consider the legal approach to state crime as its own concept, which is clearly distinguished from analysing a situation through the perspective of international law itself.

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[23] Ibid 469. Chambliss, also taking this legal approach, defines state crime in a similar manner: 'Acts defined by law as criminal and committed by state officials in the pursuit of their job as representatives of the state': Chambliss (n 10) 184.

[24] See the application of both legal and criminology ideals in Kramer and Michalowski (n 16) 446.

[25] Ibid 458.

[26] Ibid 446.

[27] Ibid 463.

[28] Ibid.

[29] Ibid.

2 *The Human Rights-Based Approach to State Crime*

The simple definition of the human rights-based approach to state crime is 'An area of overlap between two distinct phenomena, (1) the violation of human rights and (2) state organised deviance'.[30] Green and Ward are of the view that to analyse the true deviance of the state, formal legal and administrative processes should be considered, but not be relied solely upon.[31] State crime scholars following this approach are of the view that defining crime should not be completely reliant on 'arcane legal arguments' and often ambiguous and unsatisfactory laws that are developed and promoted by powerful states and transnational institutions.[32] For this reason, Green and Ward suggest that the 'fundamental premises underlying human rights law' should be considered when determining whether a 'crime' has occurred, which takes into account the fundamental needs that allow individuals to be effective purposive agents, pursue their chosen goals and participate in society.[33]

This viewpoint is based upon the social norms concerning what is universally considered right and what is universally considered wrong in the eyes of humanity as a whole when considering these rights in their general, normative meaning.[34] If the state itself breaches these principles for its own gain, then through this perspective it should be considered as a 'state crime'.[35] Human rights in its normative sense can be clearly distinguished from the legal instruments defining crime that international law is focussed on.

This alternative way of thinking of the law can be contrasted with the mainstream way of thinking about the law that international law is based upon. Unlike the strictly legal definition, these social norms that Green and Ward have been referring to are not set out precisely in a codified document.[36] As described by Popitz, social norms are: 'Those expected forms of regular behaviour whose absence or violation causes social sanctions. The repertoire ranges from disapproval over repressions, to discrimination and punishment. In a simple case, a violation of a norm is followed by a negative reaction.'[37]

Green and Ward are of the view that the social norms that resemble legal rules and procedures should be considered for determining the existence of a state crime, such as those dealing with the protection of human rights.[38] For purposes of clarity, it must be noted that the social norms for human rights violations in this sense are differentiated from the codified 'rules' of international law that cover the same principles. Smith's book *Genocide and the Europeans* describes the co-existence of legal norms concerning human rights and

[30] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 110; Kramer and Michalowski (n 16) 448; Grewcock (n 13) 153–4.
[31] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 110.
[32] Green and Ward, *State Crime* (n 10) 9.
[33] Ibid 7.
[34] Ibid.
[35] Ibid.
[36] Heinrich Popitz 'Social Norms' (2017) 11(2) *Genocide Studies and Prevention: An International Journal* 3, 3. See also Heinrich Popitz, *Phenomena of Power: Authority, Domination, and Violence* (University of Columbia Press, 2017).
[37] Ibid.
[38] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 110.

the social norms dealing with similar content.[39] Within this discussion, the example of genocide is used to explain this relationship.[40] There are two norms against the act of genocide, one arising from the legal definition in the *Genocide Convention* and *Rome Statute,* and the other the wider definition of genocide as a social norm, one that reaches beyond the legal codification.[41] Smith outlines the relationship between the legal and social norms of genocide, suggesting that, whilst the legal norm has to some extent codified the pre-existing social norm, the social norm must be considered to still exist alongside the legal norm due to its broader application.[42]

The legal definition of genocide only encompasses an act if it meets the specific requirements outlined by the *Genocide Convention*.[43] By contrast, genocide as a social norm refers to the overall idea of genocide as coined by the Polish scholar Lemkin in 1946, before such acts were codified into international law.[44] Lemkin's idea of genocide before he assisted with the drafting of the *Genocide Convention* refers simply to the act of killing or destroying a people or group as part of a planned, synchronised attack.[45] Lemkin's work explains that genocide can be undertaken in a number of ways, such as through political, economic and or religious destruction, not just the physical destructive form that is referred to in the strict legal definition.[46] This separate idea of what genocide means creates a far broader idea of the term, which is based upon what the public views as 'right or wrong'—not what is determined by the law.[47] It is this social norm, or idea of what genocide may mean, that has led to the codification of this idea at law; making this social norm a 'fundamental premise underlying human rights law'.[48]

Forming a broader view of 'rules' than that seen in the more specific framework of instruments such as the *Rome Statute* or *Genocide Convention* addresses the drawbacks of the legal approach. This is due to the fact that a more generalised view of acts or omissions that represent ideals concerning humanity as a whole is used as a benchmark for determining deviance, not only those that serve the interests of specific states.[49] As these 'rules' form a wider yet universally accepted range of acts and omissions, criminology scholars are able to use human rights as a basis for determining whether state organisational deviance has occurred.[50] From this logic, the human rights approach to state crime provides the position that state actions should be

[39] Karen Smith, *Genocide and the Europeans* (Cambridge University Press, 2010).
[40] Ibid.
[41] Ibid 6.
[42] Ibid.
[43] *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('*Genocide Convention*').
[44] Popitz, 'Social Norms' (n 36).
[45] Charles Anderton, *Genocide: Perspectives from the Social Sciences* (College of the Holy Cross, 2015).
[46] Raphael Lemkin, 'Genocide' (1946) 15(2) *American Scholar* 227; Smith (n 39) 6.
[47] Smith (n 39) 6.
[48] Green and Ward, *State Crime* (n 10) 7.
[49] Friedrichs, 'Crimes of the Powerful and the Definition of Crime' (n 5); Friedrichs, 'Rethinking the Criminology of Crimes of States' (n 5) 107.
[50] Green and Ward, *State Crime* (n 10) 4.

measured against not just international and domestic laws, but also *a state's departure from the normative ideal of human rights*.[51]

Finally, state crime scholars from the human rights-based perspective do not rely solely on the law itself for attributing responsibility for state crimes. From this perspective, it is the actions of organised civil society, which includes victims' groups, human rights organisations and Non-governmental Organisations (NGO's) that bring about change.[52]

The power of civil society lies within the dissemination of knowledge, which can lead to the eventual organisational change of the state.[53] Civil society organisations gather and distribute information to expose criminal conduct [54] This, in turn, allows the civil society organisations to place pressure on perpetrators in pursuance of change.[55] Green and Ward suggest that grave human rights violations, such as genocide and crimes against humanity, are more frequently identified, exposed and challenged through civil disobedience, boycotts, sanctions and divestment.[56] These informal actions arise as a result of an assessment against what the civil community views as norms of acceptable behaviour.[57] Green and ward have ultimately concluded that civil society plays a 'vital part' in defining, documenting and denouncing instances that involve state crime.[58]

Other scholars support this perspective too. Sims is of the view that the civilian community is able to enact change in instances of state crimes through a movement of the people beginning with the dissent of a civilian population, and extending to a loss of confidence in the government.[59] Stanley and McCulloch further support this idea with the viewpoint that in the absence of other forms of intervention, social activism and peaceful resistance are the most effective tools for change in the meantime.[60]

Although, state crime scholars don't denounce the role of international mechanisms of justice such as the ICC and ICJ entirely. With specific reference to the ICC, Green and Ward suggest that international

[51] Ibid 7.

[52] Penny Green and Tony Ward, *State Crime and Civil Activism: On the Dialectics of Repression and Resistance* (Routledge, 2019); Penny Green and Tony Ward, 'Civil Society, Resistance and State Crime' in Elizabeth Stanley, Jude McCulloch (eds) *State Crime and Resistance* (Routledge, 2013) 28; Tony Ward and Penny Green, 'Law, the State, and the Dialectics of State Crime' (2016) 24 (2) *Critical Criminology* 217, 219.

[53] Green and Ward, 'Civil Society, Resistance and State Crime' (n 52) 35.

[54] Green and Ward, *State Crime and Civil Activism: On the Dialectics of Repression and Resistance* (n 52).

[55] Ibid.

[56] Green and Ward, *State Crime and Civil Activism: On the Dialectics of Repression and Resistance* (n 52) Green and Ward, 'Civil Society, Resistance and State Crime' (n 52) 28; Green and Ward, 'Law, the State, and the Dialectics of State Crime' (n 52) 219.

[57] Tony Ward and Penny Green, 'Law, the State, and the Dialectics of State Crime' (n 52) 219.

[58] Green and Ward, *State Crime and Civil Activism: On the Dialectics of Repression and Resistance* (n 52); Green and Ward, 'Civil Society, Resistance and State Crime' (n 52) 35.

[59] Harvey Sims, '*Public Confidence in Government and Government Service Delivery*' (Canadian Centre for Management Development, 2001).

[60] Elizabeth Stanley and Jude McCulloch, '*State Crime and Resistance'* (Routledge 2014) pp. 226.

institutions can play a 'useful role' which is primarily symbolic.[61] Just as NGO's, or victims can contribute to informal state responsibility through sharing knowledge and applying pressure on governments, international institutions can also play this role.[62] Through this role of knowledge dissemination is where the importance of the ICC and ICJ's decisions lie, which is bolstered by the legitimacy from the international community. ICC verdicts and ICJ judgments can serve as a valuable, legitimate source for educating a population that the state is acting inappropriately.[63] Movements of civil society can become legitimised further, rallying more to their cause and strengthening action taken toward the government.[64] Furthermore, Green and Ward acknowledge the role of international institutions such as the ICC and ICJ in putting further pressure on the state, assisting these movements once underway.[65]

3 *Selecting an Approach for the Purpose of this Thesis*

Within the realm of criminology, there are many viewpoints that disapprove of the legal approach to state crime. Whilst the approach has its merits such as the simplicity provided by simply referring to the law as set by the discipline of international law,[66] this appears to be a 'double-edged sword', as it shares the same drawbacks as the laws it is referring to.

This criticism has been identified by Nadelmann, who is of the view that the values that the legal approach are based upon, measuring a state's conduct against international instruments and norms contained in international law, are not exactly 'universal'.[67] Such a position has also been highlighted by Kramer and Michalowski when discussing the legal perspective, bringing to light the arguments of various scholars such as Lambert et al, Otto and Sinha.[68] These scholars have formed the opinion that United Nations-sponsored international law is based upon the political hegemony of Western, white liberalism and therefore is not representative of values that may be considered 'universal' with regard to human nature.[69] It is the focus on the values of primarily powerful nations in the context of international law that is problematic when looking

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[61] According to Green and Ward, 'Bodies such as the International Criminal Court may come to play a useful role in some respects, but that role is likely to be a limited and largely symbolic one': Green and Ward, *State Crime* (n 10) 10.
[62] Green and Ward, 'Civil Society, Resistance and State Crime' (n 52) 35.
[63] Hyeran Jo and Beth Simmons, 'Can the International Criminal Court Deter Atrocity?' (2016) 70(3) *International Organization* 443, 451- 452.
[64] According to Jo and Simmons, 'Civil societies may be emboldened by the ICC to mobilize for some form of justice, petitioning the cases to national courts and potentially providing evidence to the ICC': Ibid 451 citing Fiona McKay, The Role of Human Rights NGOs in Relation to ICC Investigations. (Human Rights First, 2004); Courtney Hillebrecht. 'Domestic Politics and International Human Rights Tribunals: The Problem of Compliance' (Cambridge University Press, 2014).
[65] Green and Ward, *State Crime and Civil Activism: On the Dialectics of Repression and Resistance* (n 52).
[66] As can be seen in instruments such as the *Rome Statute*.
[67] Ethan Nadelmann, 'Global Prohibition Regimes: The Evolution of Norms in International Society' (1990) 44(4) *International Organization* 479, 526.
[68] Kramer and Michalowski (n 16) 469; Dianne Otto, 'Rethinking the Universality of Human Rights Law' (1997) 18 *Australian Year Book of International Law* 1; Mrinalini Sinha, *Feminisms and Internationalisms* (Blackwell Publishers, 1999).
[69] Ibid.

through the lens of critical criminology. Critical criminologists adopt a focus on 'harm'[70] and, from that perspective, the explicit 'lists' of actions that are deemed 'illegal' at international law only cover some, not all, possible harms.

When analysing the way in which international law is created, the position of critical criminology suggests that the values represented by international law are not in fact 'universal', but the values of powerful actors with the ability to exert 'hegemonic influence' on the international stage.[71] These powerful actors are often referred to in the field of criminology as 'transnational moral entrepreneurs'.[72] In this context, this refers to powerful actors who are able to manipulate the global agenda on a basis of emotion (such as fear) to suit their own interests.[73] Critical criminologists argue that the 'lists' of acts deemed illegal at the international level act only encompass those that support the interests of powerful, predominantly Western nations, failing to provide a complete list of all harms that should be considered, for the benefit of humanity as a whole.[74]

With this in mind, it seems increasingly more reasonable to assume that there also exists a gap in legality at an international level with regard to the responsibility of states, as international law itself is a product of state negotiation.[75] Through this perspective, it appears quite possible for acts of harm to remain unaccounted for when the entity who has caused that harm is a state that has developed,[76] or chosen to be subjected to,[77] the very law that it is being measured against. When combining this with the overarching themes of the critical criminology perspective, relying on strictly legal materials in determining the existence of state crime comes across as somewhat paradoxical. If the very aim of adopting the state crime approach is to critique the law, then relying on that law to form this opinion is likely to provide little further value. This falls in line within the logic of Nadelmann, who has expressed the opinion that Green and Ward's human rights-based approach to state crime, which focusses on a state's adherence to social norms of human rights, is more valuable.[78]

Based on the purposes of the project at hand, it appears that the human rights-based approach is the most appropriate approach for the purpose of this thesis. The primary reasoning behind this is that the human rights-based approach can be used to assess situations involving state crime with an entirely different lens than that of international law. Through a focus on human rights, this approach does not follow the same narrow scope that the discipline of international law does.[79] With the opportunity to take advantage of the

[70] Nadelmann (n 67) 526.
[71] Ibid.
[72] Howard Becker, *Outsiders: Studies in the Sociology of Deviance* (Free Press of Glencoe, 1963).
[73] Ibid.
[74] Nadelmann (n 67) 526.
[75] International law is created through negotiation and treaties: Hugh Thirlway, *The Sources of International Law* (Oxford University Press, 2019).
[76] Developed in this sense refers to partaking in negotiations to form international instruments.
[77] Choosing to be bound by an international instrument through signature or ratification: Thirlway (n 75).
[78] Nadelmann (n 67) 526.
[79] Kramer and Michalowski (n 16) 448; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 101–15.

alternative way of analysing the law in the lens that is offered by critical criminology, it appears most appropriate to embrace this perspective to its full extent.

On the other hand, the human rights-based approach to state crime is not without drawbacks. As Kramer and Michalowski suggest, departing from the comparatively clear legal rules and principles that the legal approach offers can lead to a scope that is too broad in nature.[80] Asserting that a state itself has committed a 'crime' is a strong assertion to make; a strong assertion requires a foundational basis that is considered to be just as strong. It is for this reason that reliance upon human rights in its broad and general sense for such a basis must be done with caution. From this viewpoint, questions arise such as whether the mere breach of human rights is a powerful enough basis to assert that the state itself is committing a 'crime'. If the human rights-based approach is going to be adopted for the purposes of this project, this criticism must then be addressed.

4 *Addressing the Criticism of the Human Rights-Based Approach*

With regard to this criticism of the use of 'human rights' as a benchmark for determining the existence of state crime, there are two issues that arise. The first is the ambiguity of the specific term used, the 'normative ideal of human rights',[81] which requires articulation and definition in order for it to be used as such a benchmark. Secondly, if these rights are distinctly outlined, then there exists the opportunity to define whether all or a select few of these rights will be considered a 'crime', if breached by a state.

(a) Articulation of the 'Normative Ideal of Human Rights'

The first major problem that arises with the human rights-based approach is defining precisely what a breach of human rights in this sense refers to for the purposes of such a definition. This is due to the fact that human rights in their legal sense can be argued to possess the same drawbacks as the soon to be discussed legal framework for establishing the existence of a 'crime'.[82] Following this logic, it could be argued that there is little difference between 'human rights' and the legal instruments that define crime, such as the *Rome Statute*.

This point, while perfectly understandable, only possesses a small degree of merit when digging deeper into the concept of state crime. The true state crime viewpoint on this considers the 'normative ideal of human rights' as the measuring stick for determining what a 'breach of human rights' is referring to.[83] This perspective suggests that the underlying principles and ideals that have led to the creation of human rights

[80] Kramer and Michalowski (n 16) 448.
[81] Green and Ward, *State Crime* (n 10) 7.
[82] Friedrichs and Nadelmann discuss the bias towards the 'powerful', as described above. See Friedrichs, 'Crimes of the Powerful and the Definition of Crime' (n 5); Friedrichs, 'Rethinking the Criminology of Crimes of States' (n 5) 107; Nadelmann (n 67) 526.
[83] Green and Ward, *State Crime* (n 10) 7.

law are what should be considered to determine the existence of state crime.[84] Whilst this appears to be somewhat reasonable in the theoretical sense, the understanding of human rights in this manner creates deep practical difficulties when used as a framework to measure the existence of state crime. For this reason, the most appropriate way of tangibly defining human rights in a way that is considered 'universal' to all of humanity must be identified.

State crime scholars argue that the most universally accepted framework, in both the legal and non-legal space, for determining human rights is the *Universal Declaration of Human Rights* (UDHR).[85] This document contains rights that recognise the inherent dignity and equal and inalienable rights of all members of the human family, which are the foundation of freedom, justice and peace in the world.[86] Shultz, Steiner and Alston reference the UDHR specifically with regard to this particular issue, praising the open nature of the international debate surrounding the forging of the UDHR.[87] Although the human rights-based approach does not advocate following legal regimes in determining the existence of state crime,[88] the open nature of the UDHR and its function as principles and ideas can be distinguished from other, legally centred instruments.[89]

When assessing this alongside Green and Ward's definition of state crime, it is quite reasonable to argue that the rights in this document have, to some extent, laid the foundations on which human rights law is based.[90] The ideas contained in the UDHR were later codified within specific legal materials. An example of this is the inclusion of murder or extermination of a civilian population as crimes against humanity under the *Rome Statute*,[91] which in no doubt based upon the internationally accepted principle of the right to life.[92]

In an ideal world, a specific list of rights would exist that is entirely free from any political or state influence. But, following the logic of Kramer, Shultz, Steiner and Alston, the UDHR represents the 'best available global standard'[93] for determining the appropriateness of state actions. As a result, it can be argued that the *Universal Declaration of Human Rights* is the most accepted and codified version of many of the fundamental premises underlying human rights law, forming the most appropriate benchmark for the purpose of identifying state crime.[94]

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[84] Ibid.

[85] Ibid; *Universal Declaration of Human Rights*, GA Res 217A (III); UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

[86] *Universal Declaration of Human Rights* (n 85) Preamble.

[87] Kramer and Michalowski (n 16) 459; William Shultz, *Tainted Legacy: 9/11 and the Ruin of Human Rights* (Nation Books, 2003); Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 2000).

[88] Nadelmann (n 67) 526.

[89] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*'); *Genocide Convention* (n 43).

[90] Green and Ward, *State Crime* (n10) 7.

[91] *Rome Statute* (n 89) art 7.

[92] *Universal Declaration of Human Rights* (n 85) art 3.

[93] Kramer and Michalowski (n 16) 447.

[94] Ibid.

It must be noted that other documents may contain similar ideals that may also be considered, if a strong argument can be made that they represent *fundamental premises underlying human rights law*. These include instruments such as the *International Covenant on Economic, Social and Cultural Rights*,[95] and the *International Covenant on Civil and Political Rights*,[96] which may be considered 'universal' in nature. The need for further discussion on this issue is noted, although it must be considered that the focus of the current project is to use the previously established position in state crime to critique international law.

(b) The Scope of Rights that will Constitute a 'Crime' if Breached

With a greater understanding of what human rights in this sense is referring to, the opportunity arises to determine which of these rights should be considered to constitute a 'crime' if breached. As can be inferred from this definition, concepts such as social norms and fundamental ideas surrounding the creation of human rights law can be considered to be immensely broad.[97] This has been noted by Tamanaha, who feels that the acceptance of the community's view of acceptable behaviour as a form of 'law' for the purposes of defining state crime creates the need to define a distinct boundary for what is considered to be 'law'.[98]

Criticism of the human rights-based approach to state crime in this regard is understandable. From the perspective of an initial or brief understanding of the idea of 'state crime', one would immediately leap to visions of state-sanctioned violence and acts of harm of a sickening and inherently evil nature. Events such as the Holocaust[99] or Bosnian Genocide[100] initially spring to mind, to demonstrate such an initial viewpoint. However, the idea that human rights violations such as those listed in the UDHR can constitute a 'crime' brings into consideration further rights that may not have been considered initially. This leads to many further questions: Does the failure to provide adequate free education[101] mean that the state is committing a 'crime'? Does a government's restriction on individuals joining trade unions[102] mean that a state crime has occurred?

As is the case with many other ambiguous points within the area of critical criminology,[103] the answer to these questions is yes, and also no; depending on which perspective to the issue is adopted. Luckily, this is not an entirely new point of discussion and has been dealt with on a deeper level by various state crime scholars in an attempt to limit or expand the rights considered for such purposes. According to these scholars, this problem is dealt with through the separation of human rights breaches into two tiers, which

[95] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[96] Ibid.
[97] Brian Tamanaha, 'Law and Society' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley, 2009) 368.
[98] Ibid.
[99] Raphael Lemkin, 'Genocide as a Crime Under International Law' (1947) 41(1) *American Journal of International Law* 145, 151.
[100] Marko Milanović, State Responsibility for Genocide' (2006) 17(3) *European Journal of International Law* 553, 604.
[101] *Universal Declaration of Human Rights* (n 85) art 26.
[102] Ibid art 23.
[103] See the recent discussion on the legal versus the human rights-based approach.

provide differing strengths of arguments when being utilised for the determination of an existence of a state crime.[104]

The first tier, which Campbell refers to as the 'torture paradigm', deals with the more serious human rights violations, which produce the strongest argument for the existence of state crime.[105] This first form of human rights violation refers to only 'unacceptable evils' that can never be justified, as discussed by Cohen[106] and further clarified by Campbell.[107] Cohen explains that it is more defensible for the theory of state crime to limit itself to 'gross' human rights violations.[108] Cohen forms a list of examples, which include genocide, state terrorism, torture, mass political killings, disappearances, and acts such as murder, rape, assault, kidnapping and espionage.[109] Within this example, Cohen highlights the severely inhumane nature of acts that could be considered genocide, demonstrating its 'unacceptably evil' nature.[110] Campbell justifies this position by referring to the 'shared perception of totally unacceptable evils which are never justified and undermine the claims to political legitimacy of any system of government'.[111]

Following this logic, this position suggests that only human rights violations of this gross or 'grave' nature should be considered to meet the definition of state crime.[112] Under such a position, an act may universally be considered a human rights violation by an instrument such as the UDHR, but not be considered 'grave' in this sense. By accepting the 'torture paradigm'[113] as a standard for human rights violations, a further filter can be applied to limit these 'universal' rights to 'grave' violations.

The second tier, which Campbell refers to as the 'health paradigm',[114] deals with rights on the other end of the spectrum, which hold more of a controversial place within the state crime framework.[115] The Schwendingers' 'health paradigm' advocates that, along with these rights whose violations are considered universally unacceptable evils, there are also 'second generation' human rights that should be considered to meet the definition of state crime. Rights of this kind include the right to education, right to health and right to meaningful work.[116]

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[104] Tom Campbell, 'Human Rights: A Culture of Controversy' (1999) 26 *Journal of Law and Society* 6, 18; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 103; Stanley Cohen, 'Human Rights and Crimes of the State: The Culture of Denial' (1993) 26 *Australia and New Zealand Journal of Criminology* 97, 98.
[105] Campbell (n 104) 18; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 103.
[106] Cohen (n 104) 98; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 103.
[107] Campbell (n 104) 18.
[108] Cohen (n 104) 98.
[109] Ibid.
[110] Ibid 101.
[111] Campbell (n 104) 18.
[112] Cohen (n 104) 98.
[113] Campbell (n 104) 18; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 103.
[114] Campbell (n 104).
[115] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 103.
[116] Herman Schwendinger and Julia Schwendinger, 'Defenders of Order or Guardians of Human Rights?' (1970) 5(2) *Issues in Criminology* 123, 123–46; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 105.

Whilst Green and Ward ultimately accept that the Schwendingers' approach should be considered in forming a definition of state crime,[117] it is important to note the scope of the project at hand. Due to the legal focus of this project, entering the debate as to what rights should be considered for the purposes of state crime theory is beyond the limited scope that has been set. As a result of this, the less controversial rights set forth by the 'torture paradigm'[118] will be considered. However, the door will remain left open for the scope of these rights and their applicability in the legal realm to be discussed in further research, should the need arise at a future point in time.

When determining whether a breach of the 'fundamental premises underlying human rights law'[119] has occurred, it is the acts falling within the scope of the 'torture paradigm'[120] that will become a focal point for discussion. For this reason, human rights breaches that clearly constitute a 'shared perception of totally unacceptable evils which are never justified and undermine the claims to political legitimacy of any system of government'[121] were considered for the purposes of this project.

(c) The Scope of 'Human Rights Violations' for the Purposes of this Thesis:

As a result, for an act to be considered a 'violation of human rights' for the purposes of identifying a state crime in this project, it will need to meet two criteria:

- The act must be a breach of the fundamental premises underlying human rights law, which can be measured against the UDHR.
- The act must be considered to fit within the scope of 'totally unacceptable evils which are never justified and undermine the claims to political legitimacy of any system of government'.

B *Organisational Deviance*

With the actions that fall within the scope of the term 'crime' established, it is important to also determine which of these crimes are considered to have been committed by the state itself. Green and Ward highlight that the idea of a deviant state is not a new concept, suggesting that it is now well established in criminology that organisations, as well as individuals, can be deviant actors.[122] State crime is only one of multiple categories of what criminologists refer to as 'organisational deviance', alongside other categories such as

[117] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 103.
[118] Campbell (n 104) 18; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 103.
[119] Green and Ward, *State Crime* (n 10) 7.
[120] Campbell (n 104) 18; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 103.
[121] Campbell (n 104) 18.
[122] Green and Ward, *State Crime* (n 10) 5.

corporate crime and organised crime.[123] Scholars from this discipline believe that 'organisational deviance' is the underpinning rationale for considering state crime.[124]

The most crucial consideration in a discussion of organisational deviance is the state's interests.[125] In determining whether a state is deviant, Green and Ward,[126] along with Chambliss,[127] are of the view that the scope of state crime should be restricted to acts and omissions intended to achieve organisational goals or state gain. This means that a 'crime' such as a violation of human rights mentioned in the previous section would only fall within the scope of the theory of state crime if it can be linked to the interests of the state.

This viewpoint falls in line with the views of Kramer and Michalowski from the legal approach to state crime, who have provided a great example of a situation which would fall within this category, the United States' invasion of Iraq.[128] Kramer and Michalowski explain that, among a vast array of reasons for the invasion, the main reason attributed to the United States' involvement was the United States' policy regarding the 'war on terror' and the state's doctrine of 'preventative war'.[129] The Bush administration had made a strong political point that intervention in Iraq was necessary to prevent weapons of mass destruction being deployed by Saddam Hussein.[130] It was in the interests of the US to take action in the event of an emerging threat.[131] In this situation, it was argued that an act of aggression was undertaken to further the goals of, and to benefit, the United States.[132] From this perspective, the invasion of Iraq was not considered to be carried out to achieve the personal goals of an individual soldier or even a high-ranking political figure, such as then president George Bush. The invasion of Iraq was considered to have been carried out in the interests of the state itself.[133]

Some state interests are well known and documented, leaving such a determination rather straightforward. As can be seen through the example of the United States, the Bush administration's 'Pre-emptive Doctrine' rendered the interests of the United States rather clear.[134] However, by the very nature of the involvement of a state body and the degree of power a state possesses in relation to the civilian population, identifying the interests of a state is not always straightforward and 'black and white'. If a state was committing crimes in its

[123] Ibid.

[124] Ibid. Punch provides an interesting alternative to the 'bad apples' metaphor often used to describe individual deviance. Punch states that the extent of the deviance, severity of the consequences and inability to deal with it means it is more appropriate to speak of 'rotten orchards', indicating a level of 'system failure' as the organisation itself becomes deviant: Punch (n 13) 2. This perspective is echoed through the legal approach to state crime as well: Kramer and Michalowski (n 16) 469; Chambliss (n 10) 184. See also Grewcock (n 13) 150–1.

[125] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 110; Chambliss (n 10) 184.

[126] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 110.

[127] Chambliss (n 10) 184.

[128] Kramer and Michalowski (n 16)

[129] Ibid 459.

[130] Ibid.

[131] Ibid.

[132] Ibid.

[133] Ibid.

[134] Ibid.

own interests, it may also be in the interests of that state to keep such interests hidden, in an attempt to avoid rousing public opinion on the issue.

In an attempt to ensure that the power of the state cannot impact scholarship on state crime in this way, state crime scholars have suggested that identifying the *operative goals* of an organisation or sub-unit can enable the distinction between individual and organisational deviance.[135] Green and Ward explain that the operative goals of an organisation are those that its members *actually* work together to achieve.[136] These 'operative goals' provide the key to determining the existence of organisational deviance in the event of a lack of explicitly outlined state interests. Green and Ward suggest operative goals may or may not reflect the official goals that the organisation in question publicly announces.[137] In determining these operative goals, the steps the organisation actually takes can be analysed to determine what goals are being worked towards.[138] The take-away from this is that 'The organizational goals of state agencies are not necessarily those publicly prescribed for them.'[139] And analysing the conduct of the state provides the opportunity to identify the true organisational goals of these state agencies.

Another useful tool state crime scholars use to determine the organisational deviance of a state is considering the validity of the counterargument that the 'crimes' are a product of individual deviance.[140] Green and Ward highlight the necessity to distinguish between individual deviant acts committed by state agents in the course of their employment and acts committed in pursuit of organisational goals.[141] Individual deviance is carried out for personal benefit, as opposed to acts and omissions that are in accordance with the operative goals of an organisation.[142] Individual deviance can most simply be described through the example of a state official such as a police officer accepting a personal monetary bribe. Whereas this police officer may be considered an agent of the state, working for a state organ, this official would generally be considered to be acting in their own personal interest. On face value, this would be considered a deviant act carried out by an individual in the course of their employment. This is not an example of state crime, as the act derives from individual

[135] Green and Ward, *State Crime* (n 10) 5.

[136] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 111. For further explanation of this point, the idea of 'operative goals' in contrast to 'official goals' of an organisation is also discussed by Kramer and Jaksa, who build upon the older works of Perrow: '[O]fficial goals are "... the general purposes of the organization brought forth in the charter, annual reports, public statements and other authoritative pronouncements". On the other hand, operative goals "... designate the ends sought through the actual operating policies of the organization; they tell us what the organization actually is trying to do regardless of what the official goals say are the aims."' Ronald Kramer and James Jaksa, *The Space Shuttle Disaster: Ethical Issues in Organizational Decision-Making* (ERIC, 1987) 7, citing Charles Perrow, 'The Analysis of Goals in Complex Organizations' (1961) 26 *Sociological Review* 854.

[137] Green and Ward, *State Crime* (n 10) 6.

[138] Ibid.

[139] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 111.

[140] Ibid; Chambliss (n 10) 184.

[141] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 111. Kramer, Michalowski and Chambliss also advocate distinguishing between organisational and individual deviance in establishing the existence of state crime: Kramer and Michalowski (n 16) 469; Chambliss (n 10) 184.

[142] Green and Ward, *State Crime* (n 10) 5.

deviance, not organisational deviance. The basis for this is that the police officer is not likely acting in accordance with the operative goals of an organisation.[143]

As can be inferred from this discussion, determining the deviance or 'wrongdoing' of an actor in this way is completely different to the strict legal criteria offered in international law. This perspective allows analysis of why a situation is considered to be a product of a deviant state organisation and relies on ideas such as state benefit from harm,[144] hidden state agendas[145] and the improbability of individual deviance.[146] In doing so, a broader, less rigid context of the situation can be developed. Given this broader viewpoint, understanding why a state may be considered to have partaken in organisational deviance may assist with the discussion on the appropriateness of both individual and state responsibility for international crimes by providing further context to the issue.

C *Crimes of Obedience*

Once a situation is considered a 'state crime', the crimes of obedience framework becomes an important tool for understanding how the situation has developed. As Herbert Kelman explains:

> The essence of international crimes, such as war crimes and crimes against humanity, however, is that they are generally not ordinary crimes, but crimes of obedience: crimes that take place, not in opposition to the authorities, but under explicit instructions from the authorities to engage in these acts, or in an environment in which such acts are implicitly sponsored, expected, or at least tolerated by the authorities.[147]

This theory allows criminologists to identify contributing factors in a situation involving state crime that is separate from a doctrinal legal analysis. By identifying the way in which the Rohingya crisis has developed, the crimes of obedience framework may be able to provide further context to the discussion on state responsibility within international law.

The concept of crimes of obedience originated in the political sciences, when originally coined by Kelman and Hamilton.[148] Within this context, a crime of obedience was defined as 'an act performed in response to

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[143] Ibid.

[144] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 111.

[145] Green and Ward, *State Crime* (n 10) 6.

[146] Ibid 5; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 10) 110; Chambliss (n 10) 184.

[147] Herbert Kelman, 'The Policy Context of International Crimes' in André Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press, 2009) 26, 27. Expanding on this later, Kelman states: 'Our work on authority and responsibility, and on the processes of authorization, routinization, and dehumanization, provides a small but not insignificant piece of an explanatory framework that can provide an account of the Holocaust and other genocides'. Herbert Kelman, 'Dignity and Dehumanization: The Impact of the Holocaust on the Central Themes of My Work' in Herbert Kelman, *Resolving Deep-Rooted Conflicts*, ed Werner Wintersteiner and Wilfried Graf (Routledge, 2016) 38, 44.

[148] Herbert Kelman and V Lee Hamilton, *Crimes of Obedience* (Yale University Press, 1989) 46.

orders from authority that is considered illegal or immoral'.[149] In this space, the concept was used to explain and critique an array of situations from the crash of the space shuttle *Challenger* and the systematic failures surrounding its launch, to the Watergate scandal and the surrounding organisational misconduct to, most relevant to the discussion at hand, the My Lai massacre in Vietnam, which involved the military chain of command.[150] Kelman and Hamilton's theory suggests that there are three factors that can influence an individual perpetrator's state of mind in a way that enables them to consider orders of such a nature as acceptable, ultimately serving as the preconditions to state crime.[151] These are:

- authorisation,[152]
- routinisation[153] and
- dehumanisation.[154]

Criminologists have since adopted the crimes of obedience lens as a framework for analysing instances of state crimes.[155] In the book *Darfur and the Crime of Genocide*, Hagan 'upscaled' this theory,[156] which was developed to explain lower, more mundane levels of deviance, , bringing it into a criminological perspective and addressing state crimes.[157]

Pali's work provides a clear explanation of the way in which this lens can best be applied.[158] Pali explains that within most international crimes, such as war crimes, crimes against humanity and genocide, the direct perpetrators often find themselves in a position in which they believe that their morally questionable

[149] Ibid.
[150] Ibid.
[151] Kelman and Hamilton (n 148) 17–19; Herbert Kelman, 'The Social Context of Torture: Policy Process and Authority Structure' (2005) 87 *International Review of the Red Cross* 123, 131; V Lee Hamilton, 'Chains of Command: Responsibility Attribution in Hierarchies' (1986) 16(2) *Journal of Applied Social Psychology* 118; Cohen (n 104) 110; Edward Day and Margaret Vandiver, 'Criminology and Genocide Studies: Notes On What Might Have Been and What Still Could Be' (2000) 34(1) *Crime, Law and Social Change* 43, 44–5; Edward Sherman, 'Social Psychology of Citizens' Obligations to Authority: A Review of Crimes of Obedience' (1989) 17 *American Journal of Criminal Law* 287; Leanne Weber, 'The Detention of Asylum Seekers as a Crime of Obedience' (2005) 13(1) *Critical Criminology* 89, 93; Jessica Wolfendale, 'Military Obedience: Rhetoric and Reality' in Igor Primoratz (ed), *Politics and Morality* (Palgrave Macmillan, 2007) 228.
[152] Kelman and Hamilton (n 148) 17.
[153] Ibid 18.
[154] Ibid 19.
[155] Within the realm of criminology, many scholars have adopted the crimes of obedience framework for the purpose of explaining instances of state crime in greater depth: Frank Neubacher, 'How Can it Happen That Horrendous State Crimes Are Perpetrated? An Overview of Criminological Theories' (2006) 4(4) *Journal of International Criminal Justice* 787, 791; Kelman, 'The Policy Context of International Crimes' (n 147) 26; Day and Vandiver (n 151); Roxana Marin, 'Structural and Psychological Perspectives on the Perpetrator of Genocide' (2012) 12(2) *Studia Politica: Romanian Political Science Review* 235, 242; Kelman, 'Dignity and Dehumanization' (n 147) 44.
[156] John Hagan, *Darfur and the Crime of Genocide* (Cambridge University Press, 2004).
[157] Brunilda Pali, 'Crimes of (Dis)Obedience: Radical Shifting of the Criminological Gaze', *Security Praxis* (Web Page, 1 October 2018) <https://securitypraxis.eu/crimes-of-disobedience/>.
[158] Ibid.

behaviour is actually acceptable.[159] Examples such as torture, raping and killing are provided to suggest that, in many of these situations, the direct perpetrating individual is of the view that these inhumane actions are acceptable or even condoned.[160] Whereas a reasonable person objectively analysing the situation would see these actions as morally questionable to say the least, the crimes of obedience framework explains the ways in which an individual can be manipulated to view such a situation in this way.[161]

It is through this logic that the crimes of obedience lens can provide an understanding of the Rohingya crisis, as it explains that grave human rights violations such as genocide, mass killing and torture can be carried out when three key factors are met.[162]

1 *Authorisation*

The two, more straightforward[163] concepts amounting to the preconditions of state crime are authorisation and routinisation. Authorisation refers to the instance in which a low-level perpetrator views a grave human rights violation as acceptable based on the standards set by a higher authority, such as the military's chain of command.[164]

Authorisation requires the direct perpetrating individual, which in many instances is a low-ranking soldier within a nation's military, to be acting upon the direction or orders of a higher authority.[165] Within such a situation, the individual's own moral compass is replaced by a duty to obey the orders handed down from this higher authority, as it is the individual's duty to honour the chain of command the individual is serving under.[166]

This concept is best described through an experiment that was conducted by Milgram, which explains the basic human trait of obeying an order from an authority that the individual subjectively perceives as legitimate.[167] Within Milgram's experiment, test subjects were instructed by the experiment conductors (the authority) that they were testing learning ability and the ability to remember and the effect that punishment has on such abilities.[168] This 'punishment' came in the form of electric shock, some of which carried up to

[159] Ibid.
[160] Ibid.
[161] Ibid.
[162] Kelman and Hamilton (n 148) 17–19.
[163] Given the relative simplicity of these concepts when compared with the complexities surrounding the idea of dehumanisation, the overview of these two concepts is briefer, although this is not intended to indicate that they are of lesser importance.
[164] Kelman and Hamilton (n 148) 17.
[165] Ibid.
[166] Ibid. Kelman later simplifies the idea of authorisation, suggesting that 'authorization absolves individuals of the responsibility to make personal moral choices on the basis of standard moral principles': Kelman, 'The Social Context of Torture' (n 151) 131. See also Day and Vandiver (n 151) 44; Kelman, 'The Policy Context of International Crimes' (n 147) 27.
[167] Stanley Milgram, *Obedience to Authority* (Harper and Row, 1974).
[168] Ibid.

450 volts).[169] The true experiment, however, was not testing the effects on learning and remembering abilities, but testing whether these individuals would inflict harm on another when directed by a figure of authority.[170] The results of Milgram's experiment show that 65% of subjects carried out the harm, which was found to indicate that humans are more likely to carry out morally questionable actions when directed by a perceived legitimate authority.[171]

Smeulers links this test back to the analysis of state crimes, suggesting that it is due to this basic human trait that the concept of authority, and an individual's blind willingness to adhere to their duty to obey such authority, can be leveraged to enable the individual to carry out morally questionable orders.[172] Ultimately, this factor argues that 'The perpetrators see themselves in a "no-choice situation" either because they feel their duty lies in obedience or because they feel involved in a "transcendent mission".'[173]

2 *Routinisation*

On a similar note, routinisation is the requirement for the crime to be carried out in a manner that is consistent with what one would consider a job or routine;[174] carrying out the acts as part of a common practice, enabling the individual to commit the illegal or morally challenging actions in a detached manner.[175] According to Kelman, 'routinization enables them to ignore the overall meaning of the tasks they are performing and eliminates the opportunity to raise moral questions'.[176]

Smeulers describes the application of this precondition in the realm of state crime, explaining that the low-ranking individuals tasked with physically carrying out state crimes become accustomed to the task of

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[169] Ibid.

[170] Ibid.

[171] Ibid.

[172] Alette Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (2019) 17 *Journal of International Criminal Justice* 105, 113.

[173] Neubacher (n 155) 791, citing Herbert Kelman, 'Violence Without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers' (1973) 29 *Journal of Social Issues* 25, 38.

[174] As Tsang outlines, 'Routinization causes individuals to avoid the implications of what they do by encouraging them to focus on the details of the job rather than the meaning of the tasks. The situation is then transformed from one of moral right and wrong to a focus on the process and performance of a specific assignment': Jo-Ann Tsang, 'Moral Rationalization and the Integration of Situational Factors and Psychological Processes in Immoral Behavior' (2002) 6(1) *Review of General Psychology* 25, 29.

[175] Kelman and Hamilton (n 148) 18.

[176] Kelman, 'The Social Context of Torture' (n 151) 131. Cohen provides further context to this, explaining: 'Routinisation: the first step is often difficult, but when you pass the initial moral and psychological barrier, then the pressure to continue is powerful. You become involved without considering the implications; it's all in a day's work. This tendency is re-inforced by special vocabularies and euphemisms ("surgical strike") or a simple sense of routine. (Asked about what he thought he was doing, Calley replied in one of the most chilling sentences of all times: "It was no big deal")': Cohen (n 104) 110. For another, more practical explanation concerning the banality of committing large-scale harm when operating under the guise of national duty, Weber provides a deep explanation of how British civil servants see the potentially immoral or illegal detention of asylum seekers as routine: Weber (n 151) 100–2.

committing violence, gradually becoming desensitised from what would usually be considered the horrific nature of the actions in question.[177]

This idea is supported by the logic of Staub, who explains that the way human beings learn is by 'doing' in ordinary life, and in the context of violence this does not change.[178] Staub continues, suggesting that, once engaged in committing violence, the individual progresses through a 'continuum of destruction'—the more harm committed, the further the chances of committing more horrific acts in the future increases.[179] Once this individual is placed on this continuum (which is usually done through the process of authorisation), the violence becomes a matter of routine for this individual.[180]

Within Smeulers' explanation of routinisation, he cited the research of Bilton and Sim from 1992 to describe the concept.[181] Within this discussion, an American soldier who had previously partaken in the Mai Lai massacre provided a harrowing account of the way in which horrific actions had become routine, demonstrating the progression down the continuum of destruction:

> I went to turn her and there was a little baby with her that I had also killed. The baby's face was half gone. My mind just went. The training came to me and I just started killing. Old men, women, children, water buffaloes, everything. We were told to leave nothing standing. We did what we were told, regardless of whether they were civilians. They were the enemy. Period. Kill. If you don't follow a direct order you can be shot yourself. Now, what am I supposed to do? You're damned if you do and you're damned if you don't. You didn't have to look for people to kill, they were just there. I cut their throats, cut off their hands, cut out their tongue, their hair, scalped them. I did it. A lot of people were doing it and I just followed. I just lost all sense of direction. I just started killing any kinda way I can kill. It just came. I didn't know I had it in me. After I killed the child my whole mind just went. It just went. And after you start it's very easy to keep going on. The hardest is to kill the first time but once you kill, then it becomes easier to kill the next person and the next one and the next one. Because I had no feelings, no emotions. Nothing.[182]

3 *Dehumanisation*

Finally, the crimes of obedience framework suggests that the individual will only carry out such actions if they do not consider the victim is on the same level of perceived humanity.[183] This is where the concept of dehumanisation plays a major role in explaining how a state crime can be carried out.

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[177] Smeulers (n 172) 119.

[178] Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (Cambridge University Press, 1989) 79.

[179] Ibid.

[180] Ibid.

[181] Smeulers (n 172) 119, citing Michael Bilton and Kevin Sim, *Four Hours in My Lai: A War Crime and Its Aftermath* (Viking, 1992) 335.

[182] Ibid.

[183] Kelman and Hamilton (n 148) 19; Day and Vandiver (n 151) 45; Kelman, 'Dignity and Dehumanization' (n 147) 38; Allette Smeulers, 'Perpetrators of International Crimes: Towards a Typology' in Allette Smeulers and Roelof Haveman (eds), *Supranational Criminology: Towards a Criminology of International Crimes* (Intersentia, 2008) 233, 259; Kelman, 'The Social Context of Torture' (n 151) 131.

Dehumanisation refers to the instance in which the victim population appears sub-human in the eyes of the perpetrator and surrounding community.[184] In these circumstances the usual behavioural standards of the perpetrator are not applied to the victim population.[185] As Bar-Tal explains, the perception of particular social groups within a community as less than human, or 'sub-human', can lay the foundations for the justification of social exclusion.[186] This exclusion from a social community can eventually lead to moral exclusion.[187] Through the actions of identifying, stigmatising, isolating and eventually vilifying a specific population, state crime perpetrators are able to consider the victim population as outside of their 'universe of moral obligation'—to which the usual behavioural standards and subjective moral compass of the perpetrator do not apply.[188]

This idea of dehumanisation is most clearly explained by Smeulers, who uses the examples of past instances of ethnic cleansing to demonstrate the existence of the principle in practice.[189] Smeulers gave the examples of the treatment of the Jewish population during the Holocaust perpetrated by Nazi-run Germany, along with the Tutsi population who were subject to the Rwanda genocide.[190] Both populations were seen as dehumanised in the eyes of the perpetrators.[191] When looking down on the 'inferior population', the Nazi Germans constantly referred to the Jewish population as '*Lebensunwertes Leben*', which translates to 'life unworthy of living'.[192] Similarly, the armed militia involved in the Rwanda genocide considered the Tutsi population as nothing more than 'cockroaches'.[193] Smeulers explains that the use of derogatory language in this form indicates that the offenders believed that they were superior to the victim population, justifying the actions as perceived legitimate behaviour.[194]

By perceiving that the victim population is 'less than human', the crimes of obedience framework argues, an offender can continue to abide by their own moral norms, even when carrying out such morally questionable behaviour.[195] From this perspective, moral obligations do not apply to those who are outside of an

[184] Daniel Bar-Tal, 'Causes and Consequences of Delegitimization: Models of Conflict and Ethnocentrism' (1990) 46 *Journal of Social Issues* 65; Susan Opotow, 'Moral Exclusion and Injustice: An Introduction' (1990) 46 *Journal of Social Issues* 1; Staub (n 178) 79.
[185] Bar-Tal (n 170).
[186] Ibid.
[187] Ibid.
[188] Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 172) 117.
[189] Ibid.
[190] Ibid.
[191] Ibid.
[192] Ibid.
[193] Ibid.
[194] Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 172) 117. Smeulers expands on this in other works, explaining: 'Whereas in the ordinary world it is not right to hurt someone, this moral rule does not apply to the dehumanised enemies whom they target in the professional world. To a certain extent the professional resembles the devoted warrior: they both come to see violence as a part of their job.' Smeulers, 'Perpetrators of International Crimes' (n 183) 259.
[195] Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 172) 117.

individual's universe of moral obligation.[196] Conroy provides the reasoning for this: 'It's not easy to beat a person and it isn't easy to beat a woman and a child, beating a person is unpleasant. But, [t]his is a different population, [t]his is a different kind of citizen.'[197]

This is where the theory can provide a greater understanding of how the crimes has developed in the complex Rohingya situation. By explaining how state crimes can be carried out, the crimes of obedience framework can be utilised to identify the most effective ways forward for ensuring that such a situation ceases to reoccur. Knowing exactly what issues are contributing to the establishment of these three preconditions can highlight what needs to be changed in the future. If the authorisation of the attacks, routinisation of violent acts and dehumanisation of the victim population can be mitigated, then there is less likelihood that the direct perpetrators will choose to carry out 'manifestly unlawful' conduct.[198] Through this perspective, it becomes possible to determine the impact of international law remedies on these factors that have enabled crimes to be carried out. By minimising the factors that have enabled state crime to exist, it becomes possible to minimise the risk of future instances of state crime being carried out in a region.

[196] John Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture* (University of California Press, 2001) 141.
[197] Ibid.
[198] Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 172) 106.

III BACKGROUND TO THE CASE STUDY

As outlined in Chapter I, this thesis will utilise the method of an exploratory case study to highlight the value of state crime theory with regard to the development of international law. An exploratory case study of this nature requires a deep discussion of many aspects of the chosen issue in order to demonstrate and test the value of the theoretical concepts in question.[1] For this reason, before this deep theoretical analysis of the case study can begin, some background to the case study must first be provided.

This chapter will begin by explaining the events taking place in the lead up to the clearance operations that have become a focal point for legal analysis, along with the operations themselves. Furthermore, this chapter will move to discussing the legal proceedings that have already taken place that have arisen from these events.

With this in mind, this chapter will be structured as follows:

A *Clearance Operations*
B *Legal Response to the Clearance Operations*

A *Clearance Operations*

The subject of the case study, the situation in Myanmar, is particularly nuanced, requiring its many facets to be addressed in its entirely throughout this project. This situation has arisen as a product of many years of instability, tension and ideological disparity, forming a deep societal fracture between the predominantly Buddhist Rakhine and the predominantly Muslim Rohingya populations, which has led to what has been described as some of the most horrific human rights violations occurring in the present day, known as the 'clearance operations'.[2] This term was used by the previous civilian government of Myanmar, as well as its military involved in carrying out the operations, to refer to the events carried out from 2016 to 2018 that involve targeted attacks on the Rohingya population.[3] Tensions in the region have been heightened since 2012.[4]

This section will now develop the background to the events that have taken place in Myanmar. Firstly, the growing tensions in the lead-up to the clearance operations will be discussed and secondly, the way in which the national military acted upon these tensions will be outlined.

[1] Zaidah Zainal, 'Case Study as a Research Method' (2007) 5 *Jurnal Kemanusiaan* 1.
[2] Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/39/CRP.2 (17 September 2018) [1069]–[1095] ('*Detailed Findings 2018*').
[3] Ibid [1069]–[1095].
[4] Nehginpao Kipgen, 'Conflict in Rakhine State in Myanmar: Rohingya Muslims' Conundrum' (2013) 33(2) *Journal of Muslim Minority Affairs* 298, 303.

1 *A Growing Tension in Rakhine State: The 2012 Riots*

The clearance operations did not arise overnight as a spur-of-the-moment attack. A series of events in the years prior caused tensions in the region to progressively escalate, progressing from small-scale, isolated instances of violence to large-scale rioting and military intervention.

After many weeks of disputes between the Rohingya and the Rakhine over ideological matters, a 27-year-old Rakhine woman, Ma Thida Htwe, was allegedly raped and murdered by a group of Rohingya men on 28 May 2012, in the town of Kyaukphyu.[5] Over the next week photos of the murdered woman circulated on the social media platform Facebook, which resulted in their publication by Burmese media, which emphasised the ethnic backgrounds of all parties involved.[6] On 3 June, a bus carrying 10 Rohingya was attacked by Rakhine Buddhists in the primarily Buddhist town of Taungup as a form of retaliation.[7] The Rohingya present on the bus were allegedly murdered and photo evidence of the incident then began to circulate throughout the media, triggering a further outbreak of violence and rioting.[8] As a result of this, the state of Rakhine erupted into vandalism and violence shortly after, resulting in many villages being burned to the ground.[9]

As a response to these instances of violence, the military intervened.[10] The primarily Muslim township of Maungdaw had a curfew imposed by the military in an attempt to quell the violence and armed forces entered the city on 8 June.[11] The next day, five army battalions arrived in Maungdaw and, as the rioting failed to cease, the government declared a state of emergency in Rakhine on 12 June.[12] Under this provision, the military enacted martial law within Rakhine State and, as a result, provided military administrative control.[13] Rioting and violence continued until 14 June, when the situation eased. Media outlets at the time reported the June riots resulted in 80 deaths and caused the displacement of approximately 90,000 people.[14]

In October 2012, violence between the Rohingya and Rakhine erupted once more.[15] Beginning in the towns of Mrauk Oo and Min Bya, the violence once again spread across the majority of Rakhine State. Within this second wave of violence, BBC News reported that approximately 80 people were killed, and another 22,000

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[5] Benjamin Ismail, 'Crisis in Arakan State and New Threats to Freedom of News and Information', *Reporters Without Borders* (Web Page, 28 June 2012) <https://rsf.org/en/reports/crisis-arakan-state-and-new-threats-freedom-news-and-information>.

[6] Ibid.

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

[8] Ibid.

[9] Ismail (n 5).

[10] Ibid.

[11] Ibid.

[12] Kipgen (n 4) 302.

[13] Ibid.

[14] Joshua Lipes, 'Rights Group Slams Abuse of Rohingyas', *Radio Free Asia* (Web Page, 5 July 2012) <https://www.rfa.org/english/news/myanmar/abuse-07052012172223.html>.

[15] Kipgen (n 4) 303.

individuals were displaced.[16] Within the year 2012, it was estimated that 140,000 individuals, the majority of whom were Rohingya, were displaced due to conflict in the region and the majority of Muslims were removed from the state capital, Sittwe.[17]

Whilst this violence initially seemed to be caused by basic tensions between two conflicting cultures, a number of scholars have suggested that these tensions were leveraged by political parties to incite the conflict.[18] Reports from Rakhine State revealed that the hostilities against the Rohingya stemmed from more than just a number of isolated acts. Rather, these acts that began the 2012 riots appear to be only the trigger for the violence; the open hostility and discrimination that enabled such a reaction to arise from this trigger can be traced to the influence of the Rakhine Nationalities Development Party (RNDP).[19]

At the time of the riots, the RNDP was the dominant party in the state Parliament, holding 18 of 45 seats, and had a considerable influence in policy making.[20] Human Rights Watch reported that, under the direction of the RNDP, local Buddhist monks were tasked with distributing pamphlets in the region that aimed to direct members of the public to isolate Muslims in the community.[21] It reported that these pamphlets contained a request for cessation of business with and association with the Rohingya, as well as asserting that the Rohingya were involved in a master plan to rid the region of the Rakhine through extinction.[22] In terms of direct communication from the RNDP, statements issued in July 2012 carried a similar message.[23] A public statement from the party on 26 July stated that the Rohingya population poses a threat to the existence of the people of Rakhine.[24] The statement also asserted the party's viewpoint that the Rohingya are not natives to the region and are damaging both the Rakhine population and national sovereignty as a whole.[25] Furthermore, the statement went so far as to suggest that a 'complete solution' should be reached that enabled the relocation of Rohingya to third countries in order to prevent them residing or mixing with the Rakhine population.[26] The most concerning communication on behalf of the party lay within the text of an official journal of the RNDP from 2012, *Toe Thet Yay*, which was discovered by the UN Fact-Finding

[16] 'Burma Violence: 20,000 Displaced in Rakhine State', *BBC News* (online, 28 October 2012) <https://www.bbc.com/news/world-asia-20114326>.
[17] Adrian Edwards, 'One Year On: Displacement in Rakhine State, Myanmar', *UN High Commissioner for Refugees* (Web Page, 7 June 2013) <https://www.unhcr.org/en-ie/news/briefing/2013/6/51b1af0b6/year-displacement-rakhine-state-myanmar.html>.
[18] Adam Burke, 'New Political Space, Old Tensions: History, Identity and Violence in Rakhine State, Myanmar' (2016) 38(2) *Contemporary Southeast Asia* 258, 268; Min Zin, 'Anti-Muslim Violence in Burma: Why Now?' (2015) 82(2) *Social Research: An International Quarterly* 375.
[19] Burke (n 18) 268.
[20] Ibid.
[21] Human Rights Watch, 'All You Can do is Pray' (n 7).
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid.

Mission in 2018.[27] The text cited and praised the work of Adolf Hitler, and with respect to the situation in Rakhine argued that inhumane acts are 'sometimes necessary to maintain a race'.[28]

Whilst the tensions in Rakhine State concerning the Rohingya population can be traced back many decades, even to the time of British colonial rule,[29] the immediate tensions concerning the clearance operations can be linked to the heightened societal fracture between the Rohingya and Rakhine in 2012.[30] These tensions appear to have been elevated as part of a series of riots which took place in two waves, one in June and one in October.[31] Between the excessive violence, rioting and encouragement from the powerful state party, the Rakhine Nationalities Development Party (RNDP), animosity towards the Rohingya was at an all-time high by the end of 2012. As of July 2013, 140,000 individuals had been reported by media outlets to have been displaced by the conflict and smaller, isolated instances of violence continued into 2016.[32] Ultimately, this rise of instability in the Rakhine region in 2012, backed by a history of discrimination,[33] set the conditions for the current era of conflict involving the Rohingya population, the clearance operations.

2 *Tensions Coming to a Head: The Tatmadaw's Clearance Operations*

With the instability in the region at a heightened state since the 2012 riots, numerous violent attacks were carried out in the period leading up to October 2016. Most notably, the Northern Rakhine-based insurgent group, the Arakan Rohingya Salvation Army (ARSA), attacked three of Myanmar's border posts along the border with Bangladesh.[34] Nine people were killed in the attack and ARSA confiscated the weaponry and ammunition held by the border guards.[35] As a response to this, Myanmar's national military, the Tatmadaw, Myanmar Police Force and the border guards began 'clearance operations', beginning with the establishment of lockdown zones around the Rohingya villages in Maungdaw.[36]

[27] Human Rights Council, *Detailed Findings 2018* (n 2) 169 [713].
[28] Ibid; Rakhine Nationalities Development Party, *Toe Thet Yay Journal*, vol 2; no 12 (Rakhine Nationalities Development Party, 2012).
[29] Jobair Alam, 'The Current Rohingya Crisis in Myanmar in Historical Perspective' (2019) 39(1) *Journal of Muslim Minority Affairs* 1, 4; Andrew Selth, *Burma's Muslims: Terrorists or Terrorised?* (Strategic and Defence Studies Centre of Australian National University, 2003) 7; Aye Chan, 'The Development of a Muslim Enclave in Arakan (Rakhine) State of Burma (Myanmar)' (2005) 3(2) *SOAS Bulletin of Burma Research* 396, 401.
[30] Burke (n 18); Krishna Mirmala, 'The Rohingya Plight: The Role of State Actors and Non-State Actors' (2018) 9(1) *Journal of Defence and Security* 49.
[31] Burke (n 18); Mirmala (n 30).
[32] 'The Unending Plight of Burma's Unwanted Rohingyas', *BBC News* (online, 1 July 2013) <https://www.bbc.com/news/world-asia-23077537>.
[33] Selth (n 29) 7; Chan (n 29) 401.
[34] Human Rights Council, *Detailed Findings 2018* (n 2) 255 [1069]–[1072]; Catherine Renshaw, 'Myanmar's Genocide and the Legacy of Forgetting' (2020) 48(2) *Georgia Journal of International and Comparative Law* 425, 465.
[35] Ibid 255 [1069]–[1072].
[36] Human Rights Council, *Detailed Findings 2018* (n 2) 255 [1069]–[1072].

Reports of the clearance operations have stated that the combined forces of Myanmar murdered, raped, detained, beat and tortured Rohingya citizens throughout the operations in October 2016.[37] In one instance, helicopters were even reported to have been used to hunt down fleeing Rohingya, who were shot down from the sky.[38] Mass killings of unarmed civilians were reportedly prevalent when the forces of Myanmar reached each village. For example, the Fact-Finding Mission describes one instance when the Tatmadaw arrived in the village of Dar Gyi Zar, stating that a group of approximately 200 men, women and children were taken to a nearby field, with the men and boys over the age of 12 being forced to kneel, then being executed.[39]

Violence as part of the 2016 clearance operations was not limited to men and boys. The Office of the United Nations High Commissioner for Human Rights has reported that sexual violence against women was present on a massive scale.[40] The military and security of Myanmar were found to have performed attacks of forced nudity, gang rape and general sexual assault.[41] This report corroborates that of the UN Fact-Finding Mission, which states that, in the small village of Kyet Yoe Pyin alone, over 100 females were estimated to have been raped.[42] After carrying out four months of violence directed towards the Rohingya population, the government of Myanmar ceased the clearance operations in February 2017.[43]

This 'ceasefire' from the first wave of attacks by Myanmar forces was only short lived. According to the government of Myanmar, a series of coordinated attacks against the Light Infantry Battalion Army Base and a number of police posts by insurgent groups in Rakhine State resulted in 71 deaths on 25 August 2017.[44] Taking credit for carrying out these attacks was ARSA, who claimed that these attacks were defensive, as a result of the Tatmadaw killing and raping civilians.[45] ARSA also suggested that these attacks were in response to the blockade of the town of Rathedaung, which ARSA claimed was aimed at starving the Rohingya inhabitants.[46] Immediately, the forces of Myanmar responded by commencing the second wave of clearance operations targeted at the Rohingya population in an attempt to quash the 'terrorist threat' posed by ARSA.[47]

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[37] Ibid 255–9 [1069]–[1095]; Office of the High Commissioner for Human Rights, *Interviews with Rohingyas Fleeing from Myanmar Since 9 October 2016* (Report, 3 February 2017) 13–40 <https://www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf>.

[38] Office of the High Commissioner for Human Rights (n 37) 15.

[39] Human Rights Council, *Detailed Findings 2018* (n 2) 257 [1086].

[40] Office of the High Commissioner for Human Rights (n 37) 21.

[41] Ibid.

[42] Human Rights Council, *Detailed Findings 2018* (n 2) 262 [1111].

[43] Ibid 177 [750].

[44] Ibid.

[45] 'Deadly Clashes Erupt in Myanmar's Restive Rakhine State', *Al Jazeera* (online, 26 August 2017) <https://www.aljazeera.com/news/2017/08/deadly-clashes-erupt-myanmar-restive-rakhine-state-170825055848004.html>.

[46] Ibid.

[47] Ibid.

According to the Fact-Finding Mission, hundreds of villages were immediately attacked across the areas of Rathedaung, Maungdaw and Buthiduang after these ARSA attacks.[48] Reports from this second wave of clearance operations describe the situation as more extreme and displaying a significantly higher degree of brutality than the first wave beginning in June 2016.[49] As part of this second wave, security forces and Tatmadaw soldiers were reported to have entered villages in the early morning, firing bullets as well as explosive projectiles from mortars and rocket launchers directly at civilian houses.[50] Residents of the targeted villages were raped and killed, with houses being burned to the ground.[51]

As of 2018, these attacks had not yet ceased, with the UN Special Rapporteur on Human Rights for Myanmar reporting that, since August 2016, 1000 civilians had been killed by the government forces, which, according to the same report, is likely to be a huge underestimate of the true figure of destruction.[52] In 2018 it was reported that approximately 700,000 Rohingya had fled to Bangladesh within the previous year as a result of the actions by the government forces.[53] It was reported at this time that state forces were destroying rice fields and denying the Rohingya access to markets, in an attempt to force starvation on the remaining 200,000 Rohingya in the region.[54]

Moving into 2019, reports from media outlet TRT World suggested a 'genocide zone' in the Rakhine region may have been established by the government of Myanmar.[55] These reports suggested that landmines had been placed upon the stretch of land in Rakhine State that is bordering Bangladesh, in an attempt to 'fence in' the fleeing Rohingya.[56] The report of the UN Fact-Finding Mission in 2019 supports this suggestion, stating that credible sources have found that the Tatmadaw have been using landmines in the conflict, which is a major reason why a number of Rohingya refugees have refused to return to their homes.[57] Furthermore, the reports of TRT Word described a heightened use of aircraft in attacks on both Rohingya villages and fleeing civilians from the air.[58]

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[48] Human Rights Council, *Detailed Findings 2018* (n 2) 178 [751].
[49] Ibid.
[50] Ibid 38 [144]–[146].
[51] Ibid 205 [884]–[911].
[52] Office of the High Commissioner for Human Rights, 'Statement by Ms. Yanghee Lee, Special Rapporteur on the Situation of Human Rights in Myanmar at the 37th Session of the Human Rights Council' (Media Release, 12 March 2018) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22806&LangID=E>.
[53] Md Ali Siddiquee, 'The Portrayal of the Rohingya Genocide and Refugee Crisis in the Age of Post-truth Politics' (2019) 5(2) *Asian Journal of Comparative Politics* 89; 'Rohingya Genocide is Still Going on Says Top UN Investigator', *The Guardian* (online, 24 October 2018) <https://www.theguardian.com/world/2018/oct/24/rohingya-genocide-is-still-going-on-says-top-un-investigator>.
[54] Human Rights Council, *Report of the Detailed Findings of the Independent Fact-Finding Mission on Myanmar*, UN Doc A/HRC/42/CRP.5 (9 September 2019) 52 [158] ('*Detailed Findings 2019*').
[55] CJ Werleman, 'Rohingya Trapped Inside a "Genocide Zone"', *TRT World* (online, 2019) <https://www.trtworld.com/opinion/rohingya-trapped-inside-a-genocide-zone-26095>.
[56] Ibid.
[57] Human Rights Council, *Detailed Findings 2019* (n 54) 124 [442].
[58] Werleman (n 55).

In September 2019, the UN Fact-Finding Mission stated that the rapes, gang rapes, killings, forced displacements and torture that were outlined in the 2018 *Report of the Detailed Findings* were still occurring.[59] This 2019 report suggests that the 'grave violations against the Rohingya' provide a 'real and significant danger' of further deterioration.[60]

B *Legal Response to the Clearance Operations*

These clearance operations have not remained unnoticed by the international community. The predominantly Muslim state, The Gambia,[61] and the Office of the Prosecutor of the ICC[62] have both initiated attempts to attribute accountability for the attacks, although these are only in early stages. The initiation of these actions will now be discussed, as will the current position of the Rohingya population, in an attempt to explain the current situation in Myanmar.

1 *Action in the International Criminal Court*

November 2019 was the first formal action from the international community against Myanmar for the human rights abuses of the Rohingya population.[63] At this time, the ICC authorised an investigation with regard to the Rohingya and the alleged crimes committed by the Tatmadaw.[64] The action was initiated by the Office of the Prosecutor of the ICC after being requested by thousands of alleged victims.[65] As the ICC stated, these victims who have reached out to the ICC believe that 'only justice and accountability can ensure that the perceived circle of violence and abuse comes to an end'.[66]

(a) Jurisdiction

Jurisdiction in this case is a challenging issue.[67] The ICC does not have full jurisdiction over the entirety of the alleged crimes that have been undertaken in Myanmar, as Myanmar is not a state party to the *Rome*

[59] Human Rights Council, *Detailed Findings 2019* (n 54) 5 [2].
[60] Ibid 18 [58].
[61] *The Gambia v Myanmar (Order)* (n 67).
[62] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (Authorization of Investigation)* (International Criminal Court, Pre-Trial Chamber 3 ICC-01/19-27, 14 November 2019).
[63] Ibid; Douglas Guilfoyle, 'The ICC Pre-trial Chamber Decision on Jurisdiction Over the Situation in Myanmar' (2019) 73(1) *Australian Journal of International Affairs* 2 (n 7).
[64] Ibid.
[65] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (Authorization of Investigation)* (n 62).
[66] International Criminal Court, 'ICC Judges Authorise Opening and Investigation into the Situation in Bangladesh/Myanmar' (Media Release ICC-CPI-20191114-PR1495, 14 November 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>.
[67] The most relevant provision of the *Rome Statute* concerning jurisdiction is article 12. This article addresses the precondition to the exercise of jurisdiction, which states that, generally speaking, a state accepts the jurisdiction of the ICC for certain crimes by becoming a party to the *Rome Statute.* Article 12 goes on to mention that jurisdiction of the Court is also activated if the conduct in question occurred on the state or territory of a state party to the statute, the conduct occurred on a vessel or aircraft registered to a state party, or the accused is a national of a state party: *Rome*

Statute.[68] Despite this, jurisdiction for the Prosecutor to investigate the situation in Myanmar has to some degree been granted, as neighbouring Bangladesh has been a party to the *Rome Statute* since 2010.[69] In a November 2019 decision, the Pre-Trial Chamber of the ICC emphasised that the ICC has authority to exercise jurisdiction *ratione temporis* when part of the criminal conduct in question has been undertaken on the territory of a state that is party to the *Rome Statute*.[70] Based on the current available information that has arisen from the situation, the Chamber was of the view that it is reasonable to believe that acts of widespread and/or systematic violence that may amount to crimes against humanity of deportation across the Myanmar border may have occurred.[71] This was due to the fact that the victims' movement over the border between Myanmar and Bangladesh establishes a territorial link that arises from the *actus reus* of the crime.[72]

The Pre-Trial Chamber also authorised the Prosecutor to investigate any crime or future crime listed under the *Rome Statute* that has been allegedly committed at least in part on the territory of an ICC member state and is linked to the current situation concerning the Rohingya population.[73] However, at this stage it is unclear which further crimes this may involve.

The one major caveat to the authorisation of the investigation that was provided by the Chamber was that the investigated crimes must have been committed at least in part on the territory of a state party, to remain in accordance with article 12(3) of the *Rome Statute*.[74] Furthermore, it also highlighted that, in reference to the crimes committed in part on the territory of Bangladesh, the investigation may only include crimes that were

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Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 25 ('*Rome Statute*') (n 8) art 12.

[68] International Criminal Court, 'ICC Judges Authorise Opening and Investigation into the Situation in Bangladesh/Myanmar' (n 66). Currently, only 123 states are party to the *Rome Statute*, including 19 Asia-Pacific states, 33 African states, 18 Eastern European, 25 Western European and other states. With such a large number of UN member states refusing to accept the jurisdiction of the Court, it is important to note that, generally speaking, a state's officials or allies may simply avoid prosecution at the ICC due to the state having never become a party to the *Rome Statute*. Myanmar has not signed the *Rome Statute*, which creates significant difficulty in bringing actions concerning the alleged crimes committed against the Rohingya: 'The States Parties to the Rome Statute', *International Criminal Court* (Web Page) <https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx>.

[69] 'The States Parties to the Rome Statute' (n 68).

[70] International Criminal Court, 'ICC Judges Authorise Opening and Investigation into the Situation in Bangladesh/Myanmar' (n 66).

[71] Ibid.

[72] 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Following Judicial Authorisation to Commence an Investigation into the Situation in Bangladesh/Myanmar', *International Criminal Court* (Web Page, 22 November 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=20191122-otp-statement-bangladesh-myanmar>. While crimes against humanity for deportation or forcible transfer under article 7(1)(d) were specifically mentioned by the Chamber, no assessment was made of whether other crimes in the jurisdiction of the Court may have been carried out. Rather, the Chamber suggested such a determination could be left to the Prosecutor when undertaking the investigation into the situation, which will include any crimes committed in the future. Due to this, the Chamber authorised the Prosecutor to extend the investigation to any crime listed within the Court's jurisdiction if the evidence gathered requires it.

[73] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (Authorization of Investigation)* (n 62) [112]–[114].

[74] 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda' (n 72).

allegedly committed after the date on which Bangladesh became bound by the *Rome Statute*, 1 July 2010. Ultimately, the Prosecutor of the ICC only has jurisdiction over crimes committed in part on the territory of Bangladesh after 1 July 2010, or on the territory of another state party if further facts require it.

Immediately noticeable from the Pre-Trial Chamber's decision is the lack of jurisdiction over the crime of genocide, which appears to have been committed solely on the territory of Myanmar. The Office of the Prosecutor of the ICC is currently collecting evidence on the situation as part of the pre-trial process.[75] There is no evidence to suggest that the Pre-Trial Chamber has been approached by the Prosecutor in to obtain summonses or warrants of arrest, which would be the next step for the case.[76] At this point, further progress in the case awaits the evidence of the Prosecutor's investigation and a determination of whether this evidence indicates that a case in the ICC should go ahead.[77]

(b) Gravity

Furthermore, a case in the ICC is not only required to meet the jurisdictional requirements but must also meet the gravity threshold. This gravity threshold is provided in article 17(1)(d) of the *Rome Statute*, which states that a case is inadmissible if it is not of sufficient gravity to justify action by the ICC.[78] It is up to the Prosecutor to decide whether the gravity requirement is met.[79]

Within the November 2019 decision concerning the opening of the investigation, the Chamber stated that, due to both the number of victims that may be involved in the situation and the scale of the alleged crimes, the gravity threshold has clearly been met.[80] The fact that between 600,000 and 1 million victims were estimated to have been forcibly displaced from Myanmar to Bangladesh was highlighted and used to support

[75] International Criminal Court, 'ICC Judges Authorise Opening and Investigation into the Situation in Bangladesh/Myanmar' (n 66).

[76] *Rome Statute* (n 67) arts 57(3)(a), 58.

[77] It must be noted that there is an alternative way of activating jurisdiction that may provide the ICC with the authority to bring charges of genocide in relation to the situation in Myanmar: a referral from the UN Security Council. It is the general consensus on the relevant provisions that a referral from the UN Security Council to the Prosecutor of the ICC can activate the jurisdiction of the Court over both nationals and territories of states who have neither ratified the *Rome Statute* nor accepted the jurisdiction of the Court. Although this avenue would have arguably provided a more effective ground for the Prosecutor's investigation, as giving the Court full jurisdiction in Myanmar would allow the allegations of genocide committed inside Myanmar to be immediately addressed, such a vote has not been undertaken by the UN Security Council at this point in time. Speculation about the reason for this could include the possibility of political interference and use of veto powers of the UN Security Council, although such discussion is beyond the scope of this thesis: SC Res 1422; UN Doc S/RES/1422 (12 July 2002) [4]. See also SC Res 1487, UN Doc S/RES/1487 (12 June 2003); Alexandre Galand, *UN Security Council Referrals to the International Criminal Court* (Brill, 2018) 1–6, 224–2; Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text* (Transnational Publishers, 2005) 140.

[78] *Rome Statute* (n 67) art 17(1)(d); Susana SáCouto and Katherine Cleary, 'The Gravity Threshold of the International Criminal Court' (2008) 23(5) *American Journal of International Law* 809.

[79] This is provided for in article 53(1) of the *Rome Statute*, which gives the Prosecutor power to initiate an investigation unless there is no reasonable basis to proceed under the statute, which includes article 17 and the gravity threshold. See *Rome Statute* (n 67) art 53(1).

[80] International Criminal Court, 'ICC Judges Authorise Opening and Investigation into the Situation in Bangladesh/Myanmar' (n 66).

the finding that 'there are no substantial reasons to believe that an investigation into the situation would not be in the interests of justice'.[81]

2 *Action in the International Court of Justice*

Moving to the action in the ICJ, on 11 November 2019, The Gambia brought a case against Myanmar under the *Genocide Convention*.[82] As part of this initiation of proceedings, The Gambia alleged that Myanmar has violated the *Genocide Convention* through acts adopted, taken and condoned by the Government of Myanmar.[83] The reason for this action is accusations that Myanmar has breached the *Genocide Convention*'s requirements to not carry out genocide,[84] conspiracy to commit genocide,[85] public incitement to commit genocide,[86] attempt to commit genocide,[87] and complicity in genocide[88] under article 3 of the convention.[89] The Gambia has alleged that these violations occurred as part of the clearance operations of the Tatmadaw and other Myanmar security forces that were intended to destroy the Rohingya as a group through mass murder, rape and the destruction of Rohingya villages from October 2016.[90]

At the time of writing, there have been three notable responses to the progression of the case: a) speech by ex-state leader Aung San Suu Kyi in defence of Myanmar, b) the issuance of Provisional Orders and c) decisions relating to objections of standing, jurisdiction and other preliminary matters.

(a) Speech by Myanmar State Counsellor Aung San Suu Kyi

In December 2019, the ICJ held public hearings on the matter and Myanmar's State Counsellor, Aung San Suu Kyi, a Nobel Peace Prize winner, attended the hearing to defend her country.[91] Aung San Suu Kyi addressed the ICJ in relation to the allegations of genocide that have been carried out by the Tatmadaw,

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[81] Ibid.

[82] International Court of Justice, 'The Republic of The Gambia Institutes Proceedings Against the Republic of the Union of Myanmar and Asks the Court to Indicate Provisional Measures' (Media Release 2019/47, 11 November 2019) <https://www.icj-cij.org/files/case-related/178/178-20191111-PRE-01-00-EN.pdf>; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (The Gambia v Myanmar) (Application Instituting Proceedings and Request for Provisional Measures)* (International Court of Justice, General List No 178, 11 November 2019) 4.

[83] International Court of Justice, 'The Republic of The Gambia Institutes Proceedings Against the Republic of the Union of Myanmar and Asks the Court to Indicate Provisional Measures' (n 82).

[84] *The Gambia v Myanmar (Application Instituting Proceedings and Request for Provisional Measures)* (n 82) 4; *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art III(a) ('*Genocide Convention*').

[85] Ibid art III(b).

[86] Ibid art III(c).

[87] Ibid art III(d).

[88] Ibid art III(e).

[89] Ibid art III.

[90] International Court of Justice, 'The Republic of The Gambia Institutes Proceedings Against the Republic of the Union of Myanmar and Asks the Court to Indicate Provisional Measures' (n 82).

[91] 'Transcript: Aung San Suu Kyi's Speech at the ICJ in Full', *Burma/Myanmar Library* (Web Page, 13 December 2019) <www.burmalibrary.org/en/transcript-aung-san-suu-kyis-speech-at-the-icj-in-full>.

defending the military's operations since 2016 and referring to the genocidal allegations as an 'incomplete and misleading factual picture of the situation'.[92] Aung San Suu Kyi continued, suggesting that no genocide had been taking place within Myanmar's borders, although killing has been undertaken as part of the conflict with the insurgent group Arakan Rohingya Salvation Army (ARSA).[93] She suggested that the operations in question were carried out in response to the attacks on police stations and to thwart ARSA's plan to seize the township of Maungdaw.[94] Aung San Suu Kyi argued that the insurgents posed a significant threat to Myanmar, suggesting that the group possessed weapons and explosives received from Pakistani and Afghan military groups.[95] Finally, Aung San Suu Kyi assured the Court that, if the Tatmadaw had committed any human rights violations, that they would be dealt with domestically through Myanmar's justice system.[96]

(b) Order of Provisional Measures

In January 2020, the ICJ issued the unanimous *Order of Provisional Measures of Protection*.[97] The purpose of this order is 'to establish whether the acts complained of by The Gambia are capable of falling within the provisions of the Genocide Convention'.[98] This order was specifically not aimed at ascertaining whether Myanmar had violated the *Genocide Convention*, as such a determination could only be undertaken through the examination of the merits of the case.[99] As part of this provisional order, the ICJ ordered Myanmar to take all measures to prevent the commission of genocide within its territory, ensure that its military does not commit, incite, attempt or be complicit in genocide, take effective measures to prevent the destruction of any evidence related to the allegations of genocide and to submit a report to the ICJ of the measures taken as a result of this order.[100]

Under the requirements of this order, a report from Myanmar to the ICJ regarding the measures taken following the provisional order was due on 23 May 2020.[101] This document has not yet been made public and the ICJ is under no obligation to do so;[102] however Al Jazeera has reported a conversation with a foreign ministry official regarding the matter.[103] According to this source, the foreign ministry official stated that the provisional-order-mandated report was submitted on 22 May 2020 and stated the three directives issued to the military from President Win Myint's office.[104] These directives allegedly include the orders to not

[92] Ibid.
[93] Ibid.
[94] Ibid.
[95] Ibid.
[96] Ibid.
[97] *Application of the Convention on the Prevention and Punishment of Genocide* (*The Gambia v Myanmar) (Order of 23 January 2020)* [2020] ICJ Rep 178 ('*The Gambia v Myanmar) (Order of 23 January 2020)*').
[98] Ibid.
[99] Ibid.
[100] Ibid [86].
[101] Ibid [82].
[102] There is no existing requirement for the ICJ to disclose reports required by a provisional order.
[103] 'Myanmar Submits First Report on Rohingya to UN's Top Court', *Al Jazeera* (online, 24 May 2020) <https://www.aljazeera.com/news/2020/05/myanmar-submits-report-rohingya-top-court-200524053637929.html>.
[104] Ibid.

remove or destroy evidence of a genocide, to prevent genocidal acts, and to prevent incitement and hate speech against the Rohingya.[105]

(c) Standing, Jurisdiction and Other Preliminary Issues

The standing of The Gambia was initially addressed by the ICJ on 23 January 2020, while discussing these provisional measures.[106] Within this discussion, the Court determined that the obligations under the *Genocide Convention* are obligations *erga omnes partes* and any state party to the convention may invoke the responsibility of another state party.[107]

Myanmar has contested these points through objection.[108] This response arrived on 20 January 2021, in the form of the filing of 'preliminary objections to the jurisdiction of the Court and the admissibility of the Application'.[109] These objections were addressed by the Court on 22 July 2022. These objections related to the 'real applicant', the existence of a dispute, Myanmar's reservation to article 8 of the *Genocide Convention* and the standing of The Gambia.[110]

(i) Whether The Gambia is the 'Real Applicant', Existence of a Dispute Between the Parties, Myanmar's Reservation to Article 8 of the Genocide Convention

Firstly, Myanmar argued that the 'real applicant' in these proceedings is the Organisation of Islamic Cooperation, rather than The Gambia.[111] Given the status of the Organisation of Islamic Cooperation as an international organisation, it cannot be a party before the Court. The argument from Myanmar is that, due to this, either the Court lacks jurisdiction, or the action is inadmissible.[112] Myanmar argued that an examination of the relevant facts and circumstances as a whole should be undertaken to look beyond the named party of the proceedings, to determine the 'real applicant'.[113] However, the Court did not agree with this position, stating that there is no reason for the Court to look beyond the fact that The Gambia has initiated proceedings against Myanmar in its own name. It rejected this objection.[114]

Secondly, Myanmar argued that there was no dispute between the two parties on the date of filing of the application instituting proceedings.[115] Due to this, either the Court lacks jurisdiction or the application is

[105] Ibid.
[106] *The Gambia v Myanmar (Order of 23 January 2020)* (n 97) [39]–[42].
[107] Ibid.
[108] *Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v Myanmar) (Judgment)* [2022] ICJ Rep 178 ('*The Gambia v Myanmar (Judgment)*').
[109] *Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v Myanmar)* (*Order of 28 January 2021)* [2021] ICJ Rep 178.
[110] *The Gambia v Myanmar (Judgment)* (n 108) [32].
[111] Ibid [34].
[112] Ibid.
[113] Ibid [35].
[114] Ibid [50].
[115] Ibid [51].

inadmissible.[116] This objection was addressed briefly, with the Court simply finding that, as of filing, on 11 November 2019, a dispute between the parties relating to the *Genocide Convention* did exist.[117]

Thirdly, Myanmar argued that the Court lacks jurisdiction, or that The Gambia's application is inadmissible[118] because the seisin of the Court is governed by article 8 of the *Genocide Convention*,[119] which states:

> Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.[120]

The Court found that the ordinary meaning of the terms of article 8 should be considered. This reading of Article 8 concerns addressing the prevention and suppression of genocide at the political level rather than approaching it as a matter of legal responsibility.[121] As such, this interpretation has no bearing on whether the Court can be seised by The Gambia.[122]

(ii) The Standing of The Gambia

The final objection concerned the issue of standing, which triggered a comparatively lengthy discussion.[123] Myanmar argued that The Gambia lacks standing to bring the case before the Court for three reasons, all of which were rejected by the Court.[124]

Firstly, Myanmar was of the view that only states who have been states 'adversely affected by an internationally wrongful act' are 'injured States' who have standing to bring a case before the Court.[125] As The Gambia does not fit within this definition of 'injured state', it does not have a legal interest in the matters at hand.[126] Secondly, Myanmar argued that The Gambia does not possess the standing to bring an action in the interest of the Rohingya group, as the group in question are not nationals of The Gambia.[127] Myanmar contested that this rule is reflected in article 44(a) of the International Law Commission's *Articles on the Responsibility of States for Internationally Wrongful Acts*,[128] which states that state responsibility is not invoked when 'the claim is not brought in accordance with any applicable rule relating to the nationality

[116] Ibid [52].
[117] Ibid [77].
[118] Ibid [78].
[119] Ibid [79].
[120] *Genocide Convention* (n 84) art VIII.
[121] *The Gambia v Myanmar (Judgment)* (n 108) [81].
[122] Ibid [92].
[123] Ibid [93].
[124] Ibid [114].
[125] Ibid [93].
[126] Ibid [93]–[96].
[127] Ibid [98].
[128] Ibid [98].

of claims'.[129] Thirdly, Myanmar argued that the standing of states who are not 'specially affected' is dependent on the standing of states that are 'specially affected'.[130] It was Myanmar's view that Bangladesh should be instituting proceedings against Myanmar due to its geographical location and housing of victims—not The Gambia.[131]

To answer these questions the Court consulted the *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, which states:

> In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.[132]

Based on this the Court found that: 'All the States parties to the Genocide Convention thus have a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention'.[133] This common interest implies that these obligations are *erga omnes partes*, meaning that each state party has an interest in states' compliance with these obligations.[134] Given that these obligations are *erga omnes partes*, the Court found that responsibility may be invoked through the Court irrespective of whether a 'special interest' is demonstrated.[135] Furthermore, it found that, although Bangladesh has been impacted by the events in question, this does not impact the common interest of all parties in ensuring compliance with the *erga omnes partes* obligations of the *Genocide Convention*.[136]

Ultimately, all of Myanmar's preliminary objections were rejected by the Court, and the case will now proceed to the next stage.[137]

3 *Current Position of the Rohingya*

Both cases are currently being worked through in their respective courts and, as of writing, no significant action has been taken by any state or international institution towards Myanmar outside of the provisional

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[129] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 53rd sess, ILC Report A/56/10 (2001) art 44(a).
[130] *The Gambia v Myanmar (Judgment)* (n 108) [99].
[131] Ibid.
[132] Ibid [106], citing *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (*Advisory Opinion)* [1951] ICJ Rep 15, 23.
[133] *The Gambia v Myanmar (Judgment)* (n 108) [107].
[134] Ibid [107].
[135] Ibid [108].
[136] Ibid 113].
[137] Ibid [115].

measures outlined by the ICJ.[138] At this point in time, there is no current solution to the issue being put into action.[139] The Rohingya population continues to face the same threat from the government of Myanmar forces as part of the clearance operations, such as rape, killing, torture and forced displacement.[140]

This lack of any current solution from the international community is troubling when considering that the situation is becoming increasingly dire for the Rohingya victims. Human Rights Watch has reported that Cox's Bazar in neighbouring Bangladesh is currently housing approximately 900,000 Rohingya in refugee camps.[141] Whilst the government of Bangladesh has made attempts to resettle the refugees in Myanmar, the UN High Commissioner for Refugees has concluded that it does not believe that 'current conditions in Rakhine State are conducive to the voluntary, safe, dignified, and sustainable return of refugees from Bangladesh'.[142]

Human Rights Watch has reported that the facilities provided by Myanmar for returning refugees resemble detention camps as they are surrounded by barbed wire fences and security outposts.[143] Furthermore, Human Rights Watch suggests that the internally displaced Rohingya, who are those who did not flee across the border to Bangladesh or other nations, have been confined to closed camps in Rakhine State, with a significantly limited degree of health care, education and freedom of movement.[144] Not being accepted as citizens by any neighbouring country and physically unable to reside in the state they were born in, the Rohingya population has effectively become 'stateless'.[145]

[138] *The Gambia v Myanmar (Order of 23 January 2020)* (n 97).
[139] Human Rights Council, *Detailed Findings 2018* (n 2) 5 [2].
[140] Ibid.
[141] Human Rights Watch, *Events of 2019* (Report, 2020) <https://www.hrw.org/world-report/2020/country-chapters/myanmar-burma>.
[142] UN High Commissioner for Refugees, 'Statement by the UN High Commissioner for Refugees on the Repatriation of Rohingya Refugees to Myanmar' (Media Release, 11 November 2018) <https://www.unhcr.org/news/press/2018/11/5be7c4b64/statement-un-high-commissioner-refugees-repatriation-rohingya-refugees.html>.
[143] Human Rights Watch, *Events of 2019* (n 141).
[144] Ibid.
[145] Sanzhuan Guo and Madhav Gautam, 'Stateless Rohingyas in Bangladesh and Refugee Status: Global Order and Disorder under International Law' in Leon Wolff and Danielle Ireland-Piper (eds), *Global Governance and Regulation: Order and Disorder in the 21st Century* (Routledge 2018) 83.

IV INDIVIDUAL CRIMINAL RESPONSIBILITY: CRIMES AGAINST HUMANITY IN THE INTERNATIONAL CRIMINAL COURT

Moving forward to the use of international criminal law to address the Rohingya crisis, this chapter will consider the case in the ICC dealing with crimes against humanity.[1]

As stated in greater depth in Chapter III, action within international criminal law was initiated on 4 July 2019, when the Office of the Prosecutor of the ICC submitted a request to investigate the allegations of crimes against humanity being committed against the Rohingya population.[2] This action led to 14 November 2019 decision of Pre-Trial Chamber III, authorising the Prosecutor to open an investigation into the issue.[3] This decision has enabled the Prosecutor to investigate alleged crimes in ICC member state Bangladesh, which includes alleged crimes that also took place in bordering Myanmar.[4] As of writing, the situation is currently under investigation by the Prosecutor.[5]

The attribution of individual criminal responsibility through international criminal law in this way is the traditional approach to dealing with international crimes.[6] It is argued that individual criminal responsibility in this way manages to punish all those responsible for committing a crime, and therefore responsibility should not be attributed to the state itself.[7] This viewpoint is based on the assumption that the legal framework allows all who are involved to be held responsible, as under international criminal law all persons involved can be directly prosecuted for committing a crime even though they may not have 'pulled the trigger'.[8]

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[1] International Criminal Court, 'ICC Judges Authorise Opening and Investigation into the Situation in Bangladesh/Myanmar' (Media Release ICC-CPI-20191114-PR1495, 14 November 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>; Douglas Guilfoyle, 'The ICC Pre-trial Chamber Decision on Jurisdiction Over the Situation in Myanmar' (2019) 73(1) *Australian Journal of International Affairs* 2.

[2] International Criminal Court, 'ICC Judges Authorise Opening and Investigation into the Situation in Bangladesh/Myanmar' (n 1).

[3] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (Authorization of Investigation)* (International Criminal Court, Pre-Trial Chamber 3 ICC-01/19-27, 14 November 2019).

[4] Ibid; International Criminal Court, 'ICC Judges Authorise Opening and Investigation into the Situation in Bangladesh/Myanmar' (n 1).

[5] It is noted that the preliminary issues such as jurisdiction and the gravity threshold have already been considered by the ICC, leading to the investigation into the situation being opened. This was discussed in depth in previous chapters and, as a result, will not be discussed in great depth here: International Criminal Court, 'ICC Judges Authorise Opening and Investigation into the Situation in Bangladesh/Myanmar' (n 1).

[6] When compared to state responsibility, which will be discussed in future chapters. See *Judgment of the International Military Tribunal, Trial of the Major War Criminals* (1 October 1946), reprinted in 'Judicial Decisions Involving Questions of International Law' (1947) 41 *American Journal of International Law* 172, 221.

[7] Steven Freeland, 'A Prosecution too Far? Reflections on the Accountability of Heads of State Under International Criminal Law' (2010) 41 *Victoria University of Wellington Law Review* 179, 183–90.

[8] Ibid.

If the focus remained solely on individual criminal responsibility, without responsibility being extended to the state,[9] then the ICC case would be the primary avenue to deal with the situation in Myanmar. It is for this reason that international criminal law's dealings with the issue become an important part in determining whether the law, in its current state, is adequately equipped to deal with instances of state crime—or whether state responsibility for *committing* international crimes[10] is a necessary development.

To provide a basis for analysing international criminal law's ability to address the humanitarian crisis in Myanmar, the first research sub-question must be asked: '*Who, if anyone, is an action in the ICC likely to involve?'* To answer this, the low- and mid-level perpetrators will be assessed in terms of the principal offence, and then the involvement of high level-military commanders will be discussed.[11] Furthermore, in an attempt to assess the extent of the ICC's reach in this situation, the civilian government's obligations under the *Rome Statute*'s provisions concerning aiding and abetting will be analysed.[12]

This leaves the following structure for this chapter:

A. Low and Mid-Level Perpetrators: Conduct and Contextual Elements
B. Low and Mid-Level Perpetrators: Mental Elements
C. Attributing the Crimes of Subordinates to High-Level Military Commanders
D. Civilian Government: Aiding and Abetting
E. Outlook for the ICC Case

A *Low and Mid-Level Perpetrators: Conduct and Contextual Elements*

As a starting point for analysis, the existence of crimes against humanity must first be established. Given this, the first group of perpetrators for analysis is the low- and mid-level perpetrators of the offence of committing crimes against humanity under the *Rome Statute*.

The Fact-Finding Mission has categorised these perpetrators, with the low-level perpetrators being the 33rd Light Infantry Division and 99th Light Infantry Division.[13] The mid-level perpetrators are the officers commanding these forces on the ground, being Brigadier-General Aung Aung (commanding officer of the 33rd Light Infantry Division), Brigadier-General Than Oo (commanding officer of the 99th Light Infantry

[9] In this case, through action in the ICJ.
[10] In this case, only the international crime of genocide.
[11] Under article 28 of the *Rome Statute*, the crimes of subordinates can be attributed to high-level military commanders if certain requirements are met: *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 28 ('*Rome Statute*').
[12] Ibid art 25 (3)(c).
[13] This list of perpetrators is based upon the findings in Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/39/64 (12 September 2018) 10 [52].

Division) and Major-General Maung Maung Soe (commanding officer of Western Command, which oversees the operations of these two divisions).[14]

Before this analysis is commenced, it must be noted that the Prosecutor is focussing on the period since 9 October 2012.[15] Due to this, only the actions taken by Myanmar's forces from this period will be considered when determining whether crimes against humanity have occurred. Furthermore, it is also worth noting that jurisdiction has only been granted to acts that have the involvement of the ICC member state of Bangladesh.[16] As such, crimes against humanity for deportation or forcible transfer under article 7(1)(d) are being investigated by the Office of the Prosecutor as a first priority.[17]

With this in mind, this chapter will focus on crimes against humanity for deportation or forcible transfer for the purposes of determining the prospects of a case in the ICC. According to the *Elements of Crimes*, the elements for this offense are:

1. The perpetrator deported or forcibly transferred without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[18]

For purposes of practicality, these elements will now be discussed by grouping the conduct and contextual elements, then the mental elements of the offence.

To meet the conduct and contextual elements, it is required that: a) the perpetrator deported or forcibly transferred without grounds permitted under international law, one or more persons to another state or location, by expulsion or other coercive acts, b) the victim population was lawfully present in the area from

[14] Ibid.

[15] 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Following Judicial Authorisation to Commence an Investigation into the Situation in Bangladesh/Myanmar', *International Criminal Court* (Web Page, 22 November 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=20191122-otp-statement-bangladesh-myanmar>.

[16] Ibid.

[17] Ibid.

[18] The ICC's *Elements of Crimes* is used to assist the Court in the interpretation and application of articles concerning crimes within the Court's jurisdiction. International Criminal Court, *Elements of Crimes*, Doc No ICC-ASP/1/3 (part II-B) (adopted 9 September 2002) art 7(1)(d); *Rome Statute* (n 11) art 9. For discussion on crimes against humanity for deportation or forcible transfer, see Victoria Colvin and Phil Orchard, 'The Rohingya Jurisdiction Decision: A Step Forward for Stopping Forced Deportations' (2019) 73(1) *Australian Journal of International Affairs* 16, 18; Payam Akhavan, 'The Radically Routine Rohingya Case: Territorial Jurisdiction and the Crime of Deportation under the ICC Statute' (2019) 17(2) *Journal of International Criminal Justice* 325.

which they were deported or transferred, and c) this was committed as part of a widespread or systematic attack directed against a civilian population.[19]

1 *Deportation or Forcible Transfer*

According to the *Elements of Crimes*, the first element requires it to be proven that '[t]he perpetrator deported or forcibly transferred without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts'.[20] To satisfy this element, three requirements must be met: a) the victim population must have been deported or forcibly transferred to another state or location, b) which has been done through the means of expulsion or other coercive acts,[21] c) the exceptions under international law must not be triggered.[22]

(a) Deportation or Forcible Transfer to Another State or Location

Deportation in this sense refers to the displacement of persons from one state to another, over a national border, whereas forcible transfer refers to the displacement of persons within a state's boundaries.[23] This is important to note, as the ICC only has jurisdiction when the crime in question has taken place on the territory of a state party to the *Rome Statute*, such as Bangladesh.[24]

The situation in Myanmar is seemingly unique as a case of deportation as there is no evidence to suggest that the Tatmadaw have physically deported or transported any Rohingya to other states. Prior cases such as the ICTY's *Prosecutor v Stanišić* have demonstrated instances of victims being physically removed from their origin region.[25] This case can be differentiated from the situation in Myanmar, which deals with the Rohingya fleeing to Bangladesh as a response to the harsh conditions, violence and burning of villages

[19] International Criminal Court, *Elements of Crimes* (n 18) art 7(1)(d).
[20] Ibid; Caitlin Lambert, 'Environmental Destruction in Ecuador: Crimes Against Humanity Under the Rome Statute?' (2017) 30(3) *Leiden Journal of International Law* 707, 726–7; Victoria Colvin and Phil Orchard, 'A Forgotten History: Forcible Transfers and Deportations in International Criminal Law' (2021) 32(1) *Criminal Law Forum* 51, 85.
[21] International Criminal Court, *Elements of Crimes* (n 18) art 7(1)(d); Vincent Chetail, 'Is There Any Blood on My Hands? Deportation as a Crime of International Law' (2016) 29(3) *Leiden Journal of International Law* 917, 924.
[22] International Criminal Court, *Elements of Crimes* (n 18) art 7(1)(d).
[23] *Prosecutor v Krnojelac (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-97-25-T, 15 March 2002) [474]; Colvin and Orchard, 'A Forgotten History' (n 20) 87; Akhavan (n 18) 339; Vahid Bazzar, 'Identification of Elements of the Crime against Humanity of Deportation into the Situation in Bangladesh/Myanmar' (2022) 3(1) *Journal of International Criminal Law* 48, 51.
[24] Although it may be arguable that forcible transfer may have taken place in Myanmar, unless Myanmar becomes a party to the *Rome Statute* or a referral of the situation is provided by the UN Security Council, deportation will be focussed on.
[25] In this case, evidence of deportation was provided through the finding that Muslims in Serbia were placed onto seven busses and transferred across a national border to Croatia, where they were exchanged for Serbian prisoners: *Prosecutor v Stanišić* (*Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-03-69-T, 30 May 2013) [1074]–[1079], [1106]–[1108]; Katherine Pruitt, 'Destroying the Legacy of the ICTY: Analysis of the Acquittals of Jovica Stanisic and Franko Simatovic' (2013) 15 *San Diego International Law Journal* 359, 366–88.

undertaken by the Myanmar forces. This makes it hard to draw similarities with such cases as *Prosecutor v Stanišić* .[26]

Despite this, the argument could be made that the displacement of victims due to the conditions brought onto the Rohingya by government forces constitutes the requirements of deportation, as the fleeing Rohingya had no free or genuine choice to remain in the territory. This idea is supported by the case of *Prosecutor v Tolimir*, in which the principles of international humanitarian law were used to argue this point.[27] The Trial Chamber found that the transfer in the case was considered to be forced, because the military forces had imposed living conditions on civilians that required them to evacuate as the only possible choice for survival.[28]

Furthermore, the case of *Prosecutor v Šešelj* shows that a campaign of ethnic cleansing can be an indicator of forcible transfer or deportation.[29] Within this case, propaganda and incitement to hatred against the non-Serbian minority, and the imposition of restrictive and discriminatory measures as part of a system of persecution aimed at expelling the non-Serbian civilian population were found to amount to forcible transfer or deportation.[30]

These cases paint a picture that is rather similar to that experienced by the Rohingya. The imposition of restrictive and discriminatory measures as part of a system of persecution aimed at expelling the Rohingya from Rakhine State should also be considered to meet the definition of deportation or forcible transfer to another state or location.[31] There is a strong argument that, through the violence carried out towards residents of Rohingya villages within the 2016 and 2017 clearance operations, the Tatmadaw had effectively imposed living conditions on civilians that required them to evacuate as the only possible choice for survival[32]—in a very similar fashion to that in the case of *Tolimir*.[33]

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[26] *Prosecutor v Stanišić* (*Judgment)* (n 25) [1074]–[1079], [1106]–[1108].

[27] The situation Tolimir was involved in dealt with the Muslim population of Bosnia-Herzegovina fleeing the attacks of the Army of Republika Srpska. In this case, the Court suggested that forced displacement or deportation should not be justified in a situation where the accused's unlawful activity has resulted in a humanitarian crisis that has caused the displacement in question. *Prosecutor v Tolimir* (*Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-88/2-A, 8 April 2015) [158]–[169].

[28] Ibid.

[29] *Prosecutor v Šešelj (Judgment Volume 1)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-03-67-T, 31 March 2016) [5]. Vojislav Šešelj was the president of the Serbian nationalist Serbian Radical Party at the time of the Bosnian War and was charged by the ICTY with the forcible removal of Muslim, Croatian and other non-Serbian individuals from Croatia and Bosnia and Herzegovina in an attempt to develop a region dominated by Serbians.

[30] Ibid.

[31] Ibid.

[32] Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/39/CRP.2 (17 September 2018) 180–207 [755]–[882] ('*Detailed Findings 2018*').

[33] *Prosecutor v Tolimir* (*Judgment)* (n 27) [158]–[169].

Based on such an argument, it appears that the Court is likely to consider the forced fleeing of the Rohingya through violence to fall within the definition of forcible transfer or deportation, even though members of the Tatmadaw did not physically move the Rohingya from one location to another.[34]

(b) By Expulsion or Other Coercive Acts

Next, it must be found that the deportation of the Rohingya occurred through expulsion or other coercive acts.[35] The definition of expulsion is provided under the ILC's *Draft Articles on the Expulsion of Aliens*, which states:

> "expulsion" means a formal act or conduct attributable to a State by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien to a State.[36]

According to *Prosecutor v Stanišić*, expulsion through a pattern of military attack can indicate that the requirements of this element are met.[37] Within this case, units commanded by the *Drzavna bezbednost* (Chief of State Security of Serbia) advanced into Croatian territory and performed destructive acts including the burning of houses and buildings, looting and detention and killing of civilians, which were mostly the elderly population which was unable to flee in time.[38] As a result of this military attack, tens of thousands of Croats were forced to flee the region, in fear for their personal safety.[39]

The events in *Prosecutor v Stanišić*[40] are strikingly similar to those facing the Rohingya who were forced to flee as a result of the Tatmadaw's advancement through Rohingya village, which resulted in similar violations. These violations included burning, looting, murder, torture and rape, which arguably left fleeing as the only response available to the Rohingya population residing in the affected villages.

The 2018 Fact-Finding Mission on Myanmar compiled a comprehensive 27-page outline of what it refers to as the 'most serious incidents'.[41] This documentation includes the use of satellite imagery and is based upon over 600 interviews with victims and eyewitnesses, along with photographs and videos,[42] and outlines the severity of the clearance operations with respect to individual acts of human rights violations.[43] This 'human

[34] *Prosecutor v Stanišić* (*Judgment)* (n 25) [1074]–[1079], [1106]–[1108].

[35] International Criminal Court, *Elements of Crimes* (n 18) art 7(1)(d); Colvin and Orchard, 'The Rohingya Jurisdiction Decision' (n 18) 18; Michail Vagias, 'Case No. ICC-RoC46 (3)-01/18' (2019) 113(2) *American Journal of International Law* 368, 371.

[36] International Law Commission, *Draft Articles on the Expulsion of Aliens, with Commentaries*, 66th sess, UN Doc A/CN.4/L.832 (30 May 2014) art 2 (a).

[37] *Prosecutor v Stanišić* (*Judgment)* (n 25) [155]–[157]. See also Chetail (n 21) 924.

[38] *Prosecutor v Stanišić* (*Judgment)* (n 25) [155]–[157].

[39] Ibid.

[40] Ibid.

[41] Human Rights Council, *Detailed Findings 2018* (n 32) 180–207 [755]–[882].

[42] Ibid 180 [754].

[43] Ibid 180–207 [755]–[882].

rights catastrophe'[44] occurred across seven areas, identified as Myin Hlut, Kyauk Pan Du, Southern Maungdaw, Koe Tan Kauk, Gu Dar Pyin, Maung Nu and Min Gyi (Tula Toli).[45]

When looking at the facts stated in this report, it appears that the main force involved in the clearance operation was the Tatmadaw.[46] Within this force, the Fact-Finding Mission suggests that the Western Command under the command of Major-General Maung Maung Soe, the 33rd Light Infantry Division under the command of Brigadier-General Aung Aung and the 99th Light Infantry Division under the command of Brigadier-General Than Oo were actively participating in the operations in question.[47]

There should be no doubt that the burning, looting, murder, torture and rape should be seen as a similar level of severity to that carried out by the *Drzavna bezbednost*;[48] both situations should be considered to have caused the victims subjected to such violations to flee for their own personal safety.[49] Furthermore, it could even be argued that the situation in Myanmar is of an even more atrocious nature than that in the case of *Prosecutor v Stanišić*, due to the intensity and number of reports of sexual violence experienced by Rohingya women and children.[50]

Given the vile nature of the pattern of military attacks carried out by Myanmar's official military,[51] the Rohingya have been compelled to leave the state. As a result it appears that the Rohingya have been subject to 'expulsion' by the relevant low- and mid-level perpetrators for the purposes of element 1 of crimes against humanity for deportation or forcible transfer.

(c) Exception for Grounds Permitted Under International Law

Under the *Rome Statute*, the wording of article 7(1)(e), 'deported or forcibly transferred without grounds permitted under international law', indicates that an adequate defence could be made by Myanmar if grounds permitted under international law could be established.[52] Use of the principles from the Fourth Geneva Convention for the purposes of providing an exception for crimes against humanity for deportation or

[44] Ibid 180 [754].
[45] Ibid 180–207 [755]–[882].
[46] Human Rights Council, *Report of the Independent International Fact-finding Mission on Myanmar* (n 13) 10 [52].
[47] Ibid 10 [52].
[48] *Prosecutor v Stanišić* (*Judgment)* (n 25) [155]–[157].
[49] The Tribunal in *Prosecutor v Stanišić* considered the fact that the civilian population were fleeing for personal safety as a strong consideration in determining the existence of expulsion or other acts of a coercive nature of deportation or forcible transfer. Ibid.
[50] Human Rights Council, *Detailed Findings 2018* (32) 397 [1496].
[51] Ibid 47–8 [180].
[52] *Rome Statute* (n 11) art 7(1)(e); Darryl Robinson, 'Defining Crimes Against Humanity at the Rome Conference' (1999) 93(1) *American Journal of International Law* 43; Claire Henderson, 'Australia's Treatment of Asylum Seekers: From Human Rights Violations to Crimes Against Humanity' (2014) 12(5) *Journal of International Criminal Justice* 1161, 1177; William Schabas, 'Crimes Against Humanity as a Paradigm for International Atrocity Crimes' (2011) 20(3) *Middle East Critique* 253, 261; Chetail (n 21) 926.

transfer was accepted in the case of *Prosecutor v Krstić*.[53] Based on this, the generally accepted exceptions for grounds permitted under international law at this point appear to include i) imperative military reasons and ii) if the security of the population demands.[54]

The first exception for discussion is the exception of imperative military reasons. It appears to be quite likely that the government of Myanmar will argue that the displacement caused to the Rohingya was for imperative military reasons, due to the fact that the official view of Myanmar's civilian government at the time of the clearance operations was that the attacks against the Rohingya were carried out in response to the terrorist threat posed in the affected region by the Arakan Rohingya Salvation Army.[55]

Despite this state position, the use of this as a defence in international criminal law has been quite limited, which may be due to the high threshold that such a defence requires. The defence of imperative military reasoning requires 'urgent military necessity'.[56] Whilst the expulsion of the Rohingya occurred again a backdrop of ARSA attacks, it is difficult to reasonably suggest that this response was an urgent necessity. Unlike the facts in *United States v List*,[57] the Tatmadaw appeared to be the overwhelming majority in the reported conflicts. ARSA were described as small militia forces using inferior weaponry, often resorting to melee weapons.[58] By contrast, the Myanmar forces were reported to have utilised modern military equipment, such as helicopters, rocket launchers, automatic weapons and mortars.[59] Due to this, it seems quite unreasonable to assume that the Court would accept the defence of imperative military reasons for undertaking the actions leading to the displacement of the Rohingya.

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[53] *Prosecutor v Krstić* (*Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-33-T, 2 August 2001) [524]–[527].

[54] Ibid [524]–[527]. Within this case, the Trial Chamber cited article 49 of the fourth *Geneva Convention*, which states that, with respect to individual or mass forcible transfers and deportations of protected persons, 'the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand'. See *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, signed 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 49; Schabas, 'Crimes Against Humanity as a Paradigm for International Atrocity Crimes' (n 52) 261; Emma Brandon, 'Grave Breaches and Justifications: The War Crime of Forcible Transfer or Deportation of Civilians and the Exception for Evacuations for Imperative Military Reasons' (2019) 6(2) *Oslo Law Review* 107, 112.

[55] Myanmar's ex-State Counsellor has since provided statements confirming her belief in this idea, stating the clearance operations are 'internal armed conflict between ARSA and Myanmar's Defence Services'. See the speech in full at 'Transcript: Aung San Suu Kyi's Speech at the ICJ in Full', *Burma/Myanmar Library* (Web Page, 13 December 2019) <www.burmalibrary.org/en/transcript-aung-san-suu-kyis-speech-at-the-icj-in-full>.

[56] Although no military threat was found to be present in the case of *Prosecutor v Krstić*, the case provided a valid discussion of the conditions required for such a defence to be used. Within this case, the *Rendulic Case* as part of the Nuremberg Trials was discussed to provide an example of the threshold. This involved a military general facing overwhelming opposing forces, who was charged with evacuating citizens and destroying enemy facilities during his retreat. The US Military Tribunal found that these actions were justified as an 'urgent military necessity' as it was a part of a recognised 'scorched earth tactic' of war. *Prosecutor v Krstić* (*Judgment)* (n 53) [524]–[527]; *United States v List (Decision)* (International Military Tribunal, Case No 47, 19 February 1948) 69.

[57] *United States v List (Decision)* (n 56) 69.

[58] Human Rights Council, *Detailed Findings 2018* (n 32) 18 [55].

[59] Ibid [961]–[962].

The second exception that permits deportation or forcible transfer is when the security of the civilian population is at stake.[60] Although the unrest in Rakhine State is not yet resolved, it is quite difficult to accept that the Tatmadaw are acting in the interests of civilian safety, especially when considering the violence has been reported to have been directed against women, children and other unarmed, non-uniformed individuals who were in their homes at the time of the attacks.[61] Furthermore, the Tatmadaw has shown on many occasions that it strongly believes that the Rohingya should not reside within Myanmar, labelling them illegal immigrants and terrorists.[62] The government or its forces have made no attempt to return the Rohingya from Bangladesh after the prior instances of persecution that resulted in Rohingya fleeing across the border to Bangladesh in the 1970s[63] and 1990s,[64] indicating that this return transfer is once more unlikely. As future actions can only be speculated upon, another example of this exception in practice must be examined.

In *Prosecutor v Krstić*, the lack of military threat that was present in Srebrenica, combined with the atmosphere of terror surrounding the evacuation, was found to have highlighted that the transfer involved in the case was 'carried out in furtherance of a well organised policy whose purpose was to expel the Muslim population'.[65] In this case, the evacuation itself was found to be the goal, and not the protection of civilians.[66] This closely resembles the situation in Myanmar, as the small-scale ARSA attacks and their small-scale clashes with the military are the only military threat that could be found to endanger civilians.[67] The primary military threat to the Rohingya population appears to be from the military itself, as part of a well-organised policy with the purpose to expel the Rohingya, much like that in the case of *Prosecutor v Krstić.*[68] As a result of this, it seems highly unlikely that the exception regarding the security of civilians could be acceptable grounds for deporting the Rohingya to Bangladesh.

As it is likely that the Court would accept that the Rohingya have been deported from Myanmar to Bangladesh by expulsion through a pattern of military attack, it has become evident that element 1 would likely be met.

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[60] This was dealt with in *Prosecutor v Brđanin*, in which the Trial Chamber noted that individuals who have been evacuated must be transferred back to their homes as soon as hostilities have ceased. In this case, the lack of return transfer once the hostilities had ceased led the Trial Chamber to hold that the transfer in question was not lawful: *Prosecutor v Brđanin (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-99-36-T, 1 September 2004) [556].

[61] A deeper discussion on the civilian status will be carried out shortly, as it requires a separate discussion under the ICC's *Elements of Crimes*.

[62] Human Rights Council, *Detailed Findings 2018* (n 32) 362 [1424].

[63] Maudood Elahi, 'The Rohingya Refugees in Bangladesh: Historical Perspectives and Consequences' in John Rogge (ed), *Refugees: A Third World Dilemma* (Rowman and Littlefield, 1987) 227, 231.

[64] Human Rights Watch, *Historical Background* (Report, 2000) <https://www.hrw.org/reports/2000/burma/burm005-01.htm#P112_25491>.

[65] *Prosecutor v Krstić* (*Judgment)* (n 53) [527].

[66] Ibid.

[67] Human Rights Council, *Detailed Findings 2018* (n 32) 407 [1605].

[68] *Prosecutor v Krstić* (*Judgment)* (n 53) [527].

2 *Lawful Presence*

The second element for this offence requires that 'Such person or persons were lawfully present in the area from which they were so deported or transferred.'[69] On face value, this second element appears somewhat contentious, which is due to the commonly cited position that the Rohingya population are illegal Bengali immigrants.[70]

This section will begin by discussing whether the Rohingya fall within the legal categories for citizenship under domestic law. Next, this section will consider the ways in which domestic law may not treat the Rohingya as citizens. Finally, the disparity between these two considerations will be addressed through the yardstick of international law. This will ultimately determine whether the Rohingya are considered 'lawfully present' within Myanmar's territory.

(a) The Rohingya's Citizenship Status Under Domestic Law

The first question concerns the lawful presence of the Rohingya under domestic law. In this context, 'lawfully present' refers to either citizens of that particular state, or those possessing a valid entry or residence document under domestic law.[71] Historically, it is arguable that the Rohingya are citizens under the relevant domestic citizenship laws.

The most notable provision concerning the Rohingya's citizenship status appears in the failure to include the Rohingya in list of the recognised races of Myanmar. Article 3(1) of the *Union Citizenship Act 1948* states that: '[A]ny of the indigenous races of Burma' shall mean the Arakanese, Burmese, Chin, Kachin, Karen, Kayah, Mon or Shan race.[72] This list remained in the subsequent *Burma Citizenship Law 1982*, where the Rohingya were still not recognised as one of the 135 legally recognised ethnic groups of Myanmar.[73] While the lists of indigenous races of Burma does lead to the initial assumption that the Rohingya may not be considered citizens of Myanmar, the heavy criticism surrounding the laws based upon this list appears to be somewhat misleading.[74] This is due to the fact that, in actuality, these laws did provide many ways for Rohingya to be considered citizens.[75]

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[69] International Criminal Court, *Elements of Crimes* (n 18) art 7(1)(d); Chetail (n 21) 925–6.

[70] Which by extension, could indicate an unlawful presence in Rakhine State: Penny Green, Thomas MacManus and Alicia de la Cour Venning, *Countdown to Annihilation: Genocide in Myanmar* (International State Crime Initiative, 2015) 53–5; Navine Murshid, 'Bangladesh Copes with the Rohingya Crisis by Itself' (2018) 117(798) *Current History* 129, 130.

[71] Chetail (n 21) 925. Bassiouni explains that the purpose behind the inclusion of this term in the *Rome Statute* is to allow a state to deport those who do not possess the right to be present in that state under domestic law: Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, 2011) 394; Henderson (n 52) 1177.

[72] *Union Citizenship Act 1948* (Burma) art 3(1).

[73] *Burma Citizenship Law 1982* (Burma) art 3.

[74] For example, Zarni and Cowley consider such materials and provide the strong assertion that: 'The *1982 Citizenship Act* serves as the state's legal and ideological foundation on which all forms of violence, execution, restrictions, and

Firstly, under the *Citizenship Act 1948*, the Rohingya should be considered as a 'racial group [that] has settled in any of the territories within the Union as their permanent home from a period anterior to 1823 A.D.'[76] This principle was also carried over to the *Burma Citizenship Law 1982*, contained in article 3.[77] Academic research on this issue indicates that Rohingya population were originally Arabic traders who arrived in Rakhine State in the 8th century, with the population gradually migrating to the region over time.[78] While the issue of 'permanent home' could be contested due to the constant flight of the Rohingya at the hands of the Tatmadaw over recent decades, it is quite arguable that the Rohingya were established in the region before 1823 AD.

Secondly, according to article 7 of the *Citizenship Law 1982*, there are many ways in which an individual is considered a citizen: '(a) persons born of parents, both of whom are citizens; (b) persons born of parents, one of whom is a citizen and the other an associate citizen; (c) persons born of parents, one of whom and the other a naturalized citizen'.[79]

While a deeper discussion should consider the evidence from interviews with the victims by the Prosecutor, it must be considered that it is likely that a significant portion of the victims fall into one of these categories for citizenship under the law.

(b) Modern Day Treatment of the Rohingya's Citizenship Status

The problem for the Rohingya lies within the fact that the state does not consider the majority of the population as citizens; regardless of the technicalities underlying the legal framework.[80] This position has led to the citizenship status of the Rohingya not being recorded, leaving the majority of the population undocumented. This is best demonstrated in the modern era through the practical application of the law, as will now be outlined.

In the lead up to the clearance operations, only a very small number of Rohingya were considered citizens through the citizenship regime at the time. A 'Citizen Verification Program' was set up in Rakhine State by

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human rights crimes are justified and committed with state impunity if carried out horizontally by the local ultra-nationalist Rakhine Buddhists'. Maung Zarni and Alice Cowley, 'The Slow Burning Genocide of Myanmar's Rohingya' (2014) 23 *Pacific Rim Law and Policy Journal* 683, 710.

[75] Murshid (n 70) 130.

[76] *Union Citizenship Act 1948* (Burma) art 3(1).

[77] *Burma Citizenship Law 1982* (n 73) art 3.

[78] Sanzhuan Guo and Madhav Gautam, 'Stateless Rohingyas in Bangladesh and Refugee Status: Global Order and Disorder under International Law' in Leon Wolff and Danielle Ireland-Piper (eds), *Global Governance and Regulation: Order and Disorder in the 21st Century* (Routledge 2018) 83, 84; Iqthyer Uddin Md Zahed and Bert Jenkins, 'The Politics of Rohingya Ethnicity: Understanding the Debates on Rohingya in Myanmar' (2022) 42(1) *Journal of Muslim Minority Affairs* 117, 121; Muhammad Saleem Mazhar and Naheed Goraya, 'Plight of Rohingya Muslims' (2016) 53(1) *Journal of the Research Society of Pakistan* 27, 30.

[79] *Burma Citizenship Law 1982* (n 73) art 7.

[80] Murshid (n 70) 130.

the NLD government from 2014 to 2016,[81] during the lead up to the clearance operations.[82] This process involved the issuance of Identity Cards for National Verification (ICNVs), which afforded holders the right to travel freely in their resident township and inside Rakhine State, along with travelling to Bangladesh if the individual also possessed a border pass.[83] Most importantly, this process enabled the government to scrutinise the eligibility for citizenship of each individual being identified with an ICNV.[84]

This program ultimately failed, leaving approximately 2,000 Rohingya being granted citizenship in some form.[85] When considering that approximately 600,000 to one million Rohingya have been displaced[86] as part of the clearance operations since 2016,[87] this is not a significant number. It has been reported that the primary reasoning for lack of participation to the inability for the individuals to identify as 'Rohingya', along with a lack of information provided, and lack of perceived benefits that such a process would provide.[88] Furthermore, the Rohingya feared that engaging in such a process and leaving themselves open for scrutiny may impact their ability to reside in Myanmar long-term, or leave them classed as a 'lower' level of citizen, possessing fewer rights.[89]

Due to these low rates of engagement, the majority of Rohingya remain undocumented, which has resulted in these individuals not being recognised as citizens by the state of Myanmar. This is despite the fact that a significant portion of the Rohingya would be considered as citizens under a correct application of law, rendering the majority of the population *de facto* 'stateless'.[90] What is left, is a situation in which a significant number of Rohingya are considered citizens under domestic law, although, are not treated as such due to a convoluted citizenship regime permitted under domestic law.

This leaves the question; under these contrasting legal regimes, are the Rohingya considered 'lawfully present' or not? It is for this reason, that the benchmark of international law becomes important.

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[81] Department of Home Affairs, *Rohingya: Issues Relating to Statelessness* (Report, 2021) 8; United States Commission on International Religious Freedom, *Suspended in Time: The Ongoing Persecution of Rohingya Muslims in Burma* (Report, 2016) 6.

[82] It is noted that efforts to confirm the citizenship status of the Rohingya has been attempted by the from 2014, known as the National Verification Process. However, the most noteworthy advancements occurred in 2016: Human Rights Council, *Detailed Findings 2018* (n 32) 117; Department of Home Affairs (n 81) 7.

[83] Department of Home Affairs (n 81) 9; Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, UN Doc A/HRC/34/67 (1 March 2017) 3–4.

[84] Department of Home Affairs (n 81) 9.

[85] This includes associate citizenship.

[86] International Criminal Court, 'ICC Judges Authorise Opening and Investigation into the Situation in Bangladesh/Myanmar' (n 1).

[87] Human Rights Council, *Detailed Findings 2018* (n 32) 265 [1069]–[1095].

[88] Department of Home Affairs (n 81) 9.

[89] Department of Foreign Affairs and Trade, *DFAT Country Information Report Myanmar* (Report, 2019); Department of Home Affairs (n 81) 9.

[90] Department of Foreign Affairs and Trade (n 89) 24.

(c) Lawful Presence Under International Law

It needs to be considered that an individual meeting the legal criteria for citizen, but having this right removed through a convoluted and discriminatory process permitted under domestic law, [91] would still be considered 'lawfully present' under international law.

Given that a significant portion of the Rohingya are considered some form of citizen under domestic law, it needs to be considered that these individuals have been arbitrarily deprived of the right to enter or remain in Myanmar's territory. This is provided for under article 12(4) of the *International Covenant on Civil and Political Rights* (ICCPR), which states that 'No one shall be arbitrarily deprived of the right to enter his own country.'[92]

While inconsistency with international law on its own does not necessarily make domestic law invalid,[93] it is argued that lawful presence in this sense, refers to the lawful presence under international law – not domestic law. According to Kittichaisaree, national laws, when used for the purpose of determining whether an individually is legally present, should be measured against the yardstick of international law:

> The proviso "without grounds permitted by international law" qualifies the conduct or perpetration, whereas "lawfully present" qualifies the condition in which the deportee or transferee finds himself in a territory. Although the lawfulness or otherwise of the presence is determined by national law, that national law must

[91] There have been many times in which citizenship law concerning the Rohingya has been incorrectly applied on a large scale, although there are three examples that most evidently demonstrate this point. The first is the issuance of the Foreign Registration Card (not National Registration Certificates) to all Rohingya in light of the *Burma Immigration (Emergency Provisions) Act*, which provided the basis for the military's 1997 Operation Dragon King. This operation included brutality, murder and rape, forcing a significant number of Rohingya to flee to neighbouring Bangladesh. The second is the policy adopted in 1994 to refuse to issue Rohingya children with birth certificates and the third is the refusal of government officials to recognise Rohingya households in the 2014 national survey. Human Rights Watch, *Historical Background* (n 64); Human Rights Watch, *Burma: The Rohingya Muslims: Ending a Cycle of Exodus?* (Report, 1996); Mujtaba Razvi, 'The Problem of the Burmese Muslims' (1978) 31(4) *Pakistan Horizon* 82, 89; Martin Smith, *Burma: Insurgency and the Politics of Ethnicity* (Zed Books, 1991) 241; UN Human Rights Council, 'Special Session of the Human Rights Council on the Human Rights Situation of the Minority Rohingya Muslim Population and Other Minorities in the Rakhine State of Myanmar: Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein' (Press Release, 5 December 2017) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22487&LangID=E>; Jane Ferguson, 'Who's Counting? Ethnicity, Belonging, and the National Census in Burma/Myanmar' (2015) 171(1) *Journal of the Humanities and Social Sciences of Southeast Asia* 1; Green, MacManus and de la Cour Venning (n 70) 54–5.

[92] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 16 December 1976) art 12(4). Furthermore, under article 3 of Protocol No. 4 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* '(1) No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national. (2) No one shall be deprived of the right to enter the territory of the State of which he is a national.: *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol Thereto,* opened for signature16 September 1963, ETS 46 (entered into force 2 May 1968) art 3; Gerhard Werle, *Principles of International Criminal Law* (Oxford University Press, 2005) 241.

[93] As international law and domestic law may be regarded as two different legal systems.

> also be measured against the yardstick of international law. In other words, lawful presence cannot be terminated by national law in violation of applicable rules of international law.[94]

Similarly, this is clarified with Werle in relation to the deportation of citizens on the basis of a national law:

> The crime requires that the civilians involved be residing legally in the territory from which they are deported or forcibly transferred. The standard for the lawfulness of their residence is set by international law. A forcible measure on the basis of a national law contravening international law, such as the deportation of a citizen, is therefore impermissible.[95]

Chetail has provided a number of instances in which the use of international law to establish lawful presence may be relevant. [96] This includes instances in which the undocumented status of the individual has arisen from the illegal destruction or confiscation of an entry/residence document, arbitrary refusal of family reunification and the arbitrary deprivation of nationality.[97]

Referring back to the logic of Kittichaisaree, 'lawful presence cannot be terminated by national law in violation of applicable rules of international law'.[98] The recent treatment of Rohingya citizenship, involving the 'Citizen Verification Program', is based upon domestic law that is in violation of the applicable rules of international law – in this case the ICCPR. As a result, lawful presence should be based upon whether the Rohingya are considered citizens under the relevant citizenship laws. Given that a significant portion of the group fits within the citizenship categories outlined in the *Burma Citizenship Law 1982*,[99] these individuals should be considered as 'lawfully present' within Myanmar's territory. Upon this basis, it appears likely that the Rohingya's lawful presence in the region can be established.

3 *Widespread or Systematic Attack Against a Civilian Population*

Thirdly, the *Elements of Crimes* requires that '[t]he conduct was committed as part of a widespread or systematic attack directed against a civilian population'.[100] This is further supported by article 7 of the *Rome Statute*,[101] which states that the acts in question are required to be carried out as part of a widespread or

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[94] Kriangsak Kittichaisaree, *International Criminal Law* (Oxford University Press, 2001) 109. See also Chetail (n 21) 925.

[95] Gerhard Werle, *Principles of International Criminal Law* (n 92) 241.

[96] Chetail (n 21) 925.

[97] Ibid.

[98] Kittichaisaree (n 94) 109.

[99] These include (a) persons born of parents, both of whom are citizens; (b) persons born of parents, one of whom is a citizen and the other an associate citizen; (c) persons born of parents, one of whom and the other a naturalized citizen': *Burma Citizenship Law 1982* (n 73) art 7.

[100] International Criminal Court, *Elements of Crimes* (n 18) art 7(1)(d).

[101] *Rome Statute* (n 11) art 7(1); Robinson, 'Defining Crimes Against Humanity at the Rome Conference' (n 52) 47; Phyllis Hwang, 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court' (1998) 22 *Fordham International Law Journal* 457, 500; Chetail (n 21) 930–1.

systematic attack against a civilian population.[102] Furthermore, article 7(2)(a) of the *Rome Statute* requires the attacks in question to be 'pursuant to or in furtherance of a State or organizational policy to commit such attack'.[103]

To determine whether this element can be met, a) the existence of an attack on a civilian population, b) the widespread nature of the attack, c) the systematic nature of the attack, and d) the state or organisational policy to commit such attack will all be analysed.

(a) Attack Against a Civilian Population

Before the widespread and systematic tests are applied, it must first be determined whether the actions of the Myanmar forces can be considered an attack against a civilian population.[104] This leaves two primary issues to be addressed: whether the conduct in question is considered an 'attack' and whether the victim population is considered 'civilian'.

The definition of 'attack' was discussed in *Bemba Gombo*, in which it was stated that 'attack' in this sense refers to:

> a campaign or operation carried out against the civilian population, the appropriate terminology used in article 7(2)(a) of the Statute being a 'course of conduct'. The commission of the acts referred to in article 7(1) of the Statute constitutes the 'attack' itself and, beside the commission of the acts, no additional requirement for the existence of an 'attack' should be proven.[105]

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[102] The disjunctive nature of this test suggests that only one of the requirements needs to be fulfilled in order to satisfy this article. This idea is supported by the appeal judgment in *Kunarac*, which stated that, once one qualifier has been fulfilled, the Trial Chamber is not under an obligation to consider the alternative qualifier. Furthermore, just the overall attack, not the individual acts of the perpetrator, is required to meet the test of widespread or systematic: *Prosecutor v Kunarac (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23, 12 June 2002) [94]; Robinson, 'Defining Crimes Against Humanity at the Rome Conference' (n 52) 47; Mba Chidi Nmaju, 'Violence in Kenya: Any Role for the ICC in the Quest for Accountability?' (2009) 3 *African Journal of Legal Studies* 78.

[103] *Rome Statute* (n 11) art 7(2)(a); Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text* (Brill Nijhoff, 2005) 151–2; Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Martinus Nijhoff Publishers, 1999) 243–81; William Schabas, 'Crimes Against Humanity: The State Plan or Policy Element' in Michael Scharf and Leila Sadat (eds), *The Theory and Practice of International Criminal Law* (Brill Nijhoff, 2008) 347, 347–8; Robinson, 'Defining Crimes Against Humanity at the Rome Conference' (n 52) 51. It is noted that the existence of this requirement is debated. As the ICTY stated in *Kunarac*, this requirement does not exist in customary international law, so is not applicable. The case at hand, however, concerns the ICC and the *Rome Statute*: *Prosecutor v Kunarac (Appeal Judgment)* (n 102) [98].

[104] Chetail (n 21) 929; Robinson, 'Defining Crimes Against Humanity at the Rome Conference' (n 52) 47; Lambert (n 20) 721.

[105] *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (International Criminal Court, Trial Chamber II, Case No ICC-01/05-01/08, 15 June 2009) [75]; Chetail (n 21) 929. This definition has evolved the definition in *Kunerac*, in which it was suggested that the term 'attack' is used in its usual meaning at international law, as seen in the *Geneva Convention* which defines an attack as an 'act of violence against an adversary as part of an offensive or defensive act of war'. Within this context, the term attack was not limited to acts of war and can also include the mistreatment of individuals

The Rohingya who have suffered acts of violence from their adversary, being the Tatmadaw, are taking no part in hostilities of war. The violence as part of the Tatmadaw's 'clearance operations', involving instances of burning, looting, murder, torture and rape, which have led to the situation being described as a 'human rights catastrophe',[106] should constitute an 'attack', as it is part of a 'campaign or operation'.[107]

Next, the Rohingya situation leaves very little contest to the fact that the individuals suffering from the attack of the Tatmadaw are civilians.[108] From the legal view, civilian status was defined in *Prosecutor v Popovic*, in which it was suggested that civilian status can be inferred by lack of military status.[109] When assessing the reports from the UN Fact-Finding Mission, it becomes obvious that the individuals being attacked are not military personnel. Examples of this can be seen from the various reports of the murder of the elderly,[110] the murder and rape of 12-year-old girls,[111] and the murder of 6 and 8-year-old boys.[112]

In terms of counterarguments to this point, the argument on collateral damage must be considered.[113] Given Myanmar's official position on the reason for the clearance operations,[114] it is somewhat arguable that the 'attacks' were against the ARSA insurgent group, and the civilian population casualties were collateral damage. This is a weak argument for two reasons. Firstly, it would be quite difficult to convincingly argue that the many civilian Rohingya villages that have been attacked are all legitimate military objectives of strategic value, as the precedent in *Kordic* requires.[115] Secondly, the ruling in *Galic* requires the attacker to take 'all feasible precautions to verify that the objectives attacked are neither civilians nor civilian objects' and not carry out the attack if the anticipated military advantage cannot justify the expected loss of civilian life.[116] The Fact-Finding Mission on Myanmar provides further clarification on this issue of victim selection, commenting:

> The horrific patterns described in this report make clear that no distinction whatsoever was made between civilians and civilian objects, on the one hand, and fighters and military objectives, on the

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who are taking no part in the hostilities of war: *Prosecutor v Kunarac (Trial Judgment)* (n 105) [416]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, signed 12 December 1977, 1125 UNTS 3 (entered into force 7 December 1979) art 49 (1).

[106] Human Rights Council, *Detailed Findings 2018* (n 32) 180 [754].

[107] *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105).

[108] *Rome Statute* (n 11) art 7(1); Chetail (n 21) 932; Lambert (n 20) 721.

[109] *Prosecutor v Popovic (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-A, 30 January 2015) [604]–[605].

[110] Human Rights Council, *Detailed Findings 2018* (n 32) 182 [772].

[111] Ibid 258 [1091].

[112] Ibid 221 [944], 220 [943], 182 [772].

[113] In *Kordic* the Court recognised that, in some situations, attacks on military objectives may cause collateral civilian damage: *Prosecutor v Kordic (Appeal Judgment)* (n 113) [52].

[114] That the clearance operations are a response to the 'terrorist threat' imposed by the rebel group ARSA. See 'Transcript: Aung San Suu Kyi's Speech at the ICJ in Full' (n 52).

[115] *Prosecutor v Kordic (Appeal Judgment)* (n 113) [52].

[116] *Prosecutor v Galic (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-98-29-T, 5 December 2003) [58].

> other. Everyone and everything was a target. Large-scale massacres were carried out. Men, women and children were killed and subjected to unimaginable abuse. Entire villages were wiped off the map. The operations and use of force were not targeted at eliminating a specific and limited security threat posed by ARSA; they were targeted at eliminating ARSA's support base, if not the group, the Rohingya, itself.[117]

Even if the Court could be convinced that the villages all housed active ARSA combatants, it is difficult to accept that the complete destruction and immense loss of life suffered by the Rohingya civilians were directed against ARSA. As a result, it is quite reasonable to assume that the Court would accept that there was an attack against a civilian population.

(b) Widespread Nature of the Attack

Next, the attack on the civilian population must found to be either widespread or systematic in nature.[118] This analysis will begin with the widespread nature of the attack. It is generally accepted that that a widespread attack will involve massive, frequent attacks carried out collectively against a large number of victims.[119]

The Fact-Finding Mission states that, through multiple interviews and other information, it has verified the existence of clearance operations across 54 separate locations in which there was mass killing of Rohingya civilians.[120] Along with this, the Fact-Finding Mission has also been provided firsthand accounts that a further 22 locations experienced similar attacks, although there was not enough evidence for this to be fully verified.[121] According to the Fact-Finding Mission, thousands of Rohingya were killed as a direct result of the attacks in the period 2017–18 alone,[122] in which at least 392 Rohingya villages were entirely destroyed.[123]

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[117] Human Rights Council, *Detailed Findings 2018* (n 32) 347 [1364].

[118] International Criminal Court, *Elements of Crimes* (n 18) art 7(1)(d); *Rome Statute* (n 11) art 7(1).

[119] *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105) [83]. The definition of widespread has been thoroughly discussed by the ad-hoc tribunals. In the case of *Nahinama*, the term 'widespread' refers to an attack that is of large scale in nature and it also takes into account the number of victims. This is supported by *Prosecutor v Blaškić*, in which it was very similarly determined that the phrase 'widespread' refers to the large-scale nature of the attack, and the number of targeted victims, and confirmed more recently in *Prosecutor v Gatete.* With respect to the ICC, this definition of widespread is generally accepted. When the issue arose in *Prosecutor v Ruto*, the Court found that a widespread attack involves a massive, frequent attack carried out collectively against a large number of victims. This approach was also taken in *Prosecutor v Gbagbo. Prosecutor v Nahinama* (*Appeal Judgment)* (International Criminal Court for Rwanda, Appeals Chamber, Case No ICTR-99-52-A, 28 November 20) [920]; *Prosecutor v Blaškić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-14-T, 3 March 2000) [101]; *Prosecutor v Gatete (Judgment*) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-2000-61-T, 31 March 2011) [631]; *Prosecutor v Ruto (Decision on the Confirmation of Charges*) (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-01/11, 23 January 2012) [176]–[177]; *Prosecutor v Gbagbo* (*Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11-01/11, 12 June 2014) [208]–[221]; *Prosecutor v Al Bashir* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) [81]; Robinson, 'Defining Crimes Against Humanity at the Rome Conference' (n 52) 47.

[120] Human Rights Council, *Detailed Findings 2018* (n 32) 354 [1394]–[1395].

[121] Ibid.

[122] Ibid.

Furthermore, these attacks were not an isolated incident, but carried out collectively by the Tatmadaw. These attacks were carried out over a long period of time, in many different areas, by differing military units.[124] According to the Fact-Finding Mission, there was a remarkable similarity in the conduct of operations and the timing of attacks, the division of roles between individuals, the form of violations carried out and the manner in which they were undertaken.[125]

When comparing these attacks to the available case law on the issue concerning the 'large number of victims', there is a strong argument to be made that the attacks of the forces of Myanmar are of a larger scale in nature than some of the prior instances that were found to be widespread. For example, in the ICC case of *Prosecutor v Ruto*, which dealt with the violence in the Uasin Gishu District of Kenya, the Pre-Trial Chamber found that the death of over 230 individuals, injury of approximately 500 individuals and displacement of over 5000 individuals provided substantial grounds to believe that the attack was widespread.[126] Similarly, the case of *Prosecutor v Katanga* dealt with attacks against the Hema population in the Bogoro village in the Democratic Republic of the Congo.[127] In this case, the Court found that the attack on Bogoro village had a large number of victims, as the evidence suggested that approximately 200 civilians had been killed as a result of the attacks.[128]

As raised in the pre-trial stages of the case, it is estimated that between 600,000 and 1 million victims were forcibly displaced from Myanmar to Bangladesh.[129] If numbers even close to this can be proven through evidence, it is very likely that the situation in Myanmar would be considered widespread, when comparing this to the smaller amount in other, similar cases.

Adding further strength to this argument is the consideration of the 'cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude'.[130] With the significant instances of burning, looting, murder, torture and rape carried out against the Rohingya population[131] constituting a series of inhumane acts, the cumulative effect of the attacks must provide further indication that the attacks are widespread.

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[123] Ibid 224 [959].
[124] Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (n 13) 363 [1429].
[125] Ibid 363 [1429].
[126] *Prosecutor v Ruto (Decision on the Confirmation of Charges*) (n 119) [178].
[127] *Prosecutor v Katanga (Decision on Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07, 30 September 2008) [408].
[128] Ibid.
[129] International Criminal Court, 'ICC Judges Authorise Opening and Investigation into the Situation in Bangladesh/Myanmar' (n 1).
[130] *Situation in the Republic of Kenya (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-19-Corr, 31 March 2010) [95]. Chetail suggests that '[t]he cumulative effect of the attack may be relevant when deportations are carried out in the wake of other underlying offences, such as arbitrary detention, torture or other inhumane acts under Article 7(1) of the Rome Statute': Chetail (n 21) 931.
[131] Human Rights Council, *Detailed Findings 2018* (n 32) 180 [754].

(c) Systematic Nature of the Attack

A systematic attack refers to patterns of crime that amount to non-accidental repetition of similar criminal conduct.[132] This requirement encompasses the 'organized nature of the acts of violence and the improbability of their random occurrence'.[133] This systematic nature can be determined 'through the patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis'.[134]

Firstly, it is important to note the large-scale nature of the attack or repeated commission of inhumane acts that can be linked to one another.[135] This linkage can be shown in the findings of the Human Rights Council's Fact-Finding Mission, in which the modus operandi between all attacks was considered to be consistent.[136] The weapons used by the Tatmadaw and security forces across numerous attacks on different villages were consistent, indicating a high level of collusion between the different perpetrating groups.[137] These attacks were carried out over a long period of time, in many different areas, and there was a remarkable similarity in the conduct of operations and the timing of attacks, the division of roles between individuals, the form of violations carried out and the manner in which they were undertaken.[138]

The second indicator that points toward the organised nature of the attacks is the preparation and use of significant resources.[139] The Fact-Finding Mission describes the common use of military vehicles,[140] which include military helicopters[141] and navy vessels[142] in the attacks on the Rohingya which caused them to flee to Bangladesh, which were prepared for and launched from official government bases.[143] Given this, it would

[132] In the ICC, systematic is understood as 'either an organised plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts or as patterns of crimes such that the crimes constitute a non-accidental repetition of similar criminal conduct on a regular basis': *Prosecutor v Katanga (Decision on Confirmation of Charges)* (n 127) [397]–[398]. See Chetail (n 21) 931; Lambert (n 20) 724.

[133] *Situation in the Republic of Cote D'Ivoire (Decision Pursuant to art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d'Ivoire)* (International Criminal Court, Pre-Trial Chamber, Case No ICC-02/11-14, 3 October 2011) [56], citing *Prosecutor v Katanga (Decision on Confirmation of Charges)* (n 127) [394]; Irnya Marchuk, 'No Crimes Against Humanity During the Maydan Protests in the Ukraine? Or the ICC Prosecutor's Flawed Interpretation of Crimes Against Humanity?' (2017) 35(1) *Boston University International Law Journal* 39, 52.

[134] *Prosecutor v Kunarac (Appeal Judgment)* (n 102) [94]; Marchuk (n 133) 52.

[135] *Prosecutor v Blaškić (Judgment)* (n 119) [203]–[204], [631].

[136] Human Rights Council, *Detailed Findings 2018* (n 32) 363 [1429].

[137] Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (n 13) 363 [1429].

[138] Ibid.

[139] *Prosecutor v Blaškić (Judgment)* (n 119) [203]–[204], [631].

[140] Human Rights Council, *Report of the Detailed Findings of the Independent Fact-Finding Mission on Myanmar*, UN Doc A/HRC/42/CRP.5 (9 September 2019) 71 [222] ('*Detailed Findings 2019*').

[141] Ibid [762], [1084].

[142] Human Rights Council, *Detailed Findings 2018* (n 32) 273 [1156].

[143] Ibid [1154], [1249].

appear that the use of state property for the commission of the attacks would likely be considered as significant public resources.[144]

A combination of the coordinated nature of the use of military resources,[145] coordination of differing military groups, and consistent modus operandi between attacks[146] indicates 'a continuous commission of acts or as patterns of crimes such that the crimes constitute a non-accidental repetition of similar criminal conduct on a regular basis'.[147] Ultimately, it is arguable that there is an 'improbability of random occurrence' behind the attacks against the Rohingya population.[148]

(d) Pursuant to a Policy or Plan

Finally, the *Rome Statute* requires the widespread or systematic attack on the civilian population to be 'pursuant to or in furtherance of a State or organizational policy to commit such attack'.[149] This requires that 'the State or organisation actively promote or encourage such an attack against a civilian population'.[150]

It is the approach of the ICC that the 'requirement of "a State or organizational policy" implies that the attack follows a regular pattern' and that 'The policy need not be formalised. Indeed, an attack which is planned, directed or organized—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion'.[151]

The elements demonstrating the existence of a policy in this context were set out by the Pre-Trial Chamber in *Situation in the Republic of Cote D'Ivoire*:

> (a) it must be thoroughly organised and follow a regular pattern; b) it must be conducted in furtherance of a common policy involving public or private resources; c) it can be implemented either by groups who govern a specific territory or by an organisation that has the capability to commit a widespread or systematic attack against a civilian population; and d) it need not be explicitly defined or formalized.[152]

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[144] Human Rights Council, *Detailed Findings 2019* (n 140) 71 [222].
[145] Ibid.
[146] Human Rights Council, *Detailed Findings 2018* (n 32) 363 [1429].
[147] *Prosecutor v Katanga (Decision on Confirmation of Charges)* (n 127) [397]–[398], [408].
[148] *Prosecutor v Blaškić (Judgment)* (n 119).
[149] *Rome Statute* (n 11) art 7(2)(a).
[150] International Criminal Court, *Elements of Crimes* (n 18) art 7. See also *Rome Statute* (n 11); Bassiouni, *The Legislative History of the International Criminal Court* (n 103) 151–2; Bassiouni, *Crimes Against Humanity in International Criminal Law* (n 103) 243–81; Schabas, 'Crimes Against Humanity: The State Plan or Policy Element' (n 103) 347–8; Robinson, 'Defining Crimes Against Humanity at the Rome Conference' (n 52) 51.
[151] *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105) [81]; *Prosecutor v Katanga (Decision on Confirmation of Charges)* (n 127); *Prosecutor v Tadić (Opinion and Judgment*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-94-1-T, 7 May 1997) [653]; Chetail (n 21) 932.
[152] *Situation in the Republic of Cote D'Ivoire (Decision Pursuant to art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d'Ivoire)* (n 133) [43]; Marchuk (n 133) 57.

Firstly, the attack must be thoroughly organised and follow a regular pattern.[153] The mobilisation of armed forces and a coordinated military offensive can indicate this.[154] Within the situation in Myanmar, a high degree of organisation indicating an existence of a plan can be inferred from a number of factors, as the Human Rights Council explained in the summary of their findings.[155] Such consistency is very unlikely to have occurred without a level of organisation and planning that extends up the chain of command within the military.

Secondly, the attack must be conducted in furtherance of a common policy involving public or private resources.[156] One factor that may be used to identify the existence of a political objective or plan is the existence of a a political program expressed through propaganda.[157] While the propaganda and anti-Rohingya narrative have been discussed in recent chapters, the position is most strongly highlighted through the words of the Tatmadaw's Senior General, Min Aung Hlaing. General Min Aung Hlaing, often considered the most powerful figure in Myanmar,[158] has made multiple public statements that suggest that the Rohingya population do not exist (as they are illegal Bengali immigrants), as has referred to the group as terrorists, illegal immigrants and extremists. Within this hostile context, General Min Aung Hlaing called upon the people of Myanmar to take 'patriotic action' and, as stated prior, declared that the 'Bengali problem' was an unfinished job that the government was going to 'solve'.[159] When taking into account the context of the situation, such words can be taken to highlight the Tatmadaw's highest ranking official's use of propaganda to advocate the removal the Rohingya from the region.

This is further strengthened by the alteration of the ethnic composition of populations in the region.[160] Throughout history, Myanmar's military has continuously been attempting to alter the ethnic composition of Myanmar to remove the Rohingya population in favour of the 'recognised races'.[161] The state under military

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[153] *Situation in the Republic of Cote D'Ivoire* (*Decision Pursuant to art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d'Ivoire*) (n 133) [43]; Marchuk (n 133) 57.

[154] *Prosecutor v Blaškić (Judgment)* (n 119) [203]–[204], [631].

[155] As discussed above regarding the systematic test, the Fact-Finding Mission has noted that methods undertaken by the various perpetrating groups were consistent across all attacks, indicating that the modus operandi of all attacks was consistent. See the discussion on the systematic nature of the attack in the previous section, where it was explained that there was a remarkable similarity in the conduct of the operations and the timing of attacks, division of roles between individuals, the form of violations carried out and the manner in which they were undertaken.

[156] *Situation in the Republic of Cote D'Ivoire (Decision Pursuant to art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d'Ivoire)* (n 133) [43]; Marchuk (n 133) 57.

[157] *Prosecutor v Blaškić (Judgment)* (n 119) [203]–[204], [631]. The way in which the ICC approaches this element has been criticised for lacking guidance. Within the ad-hoc tribunals, this 'policy element' was used in the systematic test, whereas in the ICC it is approached as a separate test. Despite this, the ICC refers to the jurisprudence of the ad-hoc tribunals and, as such, the explanation in *Blaškić* provides the most detailed account of what would amount to an organised policy or plan. See Marchuk (n 133) 57–8.

[158] Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (n 13) 362 [1424].

[159] Human Rights Council, *Detailed Findings 2018* (n 32) 362 [1424].

[160] *Prosecutor v Blaškić (Judgment)* (n 119) [203]–[204], [631].

[161] As can be seen through notable events such as 'Operation Dragon King' and 'Operation Clean and Beautiful Nation'. Mahbubul Haque, 'Rohingya Ethnic Muslim Minority and the 1982 Citizenship Law in Burma (2017) 37 (4)

rule has shown great concern about the presence of Rohingya in Rakhine State, to the extent of failing to explicitly refer to the group when listing the recognised national races of Myanmar.[162] The Fact-Finding Mission has noted the reconstruction of the various regions in which the clearance operations took place and the Rohingya villages were once located, as well as the planned relocation of other ethnic groups to the reconstructed Rohingya villages.[163] When taken alongside the selection of victim based on ethnicity, this demonstrates a deliberate alteration of the ethnic composition of Myanmar's population through the removal the Rohingya. Much like the situation in *Blaskic*, there appears to be a 'political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community'.[164]

Furthermore, this 'common policy'[165] to remove the Rohingya from Myanmar has been conducted through the use of public resources. The use of resources, as discussed above, included the common use of military vehicles,[166] which includes military helicopters[167] and navy vessels[168] in the attacks on the Rohingya which caused them to flee to Bangladesh, which were prepared for and launched from official government bases.[169]

Thirdly, this policy can be implemented either by groups who govern a specific territory or by an organisation that has the capability to commit a widespread or systematic attack against a civilian population.[170] Looking at these two options, it is arguable that the Tatmadaw governs the territory in question—Myanmar's territory. The Tatmadaw is an organ of the state of Myanmar,[171] the state that governs the territory in which the attacks were carried out. Furthermore, a state's official military certainly should be considered to possess the capability to commit a widespread or systematic attack against a civilian population. Under Myanmar's *Constitution*, the Commander-in-Chief of the Defence Services (the Tatmadaw) possesses the power to formulate the strategy of the defence forces,[172] which includes all armed forces in Myanmar.[173] As such, both tests under this element would likely be met.

Journal of Muslim Minority Affairs 454; Green, MacManus and de la Cour Venning (n 70); Human Rights Watch, *Historical Background* (n 64).

[162] *Union Citizenship Act 1948* (Burma) art 3(1), which was continued in *Burma Citizenship Law 1982* art 3.

[163] Human Rights Council, *Detailed Findings 2019* (n 140) 362 [1425].

[164] *Prosecutor v Blaškić (Judgment)* (n 119) [99].

[165] *Situation in the Republic of Cote D'Ivoire* (*Decision Pursuant to art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d'Ivoire*) (n 133) [43]; Marchuk (n 133) 57.

[166] Human Rights Council, *Detailed Findings 2019* (n 140) 71 [222].

[167] Human Rights Council, *Detailed Findings 2018* (n 32) [762], [1084].

[168] Ibid 273 [1156].

[169] Ibid [1154], [1249].

[170] *Situation in the Republic of Cote D'Ivoire* (*Decision Pursuant to art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d'Ivoire*) (n 133) [43]; Marchuk (n 133) [57].

[171] This will be discussed in far greater depth in the relevant discussion concerning the ICJ case and the attribution of state responsibility.

[172] *Constitution of 2008* (Myanmar) art 340.

[173] Ibid art 338.

Finally, this 'plan' need not be explicitly defined or formalised.[174] This means that, although there is no specific widely available information concerning the plan, the factors discussed in this section can indicate the existence of such.[175] With this in mind, it appears that there is an existence of a plan to remove the Rohingya from Myanmar's territory, especially when considering the comparatively low threshold of this test.[176] Through this plan, the state is actively encouraging the attack on the Rohingya.[177] With this test fulfilled, it has become evident that element 4 concerning a widespread or systematic attack on a civilian population would likely be met.

B *Low and Mid-Level Perpetrators: Mental Elements*

With the *actus reus* for the offence likely being met, the *mens rea* becomes an important point for consideration. With respect to the crime of deportation or forcible transfer, it is required that the perpetrator was 'aware of the factual circumstances that established the lawfulness of such presence'[178] and 'knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population'.[179]

While the facts in the reports on the situation in Myanmar can be used to establish the acts that have transpired for the purposes of analysing the conduct elements of the offence,[180] the mental elements require a differing form of analysis. This is due to the fact that the wording of article 30 of the Rome Statute clearly states that the individuals' subjective state of mind is used for assessment.[181]

Due to the nature of academic literature, it becomes increasingly difficult to comment on the legality of the situation on the available facts. It is difficult to determine the subjective state of mind of the perpetrators and the actual knowledge of the individuals without interviews with the offenders—which the Court is likely to carry out in due course as the case progresses further. However, when reflecting on the purpose of this chapter—to establish the likely outcomes of the case—the pathway to overcoming this hurdle becomes clearer. This section does not aim to establish the state of mind of each individual under the exact legal

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[174] *Situation in the Republic of Cote D'Ivoire* (*Decision Pursuant to art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d'Ivoire*) (n 133) [43]; Marchuk (n 133) 57.
[175] *Prosecutor v Blaškić (Judgment)* (n 119) [204].
[176] This 'policy element' has been described as a low threshold test when compared to the higher threshold of the systematic test: Robinson, 'Defining Crimes Against Humanity at the Rome Conference' (n 52); Marchuk (n 133) 57.
[177] International Criminal Court, *Elements of Crimes* (n 18) art 7(1)(d); *Rome Statute* (n 11).
[178] International Criminal Court, *Elements of Crimes* (n 18) art 7(1)(d). The case of *Prosecutor v Karadžić* provides context for this element, with the suggestion that the *mens rea* for deportation or forcible transfer requires proving intent for forced displacement or deportation. *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-5/18-T, 24 March 2016) [493].
[179] International Criminal Court, *Elements of Crimes* (n 18) art 7(1)(d); Lambert (n 20) 725.
[180] As can be seen from the analysis in the previous section.
[181] This is opposed to the state of mind of a reasonable person: *Rome Statute* (n 11) art 30; Mohamed Badar, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary From a Comparative Criminal Law Perspective' (2008) 19(3) *Criminal Law Forum* 473, 495.

framework—this would be impossible at this stage, and will be left for the Court to do so as the case progresses. Rather, this section will build upon the available knowledge to establish the likelihood of each individual meeting these elements in Court, if and when the time arises.

1 *Perpetrator's Awareness of Victim's Lawful Presence*

Under the *Elements of Crimes*, it is required that '[t]he perpetrator was aware of the factual circumstances that established the lawfulness of such presence'.[182] Under the *Rome Statute*, the perpetrator is required to have been aware of the factual circumstances that established the lawfulness of the presence of the deported population in the location they were removed from.[183] Robinson has commented on this, stating that the drafters of the *Rome Statute* have generally agreed that this awareness is limited to the factual circumstances and that the perpetrator is not required to have made a legal analysis.[184] Whether the perpetrator was aware of the relevant laws at the time, regardless of their legality, is beyond the scope of element 3.[185]

When assessing the factual circumstances that established the lawfulness of the presence of the Rohingya in Myanmar, the defendant's knowledge must be assessed in relation to the factual circumstances leading to the establishment of element *2*.[186] Given this, the accused must have been aware of the fact that many Rohingya, or their parents, were born in Myanmar's territory.

Although the position of state is that it does not approve of the Rohingya being located in the Rakhine region, the existence of the Rohingya in this area is well known and documented. When the British ruled Burma from 1824, migration of labourers into Arakan[187] from nearby regions was encouraged.[188] This, combined with the fact that no international border or immigration restrictions existed at the time, resulted in many Bengalis from the Chittagong region migrating to Arakan to undertake cheap labour.[189] Although many Rohingya have traced their heritage back to the Arakan region in the 15th century or before, it is often argued by the state that a significant number of Rohingya arrived in Arakan state during this period of British colonialism.[190] Whichever position is accepted, the Rohingya population has been present in Rakhine State

[182] International Criminal Court, *Elements of Crimes* (n 18) art 7(1)(d). The case of *Prosecutor v Karadžić* provides context for this element, with the suggestion that the *mens rea* for deportation or forcible transfer requires intent to be proven for forced displacement or deportation. *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 178) [493].

[183] International Criminal Court, *Elements of Crimes* (n 18) art 7(1)(d).

[184] Darryl Robinson, 'The Elements of Crimes Against Humanity' in Roy Lee et al (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 57, 88.

[185] Ibid 88.

[186] Ibid.

[187] Arakan is the former name for Rakhine State.

[188] Jobair Alam, 'The Current Rohingya Crisis in Myanmar in Historical Perspective' (2019) 39(1) *Journal of Muslim Minority Affairs* 1, 3; Archana Parashar and Jobair Alam, 'The National Laws of Myanmar: Making of Statelessness for the Rohingya' (2019) 57(1) *International Migration* 94, 95.

[189] Moshe Yegar, *The Muslims of Burma* (Otto Harrasowitz, 1972) 29; Aye Chan, 'The Development of a Muslim Enclave in Arakan (Rakhine) State of Burma (Myanmar)' (2005) 3(2) *SOAS Bulletin of Burma Research* 396, 400.

[190] Andrew Selth, *Burma's Muslims: Terrorists or Terrorised?* (Strategic and Defence Studies Centre of Australian National University, 2003) 7; Alam (n 188) 3.

since British annexation of Burma in the 1820s.[191] The first argument exists in the form that the existence of this particular group on Myanmar's territory, whether 'legal' or not,[192] is likely to be known by many Burmese.

The second argument lies within the fact that, since this era, there have been further indications that could have led Burmese nationals to become aware of the existence of the Rohingya population in Rakhine State. In 1978, the first reported instance of human rights violations directed towards the Rohingya population was reported, called 'Operation Nagamin' or 'Operation Dragon King', after General Ne Win's military government had declared the Muslim population in Rakhine State 'illegal immigrants'.[193] This led to approximately 200,000 Rohingya fleeing to neighbouring Bangladesh, who returned shortly, after an acknowledgement of wrongdoing by Myanmar's government at the time.[194] In a similar fashion, the Tatmadaw carried out 'Operation Pyi Thaya', or 'Operation Clean and Beautiful Nation', in 2001, in which the Rohingya were also targeted through violence on a large scale.[195]

As these instances demonstrate, the Rohingya are not an invisible ethnic group living discreetly in an isolated corner of the country. The Rohingya are a highly controversial ethnicity who have been involved in multiple large-scale, high-profile humanitarian crises. While one may not agree with the legality of the Rohingya's residence in Myanmar's territory, there is little doubt that the majority of individuals living in Myanmar are aware of their presence. Relating back to the issue of birth, it becomes strongly arguable that the majority of individuals in Myanmar would be aware that children are being born in this group, a basic characteristic of human nature that should be assumed by all. As such, it becomes reasonable to assume that a large number of Tatmadaw members would have known that the Rohingya have been present in the Rakhine region for many generations, and are having children on Myanmar's territory.

With this in mind, it becomes increasingly difficult to accept that the position that the Rohingya are illegal immigrants from Bangladesh and India could be relied upon in the current day. Even if this was the case for the Rohingya population many decades ago, the majority of the Rohingya who became victims of the clearance operations were likely born and have lived the majority of their lives in Myanmar. Even if the mid- and low-level perpetrators believed that the Rohingya migrated as illegal immigrants decades ago, they would have been aware that the children of these 'illegal immigrants' would have been born on Myanmar's territory.

It appears that the majority of the relevant mid- and low-ranking members of the Tatmadaw would likely have known of the Rohingya's presence in the region and the fact that children are constantly being born,

[191] Selth (n 190) 7.
[192] Robinson, 'The Elements of Crimes Against Humanity' (n 184) 88.
[193] Human Rights Council, *Detailed Findings 2018* (n 32) 115 [475]–[476].
[194] Ibid.
[195] Yousuf Storai, 'Systematic Ethnic Cleansing: The Case Study of Rohingya Community in Myanmar' (2017) 5(3) *Journal of South Asian Studies* 157.

much like the mid- and high-level perpetrators.[196] Of course, for this to be proven in court, the actual knowledge and subjective state of mind of each individual must be established.[197]

2 *Perpetrator's Knowledge of Widespread or Systematic Attack*

The final element of crimes against humanity for deportation or forcible transfer requires that '[t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population'.[198] This requires the perpetrator in question to possess the knowledge that the attacks in question were a) carried out against a civilian population,[199] and b) were either widespread or systematic.[200]

(a) Knowledge of Attack on a Civilian Population

Firstly, it must be determined whether the relevant individuals possessed the knowledge that the attacks in question were carried out against a civilian population.[201]

When assessing the knowledge of the mid-level and low-level perpetrators who were directly involved in the attacks on the Rohingya villages, it is very difficult to believe that the perpetrators had no knowledge that their attacks were carried out against civilians. The Fact-Finding Mission describes the hallmarks of the Tatmadaw's attacks, including the rape of women and children, along with the beating and torture of

[196] There does exist the possibility that an individual in the Tatmadaw's relevant units may have spent the entirety of their lives in a geographically isolated location in Myanmar, not knowing of the Rohingya population or their presence in Myanmar. It is somewhat plausible that an individual in that position may have been convinced that the Rohingya have recently entered Myanmar as immigrants, rendering the individual unaware of the fact that many Rohingya have been born in Myanmar's territory. While this phenomenon does appear unlikely, it emphasises the importance of further investigation of this issue by interviewing alleged perpetrators.

[197] *Rome Statute* (n 11) art 30; Badar (n 181) 495.

[198] *Rome Statute* (n 11) arts 30, 7(1)(d); International Criminal Court, *Elements of Crimes* (n 18) art 7(1)(d); Lambert (n 20) 725; Robinson, 'Defining Crimes Against Humanity at the Rome Conference' (n 52) 51.

[199] *Rome Statute* (n 11) arts 30, 7(1)(d); Roger Clark, 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences' (2001) 12(3) *Criminal Law Forum* 291, 328.

[200] Badar (n 181) 495; Lambert (n 20) 725.

[201] This requirement was expanded upon in the ICTY case of *Prosecutor v Prlić*, in which the Court stated that this assessment should be separated into two distinct points: whether the perpetrator had knowledge of an attack on a civilian population, and whether the perpetrator possessed the knowledge that their actions were part of such an attack. The Tribunal provided further clarification on the issue, holding that it is not necessary to determine that the perpetrator had been directly informed of the specific details behind the attack, or whether the perpetrator's personal motives align with the goal or purpose of the attack. Furthermore, discriminatory intent was held to not be a consideration for the purposes of determining knowledge of an individual's attack on a civilian population. *Prosecutor v Prlić (Judgment*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-04-74-T, 29 May 2013) [45]; Robinson, 'Defining Crimes Against Humanity at the Rome Conference' (n 52) 51; Badar (n 181) 478; Gerhard Werle and Florian Jessberger, 'Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law' (2005) 3(1) *Journal of International Criminal Justice* 35, 50; Albin Eser, 'Mental Elements: Mistake of Fact and Mistake of Law' in Antonio Cassese, Paola Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 767, 928.

unarmed men.[202] This circumstantial evidence shows that all perpetrators on the ground and involved with the direct perpetration of the attacks (both mid- and low-level) would have known that attacks were carried out against civilians, and their actions, whether it be the aforementioned violent acts, or the burning of villages and gathering of victims, formed part of such attacks.[203]

Furthermore, the reports of the Fact-Finding Mission suggest that the fact that children are deliberately targeted indicates that the perpetrators have full knowledge that their target is a civilian population.[204] The Tatmadaw has been reported to have partaken in the recruitment and use of children within its forces, the maiming and killing of children, attacks on schools, sexual violence carried out against children and abduction within the clearance operations.[205] In terms of legal requirements, there is little doubt that the victims would be considered a 'civilian population' for the purposes of the *Rome Statute*.[206]

(b) Mid-Level Perpetrators' Knowledge of Widespread or Systematic Nature of Attack

The second requirement for this element is that the perpetrator understands the overall context of their actions.[207] In establishing this element, the perpetrator is required to have known that their actions were part of a widespread or systematic attack, pursuant to some form of policy or plan, which ultimately separates the isolated and purely personal actions of deviant individuals from crimes against humanity.[208]

It will now be considered whether Major-General Maung Maung Soe (commanding officer of Western Command), Brigadier-General Aung Aung (commanding officer of the 33rd Light Infantry Division) and Brigadier-General Than Oo (commanding officer of the 99th Light Infantry Division) had actual or constructive knowledge of the broader dimensions of the attacks on the Rohingya.[209] This discussion will begin with the systematic nature of the attacks, and then move forward to the widespread nature of the attacks.

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[202] Human Rights Council, *Detailed Findings 2018* (n 32) 348 [1361]–[1384].

[203] It could possibly be argued that, when firing indiscriminately from a distance upon the Rohingya villages, the perpetrators had assumed the victims to be ARSA combatants. While this argument has its own material flaws, it must be considered that the later actions when the Tatmadaw had entered the villages and engaged in close-quarter attacks do not support such a position. See ibid 348 [1361]–[1384].

[204] Ibid 347 [1366].

[205] Ibid.

[206] It is noted that the actual knowledge of the perpetrators established at trial will provide further evidence to meet this element and this should be considered a major focal point for the Office of the Prosecutor.

[207] This was expanded upon in *Prosecutor v Kayishema* in the ICTR, in which the Tribunal suggested that the broader dimensions of criminal conduct are a focal point for the establishment of crimes against humanity and, by extension, the accused is required to be aware of this greater dimension surrounding their individual actions. Through this logic, the Tribunal emphasised that actual or constructive knowledge of the broader dimensions of the attack needs to be present. *Prosecutor v Kayishema (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [133]–[134].

[208] Ibid; Lambert (n 20) 725; Robinson, 'Defining Crimes Against Humanity at the Rome Conference' (n 52) 51; Badar (n 181) 478; Werle and Jessberger (n 201) 50; Eser, 'Mental Elements' (n 201) 928.

[209] *Prosecutor v Kayishema (Judgment)* (n 207) [133]–[134].

The first question is the mid-level perpetrators' knowledge of the systematic nature of their attacks. Through the very nature of a mid-level officer in a military structure, it is inherent that the mid-level perpetrators would have possessed a high level of knowledge of the overall dimensions of the attacks. In contrast with the low-level perpetrators, there exists a lower likelihood of these individuals blindly following the orders of their superiors without knowledge of a wider dimension. By the nature of their position, these mid-level perpetrators serve as a conduit for communication between the high-level policy or plan makers, and the direct perpetrators, providing these individuals with a degree of knowledge of both the actions on the ground, and the directions handed down by the high-level commanders. Given this connection to all levels in the military hierarchy, it is arguable, to some degree, that the mid-level commanders have the greatest overall picture of the true nature of the attacks being carried out. As a result of this connection with both high- and low-level perpetrators, it becomes quite reasonable to suggest that the mid-level perpetrators' knowledge of the systematic nature of the attacks can be sufficiently constructed.[210] These individuals would have undoubtably been aware of the existence of orders to attack, as they would have been handed down to them personally due to their respective positions. Similarly, these individuals would have known that the resources used, such as the weaponry and vehicles,[211] were obtained through the military. Furthermore, as the division leaders, these mid-level perpetrators would have played an instrumental role in preparing the low-level perpetrators for the attacks, which the Fact-Finding Mission describes as being carried out in a organised and pre-planned fashion.[212]

It will be necessary to establish actual knowledge through further information seeking such as interviews with these individuals; however, it seems unlikely that an argument for isolated, individual misconduct could be made. If it were to be argued that the mid-level perpetrators had directed the attacks of their respective divisions based on a personal vendetta towards the Rohingya population, the 'remarkable similarity' in the conduct of the operations and the timing of the attacks, the division of roles between individuals, the form of violations carried out and the manner in which they were undertaken[213] suggests otherwise. Given this, it appears that the constructive knowledge of the mid-level perpetrators would be sufficient to prove knowledge of a systematic attack on the Rohingya civilian population.

Secondly, it will be more difficult to argue that the mid-level perpetrators had knowledge of the widespread nature of the attack. As suggested above, it is arguable that these individuals possessed knowledge that the attacks constituted part of a military organised plan due to the orders such individuals would have received (meeting the knowledge of the systematic nature test). In saying this, it is harder to argue that these individuals possessed the knowledge of the full extent of the plan, which may not have been entirely laid out. It is somewhat plausible that the mid-level perpetrators were only aware of a smaller scope, limited to only the information passed down from the commanders. Regardless, it appears that there is insufficient evidence

[210] See the discussion which shows the acceptance of both actual and constructive knowledge for such a purpose in *Prosecutor v Kayishema (Judgment)* (n 207) [133]–[134].
[211] Human Rights Council, *Detailed Findings 2019* (n 140) 71 [222].
[212] Ibid.
[213] Human Rights Council, *Detailed Findings 2018* (n 32) 363 [1429].

concerning the mid-level perpetrators' knowledge of the widespread nature of the attacks available at this point in time, rendering any further discussion purely speculative.

However, this is not a barrier to determining the likelihood of a verdict against these individuals. Due to the non-conjunctive nature of the widespread *or* systematic tests,[214] it is worthwhile focussing on the strongest argument: that the mid-level perpetrators were aware of the systematic nature of the attacks. If such an approach is taken, it is very likely that the mid-level perpetrators will meet the requirements of element 5. Once more, for this to be proven in Court, the actual knowledge and subjective state of mind of each individual is required to be established.[215] If these elements were to be proven, this would mean that the mid-level perpetrators should meet all elements of crimes against humanity, if brought before the ICC.

(c) Low-Level Perpetrators' Knowledge of Widespread or Systematic Nature of Attack

In contrast with the mid-level perpetrators, the low-level perpetrators inherently possess a smaller degree of knowledge when considering the military chain of command associated with a Tatmadaw operation. Due to this, it immediately appears more difficult to provide a strong argument that these low-level perpetrators possessed sufficient knowledge of the broader dimensions of the attacks.[216]

With regard to the knowledge of the systematic nature of the attacks, the question must be asked whether the low-level perpetrators saw their actions as a) carried out under legitimate orders as part of a greater plan, or alternatively b) a result of individual intentions to harm based upon personal motivations.[217] While such a discussion would be best be entered into once each of these low-level perpetrators have been identified and interviewed, it may be possible to imply this knowledge from the Fact-Finding Mission reports from the region at the time.

This arises from the fact that the members of the Tatmadaw appear to have been following orders from higher command. This is supported by an official statement by General Min Aung Hlaing on 13 November 2017, in reference to the clearance operations, stating that '[s]ecurity forces took actions in accordance with the law, and did not overstep the law'.[218] General Min Aung Hlaing continued to state that the Tatmadaw individuals 'strictly followed orders and acted in accordance with the rules of engagement during the recent Rakhine crisis'.[219] Further supporting this is an official investigation into these attacks by Inspector-General Lieutenant-General Aye Win, who reported that 'all security members abided by the orders and directions of superior bodies'.[220] This existence of orders concerning the attacks indicates that the perpetrators may have

[214] *Prosecutor v Kunarac (Trial Judgment)* (n 105) [93].
[215] *Rome Statute* (n 11) art 30; Badar (n 181) 495.
[216] *Prosecutor v Kayishema (Judgment)* (n 207) [133]–[134].
[217] Ibid.
[218] Human Rights Council, *Detailed Findings 2018* (n 32) 352 [1382].
[219] Ibid.
[220] Ibid.

known that the attacks on the Rohingya were carried out under legitimate orders as part of a greater plan.[221] The argument therefore exists that, by receiving orders from superior officers, the low-level soldiers were made aware that the military's chain of command was involved. As such, it is arguable that these individuals had constructive knowledge[222] of the broader dimensions of the attack,[223] given the attack's organised military nature.[224] In saying this, it remains possible that some lower-level perpetrators may have carried out the orders of the mid-level perpetrators on the assumption that the attacks were representative of the mid-level perpetrator's individual deviance, and not a coordinated military offensive. While such a position appears rather unlikely, it is reasonable to suggest that more information on the perpetrator's actual knowledge of the systematic nature of the attack may be required. If this pathway is to be undertaken, a focus on the actual knowledge of the alleged perpetrators is encouraged, perhaps by means of the interview process.

With regard to the knowledge of the widespread nature of the attacks, it appears that, on face value, the general comments discussed above indicate that it was likely that the low-level perpetrators would have known that the Tatmadaw had led a series of attacks at a similar point in time, using different groups. The most convincing argument is the frequency of the attacks, in which the Tatmadaw attacked multiple villages across different days.[225] By the very nature of being present through multiple attacks, the knowledge of the individual concerning the broad nature of attacks across multiple villages may be able to be constructed.[226] As a matter of evidence, however, it appears harder to argue that each of the individual low-level perpetrators possessed the knowledge that the attacks were widespread in the sense that other military groups were carrying out similar tasks. Such a determination would need to be made on a case-by-case basis, and in-depth interviews with each of the accused would need to be conducted if such a position is to be strongly argued. It is at this point that the counterargument may arise that the low-level perpetrators were only carrying out the killing, rape and torture of the Rohingya to fulfill their own individual desires, as a result of the power dynamic and level of victim vulnerability at play. While this would highlight the vile and inhumane nature of the individuals in question, it is arguable that such a crime is outside of the scope of crimes against humanity and by extension the ICC, as knowledge of the widespread nature may not be present.[227]

As a result, the likelihood of a finding that the low-level perpetrators understood the widespread nature of the attacks would likely to be decided on the basis of further information that will likely arise through submissions of evidence. When comparing this to the knowledge of the systematic nature of the attacks, the

[221] *Prosecutor v Kayishema (Judgment)* (n 207) [133]–[134].
[222] Ibid.
[223] Ibid.
[224] Human Rights Council, *Detailed Findings 2018* (n 32) 363 [1429].
[225] Ibid 180 [755]–[882].
[226] See the discussion which shows the acceptance of both actual and constructive knowledge for such a purpose in *Prosecutor v Kayishema (Judgment)* (n 207) [133]–[134].
[227] Ibid.

knowledge of the widespread nature of the attacks appears slightly more difficult to establish, requiring far more information. It is for this reason that the low-level perpetrators should be considered likely to meet elements 4 and 5 under the systematic test, with the possibility that the widespread test will also be met in the event of further information arising at a later date.

3 *Prospects of a Case against the Mid- and Low-Level Perpetrators*

With a detailed analysis of the elements relevant to a case against the low- and mid-level perpetrators, it becomes possible to assess whether it is likely that either of these groups of alleged offenders will be found guilty for committing crimes against humanity for deportation or forcible transfer.

These mid-level perpetrators[228] are likely to be found to meet the five requisite elements of crimes against humanity for deportation or forcible transfer, as outlined in the ICC's *Elements of Crimes*.[229] The mid-level perpetrators are the individuals commanding the low-level troops on the ground, who have arguably removed the Rohingya civilian population from their homes, in which they were lawfully present, through the use of violence and other intimidation tactics. The mid-level perpetrators possessed knowledge that this attack was carried out in a systematic military nature and, pending further investigation of the Office of the Prosecutor, possessed the knowledge of the factual circumstances concerning the legality of the presence of the Rohingya in Myanmar's territory. As a result, this chapter has determined that these individuals are likely to be found guilty of crimes against humanity for deportation or forcible transfer under article 7(1)(d) of the *Rome Statute*.

The low-level perpetrators, the individuals reported by the Fact-Finding Mission on Myanmar to be the direct perpetrators of the attacks against the Rohingya population, are the 33rd Light Infantry Division and the 99th Light Infantry Division. Upon consideration of the various factors discussed throughout this chapter, it appears somewhat likely that members of these infantry divisions would be found guilty of crimes against humanity. Despite this, attention must be drawn to the practical difficulties concerning such a focus on lower-level alleged perpetrators. It would be necessary to identify and locate the individual members of the 33rd Light Infantry Division and 99th Light Infantry Division. In theory, this could easily be achieved through the release of all available information from the Tatmadaw concerning the individuals alleged to be involved in the clearance operations. However, given that these records would be in possession of the military, it is worthwhile to consider that such information may not be provided in a simple fashion. This can be contrasted to the mid-high-level perpetrators, whose status has enabled clear identification, as can be seen by the list of names identified by the Fact-Finding Mission.[230] Furthermore, the sheer number of individuals would be difficult to identify and, by extension, costly and time consuming to locate and transfer to The

[228] The mid-level perpetrators are Major-General Maung Maung Soe (commanding officer of Western Command); Brigadier-General Aung Aung (commanding officer of the 33rd Light Infantry Division) and Brigadier-General Than Oo (commanding officer of the 99th Light Infantry Division): Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (n 13) 10 [52].

[229] International Criminal Court, *Elements of Crimes* (n 18) art 7(1)(d).

[230] Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (n 13) 10 [52].

Hague for prosecution. It is also worthwhile to consider that interviewing each of these individuals and obtaining the relevant information required to meet the requisite mental elements may be a further practical challenge.

When considering these practical difficulties surrounding prosecution of the lower-level individuals, which would likely place great strain on financial resources and the timeliness of trial, the Office of the Prosecutor's policies surrounding the selection of a perpetrator become increasingly relevant.[231] Based on a finite amount of resources at the Prosecutor's disposal, this policy suggests that charges for crimes under the *Rome Statute* should brought against individuals who 'appear to be most responsible for the identified crimes'[232] This primarily refers to a focus on commanders and other superiors, which is described as a 'key form of liability' as it is a 'critical tool' to combatting impunity for such crimes.[233] Furthermore, the policy paper states that such a focus may lead the Prosecutor to 'consider the investigation and prosecution of a limited number of mid and high level perpetrators in order to build the evidentiary foundations for cases(s) against those most responsible'.[234]

When considering the case at hand, the most appropriate avenue for reaching a verdict against the high-level military commanders is through article 28(a) for failing to take all necessary and reasonable measures to prevent or repress crimes committed by subordinates, as will be discussed shortly.[235] To reach this point, a finding that crimes within the Court's jurisdiction have been carried out by subordinate soldiers is necessary. However, if crimes against humanity can be established through the mid-level perpetrators, it does not seem as if the Office of the Prosecutor would find a focus on lower-level individuals to be an appropriate allocation of resources.[236]

There is some degree of merit to the arguments that the *Rome Statute* has been breached by crimes against humanity for deportation or forcible transfer by these lower perpetrators, and if enough resources were invested for investigation, including locating and interviewing these alleged perpetrators, many guilty verdicts would likely result. However, when considering this multitude of difficulties alongside not only the

[231] See point 42 of Office of the Prosecutor of the International Criminal Court, *Policy Paper on Case Selection and Prioritisation* (International Criminal Court, 2016) <https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf>; Ward Ferdinandusse and Alex Whiting, 'Prosecute Little Fish at the ICC' (2021) 19(4) *Journal of International Criminal Justice* 759, 760–5; Kai Ambos, 'Office of the Prosecutor: Policy Paper on Case Selection and Prioritisation' (2018) 57(6) *International Legal Materials* 1131, 1132.

[232] The internal policy paper states that such a focus may provide the requirement to 'consider the investigation and prosecution of a limited number of mid and high level perpetrators in order to build the evidentiary foundations for cases(s) against those most responsible'. Point 42 of Office of the Prosecutor of the International Criminal Court (n 231).

[233] See ibid point 44.

[234] Ibid point 42.

[235] *Rome Statute* (n 11) art 28.

[236] This internal policy does not distinctly suggest that low-level perpetrators will not be considered, only that the Prosecutor is directed to focus resources on mid- to high-level perpetrators. See point 42 of Office of the Prosecutor of the International Criminal Court (n 231).

Office of the Prosecutor's finite resources, and policy of focusing on higher level perpetrators,[237] it appears very unlikely that the Court would shift its focus on mid- and high-level perpetrators to undertake such endeavours. Given the inherent strain on resources of bringing a case in the ICC against higher level offenders, it does not seem as if the Office of the Prosecutor would find a focus on lower-level individuals to be an appropriate allocation of resources, if prosecution of the mid-level perpetrators can provide a legal pathway to the high-level perpetrators. As a result, it does not appear that the Office of the Prosecutor would be likely to charge the low-level perpetrators with any offence in the ICC.

As this analysis has shown, the most viable way to establish the existence of crimes against humanity is to find that the mid-level perpetrators have met the requisite elements. Whether these crimes can be attributed to high-ranking commanders under article 28 of the *Rome Statute* now becomes the focal point for discussion.

C *Attributing the Crimes of Subordinates to High-Level Military Commanders*

As the existence of crimes against humanity committed by at least one of the direct perpetrators has now been established, it becomes possible to move the focal point for analysis towards the next group of alleged perpetrators, the high-ranking military commanders. It must now be asked whether these crimes of subordinate soldiers can be attributed to superior commanders for failing to exercise command and control.

The responsibility of commanders and other superiors for actions of their subordinates is dealt with in article 28 of the Rome Statute, which states:

> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
>
> > (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
> > (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[238]

As outlined by the Fact-Finding Mission, the high-ranking military commanders may be considered to be Deputy Commander General Soe Win who ultimately reports to Senior General Min Aung Hlaing.[239] Under

[237] Ibid.

[238] *Rome Statute* (n 11) art 28; Volker Nerlich, 'Superior Responsibility under Article 28 ICC Statute: For What Exactly is the Superior Held Responsible?' (2007) 5(3) *Journal of International Criminal Justice* 665, 669–71; Nora Karsten, 'Distinguishing Military and Non-military Superiors: Reflections on the Bemba Case at the ICC' (2009) 7(5) *Journal of International Criminal Justice* 983, 983–4; Alexandre Galand, 'Bemba and the Individualisation of War: Reconciling Command Responsibility Under Article 28 Rome Statute with Individual Criminal Responsibility' (2020) 20(4) *International Criminal Law Review* 669, 670.

[239] Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (n 13) 10 [52].

this framework, three major questions must now be asked to determine whether Generals Min Aung Hlaing and Soe Win would be likely to be found responsible for the crimes of the low-level Tatmadaw soldiers: (1) whether these high-ranking officers have 'control'[240] of the specific units of the Tatmadaw, (2) whether these generals possessed knowledge that crimes may be being carried out within their ranks, and (3) whether 'necessary and reasonable' steps were taken to prevent or repress such actions.

1 *Effective Command and Control or Effective Authority and Control*

Firstly, it must be established that the relevant Tatmadaw units were under the control of General Min Aung Hlaing and General Soe Win.[241] The idea of effective control in relation to the attribution of low-level perpetrators' actions to a superior commander has been discussed at the ICC in the *Bemba Gombo Decision*,[242] in which the positions taken by the ICC are consistent with International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) cases.[243]

In this sense, the *Bemba Gombo Decision* suggests that the concept of 'effective control' refers in general terms to a 'manifestation of a superior–subordinate relationship' located within a de jure or de facto chain of command or 'hierarchical relationship'.[244] In determining this, the Court suggested that the logic of the *Čelebici* case should be applied, which places the strict requirement of the existence of a relationship of subordination.[245]

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[240] Through effective command or authority: *Rome Statute* (n 11) art 28(a).

[241] Ibid.

[242] *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105) [410]–[414]; Karsten (n 238) 1002.

[243] *Prosecutor v Ndindiliyimana* (*Judgment and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-00-56-T, 17 May 2011) 1917; *Prosecutor v Prlić (Judgment*) (n 201) [238]–[244]; *Prosecutor v Perišić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-04-81-A, 28 February 2013) [87]–[88].

[244] *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105) [414]; Kai Ambos, 'Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the "Most Responsible"' in André Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press, 2009) 127, 133; Mark Osiel, 'Modes of Participation in Mass Atrocity' (2005) 38 (3) *Cornell International Law Journal* 793, 795–6; Louisa Rowe, 'The "Bemba" Appeal Decision: Command Responsibility in International Criminal Law' (2022) 41(1) *University of Tasmania Law Review* 85, 94.

[245] *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105) [414]; *Prosecutor v Mucić (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [378]. Expanding on this, the Court in *Bemba Gombo* explained the way in which the effective control test should be approached, holding that it should be perceived as the 'material ability [or power] to prevent and punish' the commission of offences. The simple ability to influence control over the deviant forces in this regard would not suffice; the standard is whether the defendant possessed the 'material ability to prevent or repress the commission of the crimes or submit the matter to the competent authorities'. *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105) [415]. Beyond this, however, it is the general view of judges in this space to treat effective control as 'more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent

It is for this reason that the structure of the Tatmadaw, discussed earlier in this chapter, becomes relevant. Under this structure, both low-level perpetrators and mid-level generals were found to report to the Deputy Commander General Soe Win, who ultimately reports to Senior General Min Aung Hlaing.[246] It is evident that General Min Aung Hlaing is positioned within a 'superior–subordinate relationship' with the direct perpetrators of the offences in question, which represents a 'hierarchical relationship'.[247] As the most senior commander and highest-ranking officer in the chain of command of the military units that carried out the genocidal acts, it is more than arguable that both Senior General Min Aung Hlaing and Deputy Commander General Soe Win possess the 'material ability to prevent or repress the commission of the crimes or submit the matter to the competent authorities'.[248]

2 *The Perpetrators' Knowledge of the Crimes of Subordinates*

The Chamber in the *Bemba Pre-Trial Decision* attempted to clarify the knowledge requirements of the *Rome Statute*, stating that article 28(a) provides two standards of the fault element. For this element to be met, General Min Aung Hlaing is required either a) to have known, or b) should have known of the crimes carried out by the Tatmadaw.[249]

(a) Actual Knowledge

With respect to the first standard, that the military commander *knew* that the forces were committing or about to commit the crimes in question, the Pre-Trial Chamber in *Bemba* suggested that this requires the existence of 'actual knowledge'.[250] This requires the suspect to have had actual knowledge that their subordinates were committing, or about to commit, a crime; generally speaking, this 'actual knowledge' cannot be 'presumed'.[251]

[or] punish': *Prosecutor v Perišić (Judgment)* (n 243) [87]. See also *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 178) [582].

[246] Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (n 13) 10 [52].

[247] *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105) 378.

[248] Ibid [415].

[249] *Rome Statute* (n 11) art 28(a); Nerlich (n 238) 676; Karsten (n 238) 986. It is noted that the provision concerning actual knowledge in article 30 of the *Rome Statute* only applies to provisions that do not state otherwise. As this provision specifies its own mental requirements, the actual knowledge requirement of article 30 does not apply.

[250] *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105) [429]. The definition of actual knowledge is outlined in the Special Court of Sierra Leone case of *Prosecutor v Taylor*, in which the Court held that 'Actual knowledge may be defined as the awareness that the relevant crimes were committed or about to be committed'. *Prosecutor v Taylor (Judgment)* (Special Court of Sierra Leone, Trial Chamber II, Case No SCSL-O3-01-T, 18 May 2012) 497; Ambos, 'Command Responsibility and Organisationsherrschaft' (n 244) 131.

[251] *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105) [430]. However, it was soon after established that 'the scope and nature of the superior's position and responsibility in the hierarchal structure, the location of the commander at the time and the geographical location of the acts' can be used to presume that the commander had actual knowledge, although this is not enough on its own. At [430]–[431].

Within the *Bemba Pre-Trial Decision*, the Chamber provided the factors of the form of knowledge, or 'factors' that, if the defendant was aware of them, would constitute actual knowledge of the subordinates committing the crimes:

> These factors include the number of illegal acts, their scope, whether their occurrence is widespread, the time during which the prohibited acts took place, the type and number of forces involved, the means of available communication, the modus operandi of similar acts, the scope and nature of the superior's position and responsibility in the hierarchal structure, the location of the commander at the time and the geographical location of the acts.[252]

Looking at the facts that highlight General Min Aung Hlaing's actual knowledge of killing, torture and rape being present within the clearance operations, there have been multiple instances that may demonstrate actual knowledge was present. Firstly, the Fact-Finding Mission has outlined that on 19 September 2017 (the middle of the first wave of the clearance operations), General Min Aung Hlaing visited Sittwe's Regional Operational Command, where the General was detailed on the situation, reviewing operational documents such as maps.[253]

Secondly, on 20 September 2017, the day after, General Min Aung Hlaing was reported to have visited Buthidaung to attend Taung Baza's Tatmadaw headquarters. The Fact-Finding Mission states that during the meetings in Buthidaung, General Min Aung Hlaing was detailed on how the operations had transpired, after which the General was reported to have provided:

> [I]nstructions on getting timely information, close supervision by officials as there could not be any more mistakes with security affairs, cooperation in ensuring regional peace and stability, secure and firm border fencing … then instructed the continued citizenship verification process for issuing NVCs to those living in the region.[254]

These meetings, which consisted of both detailing the events on the ground that were transpiring and providing orders in response to the transfer of such knowledge, demonstrate that General Min Aung Hlaing knew of the attacks on the Rohingya. However, it must be asked if the general had actual knowledge of the specific killing and rape of the Rohingya. With reference to the *Bemba Pre-Trial Decision*, 'the scope and nature of the superior's position and responsibility in the hierarchal structure, the location of the commander at the time and the geographical location of the acts'[255] can be used to presume that the general had actual knowledge, although this is not enough on its own.[256] This evidence of meetings does not explicitly demonstrate the knowledge of further factors, such as the exact acts taking place, the type and number of

[252] Ibid [431].
[253] Human Rights Council, *Detailed Findings 2018* (n 32) 388 [1539].
[254] Ibid.
[255] *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105) [431].
[256] Ibid [430].

forces involved, and the means of available communication.[257] Until further evidence can be ascertained, this first standard will not likely be met.

Moving forward to the actual knowledge of General Soe Win, the lack of available information on this individual's involvement in the clearance operations is evident. Outside of what can be assumed through General Soe Win's position as Commander-in-Chief of the Tatmadaw,[258] there is little available information on the issue, especially when compared to the strong focus on General Min Aung Hlaing's actions. For this reason, the actual knowledge of General Soe Win becomes an important point for further research. Despite this, the general may still meet the relevant knowledge thresholds from the second standard, which will now be addressed.

(b) Should Have Known

The second standard, that the military commander should have known that the forces were committing or about to commit such crimes,[259] was explained further in the case of *Prosecutor v Karadžić*.[260] During this discussion, emphasis was placed on the necessity of showing whether the defendant had information available to them that would have put them 'on notice' of unlawful acts that had been or were about to be committed by subordinates.[261] It is suggested that, when considering the circumstances of the case, the defendant possessed information 'sufficiently alarming to justify further enquiry'.[262]

Moving back to General Min Aung Hlaing's meetings on 19 and 20 September 2017,[263] the general should have known of the killing and sexual violence after being briefed upon the situation as it unfolded on the ground; it is very hard to argue that it was possible for General Min Aung Hlaing to have been ignorant and oblivious to these facts. The available evidence at this point in time shows that the general had knowledge of the locations of the attacks[264] and how the events had transpired.[265] At the very minimum, this evidence

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[257] Ibid [431].

[258] Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (n 13) 10 [52].

[259] *Rome Statute* (n 11) art 28(a)(i). Williamson outlines: 'For military commanders, the test remains that the person either knew or, owing to the circumstances at the time, should have known that the forces under his or her command were committing or about to commit such crimes … By contrast, for other superiors—that is non-military commanders—to incur liability, it must be shown that the person either knew, or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such crimes': Jamie Williamson, 'Some Considerations on Command Responsibility and Criminal Liability' (2008) 90(870) *International Review of the Red Cross* 303, 308, citing *Prosecutor v Kayishema (Judgment)* (n 207) [228]; Jenny Martinez, 'Understanding Mens Rea in Command Responsibility' (2007) 5(3) *Journal of International Criminal Justice* 638, 641; Karsten (n 238) 986.

[260] *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 178) [586].

[261] *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 178) [586]; Nerlich (n 238) 674.

[262] *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 178) [586]. The Court also clarified that the information does not need to contain specific or extensive details of the acts, setting a considerably low standard.

[263] Human Rights Council, *Detailed Findings 2018* (n 32) 388 [1539].

[264] Ibid 388 [1539].

indicates that General Min Aung Hlaing knew that the Tatmadaw was engaging in conflict with civilians, information that is arguably 'sufficiently alarming to justify further enquiry'.[266]

This argument is further strengthened when considering that the Tatmadaw's chain of command has dealt with numerous United Nations Special Rapporteurs on the human rights situation in Myanmar who have detailed the abuses directed toward civilian populations by the Tatmadaw in Myanmar.[267] Furthermore, the violations against the Rohingya have been publicly reported in real time as they have occurred by many sources, most notably the international press,[268] all representing available information that should have put General Min Aung Hlaing 'on notice' when finding out that civilians have been engaged by Tatmadaw forces.[269]

A similar argument exists that General Soe Win Should have also known that the individuals under his command were carrying out the crimes in question. Following the same logic used in the discussion concerning General Min Aung Hlaing's knowledge, many reports have highlighted the nature of the Tatmadaw's clearance operations, from the United Nations Special Rapporteurs on the human rights situation in Myanmar,[270] to anecdotal evidence from within Myanmar,[271] and reports of the international press and human rights groups.[272] As Deputy Commander of these units, General Soe Win should have also been put 'on notice'[273] when receiving this information that is 'sufficiently alarming to justify further enquiry'.[274] This position is further strengthened when considering that within the Tatmadaw's chain of command General Soe Win is one level closer to the mid-level perpetrators, with Major-General Maung

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[265] Ibid.

[266] *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 178) [586].

[267] Human Rights Council, *Detailed Findings 2018* (n 32) 388 [1538].

[268] Stephanie Nebehay, 'Brutal Myanmar Army Operation Aimed at Preventing Rohingya Return: UN', *Reuters* (Web Page, 11 October 2017) <https://www.reuters.com/article/us-myanmar-rohingya-un-idUSKBN1CG10A>; Oliver Holmes, Katharine Murphy and Damien Gayle, 'Myanmar Says 40% of Rohingya Villages Targeted by Army Are Now Empty', *The Guardian* (online, 13 September 2017) <https://www.theguardian.com/world/2017/sep/13/julie-bishop-says-myanmar-mines-in-rohingya-path-would-breach-international-law>; 'UN Human Rights Chief Points to "Textbook Example of Ethnic Cleansing" in Myanmar', *UN News* (Web Page, 17 September 2017) <https://news.un.org/en/story/2017/09/564622-un-human-rights-chief-points-textbook-example-ethnic-cleansing-myanmar>; 'More Than 6700 Rohingya Killed in Myanmar', *Al Jazeera* (online, 14 December 2017) <https://www.aljazeera.com/news/2017/12/14/msf-more-than-6700-rohingya-killed-in-myanmar>; UN Human Rights Commissioner, 'Brutal Attacks on Rohingya Meant to Make Their Return Almost Impossible' (Press Release, 11 October 2017) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=22221>.

[269] *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 178) [586].

[270] Human Rights Council, *Detailed Findings 2018* (n 32) 388 [1538].

[271] See the many comments from citizens in Myanmar throughout the entirety of the report: ibid.

[272] Nebehay (n 268); Holmes, Murphy and Gayle (n 268); 'UN Human Rights Chief Points to "Textbook Example of Ethnic Cleansing" in Myanmar' (n 268); 'More than 6700 Rohingya Killed in Myanmar' (n 268); UN Human Rights Commissioner (n 268).

[273] *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 178) [586].

[274] Ibid.

Maung Soe (commanding officer of Western Command) reporting directly to General Soe Win.[275] This direct relationship indicates that General Soe Win should be even more likely to have been aware of the events unfolding within the two infantry groups controlled by Western Command.

As such, it has become apparent that both General Min Aung Hlaing and General Soe Win should have known of the attacks committed by their subordinates. This position is supported by the reports produced by the Fact-Finding Mission on Myanmar, which have stated:

> [N]o sensible suggestion can be made that military commanders within the Tatmadaw did not know or have reason to know that their subordinates were committing crimes. It was being done everywhere, in every operation, and pursuant to a policy of their own making and implementation. Tatmadaw commanders knowingly accepted the high probability of unlawful civilian casualties and destruction of civilian property.[276]

3 *Failure to Take Necessary and Reasonable Measures*

Finally, article 28 of the *Rome Statute* requires the military commander to have failed to take 'all necessary and reasonable measures' to address the crimes, whether it be through prevention, repressing the commission of the crimes, or even requesting further investigation and prosecution from competent authorities.[277]

The idea of 'necessary and reasonable measures' has been addressed by the *Bemba Gombo* Pre-Trial Chamber, which stated that it is only required that a commander takes measures that are 'within his material possibility', with acts falling outside this scope not triggering responsibility under article 28(a) of the statute.[278] To establish what is materially possible, the Chamber suggested that an assessment of the commander's de jure power, as well as their de facto ability to undertake the measures enabled by that power, should be made.[279] Furthermore, the case of *Prosecutor v Karadžić*, which also deals with the issue of necessary and reasonable measures,[280] provides examples of what necessary and reasonable measures could include:

- reporting the matter to competent authorities where this report is likely to trigger an investigation or initiate disciplinary or criminal proceedings,

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[275] Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (n 13) 10 [52].
[276] Human Rights Council, *Detailed Findings 2018* (n 32) 1537.
[277] *Rome Statute* (n 11) art 28; Ambos, 'Command Responsibility and Organisationsherrschaft' (n 244) 133; Rowe (n 244) 94.
[278] *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105) [443]; Karsten (n 238) 990.
[279] *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105) [443]; Michala Chadimová, 'Superior Responsibility in the Bemba Case—Analysis of the Court's Findings on Necessary and Reasonable Measures' (2019) 19(2) *International and Comparative Law Review* 300, 303.
[280] Within this case, necessary measures are measures that are 'appropriate for the superior to discharge his obligation' and reasonable measures are measures 'reasonably falling within the material powers of the superior'. *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 178) [588].

- carrying out an effective investigation to establish the facts, issuing specific orders prohibiting or stopping the criminal activities, and securing implementation of those orders,
- protesting or criticising criminal action and
- taking disciplinary measures against the commission of crimes.[281]

With this in mind, a) the de jure powers of the high-level commanders and b) their de facto ability to carry out such measures will now be assessed, in relation to c) the measures that were actually taken.

(a) De Jure Powers

The first point when considering whether necessary and reasonable measures have been taken is the *de jure* powers of the individuals in question.[282] The capacity of the Tatmadaw is outlined in Myanmar's *Constitution*, which enables General Min Aung Hlaing as Commander-in-Chief of the Defence Services to formulate the strategy of the defence forces,[283] which includes all armed forces in Myanmar.[284] General Min Aung Hlaing is the 'Supreme Commander' of all armed forces within Myanmar, which, in this unique situation, is at the highest position—with no subordination to the head of state or the civilian government.[285] As Deputy Commander of the Tatmadaw,[286] it becomes arguable that General Soe Win is the second most powerful figure in Myanmar, second only to Senior General Min Aung Hlaing.

Of the forms of necessary and reasonable actions outlined in *Prosecutor v Karadžić*, it is arguable that the most appropriate actions in the case at hand would be 'carrying out an effective investigation to establish the facts, issuing specific orders prohibiting or stopping the criminal activities and securing implementation of those orders', and 'taking disciplinary measures against the commission of crimes'.[287]

As the two top commanders of the Tatmadaw, and arguably the most powerful figures in the nation, it is more than arguable that both generals possess the power under law to utilise these methods in an attempt to prevent, repress the commission of, or call for further investigation from competent authorities into[288] the attacks carried out against the Rohingya.

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[281] Ibid.

[282] *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105) [443]. The Court cited *Kordic*, which stated: 'it is the actual ability, or effective capacity to take measures which is important. The reference to the lack of formal legal competence to take measures should be read in this context. When assessing whether a superior failed to act, the Trial Chamber will look beyond his formal competence to his actual capacity to take measures': *Prosecutor v Kordic (Appeal Judgement)* (n 113) [443].

[283] *Constitution of 2008* (Myanmar) art 340.

[284] Ibid art 338.

[285] Human Rights Council, *Detailed Findings 2018* (n 32) 390 [1546]. This will be discussed further when considering the civilian government's involvement in the clearance operations shortly.

[286] Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (n 13) 10 [52].

[287] *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 178) [588].

[288] *Rome Statute* (n 11) art 28(a)(ii).

(b) De Facto Ability to Exercise Such Power

While these powers may exist through law, it is important to note that the *Bemba* case suggests that it must also be considered whether the commanders possessed the de facto ability to exercise such powers.[289]

Given that these commanders are the highest-ranking Tatmadaw officers, as well as arguably the most powerful individuals in Myanmar, there should be very little doubt that these individuals possess the ability to investigate subordinate troops suspected of carrying out crimes against civilians and to take disciplinary action as a result.[290] This level of discipline has been boasted by General Min Aung Hlaing himself, who has stated: 'Our Tatmadaw is strong because it stands on the firm ground of good military discipline and obedience. Each and every serviceman must strictly follow rules and regulations, orders and instructions.'[291]

General Min Aung Hlaing has also been reported to have described discipline as the 'backbone of the Tatmadaw'.[292] This indicates that the two highest figures have full control over which actions can be implemented regarding discipline—including those that have been identified as 'necessary and reasonable' in light of allegations of subordinates carrying out crimes against civilians.

There is, however, one point that must be considered: the power of General Min Aung Hlaing in comparison to Deputy Commander General Soe Win. At this point, the power the most senior commander, General Min Aung Hlaing, may possess over the Deputy Commander must be considered. This raises the question: if General Soe Win wished to carry out any investigations or implement a form of disciplinary action against the divisions carrying out the clearance operations, and General Min Aung Hlaing did not, would General Soe Win still be able to carry out these measures? While there may be a lack of case law that has dealt with this particular issue that could assist with determining the Court's approach to such a matter,[293] it is arguable that the second highest-ranking military official has the power to order an effective investigation and punitive measures if the situation arises. Whether this would later be overturned or condemned by a superior should be considered irrelevant.

Given this, it should be considered that both generals possessed the de facto ability to address the situation through 'carrying out an effective investigation to establish the facts, issuing specific orders prohibiting or

[289] *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105) [443]; Chadimová (n 279).
[290] *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 178) [588].
[291] Human Rights Council, *Detailed Findings 2018* (n 32) 389 [1541].
[292] Ibid.
[293] For example, the *Bemba* case deals with the defendant who was the president and commander-in-chief of the relevant forces with no superior officer. *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105).

stopping the criminal activities and securing implementation of those orders', and 'taking disciplinary measures against the commission of crimes'.[294]

(c) Measures Actually Taken

With the powers of the two generals to address the crimes of subordinates outlined, the opportunity to examine the measures taken by the individuals in question for comparative purposes arises.

The Fact-Finding Mission on Myanmar has provided commentary on the actions the Tatmadaw's high-ranking officials have taken with regard to the knowledge of the human rights violations being carried out against civilians.[295] It is suggested that there are some instances in which 'undeniable evidence' of such crimes has been presented, which, when combined with outside pressure, has prompted the Tatmadaw to launch investigations into the issue.[296] The Fact-Finding Mission states that an investigation into the clearance operations was conducted, which was led by Lieutenant General Aye Win.[297] This report states that the investigation in question was conducted between 13 October and 7 November 2017, interviewing over 3000 individuals across 58 villages, although the Fact-Finding Mission notes that no Rohingya refugees were interviewed as part of this process, as they had fled to Bangladesh as a response to the attacks. These reports concluded that the Tatmadaw had only used force as part of anti-terrorist operations, and that all individuals were acting in accordance with strict orders from superiors. Furthermore, the report concluded that there were no deaths of innocent people, and 'not a single shot' was fired upon innocent Bengalis.[298] This should not be considered a thorough and impartial report for many reasons. Firstly, the facts are in stark contrast to the victims' reports sourced by the Fact-Finding Mission.[299] Secondly, this may relate to the fact that no Rohingya victims were interviewed as part of this process,[300] leaving a one-sided report.

Less specifically, the Fact-Finding Mission suggests that other further investigation of any allegations concerning the crimes against civilians have been carried out in a superficial manner, resulting only in public statements that 'severe punishments' have been carried out in response—with no evidence of any such punishment.[301] Based on this, the Fact-Finding Mission states: 'There are no indications that any of the top Tatmadaw commanders took any substantial steps to mitigate the unlawful character of the operations and their devastating consequences on human life and dignity.'[302]

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[294] *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 178) [588].
[295] Human Rights Council, *Detailed Findings 2018* (n 32) 389 [1542].
[296] Ibid.
[297] Ibid 409 [1612].
[298] Ibid.
[299] Ibid [1069]–[1095].
[300] Ibid 409 [1612].
[301] Ibid 389 [1542].
[302] Ibid.

Criminal conduct and widespread attacks on civilians should not be considered hallmarks[303] of a disciplined force operating under a command structure of individuals taking necessary and reasonable measures to prevent the commission of such crimes. The superficial investigations that are referred to by the Fact-Finding Mission should by no means be considered an 'effective'[304] investigation, as outlined in *Prosecutor v Karadžić*. As no such investigation has been carried out, there has been no issuing of orders prohibiting or stopping the criminal activities,[305] or disciplinary action taken as a result.[306] For these reasons the measures actually taken by the Tatmadaw's senior officials would not likely meet the requirements of the necessary and reasonable test. The two generals arguably possess the de jure power to investigate allegations of crimes against civilians and the de jure power to utilise these methods. Yet, as has just been demonstrated, there is no indication that such measures have been taken.

4 *Prospects of a Case Against Commanders*

It appears that General Min Aung Hlaing and General Soe Win will likely be found by the ICC to be responsible for the crimes against humanity carried out by their subordinate soldiers. These two military commanders were in effective control[307] of the mid- and low-level Tatmadaw soldiers carrying out attacks on civilians and either knew,[308] or should have known,[309] of the nature of the attacks. Furthermore, these two individuals possessed both the de jure power to implement reasonable measures and the de facto ability to carry out such measures.[310] Despite this, there is no evidence to suggest that any necessary or reasonable measures have been taken in light of receiving this knowledge. As such, it is most arguable that General Min Aung Hlaing and General Soe Win have failed to take necessary and reasonable measures to prevent and punish actions amounting to crimes against humanity that have been carried out within the Tatmadaw's ranks.[311]

It is noted, however, that this determination is entirely dependent on whether either the low- or mid-level perpetrators can be found by the Court to have committed crimes against humanity, as a principal offence is required to be committed in the first place if such crime is to be attributed to the perpetrators' superiors.

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[303] Ibid 346–52.

[304] *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 178) [588].

[305] Ibid.

[306] Ibid.

[307] *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105) [414].

[308] *Rome Statute* (n 11) art 28(a)(i); *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105) [429].

[309] *Rome Statute* (n 11) art 28(a)(i); *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 178) [586].

[310] *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105) [443].

[311] *Rome Statute* (n 11) art 28 (a); *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105) 443; *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 178) [588].

D *Individual Members of the Civilian Government: Aiding and Abetting*

Moving forward from the military, this section will discuss the criminal responsibility of the individual members of Myanmar's civilian government at the time of the clearance operations, the National League for Democracy. For the purposes of practicality, this section will focus primarily on State Chancellor Aung San Suu Kyi, who was effectively acting as the country's de-facto leader during these clearance operations.[312] The possibility for other members of the NLD to potentially fall within the scope of this discussion is acknowledged and left open for further research in the event that action against the *de facto* leader becomes likely.

The idea that civilian authorities may be subject to the *Rome Statute*'s provisions concerning aiding and abetting was raised by the Fact-Finding Mission. The Fact-Finding Mission has suggested that, although the current available information does not suggest that the NLD has provided 'practical assistance, encouragement or support to the commission of crimes', there are certain instances in which past international criminal tribunals have attributed liability for aiding and abetting when civilian governments have provided 'encouragement and moral support to the perpetrators', or 'failing to meet a legal duty to ensure the tranquillity, public order, and security of people, amid violent attacks on refugees'.[313] Ultimately though, the Fact-Finding Mission quickly moved on to other matters, suggesting that further investigation is warranted.

While there is no evidence to suggest that Aung San Suu Kyi and the NLD took part in the physical elements of deportation or forcible transfer, and the responsibility for subordinates under the *Rome Statute* only extends to specific military commanders,[314] there is a possibility that the provisions concerning aiding and abetting may trigger criminal responsibility.

Within international criminal law, there are many forms of responsibility that arise in relation to the relevant crimes. These forms include direct perpetration, joint criminal enterprise,[315] planning,[316] ordering,[317]

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[312] Stefano Ruzza, Giuseppe Gabusi and Davide Pellegrino, 'Authoritarian Resilience Through Top-Down Transformation: Making Sense of Myanmar's Incomplete Transition' (2019) 49(2) *Italian Political Science Review* 193, 201; Richard Roewer, 'Three Faces of Party Organisation in the National League for Democracy' (2019) 38(3) *Journal of Current Southeast Asian Affairs* 286, 290; Human Rights Council, *Detailed Findings 2018* (n 32) 391 [1548]; Peter Coclanis, 'Aung San Suu Kyi is a Politician, Not a Monster', *Foreign Policy* (Web Page, 14 May 2018) <https://foreignpolicy.com/2018/05/14/aung-san-suu-kyi-is-a-politician-not-a-monster/>.

[313] Human Rights Council, *Detailed Findings 2018* (n 32) 392 [1550].

[314] *Rome Statute* (n 11) arts 57(3)(a), 28.

[315] Within the ICC, joint criminal enterprise is dealt with in the form of common purpose liability, referred to as co-perpetration, which includes other forms (such as indirect co-perpetration): *Rome Statute* (n 11) art 25(3)(a), (d); Oona Hathaway et al, 'Aiding and Abetting in International Criminal Law' (2019) 104(6) *Cornell Law Review* 1593, 1615–16; Jens Ohlin, 'Joint Criminal Confusion' (2009) 12(3) *New Criminal Law Review* 406, 408–16; Kai Ambos, 'Joint Criminal Enterprise and Command Responsibility' (2007) 5(1) *Journal of International Criminal Justice* 159.

[316] Planning deals with the contemplation of the design of the commission of the principal offence: *Prosecutor v Akayesu (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2

instigating,[318] co-perpetration, indirect perpetration,[319] indirect co-perpetration[320] and the focal point of this section: aiding and abetting.[321]

The possibility of responsibility being extended to Aung San Suu Kyi and the NLD falls under the *Rome Statute*'s provisions concerning aiding and abetting. Primarily, article 25 of the *Rome Statute* concerns aiding and abetting, stating:

> [A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person … for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.[322]

Furthermore, this assistance 'must have furthered, advanced, or facilitated the commission of such offence'.[323]

When looking at the relevant cases from the ad-hoc tribunals, a lesser degree of perpetration is generally involved in the aiding and abetting of an offence than an act constituting the direct commission of that particular crime.[324]

September 1998) [480]; *Prosecutor v Rutaganda (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, December 6, 1999) [37]; *Prosecutor v Galic (Trial Judgment)* (n 116) [168].

[317] Ordering deals with a situation in which an individual in the position of authority instructs the principal offender to commit the offence: *Prosecutor v Kordic (Appeal Judgment)* (n 113) [28]; *Prosecutor v Galic (Trial Judgment)* (n 116) [168]; *Prosecutor v Krstić* (*Judgment)* (n 53) [601]; *Prosecutor v Akayesu (Judgment)* (n 316) [483]; *Prosecutor v Rutaganda (Judgment)* (n 316) [39].

[318] Instigating deals with prompting, encouraging or urging an individual to commit the principal offence: *Prosecutor v Blaškić (Judgment)* (n 119) [280]; *Prosecutor v Bagilishema (Appeal Judgment*) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-95-1A, 3 July 2002) [30].

[319] Under the *Rome Statute*, co-perpetration and indirect perpetration are considered forms of 'commission', alongside direct perpetration. *Rome Statute* (n 11) arts 25(3)(a), 30.

[320] Indirect co-perpetration has also been established as a fourth form of commission, as can be seen in the *Lubanga* case: *Prosecutor v Lubanga Dyilo* (*Decision on the Confirmation of Charges)* (International Criminal Court, Pre-trial Chamber I, Case No ICC-01/04-01/06 29 January 2007) [318]–[367].

[321] *Rome Statute* (n 11) art 25(3)(c); *Prosecutor v Delalić (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [327]; *Prosecutor v Ndahinama (Appeal Judgment)* (International Criminal Court for Rwanda, Appeals Chamber, Case No.ICTR-99-52-A, 28 November 20) [482].

[322] *Rome Statute* (n 11) art 25(3)(c); Manuel Ventura, 'Aiding and Abetting and the International Criminal Court's Bemba et al. Case: The ICC Trial and Appeals Chamber Consider Article 25(3)(c) of the Rome Statute' (2020) 20 (6) *International Criminal Law Review* 1138; Caspar Plomp, 'Aiding and Abetting: The Responsibility of Business Leaders Under the Rome Statute of the International Criminal Court' (2014) 30 (79) *Utrecht Journal of International and European Law* 4, 7.

[323] *Prosecutor v Bemba Gombo (Public Redacted Version of Judgment Pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber VII, Case No ICC-01/05-01/13, 19 October 2016) [94].

[324] *Prosecutor v Delalić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) [342]–[343]; *Prosecutor v Blagojević (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-02-60-A, 9 May 2007)

As with any offence bearing criminal liability, the physical element or *actus reus* and mental element or *mens rea* must also be met for aiding and abetting. Generally speaking, the actus reus of the offence requires the individual in question to provide 'practical assistance, encouragement or moral support to a principal offender of a crime, which … contributes to the perpetration of the crime'.[325] Case law from the relevant ad-hoc tribunals suggests that there are three primary ways in which the *actus reus* aiding and abetting can be met. The first is aiding and abetting through tacit approval and encouragement. In such an instance, an individual may be found to have aided and abetted if the individual's conduct is established to have amounted to tacit approval and encouragement of the crime,[326] which has 'an effect'[327] or 'substantial effect'[328] on the perpetration of the crime.[329] This is contrasted with aiding and abetting through omission proper, as in this instance the establishment of responsibility is based upon 'encouragement and support' rather than a duty to act.[330]

Instances that have amounted to tacit approval and encouragement have tended to involve a position of authority, along with a physical presence at the crime scene.[331] These combined factors have allowed the inference to be made that this lack of interference has amounted to such approval and encouragement.[332] This principle has argued at the ICC and explained in great depth in the case of *Bemba*, which suggested that

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[192]; *Prosecutor v Vasiljević (Appeal Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-32-A, 25 February 2004) [134].

[325] The word 'substantially' has been omitted from this quotation due to the differing standards between the ad-hoc tribunals and ICC, which will be discussed in greater detail shortly. *Prosecutor v Delalić (Trial Judgment)* (n 321) [327]; *Prosecutor v Nahimana (Appeal Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-96-11A, 28 November 2007) [482].

[326] Tacit approval and encouragement has been considered to amount to aiding and abetting in many cases spanning the various avenues of international criminal law, from the ICC to the ad-hoc tribunals: *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (n 105) [867]–[869]; *Prosecutor v Nyiramasuhuko (Appeal Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-42-A, 14 December 2015) [2088], [2096]; *Prosecutor v Ntagerura (Appeal Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-46-A, 7 July 2006) [374]; *Prosecutor v Mrkšić (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No IT-95-13/1-T, 27 September 2007) [671]; *Prosecutor v Brđanin (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-99-36-A, 3 April 2007) [273]; *Prosecutor v Nahimana (Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-01-68-A, 16 December 2013) [147]; *Prosecutor v Kayishema (Appeal Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-95-1-A, 1 June 2001) [201]; Ventura (n 322) 14–19.

[327] *Prosecutor v Bemba Gombo (Public Redacted Version of Judgment Pursuant to Article 74 of the Statute)* (n 323) [90].

[328] *Prosecutor v Nahimana (Judgment)* (n 326) [147].

[329] *Prosecutor v Brđanin (Appeal Judgment)* (n 326) [273].

[330] Aiding and abetting through tacit approval and encouragement was discussed in relation to the concept of omission proper in the ICTR case of *Prosecutor v Kayishema*, in which the Court held that this different form of aiding and abetting is not based upon a duty to act. Rather, this form of aiding and abetting is based on the 'encouragement and support that might be afforded to the principals of the crime from such an omission': *Prosecutor v Kayishema (Judgment)* (n 207) [202], upheld by *Prosecutor v Kayishema (Appeal Judgment)* (n 326) [201]–[202].

[331] *Prosecutor v Kayishema (Judgment)* (n 207) [200]; *Prosecutor v Furundžija (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [207].

[332] *Prosecutor v Kayishema (Judgment)* (n 207) [200]; *Prosecutor v Furundžija (Trial Judgment)* (n 331) [207].

encouragement does not need to be explicit.[333] This discussion also showed that the ICC is willing to accept this principle as a form of aiding and abetting.

The second form of the *actus reus* is aiding and abetting through omission proper.[334] In this instance, criminal responsibility can be triggered when an individual fails to act when a legal duty exists for the individual to do so.[335] Aiding and abetting through omission proper requires the establishment of both a legal duty to act, and the means to fulfil said duty.[336] If these elements are met, this omission must have either 'an effect'[337] or 'substantial effect'[338] on the perpetration of the crime—depending on the court or tribunal in question.[339]

The third form is the situation in which a high-ranking military commander permits the use of resources under the individual's control, which may also amount to aiding and abetting under international criminal law.[340] Such a situation has been shown to involve resources such as subordinate military personnel being used to enable a crime within the relevant court or tribunal's jurisdiction.[341]

Of these forms of aiding and abetting, there are two ways in which the members of the civilian government at the time of the clearance operations may fall within the scope of the ICC's investigation. The first is aiding

[333] In this case, the Chamber understood the notion of 'abet' with regard to moral and psychological assistance. It held that this can take the form of sympathy and encouragement for the principal offence, which does not need to be explicit: *Prosecutor v Bemba Gombo (Public Redacted Version of Judgment Pursuant to Article 74 of the Statute)* (n 323) [89].
[334] *Prosecutor v Blaškić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) [47], [663]; *Prosecutor v Nahimana (Appeal Judgment)* (n 325) [482]; *Prosecutor v Ntagerura (Appeal Judgment)* (n 326) [335], [370]; *Prosecutor v Brđanin (Appeal Judgment)* (n 326) [274]; Jessie Ingle, 'Aiding and Abetting by Omission before the International Criminal Tribunals' (2016) 14(4) *Journal of International Criminal Justice* 747, 753–9; Christopher Gosnell, 'Damned if You Don't: Liability for Omissions in International Criminal Law' in William Schabas, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate, 2013) 101, 117.
[335] *Prosecutor v Naser Orić (Appeal Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-03-68-A, 3 July 2008) [43]; *Prosecutor v Mrkšić (Appeal Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-13/1-A, 5 May 2009) [134].
[336] This was set out in the case of *The Prosecutor v Radovan Karadžić*, which held that 'Liability for "aiding and abetting by omission proper", … may only attach where an accused had both a legal duty to act and the means to fulfil this duty': *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 178) [575].
[337] *Prosecutor v Bemba Gombo (Public Redacted Version of Judgment Pursuant to Article 74 of the Statute)* (n 323) [90].
[338] *Prosecutor v Nahimana (Judgment)* (n 326) [147].
[339] The subtle differences between the differing avenues of international criminal law will be discussed in depth shortly.
[340] *Prosecutor v Krstić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [137], [138], [144]; *Prosecutor v Blagojević (Appeal Judgement)* (n 324) [127].
[341] Ibid.

and abetting through encouragement and moral support.[342] The second is aiding and abetting through omission proper,[343] which may relate to the NLD's lack of action while the attacks were being carried out.

1 *Aiding and Abetting through Tacit Approval and Encouragement*

With the background established, it now becomes possible to ask whether the members of the civilian government's failure to interfere with the Tatmadaw's attacks on the Rohingya could be considered to amount to aiding and abetting through tacit approval and encouragement, or omission proper—beginning with the former.

(a) Actus Reus

Historically, aiding and abetting has carried a relatively high standard of actus reus, requiring a 'substantial effect' on the commission of the crimes.[344] The ICTR has adopted a similar approach, as seen by the acceptance of the substantial effect requirement in the *Nahimana Appeal Case*.[345] Generally speaking, it appears that the approach of the ICTY and ICTR is that aiding and abetting does not require the act of assistance to have directly caused the principal offenders' acts to have been carried out, but had a *substantial effect* on the crime's commission.[346]

Within the *Rome Statute* and the jurisprudence of the ICC, however, it is argued this standard is lowered even further, no longer requiring the act or omission of assistance to have a *substantial effect* on the commission of the principal crime.[347] The ICC briefly considered the use of this substantial effect test in the

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[342] *Prosecutor v Nahimana (Judgment)* (n 326) [147].

[343] *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 178) [575].

[344] As discussed in the *Taylor* appeal judgment from the Special Court for Sierra Leone: 'It is fundamental in international criminal law that an accused may only be punished for his criminal conduct. As articulated by the Trial Chamber and affirmed above, the actus reus of aiding and abetting liability under customary international law requires that an accused's acts and conduct have a substantial effect on the commission of the crimes.' *Prosecutor v Taylor (Appeal Judgment)* (Special Court of Sierra Leone, Appeals Chamber, Case No SCSL-O3-01-A, 26 September 2013) [390]; Hathaway et al (n 315) 1609; Plomp (n 322) 9.

[345] *Prosecutor v Nahimana (Judgment)* (n 326) [147].

[346] *Prosecutor v Blagojević (Appeal Judgment)* (n 324) [187]; *Prosecutor v Vasiljević (Appeal Judgment)* (n 324) [102]; *Prosecutor v Aleksovski (Appeal Judgment)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-95-14/1-A, 24 March 2000) [162].

[347] Hathaway et al describe the ICC *Rome Statute* as including a 'weak actus reus element' for aiding and abetting in comparison to the ad-hoc tribunals, as it does not require 'substantial' assistance: Hathaway et al (n 315) 1612. Schabas suggests: 'The absence of words like "substantially" in the Statute, and the failure to follow the International Law Commission draft, may imply that the Diplomatic Conference meant to reject the higher threshold of the recent case law of The Hague': William Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices' (2001) 83(842) *International Review of the Red Cross* 439, 448 See also Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press 2012) 127; Mark Summers, 'Prosecuting Generals for War Crimes: The Shifting Sands of Accomplice Liability in International Criminal Law' (2014) 23 *Cardozo Journal of International & Comparative law* 519, 538–40.

cases of *Prosecutor v Lubanga*[348] and *Prosecutor v Mbarushimana*,[349] then the Court's position was finally addressed in the later case of *Prosecutor v Bemba Gombo.* Within this case, the Trial Chamber found that '[T]he [Rome] Statute does not require the meeting of any specific threshold. The plain wording of the statutory provision does not suggest the existence of a minimum threshold.'[350] As a result, the substantial effect test was not adopted, with a finding that aiding and abetting in the ICC requires 'an effect on the commission of the offence'.[351] This position was also taken in the case of *Prosecutor v Al Mahdi*,[352] further indicating that the ICC requires 'an effect' on the perpetration of the principal crime. It is noted though, that the controversial nature[353] of this threshold (or lack thereof) leaves a degree of uncertainty on the issue.

The most convincing argument to be made is that the lack of opposition to the attacks on the Rohingya by the nation's official military has created the assumption that the civilian government, and by extension the state itself, sanctioned the attacks. In this case, the relevant conduct in question is the NLD's presence within the state of Myanmar while civilians were being attacked by Myanmar's official military. As the NLD failed to interfere with the Tatmadaw's clearance operations in any way, it may be arguable that this conduct showed support for the attacks on civilians—providing tacit approval of the crimes in question.

The Fact-Finding Mission on Myanmar[354] in its 2018 report outlines the conduct of the civilian authorities during the clearance operations:

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[348] The Trial Chamber could be considered to have implied that the substantial test was required, although this was only used in order to provide context to the issue of liability for cooperators. *Prosecutor v Lubanga (Judgment on the Appeal of Mr Thomas Lubanga Dyllo Against his Conviction)* (International Criminal Court, Case No ICC-01/04-01/06 A, 1 December 2014) [468].

[349] The Chamber briefly stated in dicta that 'a substantial contribution to the crime may be contemplated', without further addressing the issue. *Prosecutor v Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Case No ICC-01/04-01/10, 16 December 2011) [279]; Ventura (n 322) 6.

[350] *Prosecutor v Bemba Gombo (Public Redacted Version of Judgment Pursuant to Article 74 of the Statute)* (n 323) [93].

[351] Ibid; Hathaway et al (n 315) 1612. However, in relation to the uncertainties left by the *Bemba* case, Ventura notes that 'the level of assistance remains unsettled' at the ICC: Ventura (n 322) 6.

[352] *Prosecutor v Al Mahdi (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC -01/12-01/15, 24 March 2016) [26].

[353] There are earlier ICC cases suggesting otherwise, such as *Mbarushimana*, which dealt with the similar provision of art 25(3)(d), and *Prosecutor v Lubanga.* In the academic setting, Ventura notes the uncertain nature of this requirement, stating that that 'it would be odd indeed if no minimum contribution threshold would be required under Article 25(3)(c)': *Prosecutor v Mbarushimana (Decision on the Confirmation of Charges)* (n 349) [283]–[285]; *Prosecutor v Lubanga (Judgment on the Appeal of Mr Thomas Lubanga Dyllo Against His Conviction)* (n 348) [468]; Ventura (n 322) 14.

[354] This Fact-Finding Mission is an independent body established to investigate and formulate the facts regarding the allegations of human rights violations. The Fact-Finding Mission has been referred to as 'the most authoritative account of the human rights violations occurring in Myanmar', although it is noted that the Russian Federation is of the view that the Fact-Finding Mission is 'raw and biased': 'Independent Fact-Finding Mission on Myanmar', *United Nations Human Rights Council* (Web Page, 2019) <https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx>; United Nations, 'Head of Human Rights Fact-Finding Mission on Myanmar Urges Security Council to Ensure Accountability for Serious Violations against Rohingya' (Media Release SC/13552, 24 October 2018) .

> [N]othing indicates that civilian authorities at Union and State level used their limited powers to influence the situation on the ground in the country, in Rakhine State in particular, where the gravest crimes under international law were being perpetrated. The State Counsellor, Daw Aung San Suu Kyi, has not used her de facto position as Head of Government, nor her moral authority, to stem or prevent the unfolding events, or seek alternative avenues to meet the Government's responsibility to protect the civilian population or even to reveal and condemn what was happening. On the contrary, the civilian authorities have spread false and hateful narratives; denied the Tatmadaw's wrongdoing; blocked independent investigations, including of the Fact-Finding Mission; and overseen the bulldozing of burned Rohingya villages and the destruction of crime sites and evidence.[355]

When human rights violations are carried out on a widespread scale by the nation's official military, using official military equipment,[356] it is arguable that any onlooker, whether they be civilian, victim or perpetrator, would assume that such actions have been sanctioned by the nation itself. The nation's leaders, the NLD, who were undoubtedly aware of the situation,[357] made no attempt to condemn the Tatmadaw's crimes through the media, internet, or other forms of press statement.[358] It therefore becomes arguable that failing to condemn such crimes provides tacit approval through the assumption that the state has sanctioned the attacks in question.[359]

Sanction of the principal offence in such a manner has been considered to 'substantially' contribute to the offence—meeting a higher threshold than required by the ICC's 'an effect' principle.[360] As discussed in the *Nahimana Case*:

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[355] Human Rights Council, *Detailed Findings 2018* (n 32) 391 [1548].

[356] According to the Fact-Finding Mission, 'Military vehicles, such as navy vessels and helicopters were reportedly used in the military operations. Soldiers and BGP prepared and launched attacks from government security bases and security forces tortured people in government detention facilities.' Human Rights Council, *Detailed Findings 2019* (n 140) 71 [222].

[357] As the Fact-Finding Mission states, 'Ignorance on the part of the Myanmar civilian authorities was effectively impossible. The allegations of widespread human rights violations were widely covered in the media during the "clearance operations" in Rakhine State, and the military and civilian authorities were themselves providing live updates on developments, including on Facebook.' Human Rights Council, *Detailed Findings 2018* (n 32) 391 [1548].

[358] Ibid 391 [1548].

[359] Within the separate discipline of criminology, it is suggested that the assumption of official sanction of the attacks provides moral support to the direct perpetrators who have received morally questionable orders and are debating whether to carry them out. It could be argued that the assumed support of the nation-state may have added a further factor into this decision to obey such orders, enabling the direct perpetrators to justify their horrific actions as the 'right' thing to do. Further discussion from this second discipline is however outside the scope of this strictly legal discussion: Alette Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (2019) 17 *Journal of International Criminal Justice* 105, 113; Brunilda Pali, 'Crimes of (Dis)Obedience: Radical Shifting of the Criminological Gaze', *Security Praxis* (Web Page, 1 October 2018) <https://securitypraxis.eu/crimes-of-disobedience/>; Herbert Kelman, 'The Policy Context of International Crimes' in André Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press, 2009)26, 27.

[360] As touched on earlier, determining the exact standards that the ICC requires on the issue of effect on the perpetration of the crime is difficult due to two reasons. Firstly, the ICC's approach to this issue differs from that of the ICTR and ICTY, and secondly, there is a limited amount of jurisprudence on this specific point in the ICC. As a result, the higher thresholds set by the ICTR and ICTY may provide some indication on the matter; if the higher thresholds can be met,

> [I]t has been the authority of the accused combined with his presence on (or very near to) the crime scene, especially if considered with his prior conduct, which all together allow the conclusion that the accused's conduct amounts to official sanction of the crime and thus substantially contributes to it.[361]

Similarly, in *Kayishema*, the Court emphasised that 'a person's role in the commission of the proscribed act need not be tangible', and found that 'failure to oppose the killing constituted a form of tacit encouragement in light of his position of authority'.[362]

With respect to the higher ICTR and ICTY thresholds, this non-tangible effect on the situation could be considered to fit within the higher threshold of a 'substantial' effect.[363] If the ICC is to take the lower threshold, requiring *an* effect, it is highly likely that would suffice—providing that authority and presence can be established.

This leaves two further considerations: i) whether the conduct has arisen from an individual with a position of authority and ii) whether a physical presence (or near to) at the relevant scene can be established.[364]

(i) Position of Authority

As de jure leaders of the nation and representatives of the country on the international stage,[365] there is little doubt that the members of the civilian government would be considered to be in a position of authority.[366] With the NLD's presence at the time being in Yangon as opposed to Rakhine State,[367] the question for debate appears to lie with whether the Court would require presence at the actual crime scene for conduct to amount to tacit approval and encouragement of the Tatmadaw's crimes.

(ii) Presence at the Scene

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then the lower thresholds at the ICC should undoubtedly be met: *Prosecutor v Bemba Gombo (Public Redacted Version of Judgment Pursuant to Article 74 of the Statute)* (n 323) [90]; Hathaway et al (n 315) 1611.

[361] *Prosecutor v Nahimana (Judgment)* (n 326) [147]. As Peterson explains, '[E]ncouragement and moral support describe conduct which affects someone's psyche. Such conduct can have a substantial effect on the commission of a crime only if the [principal] perpetrator actually feels encouraged or supported': Ines Peterson, 'Open Questions Regarding Aiding and Abetting Liability in International Criminal Law: A Case Study of ICTY and ICTR Jurisprudence' (2016) 16(4) *International Criminal Law Review* 565, 573; Ventura (n 322) 18.

[362] *Prosecutor v Kayishema (Appeal Judgment)* (n 326) [201].

[363] It is noted that the ICC is still yet to fully clarify that 'an effect', not a substantial effect, is used in the ICC, so there is still some uncertainty surrounding the issue: *Prosecutor v Bemba Gombo (Public Redacted Version of Judgment Pursuant to Article 74 of the Statute)* (n 323) [90]; Ventura (n 322) 6.

[364] *Prosecutor v Kayishema (Judgment)* (n 207) [200]. See also *Prosecutor v Furundžija (Trial Judgment)* (n 331) [207]; *Prosecutor v Nahimana (Judgment)* (n 326) [147].

[365] Years later, Aung San Suu Kyi addressed the ICJ in relation to the allegations of genocide that have been carried out by the Tatmadaw, defending the military's operations and referring to the genocide allegations as an 'incomplete and misleading factual picture of the situation'. 'Transcript: Aung San Suu Kyi's Speech at the ICJ in Full' (n 52).

[366] *Prosecutor v Kayishema (Judgment)* (n 207) [200], See also *Prosecutor v Furundžija (Trial Judgment)* (n 331) [207].

[367] Nehginpao Kipgen, 'The 2020 Myanmar Election and the 2021 Coup: Deepening Democracy or Widening Division' (2021) 52(1) *Asian Affairs* 1.

The problem with this point is that prior cases[368] in the ad-hoc tribunals have involved instances in which the defendant was playing the role of a 'silent spectator' who was directly present at the scene.[369]

In the *Kalimanzira Case,* the defendant held a position as *directeur de cabinet* of the Ministry of Interior and was found to be present at various roadblocks that involved acts of genocide against the ethnic Tutsi population, along with Ndayamabaje's inflammatory hate speech that fuelled such actions.[370] A similar situation unfolded in the *Nahimana Case,* in which Nahimana was present at the church which was determined to be the scene of the principal crime.[371]

But the ICC may not approach this issue in the same way.[372] The Chamber in *Bemba* provided a deeper explanation of the way in which the concept of physical presence at a crime scene could be used as a tool for establishing such approval or encouragement within the specific context of the ICC.[373] It suggested that, under certain circumstances, even the act of being present at a crime scene (or in its vicinity) as a 'silent spectator' can be interpreted as tacit approval or encouragement of the principal crime.[374]

Whether this 'vicinity' of a crime scene could include 'within a country that is experiencing widespread[375] mass crimes' should be up for debate. On face value, it would seem that a nation's de jure leaders remaining silent on allegations of such widespread atrocities committed by its own military is not too dissimilar to the 'silent spectator' role.[376] Both situations can result in the effect of it appearing that the crimes have been officially sanctioned in some way, regardless of the specific location of the offender. Given the strong

[368] That have dealt with tacit approval and encouragement.

[369] *Prosecutor v Nahimana (Judgment)* (n 326) [147]; *Prosecutor v Kayishema (Appeal Judgment)* (n 326) [201], *Prosecutor v Furundžija (Trial Judgment)* (n 331) [213]; Auriane Botte-Kerrison, 'Responsibility for Bystanders in Mass Crimes: Towards a Duty to Rescue in International Criminal Justice' (2017) 17(5) *International Criminal Law Review* 879, 902.

[370] *Prosecutor v Kalimanzira (Trial Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-05-88, 22 June 2009) [292]; Khoury Cyrena et al, 'Updates from the International and Internationalized Criminal Courts' (2009) 17(1) *Human Rights Brief* 52, 54; Slava Kuperstein et al, 'Updates from the International and Internationalized Criminal Courts' (2011) 18(2) *Human Rights Brief* 44, 47.

[371] In this case, the reoccurrence of the defendant's presence at the scene played a significant role in the Tribunal's decision: *Prosecutor v Nahimana (Judgment)* (n 326) [147]; Peterson, 'Open Questions Regarding Aiding and Abetting Liability in International Criminal Law' (n 361) 577.

[372] It is acknowledged that this general approach requiring presence is both a generalisation of existing cases, and the approach of the ICTY and ICTR—not the ICC.

[373] *Prosecutor v Bemba Gombo (Public Redacted Version of Judgment Pursuant to Article 74 of the Statute)* (n 323) [89].

[374] Ibid.

[375] With regard to the widespread nature of the attacks, the Fact-Finding Mission states that, through multiple interviews and other information, it has verified the existence of clearance operations across 54 separate locations, all of which saw the mass killing of Rohingya civilians. Thousands of Rohingya were killed as a direct result of the attacks in the period 2017–18 alone, which saw at least 392 Rohingya villages being entirely destroyed. Furthermore, these attacks were not an isolated incident, but carried out collectively by the Tatmadaw. These attacks were carried out over a long period of time, in many different areas, by different military units: Human Rights Council, *Detailed Findings 2018* (n32) [959], [1394]–[1395], [1429].

[376] *Prosecutor v Nahimana (Judgment)* (n 326) [147]; *Prosecutor v Kayishema (Appeal Judgment)* (n 326) [201].

linkage between the direct perpetrators of the crimes and the nation-state, the onus should lie upon the state's top figures of authority to provide clarity and rebut the assumption that the crimes are sanctioned by the state's figures of authority.

Legally speaking though, this would require a stretch of the currently accepted law, pushing the idea of 'vicinity'[377] (or 'very near to'[378]) to its limit. It is too early to comment on the ICC's specific approach to this issue if confronted with it, but such an abstract approach appears far less likely to be taken than the traditional approach that requires a strict presence at the scene.[379] Regardless of this point, such a position still requires the mental element of the offence to be met, which will now be discussed.

b) *Mens Rea*

In a similar fashion to the *actus reus* of the offence, the *mens rea* of aiding and abetting also differs between the ICC and the ad-hoc tribunals. Within the ICTY and ICTR, the mental element for aiding and abetting requires *knowledge* that the aider or abettor's conduct may assist in the commission of the principal offender's crimes.[380] Under the *Rome Statute*, however, a heightened mental element is required, necessitating that the individual in question desires the act or omission to facilitate and assist with the crime being carried out by the principal offender.[381] This requirement arises primarily from the use of the wording 'for the purpose of facilitating the commission of such a crime' within article 25 of the *Rome Statute*.[382] Due to article 25's focus on the word 'purpose', action in the ICC concerning aiding and abetting requires a significantly higher standard than the *knowledge* requirement within the ICTY and ICTR.[383] To summarise,

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[377] *Prosecutor v Bemba Gombo (Public Redacted Version of Judgment Pursuant to Article 74 of the Statute)* (n 323) [89].

[378] *Prosecutor v Nahimana (Judgment)* (n 326) [147].

[379] For example, the ICTR cases: *Prosecutor v Kalimanzira (Trial Judgment)* (n 370) [292]; *Prosecutor v Nahimana (Judgment)* (n 326) [147].

[380] *Prosecutor v Vasiljević (Appeal Judgment)* (n 324) [102]; *Prosecutor v Blaškić (Appeal Judgment)* (n 334) [49].

[381] Albin Eser, 'Individual Criminal Responsibility' in Antonio Cassese et al, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 801; Kai Ambos, 'Article 25: Individual Criminal Responsibility' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden, 1999) 475, 483; Cherif Bassiouni, *International Criminal Law, Volume 3: International Enforcement* (Martinus Nijhoff, 3rd ed, 2008) 491.

[382] *Rome Statute* (n 11) art 25(3)(c). This is made possible due to the inclusion of the following phrase in article 30(1): 'Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime.' The words 'unless otherwise provided' allow for further requirements to be added to the mental element through article 25(3)(c): Plomp (n 322) 14; Sarah Finnin, 'Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis' (2012) 61 *International and Comparative Law Quarterly* 325, 354.

[383] Ventura (n 322) 21; Kai Ambos, *Treatise on International Criminal Law—Volume I: Foundations and General Part* (Oxford University Press, 2013) 165–6; Ambos, 'Article 25: Individual Criminal Responsibility' (n 381) 1009; Eser, 'Individual Criminal Responsibility' (n 381) 801; Geert-Jan Knoops, *Mens Rea at the International Criminal Court* (Brill Nijhoff, 2017) 48–9; van Sliedregt (n 347) 128; Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 3rd ed, 2014) 374; Miles Jackson, *Complicity in International Law* (Oxford University Press, 2015) 50; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2nd ed, 2016) 578.

this higher mental threshold requires the accused's conduct to have been carried out 'for the purpose of facilitating' the crime in question.[384]

Determining what this standard requires at this stage is difficult, especially when considering that 'purpose' is not expressly defined in the *Rome Statute.* As explained by Hathaway et al, this, combined with the fact that there is limited ICC jurisprudence on the issue, currently leaves the definition somewhat open to interpretation.[385] The *Bemba Case* has provided some further insight into the Court's approach to this issue, stating that the subjective mental element is heightened through the addition of the word 'purpose', which is distinct from the term 'knowledge'.[386] This threshold requires the defendant to have partaken in the act or omission in question with the purpose of facilitating the principal offence.[387] The Trial Chamber went on to suggest that the defendant's knowledge that their actions will assist the commission of the principal crimes is not enough.[388]

As a result, it appears that the important question is not whether the members of the NLD knew that failing to condemn the Tatmadaw's crimes would assist the Tatmadaw's commission of those crimes. The question for this particular point is whether the members of the NLD refused to condemn the Tatmadaw's crimes with the aim of assisting the Tatmadaw carry out crimes against Rohingya civilians.

While such a discussion would benefit greatly from interviews to assess the actual knowledge of these individuals, the political backdrop to the situation enables an important and convincing argument to be made as to the true purpose behind the NLD's refusal to condemn the Tatmadaw's attacks on Rohingya civilians: fear. It is at this point that the power dynamic between the military and the civilian government becomes increasingly relevant in determining the *mens rea* of the offence. A closer analysis of the political landscape shows that the military still exerts heavy political influence over the actions of the government. Before the NLD's elected rise to power, Myanmar was administered under military rule for many decades.[389] From General Ne Win's initial 1958 caretaker government and 1962 coup,[390] to the Burma Socialist Programme Party's military dictatorship[391] and the closely aligned 'democratically elected' Union Solidarity and

[384] *Rome Statute* (n 11) art 25(3)(c); confirmed in *Prosecutor v Bemba Gombo (Public Redacted Version of Judgment Pursuant to Article 74 of the Statute)* (n 323) [97]; Hathaway et al (n 315) 1616.
[385] Hathaway et al (n 315) 1615–16; Plomp (n 322) 14–15; William Schabas, 'Enforcing International Humanitarian Law' (n 347) 443.
[386] *Prosecutor v Bemba Gombo (Public Redacted Version of Judgment Pursuant to Article 74 of the Statute)* (n 323) [97]; *Prosecutor v Mbarushimana (Decision on the Confirmation of Charges)* (n 349) 281; Hathaway et al (n 315) 1616.
[387] *Prosecutor v Bemba Gombo (Public Redacted Version of Judgment Pursuant to Article 74 of the Statute)* (n 323) [97].
[388] Ibid.
[389] Konsam Devi, 'Myanmar Under the Military Rule 1962–1988' (2014) 3(10) *International Research Journal of Social Sciences* 46.
[390] Ibid.
[391] Parashar and Alam, 'The National Laws of Myanmar' (n 188) 100.

Development Party (USDP),[392] the military has effectively been able to operate as it has wished since 1958, with no interference from a governing entity. Whilst the 'power' was theoretically transferred to the relevant elected civilian government in 2010 with the military junta's dissolution and the election of the USDP,[393] it must be noted that the real power, in the form of military capability, remained in the hands of the military. Specifically, this power remains in the hands of General Min Aung Hlaing.

Based on the observations of the Fact-Finding Mission on Myanmar, General Min Aung Hlaing is the 'Supreme Commander' of all armed forces within Myanmar,[394] which provides an unusual degree of autonomy for a military leader who is not operating within in a military dictatorship. At the time of the attacks, the military was tasked with appointing the Ministers of Defence, Border Affairs and Home Affairs.[395] With such a degree of influence, General Min Aung Hlaing effectively controlled the majority of the votes in the National Defence and Security Council, which enabled full control over the military's operations and capabilities.[396] This can be contrasted with the standard modern constitutional framework in which the head of state (in this case the leader of the NLD) is placed at the top of the hierarchy of military institutions and, by extension, military officers.[397]

Such a position has led the Fact-Finding Mission on Myanmar to state that '[t]he constitutional powers of the civilian authorities afford little scope for controlling the actions of the Tatmadaw'.[398] Human Rights Watch has even referred to the relationship between the two as an 'illiberal democracy', indicating that the true power lies with the military[399] and the general assumption within Myanmar during its 'democratic' era is that whichever political party is in power is acting merely as a 'puppet' for the military leaders.[400]

Aung San Suu Kyi and the NLD appear to know firsthand of the Tatmadaw's treatment of opposing political figures and willingness to take political prisoners. This is best demonstrated through the 15 total years from 1989 that Aung San Suu Kyi spent in house arrest prior to the clearance operations.[401] The military

[392] Adam Burke, 'New Political Space, Old Tensions: History, Identity and Violence in Rakhine State, Myanmar' (2016) 38(2) *Contemporary Southeast Asia* 258; Krishna Mirmala, 'The Rohingya Plight: The Role of State Actors and Non-State Actors' (2018) 9(1) *Journal of Defence and Security* 49.

[393] Udai Bhanu Singh, 'Do the Changes in Myanmar Signify a Real Transition' (2013) 37(1) *Strategic Analysis* 101, 104.

[394] Human Rights Council, *Detailed Findings 2018* (n 32) 390 [1546].

[395] Ibid 390 [1546]. Furthermore, Green and Ward suggest that 'The military controls the three most important ministries – Defence, Interior and Border Affairs – and retains 25% of all parliamentary seats'. Penny Green and Tony Ward, *State Crime and Civil Activism: On the Dialectics of Repression and Resistance* (Routledge 2019) 200.

[396] Ibid.

[397] Ibid.

[398] Ibid.

[399] Shayna Bauchner, 'In Myanmar, Democracy's Dead End', *Human Rights Watch* (Web Page, 10 March 2020) <https://www.hrw.org/news/2020/03/10/myanmar-democracys-dead-end>.

[400] Michael Lidauer, 'Democratic Dawn? Civil Society and Elections in Myanmar' (2012) 31(2) *Journal of Current Southeast Asian Affairs* 91, 92.

[401] See the various instances from 1989 to present: Aung Zaw, *The Face of Resistance: Aung San Suu Kyi and Burma's Fight for Freedom* (Silkworm Books, 2013); Josef Silverstein, 'The Idea of Freedom in Burma and the Political Thought of Daw Aung San Suu Kyi' (1996) 69(2) *Pacific Affairs* 211, 212; Hazel Lang, 'The Courage of Aung San Suu

government at the time used its power to arrest Aung San Suu Kyi for being 'likely to undermine the community peace and stability' of the nation, a reasoning broadly considered to be political in nature.[402] The perspective of hindsight shows that the Tatmadaw did possess the power to imprison or overthrow members of the NLD, as such a situation was eventually carried out in early 2021.[403] It thus becomes reasonable to argue that the members of the NLD knew of this power imbalance and abstained from comment on the Rohingya situation through fear of the Tatmadaw's reactions.

Relating this back to the relevant *mens rea* requirements, the NLD may have known that its assumed support for the attacks would facilitate their commission. But, if the law is understood in the way discussed in *Bemba*, this is not enough.[404] The heightened mental requirements of the ICC require the purpose to be examined.

With knowledge of these broader factors concerning the deep power imbalance between the military and civilian government at the time, the primary purpose appears to arise out of fear: fear of losing whatever limited power the NLD once possessed, fear of the nation reverting to strict military rule, and more directly, fear of physical force and imprisonment. The true purpose behind the NLD's failure to condemn the Tatmadaw's conduct likely lies in the fear of repercussions that may arise from doing so. In this instance, the members of the NLD did not provide tacit support and approval 'for the purpose of facilitating the commission of such crime'.[405]

This, combined with the uncertainties concerning the developments in the law required for the *actus reus* to be met, leaves it appearing rather unlikely that a case would be brought against the members of the civilian government, let alone result in a guilty verdict against the individuals in question.

2 *Aiding and Abetting through Omission Proper*

While it may be unlikely that the NLD's failure to act on the clearance operations could be considered to amount to tacit approval and encouragement, it may still be possible for this lack of action to be considered as aiding and abetting through omission proper.[406]

Botte-Kerrison suggests that omission proper, in the context of ongoing mass crimes, does not necessarily involve the requirement of physical presence.[407] She cites Vetlesen's work, arguing that 'bystanders who

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Kyi' (2006) 183 *Overland* 61, 64; Ruzza, Gabusi and Pellegrino (n 312) 200; Ardeth Maung Thawnghmung and Khun Noah, 'Myanmar's Military Coup and the Elevation of the Minority Agenda?' (2021) 53(2) *Critical Asian Studies* 297.

[402] Anupma Kaushik, *Burmese Gandhi: Aung San Suu Kyi* (Gandhi Peace Foundation, 2012) 353.

[403] Kipgen, 'The 2020 Myanmar Election and the 2021 Coup' (n 367).

[404] *Prosecutor v Bemba Gombo (Public Redacted Version of Judgment Pursuant to Article 74 of the Statute)* (n 323) [97].

[405] *Rome Statute* (n 11) art 25(3)(c).

[406] It is noted that both the *actus reus* and *mens rea* for aiding and abetting through the means of omission are no different to aiding and abetting through means of a positive act: *Prosecutor v Orić (Appeal Judgment)* (n 335) [43]; *Prosecutor v Blaškić (Appeal Judgment)* (n 334) [47].

could have used their influence and could have provided assistance for the victims, even indirectly, could be held responsible for failing to fulfil their duty to rescue'.[408] What this leaves is an instance in which criminal responsibility could be attributed even if physical presence at the scene and the ability to provide direct assistance cannot be established. This is, of course, in the event that the requisite elements can still be met.[409]

These requirements will now be discussed in relation to the duties and means of the members of the NLD, along with the effect that failing to carry out such duties would have on the situation.

(a) Actus Reus: Duty to Act

Firstly, it is necessary to consider the question whether the civilian leaders at the time of the clearance operations possessed a legal duty to act on the situation.[410]

As demonstrated in the ICTR case of *Prosecutor v Nyiramasuhuko*, it is arguable that such a legal duty may be present in the duty to ensure the tranquillity, public order and security of people, amid violent attacks on civilians and refugees.[411] Along with the nation's relevant domestic law, which was specific to the case in question, articles 7 and 13 of *Additional Protocol II to the Geneva Conventions* were cited.[412] These was utilised to argue that there was a legal duty on the defendant to protect civilians, including the wounded and sick, as well as against acts or threats of violence.[413]

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[407] It is suggested that an individual could be held responsible if they had knowledge of ongoing mass crimes, were in a position to provide assistance to the victims, yet refused to provide said assistance: Botte-Kerrison (n 369) 905.

[408] Botte-Kerrison (n 369) 905, citing Arne Vetlesen, 'Genocide: A Case for the Responsibility of the Bystander' (2000) 37(4) *Journal of Peace Research* 519, 529.

[409] Duty to act means to fulfil the duty and the *mens rea*.

[410] *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 178) [575]; *Prosecutor v Blaškić (Appeal Judgment)* (n 334) [47], [663]; *Prosecutor v Ndahinama (Appeal Judgment)* (n 321) [482]; *Prosecutor v Ntagerura (Appeal Judgment)* (n 326) [335], [370]; *Prosecutor v Brđanin (Appeal Judgment)* (n 326) [274]; Ines Peterson, 'Criminal Responsibility for Omissions in ICTY and ICTR Jurisprudence' (2018) 18(5) *International Criminal Law Review* 749, 757, 762.

[411] The trial judgment of *Nyiramasuhuko* suggests that such a legal duty exists: 'In the Chamber's view, the criminalisation of individual conduct encompasses the Geneva Conventions in their entirety, including Articles 7 and 13 of Additional Protocol II. Therefore, these provisions impose a legal duty on the Accused to protect civilians, including the wounded and sick, against acts or threats of violence': *Prosecutor v Nyiramasuhuko (Trial Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-98-42-T, 24 June 2011) [5897]–[5899], citing *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, signed 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) arts 7, 13.

[412] *Prosecutor v Nyiramasuhuko (Trial Judgment)* (n 411); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* (n 411). Under article 7 of Additional Protocol II, the wounded, sick and shipwrecked are required to be respected, protected and treated humanely during domestic armed conflict. And under article 13, the civilian population is required to be protected against the dangers arising from military operations. This includes the requirement to not attack civilians who are not actively taking part in hostilities: arts 7, 13; Peterson, 'Criminal Responsibility for Omissions in ICTY and ICTR Jurisprudence' (n 410) 768.

[413] *Prosecutor v Nyiramasuhuko (Trial Judgment)* (n 411) [5897]–[5899].

However, it is noted that this too is a controversial point of law. Peterson argues that 'If one were to follow the Nyiramasuhuko et al Trial Judgment, anyone witnessing assaults against civilians or other protected persons in the context of a noninternational armed conflict could potentially be considered a participant to such offences'.[414] Ingle highlights the uncertainties behind this position, suggesting that 'the law has developed through statements of obiter and casual referencing—without there ever being a "clear articulation of a basis in international law for such a holding"'.[415] Ultimately, it appears that this is another uncertain position of law, which could be approached in either direction.[416]

With respect to the case at hand, many parallels can be drawn with *Prosecutor v Nyiramasuhuko*. Pauline Nyiramasuhuko was an official representative of Rwanda, being appointed as Minister of Family and Women's Development in the government, along with being a member of the 'MRND' National Committee, representing the Butare Prefecture.[417] As a comparatively lower ranking official than those considered for the case at hand, it should then be arguable that Aung San Suu Kyi and the members of the NLD civilian government are the de jure leaders of the nation in question.

Much like the case of *Nyiramasuhuko*, it is then arguable that the NLD are also required by law to uphold the duties outlined in articles 7 and 13 of *Additional Protocol II to the Geneva Conventions* to protect civilians, including the wounded and sick, as well as against acts or threats of violence.[418] This leads to the argument that, when severe acts of violence are alleged to be carried out against civilians in a nation's territory, the members of the civilian government should be acting within their means to ensure the safety of such civilians. For such an argument to be successful, however, the Court would need to affirm the position set by the *Nyiramasuhuko* Trial Chamber.[419]

(b) Actus Reus: Means to Fulfil this Duty

The second question to arise from this point is whether the NLD possessed the means to act on this duty.[420] Looking at the situation in Myanmar, it appears that there are two ways in which this duty to act could possibly be fulfilled. The first is through internal action by attempting to gain some form of control over the

[414] Peterson, 'Criminal Responsibility for Omissions in ICTY and ICTR Jurisprudence' (n 410) 768.
[415] Ingle (n 334) 752.
[416] Gideon Boas, 'Omission Liability at the International Criminal Tribunals: A Case for Reform' in Shane Darcy and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 2010) 204, 212.
[417] *Prosecutor v Nyiramasuhuko (Appeal Judgment)* (n 326) [2].
[418] Ibid [2191].
[419] Ibid. In the appeal judgment of *Nyiramasuhuko*, the Chamber noted that the ICTY and ICTR jurisprudence had not yet determined whether duties that do not carry individual criminal responsibility (such as articles 7 and 13 of Additional Protocol II to the *Geneva Conventions*) would constitute a legal duty to act for such purposes. This discussion was avoided, as the duty in question was established upon the Rwandan Penal Code. For this principle to be carried over to the ICC, the Court would have to affirm the *Nyiramasuhuko* Trial Chamber decision on this issue.
[420] *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 178) [575].

Tatmadaw's attacks. The second is through external action, calling for assistance from members of the international community.

Firstly, it must be asked whether the members of the NLD possessed the means to directly assist the Rohingya.[421] The major problem for this element once more arises from the power dynamic at play between the civilian government and the military.[422]

When considering whether the NLD possessed the means to gain a degree of control over the Tatmadaw and/or their planned attacks on the Rohingya population, this does not appear to be the case. Based on the degree of control the military has within Myanmar's borders, any attempts to cease the clearance operations would have carried little to no weight. Furthermore, when considering the later attack on the NLD as part of the 2021 coup,[423] any action of such nature may have even resulted in violent backlash.

It is worth noting that the ICTR is of the view that, when mass crimes are involved, crimes are applied to humanity as a whole—beyond the life of the victim. Due to this, the 'bystander', in this case the members of the NLD, may be required to take a greater risk.[424] Regardless of the risk taken, however, it is difficult to suggest that the NLD could have directly impacted the situation.

But, there is still a possibility that the Court could take the approach of also accepting indirect means for such purposes.[425] This leaves the argument that the members of the civilian government may have possessed the means to indirectly impact the situation on the ground by calling for external help.

This leads to an interesting question of law—is the head of state required to call for external help on internal security issues in the event of an unchecked military power carrying out alleged crimes? The issue of a head of state's involvement in a seemingly rogue, yet powerful and influential, military force is relatively new territory for international criminal law. Speculatively speaking, the NLD appears to be required to use any means to fulfil the duty in question, the duty to aid in the cessation of the clearance operations. This raises many questions. Would a call for international assistance have fulfilled this duty and put an end to the attacks on the Rohingya?

If a duty exists for heads of state to call for external help on an issue of internal security of civilians, then the most appropriate method at this point in time would be an appeal for assistance from the UN Security

[421] Ibid.

[422] As outlined above, the Tatmadaw's leader, General Min Aung Hlaing, is the 'Supreme Commander' of all armed forces, which is considered above the civilian government in terms of hierarchy. The military is tasked with appointing the Ministers of Defence, Border Affairs and Home Affairs within the nation, which provides General Min Aung Hlaing and the Tatmadaw with control of the majority of votes in the National Defence and Security Council: Human Rights Council, *Detailed Findings 2018* (n 32) 390 [1546].

[423] Kipgen, 'The 2020 Myanmar Election and the 2021 Coup' (n 367).

[424] *Prosecutor v Rutaganira (Judgment and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-95-C-T, 14 March 2005) [81]; Botte-Kerrison (n 369) 906.

[425] Botte-Kerrison and Vetlesen suggest that even indirect assistance could be required from figures of authority during instances of mass crimes: Botte-Kerrison (n 369) 905; Vetlesen (n 408) 529.

Council. If this was done, it is difficult to believe that the council could raise and discuss the issue, agree on methods forward and implement a solution (which, depending on the results of negotiations, could even include the organisation and deployment of troops) in the required time to cease the attacks on Rohingya villages before they were carried out. These attacks were carried out in a relatively short timeframe of approximately 1 year, from late 2016[426] to late 2017.[427]

For the purposes of outlining the lengthy timeline of procedures for a resolution of this nature, it is worth looking at the timeline of events from the situation in Darfur. This situation can be considered to have commenced in February 2003 when an insurgency against the government begun.[428] The first briefing on the matter in the UN Security Council was conducted in April 2004, followed by a resolution being reached in June 2004.[429] In September of that year, the parties to the conflict asked for the deployment of peacekeepers, which were authorised in April 2005 and deployed to Darfur in 2007.[430] While it is acknowledged that an entirely different situation would likely yield an entirely different timeframe of events, the Darfur example highlights that external actions of the international community are complex, lengthy and politically sensitive issues, leaving it difficult to state that such an action would impact the perpetration of the Tatmadaw's crimes.

Furthermore, it must be considered that, even if such an action could be agreed to and carried out within the required timeline, it remains purely speculative whether a resolution from the UN Security Council would cease the attacks on the Rohingya on Myanmar's territory. Major questions arise in relation to this point, such as whether, if engaged with peacekeeping forces, the Tatmadaw would still carry out violent acts toward the Rohingya population that caused the population to flee the region. This too provides further ambiguity to the determination that a call for external action would have stopped the Tatmadaw's attacks on civilians.

Once more, the further analysis of these elements has created more questions than it has answered. Again, the infancy of the ICC and lack of jurisprudence on aiding and abetting when such an obscure power dynamic exists has left this element with too much uncertainty to provide a determination. On the information available on the Court's approach at this stage, though, it does not seem likely that these elements would be met.

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[426] Human Rights Council, *Detailed Findings 2018* (n 32) [1069]–[1095]; Office of the High Commissioner for Human Rights, *Interviews with Rohingyas Fleeing from Myanmar Since 9 October 2016* (Report, 3 February 2017) 13–40 <https://www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf>.

[427] Human Rights Council, *Detailed Findings 2018* (n 32) 177 [750].

[428] Scott Straus, 'Darfur and the Genocide Debate' (2005) 84 *Foreign Affairs* 123; Mahmood Mamdani, 'Saviours and Survivors: Darfur, Politics, and the War on Terror' 14(2) (2009) *African Sociological Review* 110.

[429] SC Res 1547; UN Doc S/RES/1547 (11 June 2004).

[430] United Nations–African Union Hybrid Operation in Darfur, 'UNAMID Takes Over Peace Keeping in Darfur' (Press Release, 31 December 2007) <https://unamid.unmissions.org/31-december-2007-unamid-takes-over-peacekeeping-darfur>. See also Human Rights Watch, *Darfur 2007 Chaos by Design* (Report, 2007).

(c) Mens Rea

The final question to consider is the *mens rea* of aiding and abetting through omission proper. It is generally accepted that the *mens rea* for aiding and abetting by omission is the same as that for aiding and abetting by a positive act.[431] Given that an investigation concerning the principal offence is being undertaken by the Prosecutor of the ICC in relation to the *Rome Statute*, once more it is required that the defendant omitted to act with the purpose of facilitating the principal offence.[432]

In the same way that meeting the requirements for the *mens rea* of aiding and abetting through tacit approval and encouragement was considered problematic, it is hard to consider that Aung San Suu Kyi and the NLD would meet the heightened thresholds of the ICC on this point too. As discussed in much further depth in relation to the mental elements for the previous form of aiding and abetting, the deep power imbalance between the civilian government and the military[433] indicates the existence of a significant argument against this element being met. There is a strong argument that the purpose behind the NLD's failure to act against the Tatmadaw's human rights violations likely lies in the fear of repercussions for doing so—and not 'for the purpose of facilitating the commission of such crime'.[434]

The mental requirements of the ICTY and ICTR requiring the members of the NLD to possess *knowledge* that their conduct may assist in the commission of the Tatmadaw's crimes[435] could lead to a deeper and more contested discussion. But, given the heightened mental requirements of the ICC, it does not appear likely that the mental elements would be met for any action on this matter against the NLD that requires the defendant to have acted with the purpose of facilitating the principal offence.[436]

Ultimately, it does not appear that Aung San Suu Kyi and the members of the NLD would fall within the *Rome Statute*'s provisions concerning aiding and abetting. Although the requirements for aiding and abetting in the ICC at this stage currently appear ambiguous, it is difficult to argue that any of the requisite elements could be successfully met.

E *Outlook for the ICC Case*

Although it was determined that it was unlikely that any form of responsibility would be attributed to Aung San Suu Kyi and the members of the National League for Democracy, it appears likely that responsibility would be attributed for the principal offence. Most likely is the attribution of responsibility to mid- and high-level perpetrators.

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[431] *Prosecutor v Orić (Appeal Judgment)* (n 335) [43]; *Prosecutor v Blaškić (Appeal Judgment)* (n 334) [47].
[432] *Rome Statute* (n 11) art 25(3)(c); *Prosecutor v Bemba Gombo (Public Redacted Version of Judgment Pursuant to Article 74 of the Statute)* (n 323) [97].
[433] Human Rights Council, *Detailed Findings 2018* (n 32) 390 [1546].
[434] *Rome Statute* (n 11) art 25(3)(c).
[435] *Prosecutor v Mrkšić (Appeal Judgment)* (n 335) [102]; *Prosecutor v Blaškić (Appeal Judgment)* (n 334) [49].
[436] *Rome Statute* (n 11) art 25(3)(c); *Prosecutor v Bemba Gombo (Public Redacted Version of Judgment Pursuant to Article 74 of the Statute)* (n 323) [97].

The low- and mid-level perpetrators analysed were the individuals who were directly involved in the attacks on the ground and the individuals in charge of the low-level soldiers carrying out the attacks as the 'direct perpetrators'. According to the Human Rights Council's Fact-Finding Mission on Myanmar, the mid-level perpetrators are Major-General Maung Maung Soe (commanding officer of Western Command), Brigadier-General Aung Aung (commanding officer of the 33rd Light Infantry Division) and Brigadier-General Than Oo (commanding officer of the 99th Light Infantry Division). As this chapter has established, the mid-level perpetrators are likely to be found to meet the five requisite elements of crimes against humanity for deportation or forcible transfer, as outlined in the ICC's *Elements of Crimes*.[437]

The low-level perpetrators could, to a lesser extent, be considered likely to fall within the scope of article 7(1)(d), although the practical difficulties render these individuals less likely to be brought before the Court in practice. If heavy resources were to be utilised for investigation, including locating and interviewing these alleged perpetrators, these elements would likely be met. Although, when considering the Office of the Prosecutor's finite allocation of resources, and policy of focusing on higher level perpetrators,[438] it appears unlikely that the Court would shift its focus from the mid- and high-level perpetrators to do so.

These low- and mid-level individuals have been found by the Fact-Finding Mission on Myanmar to report directly to General Soe Win, the Deputy Commander-in-Chief, under Senior General Min Aung Hlaing,[439] who can be considered as high-ranking officers or 'military commanders'.[440] Article 28 of the *Rome Statute* covers the responsibility of commanders to control subordinates, in which the failure to undertake necessary and reasonable measures for crimes in the jurisdiction of the ICC is material.[441] Given the fact that General Soe Win and General Min Aung Hlaing were commanders of the mid-level perpetrators who are likely to be found guilty of committing crimes against humanity, it is highly likely that the Court would find that these two generals possessed the power to exercise control with regard to such crimes, yet failed to undertake any such measures.[442]

If the longstanding focus on individual criminal responsibility is relied upon,[443] then General Soe Win and General Min Aung Hlaing can be held responsible under this provision, along with the mid-level

[437] International Criminal Court, *Elements of Crimes* (n 18) art 7(1)(d). There is a minor space for contention concerning element 3, which concerns the establishment of the knowledge of the factual circumstance surrounding the lawfulness of the Rohingya's presence, although this is likely to be addressed through further research by the Prosecutor.
[438] See point 42 in Office of the Prosecutor of the International Criminal Court (n 231). See also Ferdinandusse and Whiting (n 231) 760–65.
[439] Human Rights Council, *Detailed Findings 2018* (n 32) 10 [52].
[440] *Rome Statute* (n 11) art 28.
[441] Ibid.
[442] Ibid art 28(a).
[443] And state responsibility could not be attributed for committing genocide.

perpetrators. This is in line with the ICC's focus on higher level perpetrators,[444] showing that, from the perspective of international criminal law, a verdict of this nature would be considered a great success.

If the ICC is able to deal with the individuals who 'appear to be most responsible for the identified crimes',[445] then this leads to further questions as to whether the attribution of state responsibility for crimes committed as part of the same humanitarian crisis is appropriate or necessary. For this reason, it becomes important to understand how a judgment against Myanmar in the ICJ[446] could provide a differing solution to the same humanitarian crisis, and whether that is even legally possible.

[444] See point 42 in Office of the Prosecutor of the International Criminal Court (n 231); Ferdinandusse and Whiting (n 231) 760–5.

[445] The internal policy paper states that such a focus may provide the requirement to 'consider the investigation and prosecution of a limited number of mid and high level perpetrators in order to build the evidentiary foundations for cases(s) against those most responsible'. See point 42 of Office of the Prosecutor of the International Criminal Court (n 231).

[446] For committing genocide.

V STATE RESPONSIBILITY: GENOCIDE IN THE INTERNATIONAL COURT OF JUSTICE

With the ICC's approach to the situation now identified, it is now relevant to examine the prospect of an action concerning state responsibility. This chapter will highlight the ways in which the ICJ could provide a differing solution to the humanitarian crisis than that achieved in the ICC.[1] In doing so, this chapter will answer the second research sub-question: C*an genocidal conduct be attributed to Myanmar in the ICJ, and if so what remedies may follow?*

To determine whether genocidal conduct be attributed to Myanmar and the potential remedies that may follow, there are a number of issues that must be addressed. In the order that these issues will be addressed, these are internationally wrongful act, attribution of responsibility and remedies.

Firstly, the existence of the internationally wrongful act of genocide will be assessed. The definition of genocide is outlined in article II of the *Genocide Convention*, which states:

> 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;
> 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.[2]

This section on internationally wrongful acts will begin by discussing the existence of two of these genocidal acts; the killing and causing and bodily mental harm of the Rohingya. Furthermore, genocide possesses high thresholds compared to other international crimes, due to the necessity of proving 'special genocidal intent'. To approach this delicately and in the depth required, genocidal acts and genocidal intent will be discussed as two different sections.

Secondly, is the discussion on the attribution of responsibility for the internationally wrongful act of genocide.[3] The way that such a case would be dealt with in the ICJ has been demonstrated in earlier instances

[1] Once the specifics on how each avenue of responsibility can impact the Rohingya situation are brought to light, whether the extension of state responsibility is appropriate or necessary can be discussed from the lens of state crime.
[2] *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art II ('*Genocide Convention*'); Guglielmo Verdirame, 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals' (2000) 49(3) *International & Comparative Law Quarterly* 578, 579.
[3] As seen in the *Bosnian Genocide Case*, the Court has been hesitant to attribute genocidal conduct to a state, indicating a high threshold for this element as well: *Application of the Convention on the Prevention and Punishment of the Crime*

of the ICJ's dealings with genocide,[4] in which the *Responsibility of States for Internationally Wrongful Acts* was applied.[5] The most relevant provision is article 4, which states:

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.[6]

Furthermore, the responsibility of states is not limited to situations where the entity is acting within its authority and instructions, which is clear in article 7:

> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.[7]

Given this, whether the Tatmadaw's actions can be considered the conduct of the state will be the primary discussion point of this section.[8]

Thirdly, is the question concerning what remedies would result from such an action.[9] To engage in future discussion on the appropriateness of state responsibility for committing genocide, it is important to explain the remedies that the ICJ would actually provide.[10]

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of Genocide (Bosnia and Herzegovina v Serbia and Montenegro (Judgment) [2007] ICJ Rep 4, [415] ('*Bosnian Genocide Case*').

[4] *Bosnian Genocide Case* (n 3) [173].

[5] A state is essentially considered to be responsible for an internationally wrongful act if the entity or individual carrying out the act is considered to be an 'organ of a state': *Resolution on the Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN Doc A/RES/56/83 (12 December 2001); James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) 118; Marina Spinedi, 'State Responsibility v. Individual Responsibility for International Crimes: Tertium Non Datur?' (2002) 13(4) *European Journal of International Law* 895, 898.

[6] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 4.

[7] Ibid art 7.

[8] This section will also involve a discussion on whether it is legally possible to attribute state responsibility for failing to uphold its obligations to not commit genocide, as opposed to failing to prevent and punish genocide.

[9] This is important for the overarching discussion, as the outcomes need to be clearly understood. As the ICJ has not found any state to have committed genocide in the past, there is some degree of confusion in this area. For example, it has been argued state responsibility is inappropriate due to criminalising a state and the negative impact this may have on its population. Supporting these arguments is the discussion in *Streletz, Kessler and Krenz v Germany*, in which it was suggested that a state's involvement in many instances of such crimes often reaches far deeper than an individual, or a group of individuals. As a result, it would be inappropriate to consider that individual liability is the only appropriate way of dealing with offences amounting to state crime: Steven Freeland, 'A Prosecution too Far? Reflections on the Accountability of Heads of State Under International Criminal Law' (2010) 41 *Victoria University of Wellington Law Review* 179; Frederic Megret, 'State Responsibility for Aggression: A Human Rights Approach' (2017) 58 *Harvard Journal of International Law* 62; *Streletz, Kessler and Krenz v Germany* (34044/96) [2001] ECR.

[10] The previously established decisions of the Court are noted—as of writing, the Court has rejected Myanmar's objections concerning preliminary issues. As discussed in detail in Chapter III, these issues relating to jurisdiction and standing have already been dealt with, and the Court is proceeding with the merits of the case. As a result, these

With these points in mind, this chapter will adopt the following structure:

A *Internationally Wrongful Act: Genocidal Acts*
B *Internationally Wrongful Act: Special Genocidal Intent*
C *Attribution: State Responsibility for Committing Genocide*
D *Remedies*
E *Outlook for the ICJ Case*

A *Internationally Wrongful Act: Genocidal Acts*

Article II of the *Genocide Convention* lists the five 'acts' that constitute genocide.[11] Within the context of the case against Myanmar, the most relevant acts appear to be 1) Killing members of the group, and 2) Causing serious bodily or mental harm to members of the group.[12] For these acts to be considered 'genocidal acts', they must also be carried out against a protected group.[13]

1 *Genocide by Killing*

The act of killing members of a group requires one or more persons to be killed who were chosen by the perpetrator for the sole reason of their membership of a group.[14] It is for this reason that the indiscriminate nature of the killing of the Rohingya becomes relevant.

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preliminary issues that have already been addressed by the Court will not be discussed any further: *Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v Myanmar) (Judgment)* [2022] ICJ Rep 178, [114] ('*The Gambia v Myanmar (Judgment)*').

[11] The five genocidal acts are: a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group. *Genocide Convention* (n 2) art II; Devrim Aydin, 'The Interpretation of Genocidal Intent Under the Genocide Convention and the Jurisprudence of International Courts' (2014) 78(5) *Journal of Criminal Law* 423, 425; Verdirame (n 2) 579.

[12] To assert that the situation at hand involves the crime of genocide is a strong assertion to make, requiring not only physical elements to be met, but also the establishment of special 'genocidal' intent. The genocidal acts of killing and physical and mental harm will first be analysed and if these 'genocidal acts' can be established, the requisite mental intent behind such attacks will then be addressed.

[13] *Genocide Convention* (n 2) art II; Claus Kreß, 'The Crime of Genocide Under International Law' (2006) 6(4) *International Criminal Law Review* 461, 473–9; Payam Akhavan, 'The Crime of Genocide in the ICTR Jurisprudence' (2005) 3(4) *Journal of International Criminal Justice* 989, 999; Kurt Mundorff, 'Other Peoples' Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)' (2009) 50 *Harvard International Law Journal* 61, 84.

[14] This has been expanded upon in *Prosecutor v Akayesu*, in which the requirements are further articulated. The Tribunal held the acts can be committed against one or several individuals, and that the acts need to be carried out on the basis that the individuals were members of the protected group. The Tribunal further highlighted the perpetrator's choice of victim, suggesting that a victim chosen on the basis of their own individual identity would not suffice. The victim needs to be chosen by the perpetrator for the sole reason of their membership of a group to constitute the crime of genocide: *Prosecutor v Akayesu (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No

Within the 2018 Fact-Finding Mission's summary of mass killing by the Tatmadaw, which was based upon interviews with survivors and witnesses, it found that, particularly from 25 August 2017, Rohingya men, women and children were indiscriminately killed at the hands of the Tatmadaw.[15] These reports outline the manner in which this occurred, stating that Rohingya villages were approached by the 33rd and 99th Light Infantry Divisions without warning.[16] Most often, these units approached the villages from more than one angle and fired from their assault rifles in the direction of the villages.[17] Most relevant to the current discussion is the fact that these units were reported to have fired from a distance, not aiming at any specific military objectives, nor ARSA members.[18] Shots were aimed at everyone in the village, including men, women and children. Those attempting to flee were also shot at.[19]

The indiscriminate nature of the killings becomes further evident when taking into account the witness reports that the Human Rights Council gathered throughout the Fact-Finding Mission. For example, a young girl stated:

> When the soldiers came to my village, we all ran, and they shot at us. We were around 50 people, and maybe half of us were shot. The people shot fell down while they were running. Some died and some escaped. Somehow, I escaped.[20]

Another report from a victim describes the indiscriminate nature of shooting at the Rohingya who were fleeing:

> I don't know how many people died that day. The military, they were just shooting at whomever. They were shooting at people whenever they saw them, on the streets or in the houses. When they were shooting, there was no time to look back and care for those who were shot. As people were running, they were shooting at them. That is how my daughter died. She was hit fleeing. I couldn't go back and carry her.[21]

Upon these facts, it becomes reasonable to argue that the sole reason that the individuals were targeted was that they were members of the Rohingya group.[22] Arriving at a known Rohingya village and shooting automatic weapons indiscriminately upon all men, women and children, with no attempt to differentiate civilians from any apparent military objective or combat adversary, should undoubtably be considered to meet the requirements of this element. There is no evidence to suggest the individuals who were killed were

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ICTR-96-4-T, 2 September 1998) [521]; *Prosecutor v Gatete (Judgment*) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-2000-61-T, 31 March 2011) [584]; Mundorff (n 13) 86.

[15] Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/39/CRP.2 (17 September 2018) 354 [1394]–[1395] ('*Detailed Findings 2018*').

[16] Ibid 207 [884].

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Ibid 207 [885].

[21] Ibid 207 [888].

[22] *Prosecutor v Akayesu (Judgment)* (n 14) [521]; *Prosecutor v Gatete (Judgment*) (n 14) [584].

known by the perpetrators prior to the attacks on a personal basis; the victims were simply chosen due to their presence within a Rohingya village.

2 *Genocide by Causing Serious Bodily or Mental Harm*

Genocide by causing serious bodily mental harm requires harm to be inflicted on one or more persons. Conduct in this form can include acts of torture, rape, sexual violence or inhumane or degrading treatment.[23]

As the Fact-Finding Mission on Myanmar reported, the rape of the Rohingya was a 'gruesome feature' of all major incidents taking place as part of the Tatmadaw's clearance operations.[24] The Fact-Finding Mission details the widespread nature of both rape and gang rape perpetrated towards the Rohingya women, which was suggested to have occurred throughout the region during the attacks on Rohingya villages, with 10 village tracts in three different townships reporting similar descriptions. According to these reports, the rape of the Rohingya women occurred frequently and on a large scale, in locations such as houses, military compounds and police compounds.[25] These instances of rape were also accompanied by violence that was inflicted during such actions, which, according to the Fact-Finding Mission, often caused serious bodily harm. Various methods were outlined in the report, such as severe biting, scarring of the face, scarring of the breasts, scarring of the thighs and genitalia, and mutilation of the reproductive organs.[26]

When assessing these accounts of rape and sexual violence alongside similar situations that were found at international criminal law to have resulted in serious bodily harm, there is no doubt that the victims of the Tatmadaw's actions would be considered comparable. One example is the case of *Prosecutor v Gacumbitsi*, which dealt with the rape of Tutsi women and girls in Rwanda.[27] In this case, the Chamber found that the instances of rape alone perpetrated against the Tutsi females amounted to serious bodily harm, rendering the accused, Gacumbitsi, responsible for genocide.[28] It is hard to consider that the brutal and widespread raping of the Rohingya involving multiple different means of physical harm through beatings, burning, biting and stabbing would be treated any differently when tested in Court.

Furthermore, the extreme circumstances that were forced upon the Rohingya women and girls during the clearance operation should certainly be considered to have resulted in 'more than a minor or temporary

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[23] *Akayesu* provides context concerning the scope of the terms 'rape' and 'sexual violence'. In this instance, rape is defined as a 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive', and sexual violence is 'not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact': *Prosecutor v Akayesu (Judgment)* (n 14) [688]. See also Nema Milaninia, 'Understanding Serious Bodily or Mental Harm as an Act of Genocide' (2018) 51(5) *Vanderbilt Journal of Transnational Law* 1381, 1384–97; Lisa Sharlach, 'Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda' (2000) 22(1) *New Political Science* 89; Verdirame (n 2) 595.

[24] Human Rights Council, *Detailed Findings 2018* (n 15) 397 [1496].

[25] Ibid 397 [1496].

[26] Ibid 355 [1397].

[27] *Prosecutor v Gacumbitsi* (*Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-2001-64-T, 17 June 2004) [291]–[293].

[28] Ibid.

impairment of mental faculties',[29] leaving it more than arguable that the victims also suffered serious mental harm.

3 *Protected Group*

Within the definition set out in article II of the *Genocide Convention*, genocide refers to specific acts with intent to destroy, in whole or in part, a *national, ethnical, racial or religious group*.[30] These identified groups have become what is referred to as 'protected groups', and the victims of the acts in question must be identified as one as a component of the crime of genocide.[31] This leads to the question whether the Rohingya would be considered a protected group in this sense.

Of these categories, the strongest arguments lie with the Rohingya being considered an 'ethnic group', the definition of which was outlined in the ICTR case of *Prosecutor v Akayesu.*[32] In this case, the Court stated that an 'ethnic group' would be considered 'as a group whose members share a common language or culture'.[33] This definition was reiterated in the case of *Prosecutor v Kayishema*, which further clarified the meaning of ethnic group, with the addition of the self-identification and identification of others principles:[34] '[a]n ethnic group is one whose members share a common language and culture; or a group which

[29] *Prosecutor v Emmanuel Rukundo* (*Trial Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-2001-70-T, 27 February 2009) [386].

[30] *Genocide Convention* (n 2) art II; Cécile Aptel, 'The Intent to Commit Genocide in the Case Law of the International Criminal Tribunal for Rwanda' (2002) 13(3) *Criminal Law Forum* 273, 283; Agnieszka Szpak, 'National, Ethnic, Racial, and Religious Groups Protected Against Genocide in the Jurisprudence of the Ad Hoc International Criminal Tribunals' (2012) 23(1) *European Journal of International Law* 155, 157; William Schabas, 'Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunals for Rwanda' (2000) 6(2) *ILSA Journal of International & Comparative Law* 375; Filip Strandberg Hassellind, 'Groups Defined by Gender and the Genocide Convention' (2020) 14(1) *Genocide Studies and Prevention* 60, 63; Verdirame (n 2) 588.

[31] *Prosecutor v Tolimir (Appeal Judgment)* (International Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-88/2-A, 8 April 2015) [182]. Further clarifying this requirement is the case of *Prosecutor v Karadžić*, in which the protected group, for the purposes of the ICTY (which follows the same definition of genocide as the *Genocide Convention*) was discussed. Within this discussion, the Tribunal found that this definition required a 'particular positive identity'; a destruction of various individuals who did not fall within a distinct group (in this case, 'non-Serbs') would not be considered the destruction of a 'protected group'. Based on this, the Tribunal suggested that a 'case-by-case basis' approach should be taken to determine whether a group of individuals could be considered to fall within one, or more than one, of these categories: *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-5/18-T, 24 March 2016) [541]; *Statute of the International Criminal Tribunal for the Former Yugoslavia* (as Amended on 17 May 2002; SC Res 808/1993, 827/1993, 25 May 1993) art 4(2).

[32] *Prosecutor v Akayesu (Judgment)* (n 14) [513].

[33] Ibid.

[34] *Prosecutor v Kayishema (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [98]; Szpak (n 30) 165; Strandberg Hassellind, 'Groups Defined by Gender and the Genocide Convention' (n 30) 64; Akhavan (n 13) 1001.

distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crime (identification by others)'.[35]

The Rohingya population were originally Arabic traders who arrived in Arakan (now named Rakhine State) in the 8th century, with the population gradually migrating to the region over time.[36] The group has its own customs and language that are distinct from those of other groups in the region, as outlined by the UN High Commissioner for Refugees.[37] To establish whether this group constitutes a protected 'ethnic group' for the purposes of the *Genocide Convention*, three factors will be considered: 1) sharing a common language,[38] 2) sharing a common culture,[39] 3) self-identification by the group as an ethnic group.[40]

Firstly, the common language indicates that the Rohingya are an 'ethnic group'.[41] The Rohingya group have their own language known as 'Ruáingga', which is an Indo-Aryan language that is similar, although different to, the dialect of the Bengali group from the Chittagong region.[42]

Secondly, the common culture and customs of the Rohingya allow it to be distinguished as an ethnic group.[43] As the group consists predominantly of Muslims, these individuals strictly follow Islamic law, creating dietary requirements that the group adheres to, such as the refusal to consume pork, crab, tortoise and alcohol.[44] The Rohingya group have customs concerning an individual's name; the individuals do not have surnames, nor do the names change upon marriage. Furthermore, the Rohingya often have two names: a Muslim name[45] as well as a Burmese name.[46] In regard to dress, art and poetry, Rohingya women wear head or face-covering veils, along with painting skin with henna paste for ceremonies of importance such as

[35] *Prosecutor v Kayishema (Judgment)* (n 34) [98]. Analysing all of the ad hoc-tribunal's jurisprudence on the issue, Szpak has found that a mixture of both approaches is taken—self-identification within the group (self-identification), and perception of the perpetrators (identification of others). However, it is worth noting that some, such as Schabas, advocate an objective-only approach: Szpak (n 30) 173; Schabas, 'Groups Protected by the Genocide Convention' (n 30) 384.

[36] Sanzhuan Guo and Madhav Gautam, 'Stateless Rohingyas in Bangladesh and Refugee Status: Global Order and Disorder under International Law' in Leon Wolff and Danielle Ireland-Piper (eds), *Global Governance and Regulation: Order and Disorder in the 21st Century* (Routledge 2018) 83, 84.

[37] UN High Commissioner for Refugees, *Culture, Context and the Mental Health of Rohingya Refugees* (Report, 2018) 19 <https://www.unhcr.org/5bbc6f014.pdf>.

[38] *Prosecutor v Emmanuel Rukundo* (*Trial Judgment)* (n 29) [386].

[39] Ibid.

[40] *Prosecutor v Kayishema (Judgment)* (n 34) [98].

[41] *Prosecutor v Akayesu (Judgment)* (n 14) [513].

[42] UN High Commissioner for Refugees (n 37); Alvin Tay et al, 'The Culture, Mental Health and Psychosocial Wellbeing of Rohingya Refugees: A Systematic Review' (2019) 28 *Epidemiology and Psychiatric Sciences* 489, 492; 'Rohingya Language', *The Rohingya Post* (online, 30 August 2012) <https://www.rohingyapost.com/rohingya-language/>.

[43] Iqthyer Uddin Md Zahed and Bert Jenkins, 'The Politics of Rohingya Ethnicity: Understanding the Debates on Rohingya in Myanmar' (2022) 42(1) *Journal of Muslim Minority Affairs* 117, 120–1.

[44] UN High Commissioner for Refugees (n 37) 20.

[45] For the majority of Rohingya who identify as Muslim.

[46] UN High Commissioner for Refugees (n 37) 20.

weddings. Poems and songs known as *tarana* are recited to 'keep alive the history and preserve the collective identity'.[47]

Thirdly, the further definition in *Prosecutor v Kayishema* provides a broader construction of the term, by including groups that distinguish themselves through 'self-identification'.[48] The term 'Rohingya' is not accepted by the government of Myanmar—the term is used by the group itself to self-identify as a minority ethnic group in Myanmar.[49]

Overall, it seems more than likely that the Rohingya would be considered an ethnic group, due to the sharing of a common language and culture, as well as the self-identification of the group as an ethnic group. The main argument that exists from Myanmar's perspective is that the Rohingya are not a separate ethnic group, as they are Bengali. The problem with this, however, is that the Rohingya are clearly distinguishable from the Bengali in the three areas discussed above, and even if this was not found to be the case, 'Bengalis in Myanmar' would still be likely to be considered a protected group.

B *Internationally Wrongful Act: Special Genocidal Intent*

With respect to the intention to destroy a protected group, the intention required differs from many other mental elements of criminal law in the sense that specific, or 'special', intent is required.[50]

This requirement was stressed in the *Bosnian Genocide Case*, in which the ICJ stated that the finding of the existence of the crime of genocide requires a 'very high' standard, which requires 'specific intent' or '*dolus specialis'* to be present.[51] This strong position ultimately requires the clear intent to destroy[52] the protected group. The offender must have known, or should have known, that the genocidal act would result in the

[47] Ibid.

[48] *Prosecutor v Kayishema (Judgment)* (n 34) [98].

[49] Guo and Gautam (n 36) 86.

[50] *Bosnian Genocide Case* (n 3) [187]; Otto Triffterer, 'Genocide, Its Particular Intent to Destroy In Whole or In Part the Group As Such' (2001) 14(2) *Leiden Journal of International Law* 399, 403–6; Kai Ambos, 'What Does "Intent to Destroy" in Genocide Mean?' (2009) 91 *International Review of the Red Cross* 833, 837; Janine Clark, 'Elucidating the Dolus Specialis: An Analysis of ICTY Jurisprudence on Genocidal Intent' (2015) 26(3) *Criminal Law Forum* 497; Paul Behrens, 'Genocide and the Question of Motives' (2012) 10 (3) *Journal of International Criminal Justice* 501, 506–9; Akhavan (n 13) 992.

[51] *Bosnian Genocide Case* (n 3) [187]. Clarifying this, the Court suggested that: 'It is not enough that the members of the groups are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part.' This position is based upon the previous ICTR case of *Prosecutor v Akayesu*, which provides further clarification about the form of intention that is required to establish 'genocidal intent': 'Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group"': *Prosecutor v Akayesu (Judgment)* (n 14) [498], [517]–[522]; Aydin (n 11) 430.

[52] In whole or in part.

destruction of the particular group,[53] in whole or in part.[54] Furthermore, this high standard is exacerbated by the ICJ's approach of following the 'only reasonable inference' test. As stated by the Court,

> The dolus specialis, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent. [55]

In determining whether there was an intent to destroy the group, one of two criteria must be met: firstly, the intention to destroy a community in its entirety in a specific geographical region[56] and secondly, the intention to destroy a substantial part of the group.[57] When considering these requirements, relevant factors can include the geographical location of the group and the significance of the members of the group who have been targeted.[58] It is noted that genocide through destruction of culture is not included in this definition—it needs to be physical/biological destruction of the group.[59]

In addressing the 'intent to physically destroy' prong of genocidal intent, this section will begin by exploring the factors genocidal intent can be inferred from.[60] Secondly, this section will move to discussing whether the intent behind the attacks was to destroy the group or remove it from its territory. Finally, this section will address the 'in whole or in part' prong of genocidal intent by considering whether the victims make up a 'substantial' part of the group.

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[53] *Prosecutor v Akayesu (Judgment)* (n 14) [498], [517]–[522]; *Prosecutor v Musema (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-T, 27 January 2000) [164]; *Prosecutor v Rutaganda (Judgment)* (n 316) [59].

[54] *Genocide Convention* (n 2) art II. This requires a 'significant or substantial' part of the group to be targeted, and this part needs to be 'sufficiently large to impact the group as a whole': *Prosecutor v Kayishema (Judgment)* (n 34) 44. See *Bosnian Genocide Case* (n 3) 126; Catherine Renshaw, 'The Numbers Game: Substantiality and the Definition of Genocide' (2021) *Journal of Genocide Research* (advance), 8; Triffterer (n 50) 399–408; Kjell Anderson, 'Judicial Inference of the "Intent to Destroy": A Critical, Socio-Legal Analysis' (2019) 17(1) *Journal of International Criminal Justice* 125; William Schabas, 'The Jelisić Case and the Mens Rea of the Crime of Genocide' (2001) 14(1) *Leiden Journal of International Law* 125, 129; Ambos, 'What Does "Intent to Destroy" in Genocide Mean?' (n 50) 834.

[55] *Bosnian Genocide Case* (n 3) [373].

[56] *Bosnian Genocide Case* (n 3) [32]–[37]; Renshaw (n 54) 8.

[57] *Genocide Convention* (n 2) art II; Renshaw (n 54) 8.

[58] See Behrens' 'functional approach': Paul Behrens, 'The Crime of Genocide and the Problem of Subjective Substantiality' (2016) 59 *German Yearbook of International Law* 321, 331; Renshaw (n 54) 10.

[59] *Bosnian Genocide Case* (n 3) [198]. Schabas explains that, although the 1947 and 1948 drafts of the Convention included provisions including cultural genocide, the text of the adopted convention only lists acts of physical or biological destruction: William Schabas, *Genocide in International Law* (Cambridge University Press, 2009) 271. See also Douglas Singleterry, '"Ethnic Cleansing" and Genocidal Intent: A Failure of Judicial Interpretation?' (2010) 5(1) *Genocide Studies and Prevention* 39, 58.

[60] *Prosecutor v Akayesu (Judgment)* (n 14) [523]–[524]; Anderson (n 54) 128.

1 *Inferring Genocidal Intent*

Firstly, is the factors genocidal intent can be inferred from, which can indicate the intent to physically destroy[61] the protected group.

The high thresholds of the mental element for genocide and the difficulties that follow were discussed in *Akayesu*, where the ICTR stated that 'intent is a mental factor which is difficult, even impossible to determine'.[62] To combat this major difficulty, various past cases from ad-hoc tribunals have suggested that this special intent can be inferred from circumstantial evidence.[63]

Akayesu listed a number of factors that intent could be inferred from, in the absence of a confession from the accused.[64] These factors include 'the general context of the perpetration of other culpable acts systematically directed against that same group', 'the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups', and 'the general political doctrine which gave rise to the acts; the repetition of destructive and discriminatory acts'.[65]

These factors can be used to show the general context of the situation, which can be used to indicate the existence of 'special' genocidal intent, although some cases have restricted the use of inference to purposeful words and deeds.[66] It is noted that the ICJ's high standard of the only reasonable inference test is required; evidence must point toward genocidal intent as the only reasonable inference.[67]

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[61] *Genocide Convention* (n 2) art II.

[62] *Prosecutor v Akayesu (Judgment)* (n 14) [523]–[524]; Akhavan (n 13) 997; Verdirame (n 2) 584.

[63] *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 31) [550], [2592]; *Prosecutor v Popovic (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-A, 30 January 2015) [468]; *Prosecutor v Hategekimana (Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-00-55A-A, 8 May 2012) [133].

[64] *Prosecutor v Akayesu (Judgment)* (n 14). Furthermore, the Tribunal in *Prosecutor v Rutaganda* held that intent can be 'Inferred from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by the Accused': *Prosecutor v Rutaganda (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-3-T, December 6, 1999) [61]–[63], [167]. Similarly, in *Prosecutor v Semanza*, the Tribunal stated that '[a] perpetrator's mens rea may be inferred from his actions': *Prosecutor v Semanza* (*Judgment and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20, 15 May 2003) [313].

[65] *Prosecutor v Akayesu (Judgment)* (n 14) [523]–[524]; *Prosecutor v Musema (Judgment)* (n 53) [166]; Akhavan (n 13) 997; Aptel (n 30) 287; Verdirame (n 2) 585.

[66] The Chamber in Bagilishema attempted to restrict the use of inference to the accused's purposeful words and deeds, stating: 'evidence of the context of the alleged culpable acts may help the Chamber to determine the intention of the Accused, especially where the intention is not clear from what that person says or does. The Chamber notes, however, that the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the Accused. The Chamber is of the opinion that the Accused's intent should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action': *Prosecutor v Bagilishema (Judgment*) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-95-1A-T, 7 June 2001) [63].

[67] *Bosnian Genocide Case* (n 3) [373].

(a) Systematic Targeting of the Rohingya

The systematic targeting of victims on account of their membership of a particular group can indicate the general context for establishing genocidal intent.[68]

The Fact-Finding Mission has established that the clearance operations, which resulted in over 10,000 deaths, occurred in more than 54 separate locations, with a further suspected 22 locations.[69] These reports describe the general nature of the attacks in most locations, describing how Tatmadaw units would approach each village from different angles, firing indiscriminately at any individual present within the village.[70] These acts were carried out across three overall townships, all displaying patterns of similar conduct. The Fact-Finding Mission on Myanmar indicates that the attacks on Rohingya were not carried out in isolation; they were a part of a pre-planned offensive with a recognisable and consistent modus operandi.[71]

Furthermore, the timing, sequence of events, coordination of roles and division of roles between the different perpetrators, along with the form of attacks carried out, featured a sense of 'remarkable similarity', indicating a high degree of planning and organisation.[72] The types of weapons along with the methods used by the Tatmadaw's direct perpetrators have been reported to be consistent across attacks in the 2017 clearance operations, which the Fact-Finding Mission describes as 'strikingly consistent'.[73] As the Fact-Finding Mission suggests:

> The 'clearance operations' were not planned and executed by an isolated cell of soldiers but the army as a whole. The implication of multiple levels of military command in an operation can evidence the systematic nature of the culpable acts and an organized plan of destruction.[74]

These systematic attacks were carried out against the victims in an indiscriminate manner—the only consistent factor between the victims chosen is that they were located within known Rohingya villages.[75]

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[68] *Prosecutor v Akayesu (Judgment)* (n 14) [523]–[524]; Akhavan (n 13) 997; Aptel (n 30) 287; Verdirame (n 2) 585.
[69] Human Rights Council, *Detailed Findings 2018* (n 15) 354 [1395].
[70] According to the Fact-Finding Mission, the clearance operations involved the following actions targeted towards the Rohingya. The first was the burning of Rohingya houses and villages, which occurred throughout the various attacks. It became commonplace for the Tatmadaw to burn villages to the ground at the end of their attacks, and many instances of this involved the burning of houses with Rohingya locked inside. There are multiple reports of incidents including rape, torture, beatings and sexual violence, which were 'hallmarks' of the Tatmadaw's operations against the Rohingya. The killing was part of a 'package' that comprised a variety of differing methods of causing harm to the Rohingya population. Human Rights Council, *Detailed Findings 2018* (n 15) [884], [924], [1394]–[1395].
[71] Ibid 363 [1429]. Contextual evidence of a modus operandi is considered a factor relevant to determining genocidal intent: *Prosecutor v Jelisić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-10-A, 5 July 2001) [47]; *Prosecutor v Akayesu (Judgment)* (n 14) [523]; *Prosecutor v Kayishema (Judgment)* (n 34) [93], [289], [534]–[535], [537]; *Prosecutor v Muhimana* (*Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-95-1B-T, 28 April 2005) [496].
[72] Human Rights Council, *Detailed Findings 2018* (n 15) 363 [1429].
[73] Ibid.
[74] Ibid 564 [1430].

(b) General Political Doctrine Which Gave Rise to the Acts

Another indicator of intent to eliminate the Rohingya exists in the form of the plans and policies of the government and the Tatmadaw with regard to the ethnic composition of Rakhine State.[76]

The government of Myanmar has expressed great concern about the presence of Rohingya in Rakhine State. For example, there are national laws that have the effect of attempting to alter the ethnic composition of the region, as can be seen by the restriction on marriage and birth on Rohingya residing in Rakhine State. From 2005, a discriminatory two-child policy was placed upon only the Rohingya in Rakhine State, with no such policy being implemented with regard to the ethnic Rakhine, or other ethnic groups.[77] In order for Rohingya couples to marry, official approval had to be obtained, which involved a written declaration that the couple would not have more than two children.[78] This was enforced by Myanmar's border force, the Na Sa Ka, up until its disbanding in 2013, when the police assumed these duties.[79]

From a practical standpoint, this intention to alter the demographic composition of the state can also be seen in the government's construction of 'model villages', which have been erected over the past 30 years.[80] Through this, the ethnic Rakhine, along with other non-Rohingya citizens of the Buddhist faith, have constantly been resettled into the region.[81] The Fact-Finding Mission has noted the reconstruction of the various regions where the clearance operations took place and the Rohingya villages were once located, as well as the planned relocation of other ethnic groups to the reconstructed villages.[82] Taken together, this

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[75] The indiscriminate nature of the attacks was discussed in depth above in Section A 'Genocidal Acts Against a Protected Group'.

[76] As suggested in *Akayesu*, an indicator is 'the general political doctrine which gave rise to the acts; the repetition of destructive and discriminatory acts': *Prosecutor v Akayesu (Judgment)* (n 14) [523]–[524]. See also Verdirame (n 2) 585.

[77] Human Rights Council, *Detailed Findings 2018* (n 15) 112 [1461]–[1471]; 'Burma: Revoke "Two-Child Policy" for Rohingya', *Human Rights Watch* (Web Page, 28 May 2013) <https://www.hrw.org/news/2013/05/28/burma-revoke-two-child-policy-rohingya>; 'Two-Child Policy Violates Human Rights of Myanmar's Rohingya Muslims—UN Expert', *UN News* (Web Page, 31 May 2013) <https://news.un.org/en/story/2013/05/441112>; Salman Sohel, 'The Rohingya Crisis in Myanmar: Origin and Emergence' (2017) 2 *Saudi Journal of Humanities and Social Sciences* 1007, 1012.

[78] Human Rights Council, *Detailed Findings 2018* (n 15) 112 [1461]–[1471]. See also 'Burma: Revoke "Two-Child Policy" for Rohingya' (n 77).

[79] Ibid.

[80] Human Rights Council, *Detailed Findings 2018* (n 15) 112 [1461]–[1471]; 'With Rohingya Gone, Myanmar's Ethnic Rakhine Move into New Muslim-Free "Buffer Zone"', *South China Morning Post* (online, 17 March 2018) <https://www.scmp.com/news/asia/southeast-asia/article/2137575/rohingya-gone-myanmars-ethnic-rakhine-move-new-muslim-free>; Human Rights Watch, *Discrimination in Arakan* (Report, 2000) <https://www.hrw.org/reports/2000/burma/burm005-02.html>; Nehginpao Kipgen, 'Conflict in Rakhine State in Myanmar: Rohingya Muslims' Conundrum' (2013) 33(2) *Journal of Muslim Minority Affairs* 298.

[81] Ibid.

[82] Ibid.

further highlights the government of Myanmar's, along with the military's, intention to alter the demographic composition of the region.[83]

Between the systematic targeted attacks and the general political doctrine, it becomes evident that the Rohingya were targeted as part of an organised plan of destruction. The fact that multiple, pre-planned, systematic attacks were carried out on Rohingya villages, in which the victims were chosen indiscriminately, leaves no reasonable inference[84] outside of the reasoning that the Tatmadaw had chosen their targets based upon their membership of the Rohingya group.

2 *Intent to 'Destroy' the Group, or Remove from Territory?*

Secondly, is the question as to whether the intent behind the attacks was to destroy the group or remove the group from the territory.[85]

At this point, the arguments clearly show that the Rohingya were specifically targeted by the Tatmadaw, against a backdrop of a political doctrine to alter the ethnic composition of Rakhine State. But the high threshold of genocidal intent requires one further step—the intent to 'destroy' the group.[86] The important issue that arises from this is the fact that the attacks could be argued to only constitute 'ethnic cleansing', without genocidal intent. For this reason, the way in which ethnic cleansing and genocide fit within each other and how this impacts a finding of genocidal intent need to be addressed before a determination on this point can be made.

Generally speaking, the concept of ethnic cleansing is 'the expulsion of an "undesirable" population from a given territory due to religious or ethnic discrimination, political, strategic or ideological considerations, or a combination of these'.[87] With respect to the establishment of genocidal intent, the basic understanding of ethnic cleansing is insufficient. On its own, the horrific nature of killing, torture and rape that causes the population to 'disperse and lose the ability to reconstitute' does not meet the requirements of genocidal intent.[88]

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[83] Furthermore, Green and Ward are of the view that new economic zones will be built upon land that was previously owned by the Rohingya, as burnt land becomes under government control. Although, this remains speculation at this point. Penny Green and Tony Ward, *State Crime and Civil Activism: On the Dialectics of Repression and Resistance* (Routledge 2019) 199.

[84] *Bosnian Genocide Case* (n 3) [373].

[85] As removing the group from Myanmar's territory would not show intention to 'physically destroy' the group. *Genocide Convention* (n 2) art II.

[86] *Bosnian Genocide Case* (n 3) [188], citing *Prosecutor v Kupreskic (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [636]; Ambos, 'What Does "Intent to Destroy" in Genocide Mean?' (n 50) 834; Triffterer (n 50) 399–408; Anderson (n 54); Schabas, 'The Jelisić Case and the Mens Rea of the Crime of Genocide' (n 54) 129; Renshaw (n 54) 8.

[87] Andrew Bell-Fialkoff, 'A Brief History of Ethnic Cleansing' (1993) 72(3) *Foreign Affairs* 110; Singleterry (n 59) 44.

[88] Renshaw cites *Prosecutor v Stakic*, which found that there is a significant distinction between the 'mere dissolution of a group' and its physical destruction: Renshaw (n 54) 8, citing *Prosecutor v Stakic* (*Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003) [519].

But that is not to say that the existence of ethnic cleansing indicates that genocidal intent is not present. While it is not sufficient on its own, the existence of ethnic cleansing may form part of a finding of genocidal intent.[89] This is supported by the ICTY case of *Karadzic*[90] and later in *Brđanin*, in which the Court stated that 'ethnic cleansing may under certain circumstances ultimately reach the level of genocide'.[91] Most relevant to the situation at hand is the ICJ's approach to the issue. In the *Bosnian Genocide Case*, the ICJ determined that ethnic cleansing may amount to genocide in instances in which the cleansing is carried out with the intent to destroy the group—as opposed to removing it from the region.[92]

This leaves one important question involving the extent of the ethnic cleansing: were the attacks carried out with the aim of removing the Rohingya from the region, or with the aim of destroying the group? To answer this question, there are many pieces of evidence that indicate the intent could be to destroy the group.

Firstly, there are reports of the language used by the Tatmadaw units who were the direct perpetrators, which highlight that the attacks were directed towards the Rohingya. Interviews that the Human Rights Council's Independent Fact-Finding Mission on Myanmar conducted with the survivors of the clearance operations detailed the language used by the Tatmadaw and security force soldiers when carrying out the attacks on the Rohingya villages, which highlights the intent of the direct perpetrators at the time. Phrases such as 'You don't belong here', 'We will kill you all', and 'You are Bengali' were constantly used during the attacks,[93] highlighting the intent of the individuals carrying out the attacks to remove the Rohingya from the region. In one interview, a female gang rape survivor reported a Tatmadaw soldier saying: 'We are going to kill you this way by raping. We are going to kill Rohingya, we will rape you. This is not your country.'[94]

Secondly, the rhetoric spread amongst the population of Rakhine State in the time leading up to the clearance operations can be seen in a public speech in the year prior to their commencement. At this time, the Chair of the Peace and Diversity Party, Nay Myo Wai, gave a speech at a rally at a football ground in Yangon, which

[89] According to Singleterry: 'The "intent to destroy" can manifest in many ways. "Ethnic cleansing" might demonstrate such intent, and when accompanied by a prohibited act such as killing, a finding of genocide should be judicially permitted.' Singleterry (n 59) 59.

[90] In *Prosecutor v Karadzic*, the ICTY stated that ethnic cleansing as a policy demonstrates 'genocidal characteristics' in its 'ultimate manifestation'. Intent to destroy the group can be inferred from the 'gravity of the ethnic cleansing', which in this instance was inferred from the 'circumstances manifesting an almost unparalleled cruelty': *Prosecutor v Karadzic (Review of Indictment)* (International Criminal Tribunal for the Former Yugoslavia, Case No ICTY-95-18-I, 16 November 1995) 1; Singleterry (n 59) 52.

[91] *Prosecutor v Brđanin (Judgment)* (n 60) [977]; Singleterry (n 59) 52.

[92] As outlined in the *Bosnian Genocide Case*: '[I]ntent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is destruction an automatic consequence of displacement. This is not to say that acts described as "ethnic cleansing" may never constitute genocide, if they are such as to be characterized as, for example, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part," contrary to Article II, paragraph c, of the Convention, provided such action is carried out with the necessary specific intent (dolus specialis), that is to say with a view to the destruction of the group, as distinct from its removal from the region': *Bosnian Genocide Case* (n 3) [190]. See also Singleterry (n 59) 57.

[93] Human Rights Council, *Detailed Findings 2018* (n 15) 361 [1422].

[94] Ibid 361.

was later posted to the website YouTube. In this speech, Nay Myo Wai referenced the Rohingya situation, making the following statement to a crowd of cheering onlookers:

> I won't say much, I will make it short and direct. Number one, shoot and kill them! (the Rohingyas). Number two, kill and shoot them! (the Rohingyas). Number three, shoot and bury them! (the Rohingyas). Number four, bury and shoot them! (the Rohingyas). If we do not kill, shoot, and bury them, they will keep sneaking into our country![95]

This was also a time when the local political group the Rakhine Nationalities Development Party and local Buddhist groups were allegedly inciting the societal fracture that became a catalyst for the 2012 riots. The most concerning communication on behalf of the party during this period was published in an official journal of the RNDP from 2012, *Toe Thet Yay*, which was discovered by a UN fact-finding mission in 2018.[96] Within the text, the work of Adolf Hitler was cited and praised, and with respect to the situation in Rakhine the journal argued that inhumane acts are 'sometimes necessary to maintain a race'.[97]

Thirdly, General Min Aung Hlaing, the most powerful figure in Myanmar, reportedly made multiple public statements that suggest that the Rohingya population do not exist (as they are illegal Bengali immigrants), and referred to the group as terrorists, illegal immigrants and extremists.[98] Within this hostile context, General Min Aung Hlaing called upon the people of Myanmar to take 'patriotic action' and, as stated prior, declared that the 'Bengali problem' was an unfinished job that the government was going to 'solve'.[99]

This conduct shows that the reasoning behind the attacks may extend beyond the simple removal of the group from Myanmar's territory. Based on the comments and discriminatory tone, it seems that the far end of the spectrum of ethnic cleansing has been reached. Evidence shows that instances of ethnic cleansing have been carried out numerous times in the past against this particular ethnic group,[100] yet the Rohingya have kept returning. What appears now is that the Tatmadaw and non-Rohingya civilian population became frustrated by the ineffectiveness of this campaign and began to escalate the campaign.[101] This form of

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[95] Ibid 354.

[96] Ibid 169 [713].

[97] Ibid; Rakhine Nationalities Development Party, *Toe Thet Yay Journal*, vol 2; no 12 (Rakhine Nationalities Development Party, 2012).

[98] Penny Green, Thomas MacManus and Alicia de la Cour Venning, *Countdown to Annihilation: Genocide in Myanmar* (International State Crime Initiative, 2015) 53–5; Navine Murshid, 'Bangladesh Copes with the Rohingya Crisis by Itself' (2018) 117(798) *Current History* 129, 130.

[99] Human Rights Council, *Detailed Findings 2018* (n 15) 362 [1424].

[100] Maudood Elahi, 'The Rohingya Refugees in Bangladesh: Historical Perspectives and Consequences' in John Rogge (ed), *Refugees: A Third World Dilemma* (Rowman and Littlefield, 1987) 227, 231; Martin Smith, *Burma: Insurgency and the Politics of Ethnicity* (Zed Books, 1991) 241; Human Rights Watch, *Historical Background* (Report, 2000) <https://www.hrw.org/reports/2000/burma/burm005-01.htm#P112_25491> .

[101] As can be seen by the speech of the direct perpetrators reported from the attacks: Human Rights Council, *Detailed Findings 2018* (n 15) 354.

escalation on the basis of frustration has been noted by Schabas, who considers ethnic cleansing as an early stage of genocide, stating that 'Genocide is the last resort of the frustrated ethnic cleanser'.[102]

Based on this, it becomes arguable the intent behind the attacks is the physical destruction of the group, not the forced deportation of the group.

3 *Substantial 'Part' of the Group*

Thirdly, is the consideration of whether the intent is to destroy the group 'in whole or in part'.[103] Under this principle, genocidal acts that lead to the destruction of a substantial portion of the population[104] could indicate the intent to destroy the group, rather than displace the group.[105] At these early stages of the case, comments from Myanmar's legal team indicate that this could be a key point for discussion. In their opinion, the proportion of deaths to the group's overall population is too low.[106]

To determine whether a 'substantial' part of the group has been destroyed, there are two approaches: the numerical approach and functional approach,[107] which will now be addressed.

(a) Numerical Approach

Firstly, under the numerical approach, the total size of the group in a particular region is considered, enabling the percentage of the group that has actually been destroyed to be taken into account.[108] While a 'purely numerical approach' was used in the ICTY,[109] the more recent case of *Croatia v Serbia* in the ICJ

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[102] Schabas, *Genocide in International Law* (n 59) 234. See also Singleterry (n 59) 46.

[103] *Genocide Convention* (n 2) art II.

[104] Or a substantial proportion or part of the population.

[105] *Prosecutor v Stakic* (*Judgment)* (n 88) [519]; Renshaw (n 54) 8; Clark (n 50) 511.

[106] Myanmar's legal team commented on the exclusion of the total death numbers from the application, stating: 'no total is proposed'. The team cited the report of the Fact-Finding Mission and application by the Prosecutor of the International Criminal Court, which estimate 10,000 Rohingya deaths and the forced deportation of 725,000 and 'over 700,000' respectively. This was used to argue that exclusion of these numbers indicates that The Gambia 'sees this as weakening its claim that the intent was physical destruction of the group': *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Verbatim Record)* [2019] ICJ Rep 178, 37 [47] ('*The Gambia v Myanmar (Verbatim Record)*'); Renshaw (n 54) 14.

[107] This is also referred to as the 'qualitative' approach: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Judgment)* (International Court of Justice) [2015] ICJ Rep 3 ('*Croatia v Serbia (Judgment)*') [406]; *Prosecutor v Brđanin (Judgment)* (n 60) [703]; Behrens, 'The Crime of Genocide and the Problem of Subjective Substantiality' (n 58) 331; Paul Behrens, 'Between Abstract Event and Individualized Crime: Genocidal Intent in the Case of Croatia' (2015) 28(4) *Leiden Journal of International Law* 923, 929; Renshaw (n 54) 10.

[108] When determining whether the intent is to destroy the group in whole or in part or to expel the group from the region.

[109] The numbers were relied upon heavily in the *Sikirica* case, in which a figure between 2% and 3% was considered negligible in the eyes of the Court: *Prosecutor v Sikirica (Judgement on Defence Motions to Acquit*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-8-T, 3 September 2001) [69]–[74]; Renshaw (n 54) 10.

approached this test slightly differently.[110] In this approach, the total size of the group in a particular region is considered, enabling the percentage of the group that has actually been destroyed to be taken into account.[111]

As identified by the legal representatives for Myanmar,[112] this numerical value initially appears problematic in the Rohingya situation. This is because in the period 2017–18, it is estimated that approximately 10,000 Rohingya were killed, out of a population of more than 1 million.[113] However, this position fails to consider the opportunities presented to the Tatmadaw in relation to the attacks actually carried out, and the other relevant aspects of evidence of the case.[114]

The reason the Court rejected a strict numeric test in the *Croatia v Serbia* case was that it felt that 'the emphasis should be on the geographical location of the part of the group, within a region, or a subregion or a community, as well as the opportunities presented to the perpetrators of the crime to destroy the group'.[115] This falls in line with Ambos' explanation of genocidal intent, which states that 'In practical terms, the genocidaire may intend more than he is realistically able to accomplish.'[116] Similar to the small Tatmadaw numbers in relation to the size of the Rohingya, Ambos gives the example of a white racist. This white racist may intend to destroy all African Americans in their particular city.[117] Due to the fact that this white racist is only one individual, they only possess the means to kill a small number of members of the group in actuality. In Ambos' view, this could still meet the requirements of genocidal intent.[118]

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[110] *Croatia v Serbia (Judgment)* (n 107) 65 [140]; Renshaw (n 54) 10.

[111] The Tribunal rejected this 'purely numerical approach', allowing it to consider other factors in establishing genocidal intent, as well as the relevant numerical values. Although, when considering other factors in this case, the Tribunal found that, if genocidal intent had existed, then the number of victims would be far higher than 12,500. Based on this, it appears that, while this strict approach was rejected, the numeric ratio of the victims remains one of multiple relevant factors to take into account when establishing the intent to destroy a 'substantial part' of the group: *Croatia v Serbia (Judgment)* (n 107) 65 [140]; Renshaw (n 54) 10.

[112] *The Gambia v Myanmar (Verbatim Record)* (n 106) 37 [47].

[113] Human Rights Council, *Detailed Findings 2018* (n 15) [1008], [1275], [1395], [1437], [1482]; *The Gambia v Myanmar (Verbatim Record)* (n 106) 37 [47]; Renshaw (n 54) 15.

[114] Myanmar's legal team has been quick to draw similarities between *Croatia v Serbia* and this case, but there is one important consideration that distinguishes the two—the fact that *Croatia* took place against a backdrop of war. The *Croatia v Serbia* case has been criticised for not being able to consider that genocidal intent might have formed part of the aims in the conduct of hostilities. But in this case, there are no other (legitimate) 'aims' in the conduct of hostilities for consideration. This was not a case of soldiers taking advantage of their position during an armed conflict. The sole 'aim' and reason for the soldiers to enter each village was to destroy the Rohingya inhabitants. These attacks were carried out, first and foremost, against a civilian population. And it is for this reason that further factors, extending beyond the rigid numerical ratio, need to be considered in establishing genocidal intent. Taking into account all the factors as a whole, it becomes evident that the 33rd Light Infantry Division and 99th Light Infantry Division possessed the intent to destroy a substantial part of the group, which was demonstrated by their ability to act on the opportunities presented: Parisa Zangeneh, 'Croatia v. Serbia: Genocide and the Dolus Specialis Question', *Intlawgrrls* (Blog Post, 3 February 2015) <https://ilg2.org/2015/02/03/croatia-v-serbia-genocide-and-the-dolus-specialis-question/>.

[115] *Croatia v Serbia (Judgment)* (n 107) 65 [140]; Renshaw (n 54) 10.

[116] Ambos, 'What Does "Intent to Destroy" in Genocide Mean?' (n 50) 835.

[117] Ibid.

[118] Ibid.

While the position identified by Myanmar's legal team[119] emphasises the geographical location within a region, it fails to consider the 'opportunities presented to the perpetrators of the crime to destroy the group'.[120] It needs to be considered that, although 10,000 is far smaller than 1 million, the relevant divisions of the Tatmadaw did not have the opportunity to destroy a larger percentage of the group. The two divisions of Tatmadaw, the 33rd Light Infantry Division and 99th Light Infantry Division[121] are, according to the *Global Security* website, made up from 10 light infantry battalions.[122] According to situation report from the Karen Human Rights Group, a full-strength light infantry battalion is made up of 500 soldiers, although most battalions are under-strength, comprising less than 200.[123] Based on these numbers, this equates to between 2000 and 5000 soldiers killing 10,000 people,[124] while simultaneously carrying out rape and other acts of sexual violence on a widespread scale.[125] Further consideration should be placed on the fact that these attacks took place against a backdrop of the victims fleeing—something that the group has extended experience in.[126] Relating this back to the example provided in *Croatia v Serbia*, this should not be considered an instance in which a further degree of intent would lead to a higher number of victims.[127] The brutal nature of the attacks involving an array of differing forms of violent acts suggests that the 33rd Light Infantry Division and 99th Light Infantry Division[128] did all within their power to destroy as many of the Rohingya population as they possibly could with the opportunities they had, even if that 'only' led to 10,000 deaths. With the Tatmadaw's numbers and the experience of the Rohingya fleeing the Tatmadaw's attacks, it is difficult to accept that the two divisions had the opportunity to kill even close to one million Rohingya amongst the chaos that was ensuing.

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[119] *The Gambia v Myanmar (Verbatim Record)* (n 106) 37 [47].

[120] *Croatia v Serbia (Judgment)* (n 107) 65 [140]. See also Renshaw (n 54) 10.

[121] Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/39/64 (12 September 2018) 10 [52].

[122] 'Light Infantry Divisions and Military Operations Commands', *Global Security* (Web Page, 8 January 2021) <https://www.globalsecurity.org/military/world/myanmar/army-orbat-2.htm>.

[123] 'Kler Lwee Htoo District Short Update: SAC Troops Fired Mortars into a Village, Injuring Three Villagers, December 2021', *Karen Human Rights Group* (Web Page, 6 January 2022) <https://khrg.org/2022/01/21-338-d1/kler-lwee-htoo-district-short-update-sac-troops-fired-mortars-village-injuring>. The group further notes that up-to-date information regarding the size of battalions is hard to come by.

[124] Human Rights Council, *Detailed Findings 2018* (n 15) [1008], [1275], [1395], [1437], [1482]; *The Gambia v Myanmar (Verbatim Record)* (n 106) 37 [47]; Renshaw (n 54) 15.

[125] Human Rights Council, *Detailed Findings 2018* (n 15) 397 [1496]. As will be discussed shortly regarding the functional approach, sexual violence and rape are also considered steps towards the destruction of a group: '[T]he acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process.' *Prosecutor v Akayesu (Judgment)* (n 14) [733].

[126] As can be seen through notable events such as 'Operation Dragon King' and 'Operation Clean and Beautiful Nation': Mahbubul Haque, 'Rohingya Ethnic Muslim Minority and the 1982 Citizenship Law in Burma (2017) 37 (4) *Journal of Muslim Minority Affairs* 454; Green, MacManus and de la Cour Venning (n 98); Human Rights Watch, *Historical Background* (n 100).

[127] *Croatia v Serbia (Judgment)* (n 107) 127; Renshaw (n 54) 10.

[128] Human Rights Council, *Detailed Findings 2018* (n 15) 10 [52].

It is for this reason that the number of the group who were killed was far less than one million. It is accepted in case law that the total size of the group in a geographical region could be considered. Rather than determining population size as 'all Rohingya in Rakhine State', the overall group should be isolated to the villages targeted by the Tatmadaw. The Fact-Finding Mission has outlined the six areas in which the Tatmadaw's efforts were primarily focussed:[129]

1. Min Gyi (Known as Tula Toli)[130] with a population of 4300 Rohingya[131] suffered 750 Rohingya deaths.[132]
2. Chyut Pyin (Shuap Parung) in northern Rathedaung with a population of 800 Rohingya[133] suffered 358 Rohingya deaths.[134]
3. Maung Nu (Monu Para) and Hpaung Taw Pyin village (Pondu Prang)[135] with a population of 750 Rohingya households[136] suffered at least 82 Rohingya deaths.[137]
4. Koe Tan Kauk (Ko Tan Kaung), a village tract in Rathedaung Township with 1,000 Rohingya households,[138] suffered an estimated 180 deaths.[139]
5. Gu Dar Pyin in southern Buthidaung Township[140] suffered an estimated 243 Rohingya deaths.[141]
6. There were four locations in Southern Maungdaw. Kyauk Pan Du village tract in Southern Moungdaw suffered 38 Rohingya deaths.[142] Myin Hlut, known in Rohingya as May Rulla,[143] suffered 70 deaths.[144] Ah Lel Than Kyaw (known in Rohingya as Hassu Rata)[145] suffered 77 deaths[146] and significant activity was reported at Inn Din.[147]

[129] Ibid [755]–[879].
[130] Ibid [755]–[778].
[131] Ibid [756].
[132] Ibid [774].
[133] Ibid [779].
[134] Ibid [796].
[135] Ibid [799].
[136] Ibid [799]. This figure is based upon the 400 and 350 households in Maung Nu and Hpaung Taw Pyin village. Multiplying these households by Myanmar's national average of 4.3 persons per house provides an estimated population of 1905 Rohingya: 'Myanmar Average Household Size', *ARCGIS* (Web Page 12 October 2021) <https://www.arcgis.com/home/item.html?id=2ddfa19b912f4d0f85c9246d88b05793>.
[137] Reports suggest that up to 100 people were killed, with 82 clearly identified by the Fact-Finding Mission: Human Rights Council, *Detailed Findings 2018* (n 15) [815].
[138] Ibid [834]. Multiplying this number by the national household average of 4.3 provides an estimated population of 4300: ARCGIS (n 136).
[139] Human Rights Council, *Detailed Findings 2018* (n 15) [843].
[140] Ibid [818].
[141] Ibid [833]. It is noted that there is no data available on the Rohingya population of Gu Dar Pyin at this point in time.
[142] Ibid [855].
[143] Ibid [856].
[144] Ibid [864].
[145] Ibid [865].
[146] Ibid [869].
[147] No specific death number was provided for the attacks at Inn Dinn, although the outline of the attacks indicates that there were significant casualties at this location. Ibid [871].

The specific numbers, of course, need far more research than that available at this point in time, and it is noted that The International State Crime Initiative (ISCI) has produced similar figures that are even greater than this number.[148] But, in forming a very loose approximation of the deaths compared to the Rohingya population, the ratio becomes far more 'substantial'. If only considering the statistics that the Fact-Finding Mission has provided data for, the attacks on Min Gyi, Chyut Pyin, Maung Nu and Koe Tan Kauk led to approximately 1,370 deaths out of a population of 11,305.[149] This provides a figure of 12.12% of the population.[150]

Relating this number back to the relevant jurisprudence, it can be seen where this ratio fits in. In *Prosecutor v Sikirica*, the Bosnian Muslim victims in Keraterm camp constituted 2–2.8% of the whole Bosnian Muslim population in Prijedor, which was not considered 'substantial'[151] Similarly, in *Krstić*, the Bosnian Muslims in Srebrenica constituted 2.9% of the total Bosnian Muslim population, which indicated a number that was not substantial.[152] However, in *Krstić*, the Chamber ultimately took a slightly different approach to the substantiality requirement[153] and, when the numbers were altered, the Court did suggest that 8,000 deaths out of a population of 40,000 was considered sufficient.[154] Looking at these numbers, the percentage of Rohingya killed looks far closer to the figure ultimately accepted as substantial in *Krstić*. This suggests that the number of Rohingya killed in the geographic regions of Min Gyi, Chyut Pyin, Maung Nu, Koe Tan Kauk, Gu Dar Pyin and Southern Maungdaw is 'substantial'.

Such a determination, however, is ultimately made on a case-by-case basis, as there appears to be little consistency in case law on this issue. After a review of all jurisprudence on this issue, Uraz is of the view that it is impossible to understand the numerical considerations in full, due to the lack of certainty and consistency in case law.[155] With these uncertainties surrounding the jurisprudence on the issue, the facts of the case become important in establishing whether the substantiality requirement can be met from a

[148] For example, in ISCI's figures, Min Gyi (Tula Toli) has suffered 1900 reported deaths as opposed to the 750 listed by the Fact-Finding Mission. Penny Green, Thomas MacManus and Alicia de la Cour Venning, *Genocide Achieved, Genocide Continues: Myanmar's Annihilation of the Rohingya* (International State Crime Initiative, 2018), Human Rights Council, *Detailed Findings 2018* (n 15) [774].

[149] For the data describing the Rohingya populations as 'households' as opposed to a straight number, the national household average of 4.3 has been applied: ARCGIS (n 136).

[150] Of course, this figure fails to consider the massacres in Gu Dar Pyin and Southern Maungdaw, which require further research for more accurate data, and will likely lead to a different ratio overall. Regardless, this exercise shows that the argument is not as simple as considering a simple ratio of 10,000 deaths to a pool of 1 million Rohingya, as argued by Myanmar's legal counsel: *The Gambia v Myanmar (Verbatim Record)* (n 106) 37 [47].

[151] *Prosecutor v Sikirica (Judgment on Defence Motions to Acquit*) (n 109) [69]–[72]; Onur Uraz, *Classifying Genocide in International Law: The Substantiality Requirement* (Routledge, 2022) 46.

[152] *Prosecutor v Krstić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [15]; Uraz (n 151) 46.

[153] The functional approach will be discussed shortly.

[154] *Prosecutor v Krstić* (*Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-33-T, 2 August 2001) 10; Renshaw (n 54) 10; Uraz (n 151) 52.

[155] Uraz suggests that determining a specific percentage as a threshold may have been avoided, as there would be implications. A minimum threshold may exclude small groups, whereas a threshold too low may undermine the entire requirement: Uraz (n 151) 46. See also David Alonzo-Maizlish, 'In Whole or in Part: Group Rights, the Intent Element of Genocide, and the "Quantitative Criterion"' (2002) 77 *New York University Law Review* 1397.

numerical perspective. In *Prosecutor v Sikirica*, this percentage was 'considered along with other aspects of the evidence',[156] which becomes a likely scenario in the case at hand. Relating back to the overall context in which the attacks on the Rohingya occurred, a consistent pattern of conduct of the accused towards the Rohingya becomes evident,[157] which needs to be factored in.[158] These attacks were set against a backdrop of general negative public opinion of the group that was constantly being incited by the Tatmadaw's senior officials.[159] Myanmar's general civilian population directed similar discriminatory attacks against the Rohingya, with the killing of the Rohingya from the region being commonly cited as reasoning.[160] There was no evidence of any significant armed conflict[161]—these attacks were directed against a civilian ethnic group, while killing the group was a goal cited by the military's leaders[162] and direct perpetrators.[163] And, as outlined above, these divisions appear to have taken every available opportunity to destroy the part of the group residing within the targeted villages through the use of killing and raping.[164] These factors leave no other inference to be made, other than the perpetrators possessed the intent to destroy a substantial part of the group.[165] This is supported by the Fact-Finding Mission, which states:

> An argument that the intent may have been to displace the Rohingya population, but not to seek its ultimate destruction, falls at the same hurdle. The scale and scope of violence in its varied forms, the intensity and brutality of the attacks, and the physical destruction of Rohingya life as it once was, through the mass demolition of their villages and homes, make it difficult to consider any such inferences as reasonable.[166]

(b) Functional Approach

Further strengthening the potential outcomes for the case is the consideration that the 'functional approach' may also apply in this regard.[167] Whereas the numerical approach focusses on the proportion of individuals

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[156] *Prosecutor v Sikirica (Judgement on Defence Motions to Acquit*) (n 109) 31 [75]; Renshaw (n 54) 9.
[157] *Prosecutor v Rutaganda (Judgment)* (n 316) [61]–[63]. See also *Prosecutor v Musema (Judgment)* (n 53) [167].
[158] *Prosecutor v Sikirica (Judgment on Defence Motions to Acquit*) (n 109) 31 [75]; Renshaw (n 54) 9.
[159] See General Min Aung Hlaing's speech quoted in Human Rights Council, *Detailed Findings 2018* (n 15) 361.
[160] Ibid 354, 361.
[161] The 'conflict' with ARSA at the time is noted; however, this argument is weak on the basis of proportionality. The Fact-Finding Mission explains this clearly: 'In reality, and as known to the Tatmadaw, ARSA posed a limited threat. The Tatmadaw had been present in the region for many years and was familiar with operational requirements. Enhanced security to eliminate the threat from an emerging, but still very small, armed group could have been implemented through far more limited, targeted and less pervasive means. Pursuing a campaign of absolute terror and brutality through gang raping women, killing babies and erasing entire villages, in the knowledge that such response is unlawful and disproportionate, reveals an alternative intent': Ibid 365 [1436].
[162] Ibid 362 [1424].
[163] Ibid 361.
[164] As will be discussed in more detail in the discussion on the second breach shortly.
[165] *Bosnian Genocide Case* (n 3) [373]; *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016—Volume I of IV)* (n 31) [2592]; *Prosecutor v Brđanin (Judgment)* (n 60) [970].
[166] Human Rights Council, *Detailed Findings 2018* (n 15) 365 [1458].
[167] Behrens, 'The Crime of Genocide and the Problem of Subjective Substantiality' (n 58) 331; Behrens, 'Between Abstract Event and Individualized Crime' (n 107) 929; Renshaw (n 54) 10; *Croatia v Serbia (Judgment)* (n 107) [406]; *Prosecutor v Brđanin (Judgment)* (n 60) [703].

targeted in respect to the overall population of the group in that particular region,[168] the functional approach considers the importance of the individuals who were targeted: if destroying this part of the group could lead to the group's destruction, then this could also indicate genocidal intent.[169]

An example of this is provided in the ICTY case of *Krstić*, in which the Court found that targeting military-aged men could have implications for reproduction and, by extension, the destruction of the group.[170] In this instance 8,000 military aged men being killed out of a population of 40,000 military aged men was considered to demonstrate genocidal intent.[171] This principle extends beyond military aged men, to further groups such as law enforcement and security[172] and, according to Kittichaisaree, pregnant woman too.[173]

With respect to the Rohingya crisis, Renshaw refers to the accounts from the region involving sexual violence, rape and other attacks against women.[174] From this perspective, it is suggested that degrading women in this way builds a 'different kind of account' that could indicate that the intention was to 'destroy the foundation of the group's existence'.[175] With this in mind, it becomes arguable that, by the systematic targeting and degrading of women in such a brutal and humiliating way, the Tatmadaw has demonstrated its intention to destroy the women of the group who are of reproductive age.

This conduct occurred in a widespread fashion, and was recorded across 10 villages in three different townships, with the likelihood that more unreported instances occurred.[176] As the Fact-Finding Mission suggests, the constant occurrence of the raping of Rohingya wives and daughters and the consistency in the way such actions were carried out between the different townships in the region indicates that the raping and sexual violence were carried out in a pre-planned nature.[177] To quote the Fact-Finding Mission, 'These were not the random acts of a few criminal soldiers; this was an orchestrated attack by the Tatmadaw on Rohingya mothers, wives, sisters and daughters.'[178]

Furthermore, the sexual acts were carried out alongside actions causing bodily harm to the victims, leaving behind scars from bite marks and other forms of mutilation.[179] Analysing these serious bodily harms, the Fact-Finding Mission has suggested that, on the basis of the high number of females subjected to these bodily harms during the rape and sexual violence, these marks left behind may serve as a form of

[168] *Croatia v Serbia (Judgment)* (n 107) 65; Renshaw (n 54) 10.
[169] As stated in the *Bosnian Genocide Case*, 'since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole': *Bosnian Genocide Case* (n 3) 126. See also Renshaw (n 54) 10; Uraz (n 151) 46.
[170] *Prosecutor v Krstić* (*Judgment)* (n 154) 10; Renshaw (n 54) 10.
[171] *Prosecutor v Krstić* (*Judgment)* (n 154) 10; Renshaw (n 54) 10; Uraz (n 151) 52.
[172] Behrens, 'The Crime of Genocide and the Problem of Subjective Substantiality' (n 58) 332.
[173] Ibid, citing Kriangsak Kittichaisaree, *International Criminal Law* (Oxford University Press, 2001) 73.
[174] Renshaw (n 54) 18.
[175] Ibid.
[176] Human Rights Council, *Detailed Findings 2018* (n 15) 397 [1496].
[177] Ibid.
[178] Ibid.
[179] Ibid 355 [1397].

'branding'.[180] These marks provide the victims, their families, and the community as a whole a constant reminder of the horrors they have been put through by the Tatmadaw.[181]

Following this logic of the functional approach, it is arguable that the true impact on the Rohingya group is not through the deaths of a significant number of its members, but the ongoing consequences of the rape and sexual violence. Such a position was accepted in *Akayesu*, where it was suggested that this form of rape accompanied by sexual violence is also considered to indicate the existence of genocidal intent, as 'the destruction of the spirit, of the will to live, and of life itself'[182] 'while inflicting acute suffering on its members in the process'[183] are considered steps toward the destruction of a group.[184]

The impact of this has been described by the Middle East Institute:

> The taboo and social stigma associated with rape is so potent in the Muslim culture and tradition, that these victim-survivors are ostracized—cast out and cut off from their families and communities. Their tormentors knew too well that rape would be worse than death for its victims and would come at a very low cost for its perpetrators. Their tormentors also knew that the rape of Rohingya women would humiliate and subordinate their men.[185]

Much like the military-aged men in the Srebrenica Muslim community,[186] it is arguable that these actions would have severe procreative implications for the Rohingya community, 'potentially consigning the community to extinction'.[187] From Afroza Anwary's perspective: 'the sadistic torture of the Rohingya women by Myanmar's soldiers symbolises the military's attempt to mutilate the life-giving power of the Rohingya that facilitates the continuation of the community'.[188]

This indicates that the targeted part is 'sufficiently large to impact the group as a whole'.[189] With such a large number of Rohingya women subjected to this, it becomes increasingly more arguable that genocidal intent

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[180] Ibid.

[181] Ibid.

[182] *Prosecutor v Akayesu (Judgment)* (n 14) [732].

[183] Ibid [733].

[184] Ibid; Verdirame (n 2) 595.

[185] Djaouida Siaci, 'The Mass Rape of Rohingya Muslim Women: An All-Out War Against All Women', *Middle East Institute* (Web Page, 29 September 2019) <https://www.mei.edu/publications/mass-rape-rohingya-muslim-women-all-out-war-against-all-women>. Giving this further context, Afroza Anwary refers to the account of a 15-year-old Rohingya woman: 'My family is avoided by other Rohingya refugees because of the shame I bought to it by being raped by a Buddhist soldier and by having his baby … I tried to commit suicide.' Renshaw (n 54) 18, citing Afroza Anwary, 'Sexual Violence Against Women as a Weapon of Rohingya Genocide in Myanmar' (2021) 26(3) *International Journal of Human Rights* 400, 414.

[186] *Prosecutor v Krstić* (*Judgment)* (n 154) 10; Renshaw (n 54) 10.

[187] *Prosecutor v Krstić* (*Judgment)* (n 154) 10; Renshaw (n 54) 10.

[188] Anwary (n 185) 410; Renshaw (n 54) 18.

[189] *Prosecutor v Kayishema (Judgment)* (n 34) 44; *Bosnian Genocide Case* (n 3) 126; Renshaw (n 54) 8–9.

could also be established in this way.[190] This determination is consistent with the commentary of the Fact-Finding Mission, which states:

> The scale, brutality and systematic nature of rape, gang rape, sexual slavery and other forms of sexual violence against the Rohingya lead inevitably to the inference that these acts were, in fact, aimed at destroying the very fabric of the community, particularly given the stigma associated with rape within the Rohingya community.[191]

Ultimately the 'substantial part' test, along with the numerical and functional approaches to the test, will be a point for contention in the upcoming case. Upon the analysis conducted in this section it does appear that it is likely that this element will be met, particularly when considering that there are two possible avenues to argue this point.[192] However, it is noted that this is one of the comparatively weaker arguments[193] and likely to be a deciding factor in determining the outcome of the case.

C *Attribution: State Responsibility for Committing Genocide*

Whereas the *Bosnian Genocide Case* suggested that it is legally possible to attribute state responsibility for the specific crime of genocide,[194] a new action through this avenue with differing facts may provide the opportunity for this shift in understanding on the issue of state responsibility to be solidified—if, of course, the requisite legal elements can be met.

In determining whether Myanmar could be attributed state responsibility for committing the crime of genocide, there are three major issues that must be discussed. Firstly, there is the overarching question whether a state can legally be found to have 'committed' genocide. Secondly, it is necessary to decide whether the entity that has committed genocide is considered by international law to be an 'organ of the

[190] Of course, if this approach was to be taken, further research on the number of victims must be obtained. Numbers of approximately 18,000 victims have been cited, although more conclusive data seems necessary. Mohshin Habib et al, *Forced Migration of Rohingya: The Untold Experience* (Ontario International Development Agency, 2018); '24,000 Rohingyas Killed, 18,000 Raped: Int'l Research', *New Age Bangladesh* (online, 18 August 2018) <https://www.newagebd.net/article/48675/24000-rohingyas-killed-18000-raped-intl-research>; 'Around 24,000 Rohingya Muslims Killed by Myanmar Army, 18,000 Raped: Report', *Daily Sabah* (online, 19 August 2018) <https://www.dailysabah.com/asia/2018/08/19/around-24000-rohingya-muslims-killed-by-myanmar-army-18000-raped-report>; 'Former UN Chief Says Bangladesh Cannot Continue Hosting Rohingya', *Al Jazeera* (online, 10 July 2019) <https://www.aljazeera.com/news/2019/7/10/former-un-chief-says-bangladesh-cannot-continue-hosting-rohingya>.

[191] Human Rights Council, *Detailed Findings 2018* (n 15) 357 [1406].

[192] Whether through the numeric or functional approach. These approaches are applied on a regular basis and occasionally in tandem with each other: *Croatia v Serbia (Judgment)* (n 107) [140]; *Bosnian Genocide Case* (n 3) [197]–[201]; Uraz (n 151) 6.

[193] When compared to the remainder of the arguments for establishing the existence of genocide.

[194] *Bosnian Genocide Case* (n 3) [179].

state'.[195] The third question is whether the Tatmadaw was acting in its official capacity[196] as an organ of the state while carrying out acts of genocide.

1 *Can a State Commit Genocide?*

The Court in the *Bosnian Genocide Case* provided an important evolution in the issue as to whether a state could commit genocide.[197] In this case, the majority of the Court found that a state can be held responsible for violations of the *Genocide Convention*. Genocide, as outlined in article II of the *Genocide Convention*, was found to apply to individuals *and* states.[198]

Three arguments were assessed by the Court, featuring a discussion on the duality of international law and international criminal law,[199] the nature of the *Genocide Convention* and its emphasis on individual responsibility,[200] and the general principle that international law does not recognise the criminal responsibility of the state.[201] These three arguments did not persuade the Court, and the International Law Commission's commentary on the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* was cited,[202] which states:

> Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.[203]

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[195] According to article 4 of the ILC's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.' *Responsibility of States for Internationally Wrongful Acts* (n 5) art 4; *Bosnian Genocide Case* (n 3) [389].

[196] Article 7 of the ILC's draft articles states: 'The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions'; *Responsibility of States for Internationally Wrongful Acts* (n 5) art 7. See also James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) 99; Spinedi (n 5) 898; William Dodge, 'Foreign Official Immunity in the International Law Commission: The Meanings of "Official Capacity"' (2015) 109 *American Journal of International Law* 156, 157.

[197] *Bosnian Genocide Case* (n 3) [179].

[198] Ibid; Alain Pellet, 'Can a State Commit a Crime? Definitely, Yes!' (1999) 10(2) *European Journal of International Law* 425; Paola Gaeta, 'On What Conditions Can a State be Held Responsible for Genocide?' (2007) 18(4) *European Journal of International Law* 631; Scott Shackelford, 'Holding States Accountable for the Ultimate Human Rights Abuse: A Review of the International Court of Justice's Bosnian Genocide Case' (2007) 14 *Human Rights Brief* 21, 25.

[199] *Bosnian Genocide Case* (n 3) [173].

[200] Ibid [171].

[201] Ibid [170].

[202] Ibid [173].

[203] ILC's commentary on article 58(3) in International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 53rd sess, ILC Report A/56/10 (2001) 142.

Finally, the majority determined that:

> [T]he Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III. Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred.[204]

At this point in time, the position in international law is that a state can be found to have breached its obligations to not commit genocide.[205] However, it is noted that this is a controversial point of law.[206] If the relevant criteria were met, this case would be the first time that state responsibility has been handed down in such a way.[207]

This brings us to the question: is the Tatmadaw an organ of the state?

2 *The Tatmadaw as an Organ of the State?*

State responsibility for Myanmar may result from internationally wrongful acts if Myanmar's internal law demonstrates a formal link between the Tatmadaw and the state. In determining this, the fact that a state entity owns an entity does not automatically mean that this entity is considered a state organ for the purposes of the ILC's *Responsibility of States for Internationally Wrongful Acts*.[208] For this reason, article 4 of the resolution is used,[209] which states:

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.[210]

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[204] *Bosnian Genocide Case* (n 3) [179].

[205] Pellet (n 198); Gaeta (n 198); Shackelford (n 198) 25.

[206] See, eg, the comments from the dissenting judges Shi and Koroma, as will be discussed in detail below: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Joint Declaration of Judges Shi and Koroma)* [2007] ICJ Rep 4, 279.

[207] The *Bosnian Genocide Case* did not result in a verdict of state genocide due to the distance between the VRS and the state itself. Politically, the nations were in turmoil at this time, as the VRS was a Bosnian Serb entity that refused to accept Bosnia and Herzegovina's secession from the Former Yugoslavia. *Bosnian Genocide Case* (n 3) [386]–[415]; Amabelle Asuncion, 'Pulling the Stops on Genocide: The State or the Individual?' (2009) 20(4) *European Journal of International Law* 1195. 1195–6.

[208] Crawford, *State Responsibility* (n 5) 118, citing *EDF (Services) Limited v Romania* (2009) ICSID Rep ARB/05/13, 190.

[209] *Bosnian Genocide Case* (n 3) [389].

[210] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 4. See also Crawford, *State Responsibility* (n 5) 118.

When considering the terms 'legislative, executive, judicial or any other functions',[211] Crawford has noted that the actions of armed forces are executive manifestations of state power:

> Despite such variations, most acts giving rise to implications of responsibility will emerge from the executive government, which provides the most direct manifestation of state power. The most obvious executive manifestations are actions of the armed forces, which in the context of armed conflict are in all cases attributable to and engage the international responsibility of the state in question.[212]

Relating this back to Myanmar, it must first be noted that, while the fact that Myanmar's military seized control of Myanmar in the 2021 coup and now forms the current government may be relevant for future allegations of genocidal acts,[213] state responsibility must be established at the time of the crimes. At the time of the clearance operations, the administering government was the NLD and not the Tatmadaw, which requires it to be proven that from 2016 to 2019 the Tatmadaw was an official organ of the state[214] under domestic law.[215]

Myanmar's *Constitution of 2008* provides the legal structure of the nation at the time of the clearance operations, which may be able to provide an official linkage between the military and the state by law. In this *Constitution*, chapter VII focusses on the Defence Services, firstly stating that 'The main armed force for the Defence of the Union is the Defence Services'[216] and 'All the armed forces in the Union shall be under the command of the Defence Services.'[217] These forces provided the power to act on defence issues internally, as the *Constitution* states that 'The Defence Services shall lead in safeguarding the Union against all internal and external dangers.'[218]

Furthermore, the leadership of the Defence Services and its roles are outlined in this chapter, which states: 'The strategy of the people's militia shall be carried out under the leadership of the Defence Services'[219] and 'The President shall appoint the Commander-in-Chief of the Defence Services with the proposal and

[211] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 4.
[212] Crawford, *State Responsibility* (n 5) 119, citing *Hague Convention IV Respecting the Laws and Customs of War on Land*, adopted 18 October 1907, 205 CTS 277 (entered into force 26 January 1910) art 3; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, adopted 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 91.
[213] Nehginpao Kipgen, 'The 2020 Myanmar Election and the 2021 Coup: Deepening Democracy or Widening Division' (2021) 52(1) *Asian Affairs* 1.
[214] Ibid.
[215] Article 4(2) of the ILC's draft articles states: 'An organ includes any person or entity which has that status in accordance with the internal law of the State.' *Responsibility of States for Internationally Wrongful Acts* (n 5) art 4(2).
[216] *Constitution of 2008* (Myanmar) art 337.
[217] Ibid art 338.
[218] Ibid art 339.
[219] Ibid art 340.

approval of the National Defence and Security Council.'[220] On 30 March 2011, General Min Aung Hlaing was appointed by the president as Commander-in-Chief of the Defence Services in this manner.[221]

Based on this, it is evident that the nation's military forces are exercising executive manifestations of state power.[222] As the legitimate national military, the Tatmadaw would likely be considered a de jure executive organ under domestic law.[223]

3 *The Tatmadaw Acting Within Official Capacity*

When attempting to attribute the genocidal actions of the Tatmadaw to the state of Myanmar itself, it must be considered that the acts in question could be argued to have been carried out by individuals acting on their own discriminatory views toward the Rohingya, irrespective of whether the state has supported or condemned such actions.[224] With this in mind, it could be argued that the genocidal actions are evidence of individual responsibility, and not the state's. This particular instance has been addressed through the law, where the material factor is whether the actions are carried out by the individual or entity in their 'official capacity'. This is provided for under article 7 of the *Responsibility of States for Internationally Wrongful Acts*, which states:

> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.[225]

Crawford uses the terms 'in an apparently official capacity or under colour of authority' to articulate this standard.[226] The wording of article 7 means that, even if the individual is exceeding their competence or contravening instructions, if the individual is acting under the official capacity of a state organ, then that conduct may be attributable to the state. This means that an ultra vires act carried out under official capacity of a state organ will fall within this scope.[227]

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[220] Ibid art 342.

[221] Renaud Egreteau, 'The Continuing Political Salience of the Military in Post-SPDC Myanmar' in Nick Cheesman, Nicholas Farrelly and Trevor Wilson (eds), *Debating Democratization in Myanmar* (Institute of South East Asian Studies, 2014) 259; Min Than, 'The Tatmadaw in the Hluttaw' (Perspective No 73, Institute of South East Asian Studies, 2018) <https://www.iseas.edu.sg/wp-content/uploads/pdfs/ISEAS_Perspective_2018_73.1@50.pdf>.

[222] Crawford, *State Responsibility* (n 5) 119, citing *Hague Convention IV Respecting the Laws and Customs of War on Land* (n 212) art 3; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (n 212) art 91.

[223] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 4.

[224] Ibid art 7; Crawford, *The International Law Commission's Articles on State Responsibility* (n 196) 99; Spinedi (n 5) 898; Dodge (n 196) 157.

[225] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 7.

[226] Crawford, *The International Law Commission's Articles on State Responsibility* (n 196) 99.

[227] Martin Dixon, *Textbook on International Law* (Oxford University Press, 6th ed, 2007) 248.

Based on this, the organ's conduct is attributable to the state when acting in is 'official capacity', which can be contrasted to when an individual is acting as a private person.[228] Crawford provides further context to this, stating:

> The mere fact of a soldier losing his way does not deprive him of the status of a state organ, and prima facie any acts of soldiery he performs while astray remain those of the state, even if they involve pillage for private gain.[229]

This is contrasted to the private actions of members of the military, such as becoming involved in a brawl while on leave.[230]

An explanation of how to navigate these two opposing ends of the spectrum is provided the case of *Youmans*.[231] This case dealt with an instance when Mexican troops were ordered to stop an attack on a group of Americans during a riot. Rather than stopping the riot, however, the soldiers participated. Ultimately, it was found that the actions of these Mexican troops were attributable to the state due to the fact that the soldiers were on duty and under the command of a superior officer.[232] Crawford comments on this, suggesting that if these soldiers were not on duty and participating in the riots while wearing civilian clothing, they would be participating as private citizens.[233]

This leads to the question: were the Tatmadaw acting within their official capacity when carrying out the mass killing and bodily harm of the Rohingya, or acting in their capacity as private persons?

When carrying out the clearance operations, there are a number of factors that suggest that the relevant members of the Tatmadaw were acting 'in an apparently official capacity or under colour of authority'.[234] Firstly, the fact that the genocidal acts were carried out in a planned and organised manner, in which a unified chain of command was utilised, indicates that the perpetrators were acting in an official capacity. The weapons and tactics used by the Tatmadaw were described as 'strikingly consistent' amongst all attacks in 2017's clearance operations.[235] To directly quote the Fact-Finding Mission:

> The 'clearance operations' were not planned and executed by an isolated cell of soldiers but the army as a whole. The implication of multiple levels of military command in an operation can evidence the systematic nature of the culpable acts and an organized plan of destruction.[236]

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[228] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 7; Crawford, *The International Law Commission's Articles on State Responsibility* (n 196) 99.
[229] Crawford, *State Responsibility* (n 5) 119.
[230] Crawford suggests acts of this nature would not of themselves give rise to state responsibility: Crawford, *State Responsibility* (n 5) 120, citing *The Zafiro (Great Britain v US)* (1925) 6 RIAA 160, 164.
[231] *Youmans (US v Mexico)* (1926) 3 ILR 223, 223–4; Crawford, *State Responsibility* (n 5) 120.
[232] *Youmans (US v Mexico)* (n 231) 223–4. See also Crawford, *State Responsibility* (n 5) 120.
[233] Crawford, *State Responsibility* (n 5) 120; *Eis (US v Soviet Union)* (1959) 30 ILR 116, 117.
[234] Crawford, *The International Law Commission's Articles on State Responsibility* (n 196) 99.
[235] Human Rights Council, *Detailed Findings 2018* (n 15) 363 [1429].
[236] Ibid 564 [1430].

Much like the example provided in *Youmans*, the members of the Tatmadaw appeared to be on duty under a superior command at the time.[237] The Fact-Finding Mission has referenced an official statement of 13 November 2017 by General Min Aung Hlaing stating that his men 'strictly followed orders and acted in accordance with the rules of engagement during the recent Rakhine crisis'.[238]

Secondly, the use of military equipment, weaponry and bases for the attacks on the Rohingya also indicates that the perpetrators were acting under the 'colour of authority'. When looking at *Youmans*,[239] another material factor was that the troops were in uniform and not civilian clothing. The case in Myanmar takes this further as the Tatmadaw were not just in uniform, but using official military equipment.[240]

Thirdly, the Fact-Finding Mission describes the use of state property, the users of which would commonly be associated with authority within Myanmar.[241] The attacks throughout the period of the clearance operations included the use of military vehicles,[242] which includes military helicopters[243] and navy vessels,[244] and were prepared for and launched from official government bases.[245] Furthermore, these reports also state that government detention facilities were used to carry out instances of torture and other bodily harm.[246]

Furthermore, Myanmar's *Constitution* enables General Min Aung Hlaing as Commander-in-Chief of the Defence Services to formulate the strategy of the defence forces,[247] which includes all armed forces in Myanmar.[248] Furthermore, the Tatmadaw is given the task of safeguarding the nation against both external and *internal* dangers.[249] Through the *Constitution*, General Min Aung Hlaing has effectively been given full power to command and develop the strategy for the Tatmadaw. As the legitimate military, the Tatmadaw is 'empowered to exercise elements of the governmental authority'[250] in this regard. As such, the Tatmadaw is tasked by the state with both external and internal matters concerning security. By the military nature of the organ, the use of force and weaponry to achieve such goals should be implied. An individual who was carrying out actions involving use of force in uniform would no doubt be considered by a civilian onlooker to be acting on behalf of a government authority.

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[237] *Youmans (US v Mexico)* (n 231) 223–4.
[238] Human Rights Council, *Detailed Findings 2018* (n 15) 352 [1383].
[239] *Youmans (US v Mexico)* (n 231) 223–4.
[240] Crawford, *The International Law Commission's Articles on State Responsibility* (n 196) 99.
[241] Human Rights Council, *Report of the Detailed Findings of the Independent Fact-Finding Mission on Myanmar*, UN Doc A/HRC/42/CRP.5 (9 September 2019) 71 [222].
[242] Ibid.
[243] Ibid [762], [1084].
[244] Ibid 273 [1156].
[245] Ibid [1154], [1249].
[246] Ibid [929], [1162], [1172].
[247] *Constitution of 2008* (Myanmar) art 340.
[248] Ibid art 338.
[249] Ibid art 339.
[250] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 7.

Upon consideration of these facts, it becomes evident that the genocidal acts in question were carried out by numerous members of the military, in an organised and planned fashion, utilising military resources and bases to carry out the attacks. These facts do not appear to indicate the acts of a number of rogue individuals; these facts indicate that carried out 'in an apparently official capacity or under colour of authority'.[251]

D *Remedies*

If the Court is of the view that Myanmar has committed genocide, then the Court will be tasked with determining a remedy for breaching the obligation in the *Genocide Convention* to not commit genocide. Such a task is merely speculatory at this point, largely due to the lack in discourse on the subject. When analysing the Court's approach to the issue of remedies, scholars such as Crawford, Gray and Stoica have concluded that the limited discussion on the scope of remedies of the ICJ has rendered a comprehensive analysis of these issues both outstanding and necessary.[252]

In articulating the relationship between state criminal acts and state criminal responsibility, Gilbert, citing the logic of Tunkin and Mohr, suggests that the ILC has no intention to 'criminalise' state responsibility.[253] This is due to the fact that doing so would provide a deep contrast with the basic idea of the sovereignty of states.[254] Rather, the intent of determining that a state has committed a crime would be to emphasise the gravity of a special kind of internationally wrongful act.[255] As such, the current position appears to be that the determination that a state committed a crime does not carry state criminal responsibility. State criminal acts should thus be treated as internationally wrongful acts, enabling the courts' current general approach to remedies to be followed. The current understanding of this issue is that the Court follows the general framework of the ILC articles, which outline the available remedies for a breach of an internationally wrongful act.[256]

In relation to the internationally wrongful act of committing genocide, The Gambia is seeking remedy in three primary forms. Firstly, The Gambia is requesting that Myanmar cease the internationally wrongful acts of genocide.[257] Secondly, The Gambia is seeking that Myanmar offers assurances and guarantees of non-

[251] Crawford, *The International Law Commission's Articles on State Responsibility* (n 196) 99.
[252] Crawford, *State Responsibility* (n 5) 506–36, Christine Gray, *Judicial Remedies in International Law* (Clarendon Press, 1990) 59–119; Victor Stoica, *Remedies Before the International Court of Justice* (Cambridge University Press, 2001).
[253] While this discussion was provided in the context of articulating article 19 of the ILC's draft articles, this argument remains relevant to the issue at hand: Geoff Gilbert, 'The Criminal Responsibility of States' (1990) 39(2) *International and Comparative Law Quarterly* 345, 368.
[254] Manfred Mohr, 'The ILC's Distinction between International Crimes and International Delicts and its Implications' in Marina Spinedi and Bruno Simma (eds), *United Nations Codification of Responsibility* (Oceana Publications, 1987) 115, 139.
[255] Ibid.
[256] Stoica describes the role of such articles in this context, stating that the ILC's articles represent a 'general instrument' that aims to be taken as merely that; the articles do not intend to provide a clear determination on the specific way in which remedies should be prescribed: Stoica (n 252).
[257] *The Gambia v Myanmar (Judgment)* (n 10) 12 [24].

repetition. Thirdly, The Gambia is seeking reparation for the internationally wrongful acts that have occurred.[258] While observing the fluid and evolving nature of the ICJ's approach to remedies, the available remedies will now be analysed with respect to Myanmar's conduct.

1 *Cessation of Internationally Wrongful Acts*

The first remedy sought from The Gambia, is that Myanmar ceases the internationally wrongful acts that have been carried out.[259] Cessation of internationally wrongful acts is provided by article 30 of the ILC's articles on *Responsibility of States for Internationally Wrongful Acts*, which states that: 'State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing'.[260] Cessation in this context is a separate obligation to reparation, referring to the basic compliance with international law with respect to the internationally wrongful act.[261] Within the situation in Myanmar, a finding that Myanmar has committed genocide would lead to the obligation for Myanmar to stop committing genocide. More particularly, this obligation would require the Tatmadaw to cease the genocidal acts against the Rohingya. Naturally it is reasonable to assume that the Court would order Myanmar to comply with international law and cease its 'genocidal acts' of killing, torturing and raping the Rohingya.[262]

2 *Assurance and Guarantees of Non-Repetition*

Secondly, The Gambia has requested that Myanmar:

> must offer assurances and guarantees of non-repetition by notably providing full and equal citizenship to all members of the Rohingya group who are present in Myanmar or have been displaced due to the events for which Myanmar bears responsibility under the Convention.[263]

This request falls under the remedy of providing appropriate assurances and guarantees of non-repetition, which is enabled by article 30 of the ILC's articles on the responsibility of states. Under this provision, the 'State responsible for the internationally wrongful act is under an obligation … (b) to offer appropriate

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[258] Ibid 12–13 [24].

[259] Ibid.

[260] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 30.

[261] Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96(4) *American Journal of International Law* 833, 839.

[262] It is also noted that The Gambia has requested that Myanmar be ordered to take steps to enact specific criminal legislation on genocide, put to trial individuals suspected of having committed genocide and supress public incitement to commit genocide. This is in relation to the breach of failing to punish genocide, rather than committing genocide, which has been omitted from this research as a matter of scope. If it were to be found that Myanmar has failed to punish genocide, The Gambia's sought remedy of ordering Myanmar to put Myanmar's current leaders to trial through domestic law does not appear viable in practice, nor likely to be accepted by the Court. As the Fact-Finding Mission states: 'In the light of the pervasive culture of impunity at the domestic level, the mission finds that the impetus for accountability must come from the international community': *The Gambia v Myanmar (Judgment)* (n 10) 12–13 [24]; Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (n 121) 1.

[263] *The Gambia v Myanmar (Judgment)* (n 10) 14 [24].

assurances and guarantees of non-repetition, if circumstances so require'.[264] Within this context, assurances of non-repetition primarily consist of a promise to not commit the wrong any further, while guarantees provide ways in which the likelihood of repetition is reduced.[265]

The issue that arises from this point is whether The Gambia's request for citizenship for the Rohingya could be considered as offering an appropriate assurance and guarantee that genocide against the Rohingya will not be repeated. On one hand, there lies the argument that citizenship for the Rohingya would solve the underlying issue that has led to the initial tensions with the Rohingya. The Tatmadaw has commonly cited that one reason behind the attacks is that the Rohingya are 'illegal Bengali immigrants'.[266] Based on this, it seems logical that, by granting citizenship status to the Rohingya, the Tatmadaw would have no reason to attack the group. On the other hand, there is a counterargument that the citizenship issue is not directly relevant to assuring and guaranteeing the non-repetition of attacks. From this perspective, it could be arguable that the link between Rohingya citizenship and the Tatmadaw's genocide is too distant. Whether civilian groups are indiscriminately attacked is not necessarily based upon the citizenship status of the group. The fact that the military is physically, legally and politically able to attack civilians in this way is the primary issue. Based on this, a more appropriate and direct way of assuring and guaranteeing non-repetition is removing the ability for the Tatmadaw to attack groups of civilians in this manner.

Other ways of ensuring non-repetition of attacks of this nature have been found to be through the reform of legislation that permits such attacks, reforming the institutions involved, lustration and vetting of high-ranking officials, and disarmament or demobilisation of armed groups.[267] While it is acknowledged not all of these methods may be appropriate for a nation which relies on this armed group as its national military, it is arguable that exploring alternative avenues of guaranteeing non-repetition may be more legally appropriate. More specifically, reforming relevant institutions and vetting future leaders appear to be the most reasonable approach.

One alternative method of guaranteeing non-repetition is reforming institutions. As has been shown earlier in this chapter, the Tatmadaw's genocidal conduct has been attributed to the state. Based on this, it is worth

[264] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 30; Christian Tams, 'Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?' (2002) 13(5) *European Journal of International Law* 1161, 1164.

[265] Scott Sullivan, 'Changing the Premise of International Legal Remedies: The Unfounded Adoption of Assurances and Guarantees of Non-Repetition' (2002) 7(2) *University of California Los Angeles Journal of International Law and Foreign Affairs* 265. According to Shelton, guarantees of non-repetition are appropriate where there is 'a risk of repetition of the wrongful act and re-establishment of the prior legal situation is considered insufficient': Dinah Shelton, *Remedies in International Law* (Oxford University Press, 2006) 102, 302. See also Naomi Roht-Arriaza, 'Measures of Non-Repetition in Transitional Justice: The Missing Link?' in Paul Gready and Simon Robins (eds), *From Transitional to Transformative Justice* (Cambridge University Press, 2019) 105, 110.

[266] Phrases used during the attacks by the Tatmadaw were: 'You don't belong here', 'We will kill you all', and 'You are Bengali', along with 'We are going to kill you this way by raping. We are going to kill Rohingya, we will rape you. This is not your country': Human Rights Council, *Detailed Findings 2018* (n 15) 361; Green, MacManus and de la Cour Venning (n 98) 53–5; Murshid (n 98) 130.

[267] Roht-Arriaza (n 265).

considering that reform of the Tatmadaw is an appropriate way of guaranteeing non-repetition.[268] Directions for how institutions should be reformed in this way has been provided under the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*.[269] This document suggests that states should ensure that public officials who have been involved in human rights violations should not serve in state institutions,[270] and that those formally charged with associated crimes should be suspended from official duties during proceedings,[271] which are run by an independent impartial and effective judiciary.[272] Furthermore, public officials (particularly the military) should receive training in human rights and humanitarian law standards,[273] and civil complaint procedures should be established.[274]

Another alternative method of guaranteeing non-repetition is through vetting of future Tatmadaw senior officials. Vetting, in this instance, refers to an increased focus on the individuals chosen to serve in military or security forces.[275] Mayer-Rieckh explains the preventative value of vetting:

> Removing abusive officials or precluding the employment of individuals with abusive backgrounds affirms and signals a commitment to basic norms and values, thereby providing recognition to victims as citizens, promoting trust in discredited public institutions, and generally strengthening the democratic rule of law.[276]

This is based on the perspective that, even if new institutions were established, deviant individuals would continue to act as such and hinder change.[277] An example of vetting of this nature can be seen in El Salvador, where the Ad-Hoc Commission was created as part of the peace accords. The purpose of this was the vetting of military officers.[278] Within the situation at hand, The Gambia has acknowledged the importance of ensuring that the Tatmadaw's highest ranking officials stand trial for their involvement.[279] Perhaps the most

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[268] According to Roht-Arriaza, this can be achieved through 'reform, reduction, reorganization, and reeducation of the armed forces and police, strengthening and training the judiciary, abolishing military jurisdiction over civilians and the secrecy and isolation in detention that facilitate torture, and subjecting the government to the outside scrutiny of international human rights law': ibid 109.

[269] United Nations Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, 61st sess, UN Doc E/CN.4/2005/102/Add.1 (8 February 2005) principle 36.

[270] Ibid principle 36(a).

[271] Ibid principle 36(b).

[272] Ibid.

[273] Ibid principle 36(e).

[274] Ibid principle 36(d).

[275] Roht-Arriaza (n 265) 108.

[276] Alexander Mayer-Rieckh, 'Vetting: The Way to Prevent Recurrence?' in Carsten Stahn and Jens Iverson (eds), *Just Peace After Conflict: Jus Post Bellum and the Justice of Peace* (Oxford University Press, 2020) 284, 287; Pablo de Greiff, 'Vetting and Transitional Justice' in Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council, 2007) 522, 524–6, 530–7.

[277] Roht-Arriaza (n 265) 108.

[278] David Holiday and William Stanley, 'Building the Peace: Preliminary Lessons from El Salvador' (1993) 46(2) *Journal of International Affairs* 415; Rubén Zamora with David Holiday, 'The Struggle for Lasting Reform: Vetting Processes in El Salvador' in Alexander Mayer-Rieckh and Pablo de Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council, 2007) 80; Roht-Arriaza (n 265) 108.

[279] *The Gambia v Myanmar (Judgment)* (n 10) 12–13 [24].

straightforward way of guaranteeing non-repetition is a focus on vetting the Tatmadaw's next generation of leadership.

Ultimately, it has become evident that there are more legally appropriate ways of assuring and guaranteeing non-repetition of genocide in Myanmar than addressing the citizenship issue.[280] While it is acknowledged that this is by no means an exclusive list, institutional reform and vetting future Tatmadaw officials are likely to be considered a more appropriate way of achieving this goal.[281] This is all speculative, but it does highlight the need for further negotiation between the parties on this issue.

3 *Reparation*

The third remedy requested by The Gambia is reparation for the genocidal acts that have been carried out by Myanmar.[282] Analysing the ILC's articles, it is suggested that a state should be responsible for making full reparation for injury caused by internationally wrongful acts,[283] which may take the form of restitution, compensation and satisfaction.[284] These forms of reparation may be required either on their own, or in combination with one another, depending on the situation.[285]

In examining the Court's approach to selecting which form of reparation is handed down, it appears that the Court bases its decision on 'what the parties have asked for, weighting each request flexibly and carefully'.[286] The previous hierarchical position on the issue[287] is no longer followed closely.[288] Emphasis is now placed on 'Finding a pragmatic solution to restore mutual relationships'.[289] Ultimately, the current

[280] Citizenship for the Rohingya is an important issue for establishing peace and security in Myanmar. In saying this, it does not seem that the most legally appropriate way of solving the citizenship issue is through assurance and guarantee of non-repetition.

[281] It is also noted that institutional reform in the form of 'Ensuring effective civilian control of military and security forces' would have also been relevant when Myanmar was still operating under the NLD's leadership: UN GAOR, 60th sess, Agenda Item 71(a), UN Doc A/RES/60/147 (21 March 2006) 8; United Nations Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (n 269) principle 36(c).

[282] *The Gambia v Myanmar (Judgment)* (n 10) 13–15 [24].

[283] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 31.

[284] Ibid art 34.

[285] Ibid.

[286] Felix Torres, 'Revisiting the Chorzów Factory Standard of Reparation—Its Relevance in Contemporary International Law and Practice' (2021) 90 *Nordic Journal of International Law* 190, 199, 227.

[287] According to previous positions in international law the most important form of reparation is returning the situation to as it was before the wrong occurred. This established the position that restitution prevails over compensation and satisfaction: *Factory at Chorzow (Germany v Poland) (Merits)* [1928] PCIJ (ser A) No 17 [47]; Torres (n 286) 199, 227.

[288] Nowadays, scholars are reluctant to accept that this hierarchy exists in practice. Gray has suggested that 'the divergence between principle and practice is so extensive that the principle of the primacy of restitution is in itself misleading': Gray, *Judicial Remedies in International Law* (n 252) 13. More recently, through consideration of the International Law Commission's 2001 *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Torres found that: 'it is not paramount to undo the consequences of the illegal act and re-establish the situation which would have existed in the present had the wrongdoing not been committed': Torres (n 286) 227.

[289] Torres (n 286) 227.

understanding of the hierarchy in practice is that restitution does not prevail over compensation and satisfaction, if the value of compensation and satisfaction outweigh restitution.[290]

In the case at hand, The Gambia has sought reparation through a combination of restitution and compensation. By way of restitution, *The Gambia* has requested that Myanmar:

> (1) allow the safe and dignified return to their place of residence of displaced members of the Rohingya group, whether they are displaced within Myanmar or abroad;
> (2) return to the Rohingya their individual and collective property, including their land, houses, places of worship and communal life, fields, livestock and crops, or replace them in kind;
> (3) allow and facilitate the safe and dignified reunification of families;
> (4) provide for the rehabilitation of the physically or mentally injured members of the Rohingya group; such rehabilitation must include adequate medical and psychological care as well as legal and social services;
> (5) facilitate the search for the disappeared and assist in the recovery, identification and reburial of the bodies of those killed in accordance with the expressed or presumed wishes of the victims and in accordance with the cultural and religious practices of the Rohingya;
> (6) ensure the protection of the Rohingya against discrimination and persecution;
> (7) ensure the right of the Rohingya to identify as such;
> (8) ensure the liberty and freedom of movement of the Rohingya within Myanmar and remove any restriction on their place of residence;
> (9) remove any restriction or discrimination on the employment or access to livelihoods of the Rohingya.[291]

By way of compensation, The Gambia requested that Myanmar 'compensate, and provide any additional forms of reparation, for any harm, loss or injury suffered by the Rohingya victims that is not capable of full reparation by restitution'.[292]

It is noted that the Gambia has not sought any form of satisfaction,[293] although it is possible that satisfaction could be provided, if the Court deems other modes insufficient.[294]

When looking at requests from The Gambia and the applicable modes of reparation, the question ultimately remains as to whether the Court would deem restitution, compensation or satisfaction (or a combination) the most appropriate remedy. Due to this, the Court's likely approach to each of these remedies will now be discussed, in order to determine the remedies most likely to be handed down to Myanmar.

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[290] Ibid 199, 227.
[291] *The Gambia v Myanmar (Judgment)* (n 10) 13–14 [24].
[292] Ibid 14 [24].
[293] See the list of requests made by The Gambia in ibid 13–14 [24].
[294] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 37(1).

(a) Restitution

Restitution is provided for under article 35 of the ILC articles, which states that a state that has committed an internationally wrongful act shall make restitution, which is defined as re-establishing the situation before the wrongful act occurred.[295] Limits are placed on this obligation, however, which suggests that restitution is required to the extent that doing so is materially possible, and it is not imposed when compensation would be proportionally more appropriate.[296] Orders of restitution are rare in practice, particularly within the ICJ's proceedings.[297] As Gray explains, use of this remedy is rare within international arbitration, with compensation becoming a far more common outcome in disputes.[298] The use of restitution is rare because it is often unavailable or inadequate.[299] Given that the use of restitution is rare,[300] it must be asked whether restitution is available and adequate in the situation at hand.

The first consideration is whether restitution is possible in this situation.[301] This begs the question whether The Gambia's requests re-establish the situation before the wrongful act occurred.[302] If the purpose of reparation is to 'wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed'[303] it must be questioned whether these issues would exist if The Tatmadaw had not attacked the Rohingya civilians. The problem primarily arises from items (6) through (9) of The Gambia's requests for restitution, which address the Rohingya's rights concerning discrimination, identification, freedom of movement and employment access.[304] Based on these requests, The Gambia is effectively arguing that, prior to the genocidal acts, the Rohingya possessed all of these rights. The problem is that the Rohingya have been ill-treated for many decades, long before the genocidal acts were carried out. Before the internationally wrongful acts of genocide were carried out in the

[295] Ibid art 35; *Factory at Chorzow (Germany v Poland)* (n 287) [47]; Antoine Buyse, 'Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law' (2006) 68 *Heidelberg Journal of International Law* 129; Shelton, 'Righting Wrongs' (n 261) 844.

[296] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 35.

[297] Christine Gray, 'The Choice Between Compensation and Satisfaction' (1999) 10 *European Journal of International Law* 413, 416; Rizwanul Islam and Naimul Muquim, 'The Gambia v Myanmar at the ICJ: Good Samaritans Testing State Responsibility for Atrocities on the Rohingya' (2020) 51(4) *California Western International Law Journal* 77, 129; Christine Gray, 'Remedies' in Cesare Romano et al (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2013) 871, 875.

[298] Islam and Muquim (n 297) 129; Gray, 'Remedies' (n 297) 875.

[299] Gray, 'Remedies' (n 297) 875; Torres (n 286) 198.

[300] Gray, 'Remedies' (n 297) 875; Torres (n 286) 198.

[301] Gray, 'Remedies' (n 297) 875; Torres (n 286) 198.

[302] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 35. According to the *Factory at Chorzow Case*, 'Reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed': *Factory at Chorzow (Germany v Poland)* (n 287) [47]. See also Buyse (n 295).

[303] *Factory at Chorzow (Germany v Poland)* (n 287) [47]; Buyse (n 295).

[304] These items are: '(6) ensure the protection of the Rohingya against discrimination and persecution; (7) ensure the right of the Rohingya to identify as such; (8) ensure the liberty and freedom of movement of the Rohingya within Myanmar and remove any restriction on their place of residence; (9) remove any restriction or discrimination on the employment or access to livelihoods of the Rohingya': *The Gambia v Myanmar (Judgment)* (n 10) 13–14 [24].

recent clearance operations, the Rohingya were discriminated against,[305] had restrictions on their movement[306] and employment,[307] and were unable to identify as Rohingya.[308] Similar to the discussion on assurance and guarantee of non-repetition, the causal link between the genocidal acts and The Gambia's requests does not appear to be strong enough. It is difficult to suggest that these issues were created by Myanmar's 2016–17 genocidal acts, as these issues have troubled the Rohingya throughout most of recent history. The Rohingya's treatment by the government and civil society before the clearance operations was inhumane and morally unfair. But this does leave it arguable that some of The Gambia's requests would not 'in all probability' restore the situation to what is was before the wrong occurred.[309] Addressing the Rohingya's issues of discrimination, identification, freedom of movement and employment access are important goals, as acknowledged by their inclusion in The Gambia's list of reparations.[310] However, an alternative method of working towards these goals may be more legally appropriate.

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[305] The Rohingya have been discriminated against at least since the era of British colonialism, and it has continued in each era since: Moshe Yegar, *The Muslims of Burma* (Otto Harrasowitz, 1972) 29; Aye Chan, 'The Development of a Muslim Enclave in Arakan (Rakhine) State of Burma (Myanmar)' (2005) 3(2) *SOAS Bulletin of Burma Research* 396, 400; Jobair Alam, 'The Current Rohingya Crisis in Myanmar in Historical Perspective' (2019) 39(1) *Journal of Muslim Minority Affairs* 1, 4; Andrew Selth, *Burma's Muslims: Terrorists or Terrorised?* (Strategic and Defence Studies Centre of Australian National University, 2003) 7; Anthony Ware and Costas Laoutides, 'Myanmar's "Rohingya" Conflict: Misconceptions and Complexity' (2019) 50(1) *Asian Affairs* 67;Jayita Sarkar, 'How WWII Shaped the Crisis in Myanmar', *The Washington Post* (online, 10 March 2019) <https://www.washingtonpost.com/outlook/2019/03/10/how-wwii-shaped-crisis-myanmar/>; Elahi (n 100) 231; Haque (n 126); Human Rights Watch, *Historical Background* (n 100).

[306] The Rohingya have had their movements restricted for decades now. Notable instances can be seen in relation to Operations Dragon King and Clean and Beautiful Nation, and the 1994 policy on birth certificates: Elahi (n 100) 231; Haque (n 126); Human Rights Watch, *Historical Background* (n 100); Green, MacManus and de la Cour Venning (n 98) 72.

[307] As a by-product of citizenship status, the Rohingya have always dealt with employment restrictions, which date back to at least the establishment of independent Burma: Green, MacManus and de la Cour Venning (n 98) 19; Chris Lewa, 'North Arakan: An Open Prison for the Rohingya in Burma' (2009) 32 *Forced Migration Review* 11; Akm Ahsan Ullah, 'Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalization' (2011) 9(2) *Journal of Immigrant & Refugee Studies* 139; Shehmin Awan, 'The Statelessness Problem of the Rohingya Muslims' (2020) 19 *Washington University Global Studies Law Review* 85.

[308] Practically speaking, the Rohingya have been unable to identify as such since at least Operation Dragon King, due to the persecution that has followed. More explicit examples include the refusal to issue Rohingya children with birth certificates from 1994 and the refusal to acknowledge Rohingya as part of the 2014 census: UN Human Rights Council, 'Special Session of the Human Rights Council on the Human Rights Situation of the Minority Rohingya Muslim Population and Other Minorities in the Rakhine State of Myanmar: Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein' (Press Release, 5 December 2017) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22487&LangID=E>; Green, MacManus and de la Cour Venning (n 98) 54–5; Nick Cheesman, 'How in Myanmar "National Races" Came to Surpass Citizenship and Exclude Rohingya' (2017) 47(3) *Journal of Contemporary Asia* 461.

[309] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 35; *Factory at Chorzow (Germany v Poland)* (n 287) [47]; Buyse (n 295).

[310] These items are: '(6) ensure the protection of the Rohingya against discrimination and persecution; (7) ensure the right of the Rohingya to identify as such; (8) ensure the liberty and freedom of movement of the Rohingya within Myanmar and remove any restriction on their place of residence; (9) remove any restriction or discrimination on the employment or access to livelihoods of the Rohingya': *The Gambia v Myanmar (Judgment)* (n 10) 13–14 [24].

Secondly, reparation may be inadequate for the damage that has been caused.[311] This argument has been highlighted by Gray, who discusses the example of medical care as reparation for the use of torture. The argument is that medical care, on its own, does not provide sufficient reparation for the harm that has been caused.[312] Similarly, Gray suggests that the timeframe between wrong and remedy leaves it difficult in many situations to return the property to the original inhabitant.[313] Gray provides the example of a house, explaining that as time continues to go by, new generations of people begin to live within the house, which creates practical and moral difficulties.[314] When combining this with the consideration that a significant amount of Rohingya property has been burnt down[315] or otherwise destroyed, it becomes arguable that another form of reparation may be more appropriate.

Given these arguments, it is difficult to suggest that the Court, which rarely orders this remedy for these two specific reasons,[316] would order restitution in this situation. The ICJ has shown extreme hesitance in regard to this principle,[317] particularly in situations in which restitution would not provide full restitution.

There is of course a possibility that the Court may buck the trend of not ordering restitution.[318] If this was the case, items (1) through (5) appear the most reasonable in returning the situation to the way it was before the genocidal acts occurred. If reparation in this form was ordered, the associated disadvantages with the adequacy of restitution render further complementary remedies necessary.[319]

(b) Compensation

Compensation is provided for under article 36 of the ILC articles.[320] Under this article, reparation can be provided through the obligation to compensate for the damage caused by the state.[321] It is noted that recent precedent does not advocate the use of compensation in the ICJ,[322] although the relevance of this precedent

[311] Gray, *Judicial Remedies in International Law* (n 252) 13–16; Buyse (n 295).
[312] Gray, *Judicial Remedies in International Law* (n 252) 16.
[313] Or the original inhabitant's heirs.
[314] Gray, *Judicial Remedies in International Law* (n 252) 13–16.
[315] Human Rights Council, *Detailed Findings 2018* (n 15) 38 [144]–[146].
[316] Gray, 'Remedies' (n 297) 875; Torres (n 286).
[317] Gray, 'Remedies' (n 297) 875; Torres (n 286) 198.
[318] This could be in light of the gravity of *The Gambia v Myanmar*, as this would be the first time a state has been considered to have breached its obligation to not commit genocide.
[319] Buyse (n 295) 132; Gray, *Judicial Remedies in International Law* (n 252) 13–16.
[320] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 36(1); Shelton, 'Righting Wrongs' (n 261) 851; Tams (n 264) 1171.
[321] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 36(1); *Factory at Chorzow (Germany v Poland)* (n 287) [47].
[322] *Bosnian Genocide Case* (n 3) 233 [462]; Islam and Muquim (n 297) 121.

to the case at hand is questioned.[323] There appears to be two ways that compensation could potentially be handed down in this case: compensation for loss of property and for injury.[324]

The first and most straightforward application of compensation lies in the form of compensation for destroyed property. As the Fact-Finding Mission found, at least 392 Rohingya villages were entirely destroyed across 54 separate locations.[325] While the Court has suggested in the past that 'financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide',[326] this approach is not certain.[327] Within this previous decision, Serbia was found to have failed to prevent genocide,[328] whereas Myanmar is likely to be found to have committed genocide.[329] The fact that the state's de jure organ has directly caused the damages for which The Gambia is seeking reparation should be a distinguishing factor. As a result, it does appear that the Court would accept The Gambia's request for compensation for the loss of property, including land, houses, places of worship and communal life, fields, livestock and crops.[330]

The second potential application of compensation is compensation for the injury and death of the Rohingya, as this could potentially equate to a loss of profits or wages, amounting to a financial figure.[331] ICJ jurisprudence suggests that payments for this form of non-monetary loss are acceptable in certain circumstances. In the *Corfu Channel Case*, payment of non-monetary losses was approved for the shipping

[323] As will be discussed shortly.

[324] This discussion remains within the bounds of the generally accepted 'narrow' understanding of compensation. It is acknowledged that it could be somewhat arguable that a broader understanding of compensation could potentially result in further remedy through compensation. Given the degree of uncertainty associated with this, however, remedies will be discussed using this narrow approach.

[325] Human Rights Council, *Detailed Findings 2018* (n 15) 224 [959].

[326] This led to the Court dismissing Bosnia's claim for compensation: *Bosnian Genocide Case* (n 3) 233 [462]; Islam and Muquim (n 297) 129.

[327] Islam and Muquim suggest that 'it is not entirely clear whether the I.C.J. will follow previous precedent on payment of compensation for genocide in this current case': Islam and Muquim (n 297) 122.

[328] *Bosnian Genocide Case* (n 3) 233 [462].

[329] *The Gambia v Myanmar (Judgment)* (n 10) 13–14 [24].

[330] It is noted that compensation for loss of property in this way, however, is only available in the situation in which reparation is not found more appropriate through restitution. As outlined above, The Gambia has requested that Myanmar 'return to the Rohingya their individual and collective property, including their land, houses, places of worship and communal life, fields, livestock and crops, or replace them in kind'. If the Court does not accept The Gambia's arguments concerning restitution, then compensation in this way appears a valid and reasonable option. *The Gambia v Myanmar (Judgment)* (n 10) 13–14 [24].

[331] Compensation for injury and death and unlawful detention was considered in the *Lusitania Cases*, in which it was suggested that the following factors could be estimated: 'the amounts (a) which the decedent, had he not been killed, would probably have contributed to the claimant, add[ing] thereto (b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add[ing] (c) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant': *Lusitania Cases (United States v Germany) (Opinion in the Lusitania Cases)* (1923) 7 RIAA 32, 35. See also Shelton, 'Righting Wrongs' (n 261) 852.

crew's death and injury.[332] This was approved without further justification or discussion of how this could be achieved in practice.[333] In the more recent *Diallo Case*, non-material damages, losses accrued and income lost were awarded in response to human rights abuses.[334] Furthermore, the requirement for 'a sufficiently direct and certain causal nexus between the wrongful act and the injury suffered' was provided.[335] As can been seen by the facts of the Myanmar case this far, the death and injury suffered by the Rohingya were undoubtedly a direct result of the Tatmadaw's genocidal acts. The killing, rape and torture of the Rohingya led to death and injury. As a result of this causal nexus,[336] compensation appears appropriate. This could be ordered even in the event that the Court sees restitution as an appropriate way of addressing the physical and mental harm of the Rohingya.[337]

It is important to note that compensation should not be considered an appropriate reparation to this situation on its own. In the event that restitution is unable to provide reparation for the loss of property and injury, compensation could prove valuable in this regard. Compensation is only practically relevant to the Rohingya when rebuilding their lives once they have settled in a more permanent setting. It is hard to consider that increased financial power would assist the currently stateless Rohingya refugees, who are not currently welcome in unstable home territory in Rakhine State. It is for this reason that compensation could be ordered by the Court, but not be considered as providing appropriate reparation on its own—highlighting the importance of satisfaction.

(c) Satisfaction

Finally, satisfaction is available when the prior two modes of reparation are insufficient.[338] The forms of satisfaction listed by the ILC in article 37 include acknowledgement of and apology for the breach, but leave the door open for other ways that may be appropriate.[339] There are many ways in which satisfaction can be

[332] *Corfu Channel Case (United Kingdom v Albania) (Assessment of the Amount of Compensation Due from the People's Republic of Albania to the United Kingdom of Great Britain and Northern Island)* [1949] ICJ Rep 244, 249–50; Torres (n 286) 199.
[333] *Corfu Channel Case (United Kingdom v Albania)* (n 332).
[334] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo*) *(Compensation Judgment)* [2012] ICJ Rep 324, [14], [18]–[55]; Torres (n 286) 200.
[335] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo*) (n 334) 12 [14].
[336] Ibid.
[337] As discussed, restitution could possibly aid in the physical and mental rehabilitation of the surviving Rohingya. But restitution is unable to truly provide reparation for those who have been killed or permanently injured. It is for this reason that, even if the use of restitution is accepted by the Court, compensation should still be provided: *The Gambia v Myanmar (Judgment)* (n 10) 13–14 [24].
[338] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 37(1).
[339] Ibid art 37(2); Shelton, 'Righting Wrongs' (n 261) 847.

provided, with the two most relevant forms being satisfaction through order of an acknowledgement of wrongdoing and formal apology,[340] and satisfaction through a declaratory judgment.[341]

(i) Apology and Acknowledgement of Wrongdoing

Firstly, it is possible for the Court to order Myanmar to acknowledge its wrongdoing through a formal apology.[342] The Gambia has highlighted that addressing the ill-treatment of the Rohingya is an important part of reparation,[343] which may be able to be addressed through this form of satisfaction, to some degree. Issues such as discrimination, the right to identify as Rohingya and freedom of movement have been highlighted by The Gambia as important for the Rohingya's return to the region.[344] Yet, this discussion of remedies has shown the difficulty in addressing these issues through restitution[345] and compensation.[346] The issues of the safe return of the Rohingya, reuniting families, ending discrimination, the right to identify as Rohingya and freedom of movement[347] have all been primarily created by the state at one point in time. In the optimistic eyes of the Court, an honest and serious attempt by the government to acknowledge and apologise for the treatment of the Rohingya may be seen as the most logical way of addressing these issues.[348] As can be seen in the *Bosnian Genocide Case*, the use of satisfaction is far more appealing for the Court than restitution.[349] If the Court forms the view that satisfaction can address these issues without needing to engage with a rare[350] and legally questionable application of restitution,[351] then this will form the most viable option to achieve these goals.

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[340] According to article 37(2), 'Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality': *Responsibility of States for Internationally Wrongful Acts* (n 5) art 37(2).

[341] Shelton, 'Righting Wrongs' (n 261) 836; Elena Fasoli, 'Declaratory Judgments and Official Apologies as Forms of Reparation for the Non-Material Damage Suffered by the State: The Djibouti-France Case' (2008) 7(2) *Law and Practice of International Courts and Tribunals* 177, 184.

[342] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 37(2).

[343] As seen in items (6) through (9) in The Gambia's requests for restitution: '(6) ensure the protection of the Rohingya against discrimination and persecution; (7) ensure the right of the Rohingya to identify as such; (8) ensure the liberty and freedom of movement of the Rohingya within Myanmar and remove any restriction on their place of residence; (9) remove any restriction or discrimination on the employment or access to livelihoods of the Rohingya': *The Gambia v Myanmar (Judgment)* (n 10) 13–14 [24].

[344] Ibid 13–14 [24].

[345] As outlined above, items (6) through (9) are unlikely to fall within the definition of restitution, as they would not re-establish the situation before the wrongful act occurred: *Responsibility of States for Internationally Wrongful Acts* (n 5) art 35.

[346] There is little to suggest that financial repayment can assist with the ongoing discrimination of the Rohingya, nor is this requested by The Gambia.

[347] *The Gambia v Myanmar (Judgment)* (n 10) 13–14 [24].

[348] While in practice it remains unclear and potentially unlikely that Myanmar would comply with orders of this nature, the impact of the ICJ's remedies is a discussion for future chapters.

[349] In the *Bosnian Genocide Case* only satisfaction was ordered against Serbia: *Bosnian Genocide Case* (n 3) 233 [462].

[350] Islam and Muquim (n 297) 129; Gray, 'Remedies' (n 297).

[351] Given that it is arguable that many points do not restore the situation to how it was before the internationally wrongful acts occurred.

(ii) Declaratory Judgment

Secondly, in the event that the Court decides that all other options are not appropriate, the last and most simple remedy is satisfaction through declaratory judgment.[352] Precedent for the use of satisfaction in this way can be seen in the *Bosnian Genocide Case*.[353] In relation to Serbia's obligation to prevent genocide, no compensation was provided.[354] Instead, satisfaction was ordered in the form of a formal declaration of the Court that Serbia and Montenegro had breached its obligations under the *Genocide Convention*.[355]

The declaratory judgment is a useful form of reparation for a breach of an international obligation due to the fact that it is issued by the 'authoritative body' of the ICJ.[356] Given the legitimacy of this authoritative body, the wrongful act becomes a 'grave' matter of the 'highest international significance'.[357] This form of satisfaction is reparation that does not require any action by the breaching party. The value in a declaratory judgment lies in a situation in which conflict could be further aggravated or reignited if another form of reparation was used.

Perhaps in this instance, it could be recognised that seeking justice is not always the best political choice and that sometimes there are other means that can achieve peace. In relation to human rights abuses in South Africa, amnesty was found to be the most appropriate way forward for achieving peace—but not justice.[358] Similarly, in the politically fragile environment of post-transition Chile, justice for human rights abuses might have jeopardised the deeply sought democracy.[359] Within both of these situations, many expressed the view that the most appropriate way forward was not to use punitive measures. Similar to these situations, the political situation is extremely volatile in Myanmar. In light of the 2021 coup, Myanmar's current leaders[360]

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[352] Shelton, 'Righting Wrongs' (n 261) 836; Fasoli (n 341) 184.
[353] *Bosnian Genocide Case* (n 3) [471].
[354] Ibid; Islam and Muquim (n 297) 122; Christian Tomuschat, 'Reparation in Cases of Genocide' (2007) 5(4) *Journal of International Criminal Justice* 905, 907, 909.
[355] *Bosnian Genocide Case* (n 3) [471]; Islam and Muquim (n 297) 122.
[356] Juliette McIntyre, 'The Declaratory Judgment in Recent Jurisprudence of the ICJ: Conflicting Approaches to State Responsibility?' (2016) 29(1) *Leiden Journal of International Law* 177, 194; Pellet (n 198) 434.
[357] McIntyre (n 356) 194; *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Rejoinder of Uruguay)* [2008] ICJ Rep 3, 393 [7.17] ('*Rejoinder of Uruguay*').
[358] James Gibson, 'Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa' (2002) 46(3) *American Journal of Political Science* 540; John Dugard, 'Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?' (1999) 12(4) *Leiden Journal of International Law* 1001, 1003–4; Andrea Bianchi, 'Immunity Versus Human Rights: The Pinochet Case' (1999) 10(2) *European Journal of International Law* 237, 275; Michael Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes (1996) 59 *Law and Contemporary Problems* 41; *Azanian People's Organisation v President of the Republic of South* Africa [1996] 4 SA 672 (Constitutional Court) [50].
[359] Under Decree Law No 2191 of 19 April 1978, amnesty was granted to those who had committed criminal actions between 1973 and 1978, in an attempt to protect democracy. In future cases, extradition was opposed, due to the belief that choosing to prosecute General Pinochet 'threatens to destabilise Chile's successful transition from military rule to civilian government': Nehal Bhuta, 'R v Evans and Bartle; Ex parte Augusto Pinochet Ugarte; Justice without Borders? Prosecuting General Pinochet' (1999) 23(2) *Melbourne University Law Review* 499, 509; Dugard (n 358) 1007.
[360] Particularly General Min Aung Hlaing.

possess full control over its military.[361] Myanmar's current leader is considered to have played a significant role in the internationally wrongful act of genocide.[362] The hostile nature of Myanmar's current leaders leaves the important consideration that the Tatmadaw may respond unfavourably if Myanmar was to suffer any detrimental impact as a result of The Gambia's legal action on behalf of the Rohingya. The Tatmadaw has shown that it is fully willing to carry out violent attacks against Rohingya civilians on numerous occasions.[363] Based on this, it is worth considering that any other form of reparation may be detrimental to the overall goal of establishing peace and stability in the region.[364]

Furthermore, it appears that democracy is in the Rohingya's best interest, as opposed to military rule. Politically speaking, the greatest hope for democracy to be reinstated in Myanmar lies with the popular Aung San Suu Kyi and the NLD. If Myanmar was to suffer in any meaningful way due to the events that occurred while the state was under democratic rule by the NLD, then this may negatively impact future attempts at restoring democracy.

If the Court is most focussed on 'finding a pragmatic solution to restore mutual relationships',[365] then it is likely to focus on establishing remedies that place the least burden on Myanmar, while acknowledging the Rohingya's plight as a 'grave' matter of the 'highest international significance'.[366] Given this, further negotiations and deliberation by the Court may consider that, in the current political landscape, the sole application of a reparation that does not require any action from the breaching party is most appropriate. This can be achieved through a declaratory judgment.[367]

4 *Most Likely Remedies to be Handed Down to Myanmar*

After analysing the available remedies, the requests from The Gambia and the Court's approach to remedies, it appears that there are a number of potential outcomes for the case. It is difficult to predict which remedies the Court will ultimately select and The Gambia, Myanmar and the Court will need to deliberate far more on this issue as the case proceeds. Theoretically, it would seem most reasonable for the Court to apply a

[361] Kipgen, 'The 2020 Myanmar Election and the 2021 Coup' (n 213).
[362] As can be seen by the explicit naming of General Min Aung Hlaing in The Gambia's requests for remedies: *The Gambia v Myanmar (Judgment)* (n 10) 12–13 [24].
[363] See the clearance operations, Operation Clean and Beautiful Nation and Operation Dragon King. Elahi (n 100) 231; Haque (n 126); Human Rights Watch, *Historical Background* (n 100); International Criminal Court, 'ICC Judges Authorise Opening and Investigation into the Situation in Bangladesh/Myanmar' (Media Release ICC-CPI-20191114-PR1495, 14 November 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>; Md Ali Siddiquee, 'The Portrayal of the Rohingya Genocide and Refugee Crisis in the Age of Post-truth Politics' (2019) 5(2) *Asian Journal of Comparative Politics* 89.
[364] While there is an argument that The Gambia could apply for countermeasures if this was to occur, the untimely nature of doing so would not protect the Rohingya from an immediate response from the Tatmadaw.
[365] Torres (n 286) 227.
[366] McIntyre (n 356) 194; *Rejoinder of Uruguay* (n 357) 393 [7.17].
[367] The declaratory judgement is referred to as the as the 'least intrusive' form of remedy: Gray, *Judicial Remedies in International Law* (n 252) 98.

combination[368] of restitution, compensation and satisfaction. Restitution will allow the Rohingya's physical return,[369] restitution and compensation together will address injury and the loss of property, and satisfaction will address discrimination through the state's acknowledgment of wrongdoing. In practice, however, in the past the Court has been reluctant to use restitution, so this is not the most likely outcome,[370] particularly when considering the practicalities associated with Myanmar's current leadership. Due to this uncertainty, findings on the most likely remedies will be split into two categories: those that may arise in the most optimistic scenario for The Gambia, and the most realistic outcome for The Gambia.

In the most optimistic outcome for The Gambia, the most appropriate remedies appear to be through an order for Myanmar to:

- cease the internationally wrongful acts of genocide by stopping the killing, raping and torture of the Rohingya;
- guarantee and assure non-repetition of genocide through institutional reform and vetting new commanders;
- by means of restitution: (1) allow the safe and dignified return to their place of residence of displaced members of the Rohingya group, whether they are displaced within Myanmar or abroad; (2) return to the Rohingya their individual and collective property, including their land, houses, places of worship and communal life, fields, livestock and crops, or replace them in kind; (3) allow and facilitate the safe and dignified reunification of families; (4) provide for the rehabilitation of the physically or mentally injured members of the Rohingya group; such rehabilitation must include adequate medical and psychological care as well as legal and social services; (5) facilitate the search for the disappeared and assist in the recovery, identification and reburial of the bodies of those killed in accordance with the expressed or presumed wishes of the victims and in accordance with the cultural and religious practices of the Rohingya;
- compensation (1) for the loss of property, including land, houses, places of worship and communal life, fields, livestock and crops; and (2) for damages, losses accrued and income lost as a result of the genocidal acts;
- by means of satisfaction, an order of apology and acknowledgement of wrongdoing by official representatives of the state.

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[368] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 34.

[369] Through items (1) through (5), which request that the Court order Myanmar to (1) allow the safe and dignified return to their place of residence of displaced members of the Rohingya group, whether they are displaced within Myanmar or abroad; (2) return to the Rohingya their individual and collective property, including their land, houses, places of worship and communal life, fields, livestock and crops, or replace them in kind; (3) allow and facilitate the safe and dignified reunification of families; (4) provide for the rehabilitation of the physically or mentally injured members of the Rohingya group; such rehabilitation must include adequate medical and psychological care as well as legal and social services; (5) facilitate the search for the disappeared and assist in the recovery, identification and reburial of the bodies of those killed in accordance with the expressed or presumed wishes of the victims and in accordance with the cultural and religious practices of the Rohingya: *The Gambia v Myanmar (Judgment)* (n 10) 13–14 [24].

[370] Gray, 'Remedies' (n 297) 875; Torres (n 286) 198.

In the event that Myanmar is found to have committed genocide, the very minimum politically safe and realistic option that arises is an order:

- for Myanmar to cease the internationally wrongful acts of genocide by stopping the killing, raping and torture of the Rohingya;
- by means of satisfaction, a declaratory judgment outlining that Myanmar's wrongful act constitutes a 'grave' matter of the 'highest international significance'.

Which remedies will be ordered in *The Gambia v Myanmar* is ultimately a question for the Court to decide, which will be important in creating precedent for future cases.

E *Outlook for the ICJ Case*

Reaching the tail end of this chapter, it becomes possible to reflect upon the analyses concerning the questions of whether the clearance operations involved genocide, whether this genocide can be attributed to the state of Myanmar, and what remedies are likely to be ordered.

Firstly, it has become apparent that the Court will likely consider the Tatmadaw's actions to constitute the crime of genocide. This is due to the findings that the killing and mental and bodily harm inflicted against the Rohingya population has been carried out with genocidal intent[371] to a protected group.[372] These actions were carried out by a de jure organ of the state[373] which is recognised by the nation's *Constitution*.[374] Furthermore, these genocidal acts were carried out in an apparently official capacity,[375] due to the use of state resources such as weaponry, vehicles and bases, and uniforms.[376]

Secondly, the Tatmadaw's actions against the Rohingya population appear to provide a textbook example of a state *committing* genocide. The 'crime' in this sense is not dealt with by attributing criminal responsibility to the state. Rather, the 'crime' is treated as a breach of an international obligation to not commit the crime of genocide, which is dealt with through the ILC's articles on the responsibility of states.

Thirdly, this chapter has determined that the most realistic and most likely remedy is an order to cease the internationally wrongful acts of genocide, and for the wrongful act to be acknowledged through a declaratory judgment. However, it is noted that there is still the possibility that further remedies may be ordered that are more favourable for The Gambia. This may include the guarantee of non-repetition through institutional reform and vetting of future leaders, restitution through a variety of means that enable the safe return of the

[371] *Genocide Convention* (n 2) art II. See also *Bosnian Genocide Case* (n 3) [187].
[372] *Genocide Convention* (n 2) art II. See also *Prosecutor v Tolimir (Appeal Judgment)* (n 31) [182].
[373] *Bosnian Genocide Case* (n 3) [389].
[374] *Constitution of 2008* (Myanmar) arts 337–8.
[375] *Responsibility of States for Internationally Wrongful Acts* (n 5) art 7.
[376] Human Rights Council, *Detailed Findings 2018* (n 15) 71 [222], 363 [1429].

Rohingya, compensation for property, injury and death, and satisfaction through an order of apology and acknowledgement of wrongdoing.

Ultimately, this chapter has determined that it is legally possible to attribute state responsibility to Myanmar for committing genocide, which can be remedied under the guide of the ILC's articles on the responsibility of states. But, relating back to the overarching research question, the controversial nature of doing so is noted. Identifying that a state has carried out the 'crime of crimes' is likely to be in deep contrast with international law's longstanding focus on individual criminal responsibility. The ICJ has been accused in the past of operating under a policy of 'bad law and good politics',[377] indicating that the Court may hesitate to reach a finding of state responsibility for committing genocide. Once more, this highlights the importance of the research question, which asks whether the attribution of state responsibility for committing genocide in this manner is appropriate.

Coming to a close on the legal analysis of the situation involving both the ICC and ICJ cases, it becomes evident that, from a strictly legal viewpoint, the pathway forward is at a crossroads. On one hand, the ICC is dealing with the issue in a way that is likely to hold the high-ranking commanders responsible for committing crimes against humanity against the Rohingya. If the ICC case is sufficient to deal with the situation, reaching guilty verdicts for the high-ranking commanders who were 'most responsible'[378] for the crimes carried out, then why raise any further controversy by involving the state itself? But who is to say that dealing with the highest ranking commanders is 'enough' to address the situation—can state responsibility address a further dimension of the crimes? On the other hand, it is legally possible to attribute genocide to the state—so why not do so? 167his raises the question whether the state in its entirety should truly bear responsibility, when the genocidal conduct can only be linked to one state organ operating in a somewhat distanced fashion from the remainder of the state apparatus. With no alternative theoretical background serving as a benchmark for determining what is appropriate or necessary, answering this question from the perspective of international law on its own is difficult. It is for this reason that the lens of state crime will now be engaged with, providing context to how the issue of responsibility should be approached in seeking resolution to the humanitarian crisis in Myanmar.

[377] The outcome of the *Bosnian Genocide Case* has led some to suggest that the outcome was a result of 'good politics, bad law'. Rajkovic states: 'The stylized characterization voiced privately by many critics is that the judgment amounted to "bad law" and "good politics"; that the Court's ruling had been profoundly influenced by Serbia's fragile domestic politics and hence this worked silently to constrain the Court's rationale and lawmaking … This political intrusion into the sanctuary of lawmaking produced a judgment that now denies the "universal" deterrent which the Genocide case could have provided': Nikolas Rajkovic, 'On "Bad Law" and "Good Politics": The Politics of the ICJ Genocide Case and Its Interpretation' (2008) 21(4) *Leiden Journal of International Law* 885.

[378] See point 42 in Office of the Prosecutor of the International Criminal Court, *Policy Paper on Case Selection and Prioritisation* (International Criminal Court, 2016) <https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf>; Ward Ferdinandusse and Alex Whiting, 'Prosecute Little Fish at the ICC' (2021) 19(4) *Journal of International Criminal Justice* 759, 760–5. *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 28.

VI A STATE CRIME APPROACH TO THE ROHINGYA SITUATION

With an understanding of how the two differing legal avenues approach the situation in Myanmar now developed, it becomes time to develop an understanding of whether either of these avenues could have a positive impact on the situation on the ground. To do this, a complete alternative analysis of the situation will be undertaken through the lens of state crime, before this can be used to comment on international law's approaches to the situation in subsequent chapters. It is through this analysis, that this chapter will answer the third research sub-question: *How does the lens of state crime approach the Rohingya crisis?*

There are two primary ways in which a state crime perspective can provide further context to the pressing discussion concerning state responsibility at international law. Firstly, by outlining the reasoning for why the state is or is not acting as a deviant actor, the possibility to provide further context on the discussion of state responsibility arises. From this perspective, this chapter will ask whether the harm caused to the Rohingya is an act of the state's deviance, or a product of deviant individuals representing the state.[1] Relating this back to the discussion in international law, harm resulting from state-organised deviance highlights the importance of showing that the state itself is responsible for the harm. By contrast, if the harm is considered to be the result of individual deviance, then this would suggest that a focus on prosecuting the deviant individuals may be the most appropriate way forward for dealing with the situation.

Secondly, a determination that the harm is a result of the organisational deviance of the state allows for an analysis of how the crime has developed.[2] As outlined in Chapter II, state crimes can be carried out through the convergence of three factors: authorisation, routinisation and dehumanisation.[3] This analysis provides the opportunity to highlight the factors that are enabling state crimes to be carried out. From this perspective, removal of these factors reduces the probability of future state crimes being carried out in Myanmar.[4] An understanding of how the crime has developed provides the opportunity to comment on the potential impact of the various remedies available at international law. This allows commentary to be made on the impact these remedies may have on the situation on the ground and whether the probability of future instances of state crime toward the Rohingya can be reduced.

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[1] Penny Green and Tony Ward, *State Crime* (Pluto, 2004) 5; Penny Green and Tony Ward, 'State Crime, Human Rights, and the Limits of Criminology' (2000) 27(1) *Social Justice* 101, 110; William Chambliss, 'State-Organized Crime' (1989) 27(2) *Criminology* 183, 184.

[2] John Hagan, *Darfur and the Crime of Genocide* (Cambridge University Press, 2004).

[3] Herbert Kelman and V Lee Hamilton, *Crimes of Obedience* (Yale University Press, 1989) 17–19; Brunilda Pali, 'Crimes of (Dis)Obedience: Radical Shifting of the Criminological Gaze', *Security Praxis* (Web Page, 1 October 2018) <https://securitypraxis.eu/crimes-of-disobedience/>; Alette Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (2019) 17 *Journal of International Criminal Justice* 105.

[4] As factors of authorisation, routinisation and dehumanisation are requisite to sanctioning massacres, removal or reduction of these factors will reduce the likelihood of state crimes being carried out against the Rohingya in the future. See Kelman and Hamilton (n 3) 46.

Ultimately, this chapter will show that the Rohingya crisis is a product of the state's organised deviance, which has been caused by various factors that extend beyond the Tatmadaw's direct perpetrators.[5] With this in mind, this chapter will be structured as follows:

A *Has a 'Crime' been Committed from this Perspective?*
B *Was this 'Crime' a Product of Organisational Deviance or Individual Deviance?*
C *How has the Crime Developed?*
D *Findings from the Lens of State Crime*

A *Has a 'Crime' been Committed from this Perspective?*

Before the discussions concerning individual versus organisational deviance and the factors that have enabled any crimes to be carried out, it must first be determined whether the harm in question falls within state crime's scope of 'crime'.

As outlined in the theoretical background, the element determining the existence of state crime from the human rights-based approach is whether a violation of human rights has occurred.[6] When considering the initial overview of the Rohingya situation and the actions described, it must be considered that the case study may involve at least two human rights violations that immediately stand out due to their cruel and inhumane nature. These are breaches of the right to life[7] and the ban on torture,[8] which will now be outlined.

1 *Right to Life*

Firstly, it is arguable that the right to life has been breached through the indiscriminate killing of the Rohingya. The right to life is set out in article 3 of the *Universal Declaration of Human Rights*, which states that 'Everyone has the right to life, liberty and security of person'.[9] This section will now outline the Tatmadaw's breaches of the right to life, along with the severity of those breaches.[10]

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[5] By establishing this, it becomes possible to comment on international law's approaches to the situation in future chapters (whether it be through state responsibility or individual responsibility), along with the impact of the available remedies.

[6] Ronald Kramer and Raymond Michalowski, 'War, Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq (2005) 45(4) *British Journal of Criminology* 446, 448, citing Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 1) 101–15.

[7] *Universal Declaration of Human Rights*, GA Res 217A (III); UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 3.

[8] Ibid art 5.

[9] One of the rights set out in the *Universal Declaration of Human Rights* that is of utmost importance for freedom, justice and peace to be preserved is outlined in article 3, which is often referred to as the 'right to life': ibid art 3.

[10] Severity is an important issue within state crime scholarship, as the degree of the state's wrongdoing determines how the crime is categorised. See, eg, the 'torture paradigm vs health paradigm' discussion: Tom Campbell, 'Human Rights: A Culture of Controversy' (1999) 26 *Journal of Law and Society* 6, 18; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 1) 103; Stanley Cohen, 'Human Rights and Crimes of the State: The Culture of Denial' (1993) 26 *Australia and New Zealand Journal of Criminology* 97, 98.

From the many reports from Myanmar that detail the large-scale killing of the Rohingya, there is very little doubt that the Tatmadaw has breached this fundamental human right. From 25 August 2017, the mass killing of the Rohingya is very well documented in a variety of sources. Most notable is the in-depth interviews conducted by the Fact-Finding Mission of the Human Rights Council.[11] These reports of the clearance operations suggest that thousands of Rohingya were killed as a direct result of the attacks in the period 2017–18 alone,[12] in which at least 392 Rohingya villages were entirely destroyed.[13] As detailed in Chapter III, the majority of deaths recorded were found to be as a result of a combination of gunshot wounds and being burned alive whilst the Tatmadaw were razing the villages.[14]

The 2018 Fact-Finding Mission has detailed the Tatmadaw's breaches of the right to life within the context of the clearance operations.[15] Within its summary of the mass killing by the Tatmadaw, which was based upon interviews with survivors and witnesses, it found that, particularly from 25 August 2017, Rohingya men, women and children were intentionally killed at the hands of the Tatmadaw.[16] The Fact-Finding Mission continues, highlighting the horrific and intense nature of the operations, in which Myanmar's forces attacked village after village of the Rohingya.[17] Upon entering each village, the Tatmadaw was reported to open fire on any villagers present, while simultaneously burning the village's houses down.[18] Reports claim that some individuals were targeted by the various soldiers to be killed, while others were murdered in an indiscriminate manner by opening fire in the general direction of fleeing civilians.[19] Some Rohingya were thrown into, or even locked into, houses that had previously been set on fire, which led to their death, while others were reported to have been placed in a line and executed.[20]

One example of this is described in the report of the Fact-Finding Mission on the events that took place in the Rohingya villages of Min Gyi and Maung Nu. The report states that, within these areas, the members of the villages were gathered together by the Tatmadaw, then separated into males and females.[21] The males, which included not only the men, but also the boys, were instantly killed. The females on the other hand, both the women and girls, were taken by the members of the Tatmadaw to the remaining houses within the

[11] Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/39/CRP.2 (17 September 2018) ('*Detailed Findings 2018*').
[12] Ibid.
[13] Ibid 224 [959].
[14] Ibid.
[15] Ibid 354 [1394]–[1395].
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] Ibid.

village to be gang raped.[22] Afterwards, the report states that the females were then killed by the Tatmadaw's members, who locked the houses and set them on fire.[23]

When attempting to put a number on the individuals who were killed through the Tatmadaw's operations, the Fact-Finding Mission report highlighted the lack of official reporting on the issue, which can only be assumed to be a product of state involvement in perpetrating the killings.[24] It was suggested that the exact number of Rohingya deaths occurring from both the clearance operations and the prior systematic oppression may never truly be known.[25] However, an educated guess within the report states that the large-scale massacres can be found on reasonable grounds to have directly resulted in more than 10,000 deaths.[26] The Fact-Finding Mission states that, through multiple interviews and other information, it has verified the existence of clearance operations across 54 separate locations, in which there was mass killing of Rohingya civilians.[27] Along with this, the Fact-Finding Mission was also provided firsthand accounts that a further 22 locations experienced similar attacks, although there was not enough evidence for this to be fully verified.[28]

The mass, indiscriminate killing by Myanmar's military forces can clearly be considered to have violated the right to life of the civilian victims of the clearance operations, forming a violation of one of the fundamental principles underlying human rights law.[29] When looking at the reports of the breaches in question, the 2018 Fact-Finding Mission addresses the inherently evil and total unacceptable nature of the mass killing of the Rohingya in a rather eloquent manner:

> There can never be a necessity to engage in mass killings, including of women and children; in rape and sexual violence on a massive scale; in the specific targeting of children; or in the large-scale and deliberate looting and destruction of complete villages across three townships.[30]

The actions that are referred to in the various materials documenting the incidents involving death do not appear to indicate any form of justification for the breach of this right to life. Reports from the Human Rights Council's Fact-Finding Mission depict these instances of killing as more than isolated instances of punitive measures, or even as accidental in nature. The facts arising from within Myanmar show that the death of the Rohingya has occurred on a mass scale,[31] meaning that none of these justifications could be considered reasonable or necessary.

[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Ibid 316 [1285].
[31] Ibid 354 [1394]–[1395].

Moreover, the mass killings of the Rohingya were carried out indiscriminately,[32] indicating an even more sinister and 'totally unacceptable' nature of the attacks. On a philosophical level, Coady has noted that philosophers such as the 17th-century philosopher Hobbes, as well as theologians and lawyers, have argued over many years that, although the act of killing in some circumstances such as war may be necessary, there should be 'moral limits' on how this should be conducted.[33] These moral limits that should be placed upon killing when it is necessary to do so should under no circumstances allow intentionally attacks on non-combatants.[34]

Coady is of the view that the breach of this principle should be considered no less than a 'horrendous moral crime'; there is a difference between soldiers' deaths and those of civilians.[35] With reference to the Rohingya situation, the attacks were carried out regardless of whether the individuals were armed combatants. The attacks were intentionally directed against civilian women and children,[36] appearing to be based upon little more than their presence within a specific village at the time of the Tatmadaw's arrival. This form of indiscriminate killing should be, in the words of Coady, considered no less than a 'horrendous moral crime'. A nation's military's systematic mass murder of the civilian population is an act that objectively speaking would in no manner be considered an acceptable form of behaviour when assessed by the standards of humanity as a whole, the very standard that the *Universal Declaration of Human Rights* aims to represent.

Relating this back to the 'torture paradigm' scope of human rights violations,[37] there is no doubt that the mass indiscriminate killing of civilians would fit within this extreme category. The Tatmadaw's actions in this regard are 'totally unacceptable evils which are never justified'.[38]

2 *Ban on Torture*

Of similar gravity to the right to life is the 'ban on torture',[39] which was introduced by article 5 of the *Universal Declaration of Human Rights*.[40] 172his article states: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'[41]

With regard to the situation in Myanmar, the Human Rights Council has provided an extensive list outlining the different techniques used by the Tatmadaw against the Rohingya, which were believed to be acts of

[32] Ibid.
[33] Tony Coady, *Morality and Political Violence* (Cambridge University Press, 2012) 179–204; Tony Coady, 'A Just Cause Doesn't Excuse Indiscriminate Killing', *The Age* (online, 14 November 2007) <https://www.theage.com.au/national/a-just-cause-doesnt-excuse-indiscriminate-killing-20071114-ge6aoe.html>.
[34] Ibid.
[35] Ibid.
[36] Human Rights Council, *Detailed Findings 2018* (n 11) 354 [1394]–[1395].
[37] Campbell (n 10) 18; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 1) 103; Cohen (n 10) 98.
[38] Campbell (n 10) 18.
[39] Torture is explicitly listed in Campbell's discussion of the 'torture paradigm'. Ibid 19.
[40] *Universal Declaration of Human Rights* (n 7) art 5.
[41] Ibid.

torture.[42] Of this list, the more severe methods of torture included burning the skin of the victims with a hot knife, pouring hot wax on the victims' skin, tying hands and feet with ropes, beating with a metal rod, murdering other detainees in front of the victims and many instances of sexual violence, including rape.[43] The full list of torturous acts identified by the Fact-Finding Mission is outlined below:

- beating with a bamboo stick or metal rod;
- laying bamboo across the shins of the victim, and standing or jumping on it;
- tying up hands and/or feet with ropes;
- beating on several parts of the body;
- hitting on the head with the butt of a firearm;
- pointing a firearm at their temple;
- blindfolding;
- using death threats, instilling a justified fear of being killed;
- killing other detainees in front of victim;
- performing sexual violence, including rape;
- using insults of an ethnic or religious nature;
- burning the skin with a hot knife or cigarette stubs;
- pouring hot wax on skin;
- forcing nudity, fully and partially;
- forcing to kneel several hours on the ground, sometimes on stones;
- jabbing the skin with a needle or sharp knife;
- making victims dig their 'own' graves.[44]

According to the reports from the Human Rights Council, these torture techniques became hallmarks of the Tatmadaw's attacks on Rohingya villages, with similar reports emerging from the early 2012 violence, all the way through the recent clearance operations that are a primary focus of this thesis.[45] These torturous actions of the Tatmadaw were cruel, inhumane and degrading treatment of the Rohingya in clear violation of their basic human rights, which have been set out not just through the *Universal Declaration of Human Rights*, but also the underpinning public opinion that has led to the creation of numerous human rights-based internationally accepted legal materials.

The ideals underlying the creation of the laws surrounding torture can best be described by the criminologist Crelinsten.[46] In 'The World of Torture, A Constructed Reality', Crelinsten highlights the post-World War II

[42] Human Rights Council, *Detailed Findings 2018* (n 11) 47–8 [180].
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] Ronald Crelinsten, 'The World of Torture: A Constructed Reality' (2003) 7(3) *Theoretical Criminology* 294.

opinion on torture which led to the development of the 1950 *European Convention on Human Rights*.[47] Crelinsten cites the delegate F Cocks, who suggested that all forms of physical torture are inconsistent with civilised society and are offences against both heaven and humanity.[48] Cocks continued, with the comment that it would be 'better for Society to perish, than for it to permit this relic of barbarism to remain'.[49]

These comments highlight modern society's complete intolerance of any instances of torture, which has led to the universally accepted condemnation of the practice in many modern-day legal materials. Condemnation of the act of torture extends beyond the *Universal Declaration of Human Rights*[50] and has given rise to the development of treaties such as the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.[51]

The horrific instances of torture that were experienced by some members of the Rohingya group at the hands of the Tatmadaw should be, much like the acts of mass killing of civilians, considered unacceptable acts of evil.[52] Following the logic of Cocks' comments, the inconsistency of acts of torture with civil society mean the acts are never justifiable. Under no circumstances should such acts of 'barbarism'[53] be considered acceptable behavioural norms, and the conduct displayed by the Tatmadaw would no doubt be considered from Cocks' viewpoint to be an offence against 'both heaven and humanity'.[54]

From this perspective, the conduct of the Tatmadaw, through its breaches of the right to life and the ban on torture, should be considered nothing less than 'totally unacceptable evils which are never justified and undermine the claims to political legitimacy of any system of government'.[55]

It must be noted that this is by no means a comprehensive list of the human rights breaches that form a state crime, nor a comprehensive list of the human rights breaches that were experienced by the Rohingya population. It is certainly arguable that many more human rights breaches that are existent as social norms may have been breached as part of the Tatmadaw's actions.[56] Regardless, outlining these two human rights violations renders it possible to move forward to explain why these attacks should be considered an action of the state.

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[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] *Universal Declaration of Human Rights* (n 7).
[51] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
[52] Campbell (n 10) 18; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 1) 103; Cohen (n 10) 98.
[53] Crelinsten (n 46).
[54] Ibid.
[55] Campbell (n 10) 18; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 1) 103; Cohen (n 10) 98.
[56] Although following such a pathway does not seem necessary for the scope of this project when considering the horrific and universally condemned nature of the human rights breaches that have been identified.

B *Was This 'Crime' a Product of Organisational Deviance or Individual Deviance?*

The second element required for a situation to be considered a state crime is that the actions in question are a product of organisational deviance, which takes into account organisational goals and state gain.[57] Following the logic of Green and Ward, for an act to be considered a state crime, it must be carried out by public officials, states or governments, in furtherance of an organisational goal or policy.[58] This can be contrasted to the notion of 'individual deviance', which would be the actions of a rogue individual.[59]

In determining whether the deviance is a result of the state itself, two considerations may provide further indication: firstly, whether the 'crime' was carried out by public officials, states or governments,[60] and secondly, whether these actions were in the 'interest of the state'—furthering an organisational goal or policy, as opposed to individual gain.[61] This discussion will also consider the counterargument that the acts of the Tatmadaw may have been carried out by rogue members of the Tatmadaw taking advantage of their position of power, before ultimately determining whether the situation in Myanmar is a product of state-organised deviance.[62]

Ultimately, this section explains that the clearance operations were not the rogue acts of a small number of individuals acting as 'bad apples'.[63] By understanding that the attacks were carried out by public officials, in furtherance of a longstanding organisational goal to remove the Rohingya from Myanmar's territory, the true involvement of the state is highlighted. This section will now demonstrate why the attacks on the Rohingya were the product of organisational deviance or, as Punch puts it, the product of a 'rotten orchard'.[64]

1 *Carried Out by Public Officials, States or Governments?*

First, it is necessary to decide whether the attacks on the Rohingya were carried out by the state's official military, fitting within Green and Ward's definition requiring the acts to be carried out by public officials, states or governments.[65]

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[57] Green and Ward, *State Crime* (n 1); Chambliss (n 1) 184.
[58] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 1) 110.
[59] Kramer and Michalowski (n 6) 448, citing Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 1) 101–15.
[60] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 1) 110.
[61] Ibid. It is noted that, although the strict legal framework requires it to be proven that removing the Rohingya from Myanmar's territory carried the intent to destroy the group, the state crime perspective only requires the crimes to be carried out for the furtherance of an organisational goal. As a result, the lower threshold—that there is a general ideology of removing the Rohingya from Myanmar's territory—is enough to meet this criteria, if it can be convincingly argued.
[62] In terms of the overarching research question, this understanding of whether the state is considered responsible provides the opportunity to comment on international law's approaches to the issue in subsequent chapters.
[63] Maurice Punch, *Police Corruption: Exploring Police Deviance and Crime* (Willan, 2013) 2.
[64] Ibid.
[65] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 1) 110.

The military units tasked with carrying out the clearance operations against the Rohingya that involved genocidal acts have been detailed in previous investigations by the Fact-Finding Mission.[66] The low-level 'direct' perpetrators which have been detailed are the 33rd Light Infantry Division and the 99th Light Infantry Division.[67] These divisions are commanded by Brigadier-General Aung Aung (commanding officer of the 33rd Light Infantry Division), Brigadier-General Than Oo (commanding officer of the 99th Light Infantry Division), both of whom report to Major-General Maung Maung Soe (commanding officer of Western Command).[68] Overseeing all operations within the Tatmadaw are the two most senior commanders: General Soe Win and Senior General Min Aung Hlaing.[69]

These individuals, acting together in a coordinated fashion, are undoubtably official representatives of the state.[70] Myanmar's *Constitution of 2008* states that 'The main armed force for the Defence of the Union is the Defence Services'[71] and 'All the armed forces in the Union shall be under the command of the Defence Services.'[72] These forces provide the power to operate on defence issues internally, as the *Constitution* states that 'The Defence Services shall lead in safeguarding the Union against all internal and external dangers.'[73]

While there is a linkage between the state and the individuals carrying out the 'crimes', for these actions to be considered an action of the state, these crimes must be the product of organisational deviance, and not individual deviance.[74] To assist with this determination, the interests of the state become an important consideration.[75]

2 *What Are the Interests of the State?*

Secondly, the attacks are considered an act of the state if they are carried out by these individuals in the 'interest of the state'. In such an instance, the perpetrators would be furthering an organisational goal or policy, as opposed to achieving individual gain.[76]

Looking at the historic treatment through this lens shows that there may have been steps or 'operative goals'[77] that indicate that there is a longstanding general organisational ideology concerning the Rohingya's

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[66] Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/39/64 (12 September 2018) 10 [52].
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 1) 110.
[71] *Constitution of 2008* (Myanmar) art 337.
[72] Ibid art 338.
[73] Ibid art 339.
[74] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 1) 110.
[75] Chambliss (n 1) 184.
[76] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 1) 110.
[77] In determining this, it is important to note the consideration identified in Chapter II that the 'organizational goals of state agencies are not necessarily those publicly prescribed for them'. To determine the true interests of the state in this situation, it is the *operative goals* of the state that need to be considered, which takes into account the steps actually

citizenship status. By assessing the goals that the state has *actually* been working towards,[78] taking into account previous steps taken to remove the Rohingya from the region, this approach allows the unwritten state interests to be brought to light.

This section will demonstrate how, over many different political eras, through various leaders, the state has held the belief that the Rohingya are illegal 'Bengali' immigrants who should not reside on Myanmar's territory. This longstanding ideology concerning the Rohingya's legal presence in the region is complemented by active steps of removal, which further show the state's interest on the issue. This is demonstrated through the wording of legislation,[79] incorrect application of citizenship laws[80] and the physical, violent removal of the Rohingya from state territory on multiple prior occasions.[81] Ultimately, these steps or 'operative goals' bring to light a clear state goal to Remove the Rohingya from Myanmar's territory.

In order to demonstrate this, this analysis will begin with an outline of the historic tensions before moving in a linear fashion through the state's previous attempts to remove the Rohingya from its territory.

(a) Historic Tensions: A Product of Foreign Interference

To understand the reasoning behind Myanmar's multiple attempts to remove the Rohingya from its territory (including the Tatmadaw's attacks in the modern day), it becomes important to note the origins of the anti-Rohingya position. As suggested throughout this thesis, a primary cause of tension in Rakhine State at the time of the clearance operations is the citizenship status of the Rohingya,[82] with a common narrative being spread that the Rohingya are 'illegal Bengali immigrants'.[83] Looking deeper, it appears that the Rohingya's mass migration alongside the British[84] set in place the societal fracture that reached its inevitable boiling point in modern times.

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taken by the state and its organs: Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 1); Green and Ward, *State Crime* (n 1) 5; Ronald Kramer and James Jaksa, *The Space Shuttle Disaster: Ethical Issues in Organizational Decision-Making* (ERIC, 1987); Charles Perrow, 'The Analysis of Goals in Complex Organizations' (1961) 26 *Sociological Review* 854.

[78] Green and Ward, *State Crime* (n 1) 6.

[79] Archana Parashar and Jobair Alam, 'The National Laws of Myanmar: Making of Statelessness for the Rohingya' (2019) 57(1) *International Migration* 94, 98.

[80] Penny Green, Thomas MacManus and Alicia de la Cour Venning, *Countdown to Annihilation: Genocide in Myanmar* (International State Crime Initiative, 2015) 54–5; UN Human Rights Council, 'Special Session of the Human Rights Council on the Human Rights Situation of the Minority Rohingya Muslim Population and Other Minorities in the Rakhine State of Myanmar: Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein' (Press Release, 5 December 2017) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22487&LangID=E>.

[81] Human Rights Watch, *Historical Background* (Report, 2000) <https://www.hrw.org/reports/2000/burma/burm005-01.htm#P112_25491>.

[82] Human Rights Council, *Detailed Findings 2018* (n 11) 333 [1328].

[83] Green, MacManus and de la Cour Venning (n 80) 53–5.

[84] Andrew Selth, *Burma's Muslims: Terrorists or Terrorised?* (Strategic and Defence Studies Centre of Australian National University, 2003) 7; Aye Chan, 'The Development of a Muslim Enclave in Arakan (Rakhine) State of Burma (Myanmar)' (2005) 3(2) *SOAS Bulletin of Burma Research* 396, 401.

The British rule of Burma began in 1824[85] and involved three Anglo-Burmese wars,[86] the establishment of Burma as a region of British-controlled India,[87] the formation of Burma as a separately administered colony[88] and Japanese occupation during World War II.[89] Arakan State, which is known today as Rakhine State, was annexed by the British in 1826 after the first Anglo-Burmese War[90] in an event in which many scholars have found to be crucial in shaping the beliefs of many individuals in Rakhine State today.[91]

Throughout British rule, migration of labourers into Arakan State from nearby regions was encouraged, which, when accompanied by no international border or immigration restrictions, led to many Bengalis from the Chittagong region migrating to Arakan to undertake cheap labour, primarily in the Arakan fields.[92] Many Rohingya have traced their heritage back to the Arakan region in the 15th century; however, it is believed that a significant number of Rohingya arrived in Arakan State during this period of British colonialism.[93] Whilst such migration has been reported to have boosted the economy of the region at the time,[94] it is suggested that the local Arakan residents were strongly opposed to the increase in Muslim migrants to the region.[95] Such a viewpoint can be highlighted by a number of historical events including the 1930 Yangon riots[96] and the 1938 riots of the Arakanese against the Rohingya, which form an important snapshot of the non-Rohingya population's feelings toward the Rohingya population at the time.[97]

With the invasion by the Japanese during World War II, this animosity between the two distinct cultures was exacerbated.[98] The ruling British had promised the Rohingya the prospects of a post-war Muslim state and, as a result, the Rohingya had formed an alliance with the British.[99] Many Rohingya labourers were even recruited by the British and formed the Fourteenth Army.[100] By contrast, the Japanese promised the Burmese

[85] Bertie Pearn, 'Arakan and the First Anglo-Burmese War 1824–25' (1944) 4(1) *Far Eastern Quarterly* 27, 40.
[86] Ibid.
[87] Robert Taylor, 'British Policy towards Myanmar and the Creation of the Burma Problem' in Narayanan Ganesan and Kyaw Yin Hlaing (eds), *Myanmar: State, Society and Ethnicity* (Institute of Southeast Asian Studies, 2007) 70, 71.
[88] Nilakanta Sastri, 'Colonies and Backward Peoples' (1943) 5(2) *Indian Journal of Political Science* 191.
[89] Taylor (n 87).
[90] Ibid 71.
[91] Matthew Bowser, 'Partners in Empire? Co-colonialism and the Rise of Anti-Indian Nationalism in Burma, 1930–1938' (2021) 49(1) *Journal of Imperial and Commonwealth History* 118.
[92] Moshe Yegar, *The Muslims of Burma* (Otto Harrasowitz, 1972) 29; Chan (n 84) 400.
[93] Jobair Alam, 'The Current Rohingya Crisis in Myanmar in Historical Perspective' (2019) 39(1) *Journal of Muslim Minority Affairs* 1, 4; Selth (n 84) 7.
[94] Chan (n 84) 401.
[95] Ibid.
[96] Ibid 404.
[97] Bowser (n 91) 147.
[98] Alam (n 93) 5; Anthony Ware and Costas Laoutides, 'Myanmar's "Rohingya" Conflict: Misconceptions and Complexity' (2019) 50(1) *Asian Affairs* 67; Md Ali Siddiquee, 'The Portrayal of the Rohingya Genocide and Refugee Crisis in the Age of Post-truth Politics' (2019) 5(2) *Asian Journal of Comparative Politics* 89.
[99] Jacques Leider, *Rohingya: The History of a Muslim Identity in Myanmar* (Oxford Research Encyclopedia of Asian History, 2018).
[100] Jayita Sarkar, 'How WWII Shaped the Crisis in Myanmar', *The Washington Post* (online, 10 March 2019) <https://www.washingtonpost.com/outlook/2019/03/10/how-wwii-shaped-crisis-myanmar/>.

independence from British rule and, as a result, the Rakhine formed an alliance with the Japanese invaders.[101] This violence was not just limited to the British–Japanese conflict, as violence broke out in Arakan communities in 1943 as a response to the events taking place in the war.[102] Upon their return from participating in British-led operations, the violence continued in local communities until eventually British military administrators declared specific towns protected areas and stopped allowing the Rohingya to return to their own villages, in an attempt to stabilise the region and prevent further conflict.[103]

With this background, the basis of the tensions in the modern era becomes more apparent. A combination of mass migration alongside a foreign power that colonised the nation, willingness to partake in cheap labour which may have undercut the local workforce and threatened job security, along with the involvement in the World War II conflict on opposing sides can all be considered likely to have played a major role in the development of this societal fracture.

(b) Burma's Independence and the Union Citizenship Act 1948

This societal fracture and animosity towards the Rohingya population prompted numerous attempts to remove the Rohingya from Myanmar's (or Burma's) territory over the following century.

The first point at which the state can be seen to have made a visible step towards the removal of the Rohingya's citizenship can be seen in Burma's *Union Citizenship Act 1948.* Moving into an era of Burmese independence from British colonial rule,[104] the formation of this new nation that was deeply wounded by foreign interference was a crucial point in Burmese ethic relations.[105]

In establishing this new nation, the *Union Citizenship Act* was passed in 1948 and defined the citizenship of Myanmar.[106] This was achieved by outlining the specific ethnicities that were seen by the government to be indigenous races of Burma.[107] Most notably, this exclusive list of indigenous races did not include the

[101] Ware and Laoutides (n 98).
[102] Adam Burke, 'New Political Space, Old Tensions: History, Identity and Violence in Rakhine State, Myanmar' (2016) 38(2) *Contemporary Southeast Asia* 258.
[103] Sarkar (n 100).
[104] Yegar (n 92) 68.
[105] Aung San, along with the Anti-Fascist People's Freedom League found overwhelming popular support with the Burmese population and, as a result, enabled the successful negotiation for independence and the creation of an independent republic under the *Burma Independence Act 1947* (UK). This new country, formed in 1948, was named the 'Union of Burma', and the citizenship debates that are so prevalent today in Myanmar began at this time. Sigfrid Steinberg, 'Burma' in Sigfrid Steinberg (ed), *The Statesman's Year-Book* (Palgrave Macmillan, 1950) 835.
[106] Allard Lowenstein, *Persecution of the Rohingya Muslims* (Yale Law School International Human Rights Clinic, 2015).
[107] Ibid.

Rohingya people.[108] As outlined in article 3(1) of the *Union Citizenship Act 1948*: '[A]ny of the indigenous races of Burma' shall mean the Arakanese, Burmese, Chin, Kachin, Karen, Kayah, Mon or Shan race.[109]

With the dawn of the new nation and the adoption of the *Union Citizenship Act* came the opportunity for the first leaders of the nation, Sao Shwe Thaik and U Nu, to unify the nation in light of the tensions caused through British colonial rule.[110] As outlined above, tensions had risen in the region as a result of the mass migration of labourers[111] and World War II allegiances.[112] There was strong evidence of ethnic clashes occurring at the time, involving violence and rioting.

A fresh start and the creation of the nation's first citizenship Act provided these leaders the opportunity to legislate in a manner that could have lessened the impact of the divide predominantly caused by foreign interference.[113] This statement does not specifically argue that the Rohingya should have been included on the list of indigenous races—only that there could have been other ways to legislate citizenship status without assuming that the Rohingya are not an indigenous race of Myanmar. The way in which the *Union Citizenship Act* was written shows a deliberate decision was made to highlight a general list of ethnic groups that were considered indigenous to Myanmar and to exclude the Rohingya from this list.[114]

While this appears to have had little direct impact on the Rohingya at the time,[115] this official position opened the gateway for future military governments to further the societal divide.

(c) Operations 'Dragon King' and 'Clean and Beautiful Nation'

Between the Rohingya's arrival alongside the British and the creation of a somewhat exclusive citizenship law, the position that the Rohingya were a group of illegal immigrants began to gain significant traction. This position was taken to the extreme during the period of military dictatorship, when a hardened official stance was finally taken on the issue of Rohingya citizenship, ultimately leading to multiple instances of human rights violations.

Between 1948 and 1958, Myanmar operated as a democratic nation.[116] In 1962,[117] however, General Ne Win took over the role of head of state and became Prime Minister and chairman of the Union Revolutionary

[108] *Union Citizenship Act 1948* (Burma) art 3(1) listed the indigenous races of Burma for the first time and did not include the Rohingya, and stated that any other racial groups must have been settled prior to 1823 (the year before British colonial rule commenced). See Parashar and Alam, 'The National Laws of Myanmar' (n 79) 98.
[109] *Union Citizenship Act 1948* (Burma) art 3(1).
[110] Selth (n 84) 7; Chan (n 84) 401.
[111] Chan (n 84) 400.
[112] Ware and Laoutides (n 98); Sarkar (n 100).
[113] Selth (n 84) 7; Chan (n 84) 401.
[114] Lowenstein (n 106) 6.
[115] Ibid.
[116] Aktar Taslima, 'Politics of Myanmar: Experiment with Democracy, 1948–1962' 46(4) *Asian Profile* 381.
[117] In 1958 the first Prime Minister, U Nu, was forced to hand over power to the military under General Ne Win, in order to settle the situation arising from a loss of unity in the country. After U Nu regained power as head of a civilian government in 1960 and was unable to remedy the prior issues the state had been facing, General Ne Win staged a

Council, which now governed the country in a military dictatorship.[118] Under this military dictatorship there were two notable instances when the Rohingya were forcibly removed from the region.

The first notable instance of a previous military regime dealing with the citizenship of the Rohingya population arises from this Ne Win era of military governance. During this period, the military oversaw the creation of a new constitution, which contained a number of provisions that were severely unfavourable to the Rohingya and their citizenship status.[119] In 1974, the new constitution of Myanmar entered into force, transferring power from the military to a people's assembly, represented by members of the Burma Socialist Programme Party led by Ne Win.[120] From this point, the government required all citizens to obtain registration cards known as National Registration Certificates under the *Burma Immigration (Emergency Provisions) Act 1947*.[121] At the time, the Rohingya were not provided with National Registration Certificates, but Foreign Registration Cards.[122] According to Human Rights Watch, this provided the military with the means to begin persecuting the Rohingya.[123]

Through an operation codenamed 'Dragon King' in 1977, the Tatmadaw enforced the *Burma Immigration (Emergency Provisions) Act* in an attempt to remove all 'foreigners' in the lead-up to a national census.[124] At this time, it is reported that there were instances of brutality, murder and rape, causing a significant number of Rohingya to flee to neighbouring Bangladesh,[125] foreshadowing what was to follow in the coming decades.[126] During the Ne Win era of governance a large percentage of the Rohingya population was forced to flee from the military's targeted attacks involving brutality, murder and rape.[127] After Operation Dragon King, reports have suggested that Ne Win effectively affirmed the non-citizenship status of the Rohingya by stating that the Rohingya's actions of choosing to flee from Myanmar's territory were 'an admission of guilt'.[128] The second notable instance of a previous military regime dealing with the citizenship status of the

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military coup in 1962, arresting former Prime Minister U Nu, along with a number of other high-ranking officials: Konsam Devi, 'Myanmar Under the Military Rule 1962–1988' (2014) 3(10) *International Research Journal of Social Sciences* 46 ; Frank Trager, 'The Failure of U Nu and the Return of the Armed Forces in Burma' (1963) 25(3) *Review of Politics* 328.

[118] Mahbubul Haque, 'Rohingya Ethnic Muslim Minority and the 1982 Citizenship Law in Burma (2017) 37 (4) *Journal of Muslim Minority Affairs* 454.

[119] Parashar and Alam, 'The National Laws of Myanmar: Making of Statelessness for the Rohingya' (n 79) 100.

[120] Ibid.

[121] Engy Abdelkader, 'The Rohingya Muslims in Myanmar: Past, Present, and Future' (2013) 15 *Oregon Review of International Law* 393, 396.

[122] Human Rights Watch, *Burma: The Rohingya Muslims: Ending a Cycle of Exodus?* (Report, 1996); Kei Nemoto, 'The Rohingya Issue: A Thorny Obstacle Between Burma (Myanmar) and Bangladesh' (1991) 5 *Journal of Burma Studies* 1.

[123] Human Rights Watch, *Historical Background* (n 81).

[124] Maudood Elahi, 'The Rohingya Refugees in Bangladesh: Historical Perspectives and Consequences' in John Rogge (ed), *Refugees: A Third World Dilemma* (Rowman and Littlefield, 1987) 227, 231.

[125] Martin Smith, *Burma: Insurgency and the Politics of Ethnicity* (Zed Books, 1991) 241.

[126] Human Rights Council, *Detailed Findings 2018* (n 11) [1069]–[1095].

[127] Human Rights Watch, *Historical Background* (n 81).

[128] Ibid.

Rohingya population occurred during the 1988–92 rule of Saw Maung,[129] a time when the anti-Rohingya narrative popularised by Ne Win was once more legitimised for a modern-day audience.

With the military's position regarding the citizenship of the Rohingya firmly cemented by the 1990s,[130] the persecution of the Rohingya increased further, beginning with the military operations targeting Muslims in the early 1990s.[131] The 1990 Myanmar election, which was won by the National League for Democracy and headed by Aung San Suu Kyi, provided the circumstances for military persecution within Myanmar to be upscaled.[132] The ruling military government, who lost the election, failed to honour the results of the election and retained power.[133] Gravers explains the perspective of the government at the time in *Nationalism as Political Paranoia in Burma: An Essay on the Historical Practice of Power*[134] by highlighting Order 1/90. This order explained that the military government was recognised by many other states, as well as the United Nations, as the formal government of Myanmar and, as a result, was the official governing power of the nation.[135] Order 1/90 also required other political parties to accept this order, which led to those failing to accept this rule being persecuted.[136]

At this point the military launched 'Operation Pyi Thaya', which translates to English as 'Operation Clean and Beautiful Nation'. As a result of this increased military persecution, the Rohingya faced instances of forced labour, destruction of religious structures, the confiscation of houses, outlawing of religious activities and confiscation of farm animals.[137] According to a report by Human Rights Watch, approximately 250,000 Rohingya fled to bordering Bangladesh as a result of this increased presence of military persecution.[138]

The events transpiring as part of Operation Dragon King appear to be one of the early points at which the Rohingya issue reached the masses, in what could arguably be considered a turning point in establishing the modern-day position that the Rohingya are illegally residing on Myanmar's territory. From the issuance of Foreign Registration Cards,[139] to the human rights violations carried out to enforce the *Burma Immigration (Emergency Provisions) Act*,[140] Operation Dragon King shows a clear attempt to remove the Rohingya from Myanmar's territory. Similarly, it is evident that, through the implementation of Operation Clean and Beautiful Nation, the Saw Maung military government effectively legitimised the anti-Rohingya position of

[129] Cheng Ruisheng, 'Handling Relations with Myanmar in a Chinese Way: A Personal Reflection' (2010) 5(4) *Hague Journal of Diplomacy* 405.
[130] Haque (n 118).
[131] Ibid.
[132] Derek Tonkin, 'The 1990 Elections in Myanmar: Broken Promises or a Failure of Communication? (2007) 29(1) *Contemporary Southeast Asia* 33.
[133] Ibid; James Guyot, 'Myanmar in 1990: The Unconsummated Election' (1991) 31(2) *Asian Survey* 205.
[134] Mikael Gravers, *Nationalism as Political Paranoia in Burma: An Essay on the Historical Practice of Power* (Taylor and Francis, 1999) 69.
[135] Ibid.
[136] Ibid.
[137] Human Rights Watch, *Historical Background* (n 81).
[138] Ibid.
[139] Human Rights Watch, *Burma: The Rohingya Muslims: Ending a Cycle of Exodus?* (n 122); Nemoto (n 122).
[140] Abdelkader (n 121) 396.

the Ne Win government, which served for a substantial period prior.[141] These operations show that, on two separate occasions, in two differing political eras, the state has physically taken steps to remove the Rohingya from Myanmar's territory.

(d) Improper Application of Citizenship Law

Moving beyond the physical removal of Rohingya citizens from Myanmar's territory, more subtle steps towards the removal of the Rohingya were undertaken in the lead-up to the modern-day violence. Although the Rohingya may arguably meet the requirements for citizenship in some instances, the state and its representatives have constantly incorrectly applied laws on issues concerning Rohingya citizenship status.

Legally speaking, it is arguable that the Rohingya meet the requirements for citizenship, most notably, the *Citizenship Act 1948*, for which they should be considered as a 'racial group as has settled in any of the territories within the Union as their permanent home from a period anterior to 1823 A.D.'[142] This principle was also carried over to the *Burma Citizenship Law 1982* in article 3.[143] Academic research on this issue indicates that the Rohingya population were originally Arabic traders who arrived in Rakhine State in the 8th century, with the population gradually migrating to the region over time.[144] While the issue of 'permanent home' could be contested due to the constant flight of the Rohingya at the hands of the Tatmadaw over recent decades, it is quite arguable that the Rohingya were established in the region before 1823 AD.

Furthermore, through the *Burma Citizenship Law 1982*, the Rohingya were technically also able to receive 'associate citizenship', which, although it may not provide the full rights afforded to other ethnic groups, still paved the way under law to enable the Rohingya to receive citizenship.[145] Despite the multiple ways in which it is legally possible for the Rohingya to receive citizenship, laws concerning this issue have been applied incorrectly on numerous occasions.

The first instance of improper application of relevant citizenship law concerning the Rohingya is the policy adopted in 1994 to refuse to issue Rohingya children with birth certificates.[146] Under the *Citizenship Act 1982*, there were many ways in which a newborn child born in Myanmar would have been considered to meet the criteria of a 'citizen'. For example, under article 5 of the *Citizenship Law* those born of parents who are national citizens by birth would meet the requirements for receiving a birth certificate.[147] Similarly,

[141] Human Rights Council, *Detailed Findings 2018* (n 11) 116.
[142] *Union Citizenship Act 1948* (Burma) art 3(1).
[143] *Burma Citizenship Law 1982* art 3.
[144] Sanzhuan Guo and Madhav Gautam, 'Stateless Rohingyas in Bangladesh and Refugee Status: Global Order and Disorder under International Law' in Leon Wolff and Danielle Ireland-Piper (eds), *Global Governance and Regulation: Order and Disorder in the 21st Century* (Routledge 2018) 83, 84; Iqthyer Uddin Md Zahed and Bert Jenkins, 'The Politics of Rohingya Ethnicity: Understanding the Debates on Rohingya in Myanmar' (2022) 42(1) *Journal of Muslim Minority Affairs* 117, 121.
[145] *Burma Citizenship Law 1982* (n 143) art 7.
[146] UN Human Rights Council, 'Special Session of the Human Rights Council' (n 80).
[147] *Burma Citizenship Law 1982* (n 143) art 5.

children born to two associate citizens would also meet the relevant criteria.[148] Whilst the many newborn Rohingya should be considered in many cases to be born to two nationals by birth, the reality is that many Rohingya have been reduced to associate citizenship. Based on the *Citizenship Act*, a child born of two associate citizens would also meet the requirements of citizenship for newborn children.[149] Regardless of which level of citizenship is considered, or the number of Rohingya in such a position, the blanket application of this in such a way that Rohingya newborn children would not receive citizenship does not follow the citizenship law correctly. The determination that an individual is of the Rohingya ethnic group does not immediately mean that they should be, under citizenship law, unable to obtain a birth certificate. The blanket application of the *Citizenship Law* appears to be improper as decisions on a case-by-case basis are required in order to determine if the requirements of the act are met.

The second instance in which the citizenship law was incorrectly applied was when the Rohingya were effectively excluded from the 2014 census.[150] The census was undertaken with support of the United Nations Population Fund, which reported that the government at the time had agreed to include those who are not listed as one of the ethnic groups, which would have allowed the Rohingya to partake in the census.[151] Despite these promises, when the census was eventually carried out, officials conducting the survey did not allow the Rohingya to register their ethnicity as 'Rohingya'.[152] Reports from the time state that, when the response to the question on ethnicity was 'Rohingya', the individuals conducting the survey thanked the household for their time and walked away—not completing the survey.[153]

These reports are consistent with the views of civilian government spokesperson Ye Htut, who reportedly stated: 'If a household wants to identify themselves as "Rohingya", we will not register it.'[154] Similar to the recent 1994 example, many of these individuals may have been considered citizens, even under the high thresholds of the *Citizenship Law 1982*.[155] Yet, once again, any further analysis was discarded at the initial determination that the individuals in question identified as Rohingya.

These examples of improper application of the citizenship law when it involves the Rohingya population form a far from exclusive list, as there are many further examples that can be used to support this point.[156] Although the Rohingya could be found to meet the criteria of the relevant legislation and be considered citizens, they face restrictions on their movement, restrictions on higher education, restrictions on

[148] Ibid art 7.
[149] Chris Lewa, 'North Arakan: An Open Prison for the Rohingya in Burma' (2009) 32 *Forced Migration Review* 11.
[150] Green, MacManus and de la Cour Venning (n 80) 54–5.
[151] Jane Ferguson, 'Who's Counting? Ethnicity, Belonging, and the National Census in Burma/Myanmar' (2015) 171(1) *Journal of the Humanities and Social Sciences of Southeast Asia* 1.
[152] Green, MacManus and de la Cour Venning (n 80) 54–5.
[153] Ibid.
[154] Ibid.
[155] *Burma Citizenship Law 1982* (n 143).
[156] For a longer list of allegations concerning the improper application of citizenship law see Green, MacManus and de la Cour Venning (n 80) 19.

employment opportunities and a constant denial of access to health care[157]—all rights which other ethnic groups that are considered 'citizens' are afforded.

(e) 2008 Constitution and Further Citizenship Requirements

The final indication of Myanmar's state interests concerning the Rohingya can be seen in the *2008 Constitution* and its impact on Rohingya citizenship. While it was previously arguable that many Rohingya could receive citizenship under the 1948 and 1974 constitutions and the *Citizenship Act 1982*, it is argued that the *2008 Constitution* removed this possibility.[158]

Under the new requirements for citizenship, individuals are required to prove that their parents are citizens of Myanmar, or that they are already citizens.[159] The problematic aspect of this is that most Rohingya do not hold the documentation that is required to prove their claim. As a result, the chances of the Rohingya becoming legitimate citizens were reduced even further by the *2008 Constitution.*[160] This has been noted by Parashar and Alam, who have analysed the history of Myanmar's citizenship regime.[161] Their findings highlight the role of law over time in creating the statelessness of the Rohingya:

> A doctrinal analysis demonstrates that: (i) the earlier Constitutions and laws provided citizenship for the Rohingya (where they were identified as an ethnic minority); and (ii) their status has been changed gradually under the later constitutions and legislations until recently, when they are regarded as neither minority nor citizen and rendered stateless by the law. The role of legislation in disempowering the Rohingya is thus made explicit.[162]

Renshaw is of the view that the *2008 Constitution* was 'specifically drafted to exclude the Rohingya by reserving important rights for citizens only'.[163] Through these new practical difficulties that the *2008 Constitution* created, the Rohingya's citizenship position was exacerbated.

(f) Myanmar's State Interests Concerning the Rohingya

By looking at the historic treatment of the Rohingya, this section has shown that many steps (or 'operative goals'[164]) have been taken to remove the Rohingya from Myanmar's territory. From the perspective of state

[157] Ibid 19; Neve Gordon and Penny Green, 'State Crime, Structural Violence and COVID-19' 10(1) *State Crime* 4, 7.
[158] Parashar and Alam, 'The National Laws of Myanmar' (n 79) 102–4; Siddiquee (n 98) 97.
[159] Alvin Hoi-Chun Hung, 'Citizens or Foreigners? A Socio-legal Perspective on Persecution of Rohingyas', *New Mandala* (Web Page, 19 August 2021) <https://www.newmandala.org/citizens-or-foreigners-a-socio-legal-perspective-on-persecution-of-rohingyas/>.
[160] Ibid.
[161] Including the constitutions of 1947, 1974 and 2008, along with other major citizenship legislation such as the *Burma Citizenship Law 1982*: Parashar and Alam, 'The National Laws of Myanmar' (n 79) 94.
[162] Ibid.
[163] Catherine Renshaw, 'Myanmar's Genocide and the Legacy of Forgetting' (2020) 48(2) *Georgia Journal of International and Comparative Law* 425, 464. See also Catherine Renshaw, 'Human Rights Under the New Regime' in Andrew Harding and Khin Khin Oo (eds), *Constitutionalism and Legal Change in Myanmar* (Hart Publishing, 2017) 215, 223.
[164] Green and Ward, *State Crime* (n 1) 5.

crime, the existence of these 'operative goals' indicates that there is a longstanding general organisational ideology concerning the Rohingya's citizenship.[165]

The state, through many different leaders over many different eras, has shown time and time again that it believes that the Rohingya are illegal 'Bengali' immigrants who should not reside on Myanmar's territory. This deep, longstanding position has been combined with not only ideologies concerning the removal of the Rohingya, but active steps to do so. Through the wording of legislation,[166] subtle incorrect application of citizenship laws[167] and the physical removal of the Rohingya from Myanmar's territory on multiple prior occasions,[168] the state has actively attempted to remove the Rohingya.

These steps or 'operative goals'[169] to remove the Rohingya indicate that there is a general organisational ideology concerning the removal of the Rohingya from Myanmar's territory that is ingrained in the state. This analysis has shown that the organisational goals concerning the Rohingya extend far beyond the individuals in the current military, but to previous state leaders.[170]

This viewpoint has also been noted by International State Crime Initiative workers who undertook fieldwork in Myanmar at the time of the 2012 riots,[171] who suggested that the massacres did not arise as a result of 'intercommunal violence'—the perpetrators used such violence as an opportunity to further a 'long term, systematic strategy by national and regional governments to remove the already persecuted Rohingya minority from the State's realm of political, social, moral and physical obligation'.[172]

Statements made by General Min Aung Hlaing after the clearance operations support this view:

> Bengali do not have any characteristics or culture in common with the ethnicities of Myanmar. The tensions (in Rakhine State) were fuelled because the Bengali demanded citizenship.
>
> 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.
>
> Entire government institutions and people must defend the country with strong patriotism.[173]

[165] Ibid.
[166] Parashar and Alam, 'The National Laws of Myanmar' (n 79) 98.
[167] Green, MacManus and de la Cour Venning (n 80) 54–5; UN Human Rights Council, 'Special Session of the Human Rights Council' (n 80).
[168] Human Rights Watch, *Historical Background* (n 81).
[169] Green and Ward, *State Crime* (n 1) 5.
[170] Human Rights Council, *Detailed Findings 2018* (n 11) 116, 333 [1328].
[171] Green, MacManus and de la Cour Venning (n 80) 19.
[172] Ibid.
[173] Human Rights Council, *Detailed Findings 2018* (n 11) 333 [1328], 337 [1336], 180 fn 1617.

3 *Individual or Organisational Deviance?*

Relating these organisational goals to the violations carried out towards the Rohingya, it can finally be asked whether these attacks were carried out in the interest of the state, or in the interest of the direct perpetrators.

The argument of individual deviance still needs to be considered in light of the position of the State Chancellor at the time, Aung San Suu Kyi, which suggests that the attacks were against the terrorist group ARS'[174] and not the Rohingya civilian population. From this perspective, the argument could be that the state-sanctioned operations were carried out against the insurgent group, and the attacks on civilians were a product of deviant individual soldiers abusing their power as state officials for self-interest. This, in turn, would indicate that the situation is the result of a number of deviant individuals, and not the state.[175]

Such a situation has been specifically explained by Green and Ward, who suggest that the absence of action by fellow soldiers or superior ranking officials in light of individual deviance can indicate that the deviance may be organisational in nature: 'The organisational goal does not need to be the same as the individual motive'.[176] Green and Ward provide the example of a soldier committing rape for reasons of personal gratification during war, but these actions still contribute to the organisational goals of demoralising the enemy or promoting ethnic cleansing:

> The organisational goal may be of little importance to the soldier themselves, but the organisational goal may be why the comrades and superiors have turned a blind eye … If a soldier was to be court martialled for such actions, then this would explain that the individual acted contrary to the state goals.[177]

It is very unlikely that the Tatmadaw's generals, such as Min Aung Hlaing and Soe Win, did not know of the attacks on Rohingya civilians. The large-scale nature of the attacks[178] and evidence that they physically attended briefings on the clearance operations[179] provide a strong indication of the high-ranking generals' knowledge. As the Fact-Finding Mission states:

> [N]o sensible suggestion can be made that military commanders within the Tatmadaw did not know or have reason to know that their subordinates were committing crimes. It was being done everywhere, in every operation, and pursuant to a policy of their own making and implementation. Tatmadaw

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[174] 'Transcript: Aung San Suu Kyi's Speech at the ICJ in Full', *Burma/Myanmar Library* (Web Page, 13 December 2019) <www.burmalibrary.org/en/transcript-aung-san-suu-kyis-speech-at-the-icj-in-full>.

[175] Green and Ward, *State Crime* (n 1) 5; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 1) 110; Chambliss (n 1) 184.

[176] Green and Ward, *State Crime* (n 1) 6.

[177] Ibid.

[178] International Criminal Court, 'ICC Judges Authorise Opening and Investigation into the Situation in Bangladesh/Myanmar' (Media Release ICC-CPI-20191114-PR1495, 14 November 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>.

[179] Human Rights Council, *Detailed Findings 2018* (n 11) 388 [1539].

> commanders knowingly accepted the high probability of unlawful civilian casualties and destruction of civilian property.[180]

Yet, there have only been superficial investigations of these allegations, with no significant penalties being handed down for the many instances of killing, torture and rape.[181] According to the Fact-Finding Mission, an investigation into the clearance operations was led by Lieutenant General Aye Win.[182] The investigation was allegedly conducted between 13 October and 7 November 2017, and it found that the there was no death of innocent people, and 'not a single shot' was fired upon innocent Bengalis.[183] Based on this, the Fact-Finding Mission suggests that the investigation concerning crimes against civilians was carried out in a superficial manner,[184] stating: 'There are no indications that any of the top Tatmadaw commanders took any substantial steps to mitigate the unlawful character of the operations and their devastating consequences on human life and dignity'.[185]

Following on from the logic of Green and Ward,[186] it becomes evident that the reason for the failure to punish well-known violations against the Rohingya population is that these attacks were in line with the organisational goals of the state. If the organisational goal of the state was the removal of the Rohingya from Myanmar's territory, then preventing or punishing conduct that would likely cause the Rohingya to flee would be counter-intuitive for the state and its military's leadership. Given the history of the Rohingya's exodus at the hands of the Tatmadaw as a response to similar operations,[187] the Tatmadaw's commanders would have known that this mass exodus would be achieved if the human rights violations were carried out against the Rohingya.

These human rights violations, taken alongside the state's longstanding discriminatory position regarding the citizenship of the Rohingya, indicate that the clearance operations were in line with state goals of removing the Rohingya from the country. This has been attempted in many different prior instances, whether through the effective removal of citizenship status,[188] or similar military-based operations of force.[189] The end result of the clearance operations, the removal of the Rohingya, was clearly in line with these goals at the time.[190]

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[180] Ibid [1537].
[181] Ibid 409 [1612].
[182] Ibid.
[183] Ibid.
[184] Ibid 389 [1542].
[185] Ibid.
[186] Green and Ward, *State Crime* (n 1) 6.
[187] As can be seen by Operations Dragon King and Clean and Beautiful Nation. See Human Rights Watch, *Historical Background* (n 92).
[188] *Union Citizenship Act 1948* (Burma); *Burma Citizenship Law 1982* (n 143); Parashar and Alam, 'The National Laws of Myanmar' (n 79) 102–4; Siddiquee (n 98) 97.
[189] Mujtaba Razvi, 'The Problem of the Burmese Muslims' (1978) 31(4) *Pakistan Horizon* 82, 89; Elahi (n 124) 231; Smith, *Burma: Insurgency and the Politics of Ethnicity* (n 125) 241; Human Rights Watch, *Historical Background* (n 81).
[190] This determination is consistent with the comments from the Special Rapporteur on the Situation of Human Rights in Myanmar, who stated in 2010: 'Given the gross and systematic nature of human rights violations in Myanmar over a

Smeulers describes how malicious intent, hatred, fear, greed and abused idealism can evolve into 'collective madness' when placed alongside consistent state policy:

> [M]alicious intent, hatred, fear, greed and abused idealism sometimes create a dangerous mix and may explode in an episode of collective violence. Once this happens many people get involved merely by not actively opposing the orders of the state or not stopping the collective madness. In this manner they inevitably become involved in international crimes. Within an evil system the social context is thrown upside down and in such systems we have to fear those who abide by the law more than those who break the law. All those who believe in state policy, who just do as they are told, who go along with or simply follow the current get involved in mass atrocities.[191]

As a result, the attacks on the Rohingya are not the rogue acts of a small number of individuals acting as 'bad apples'.[192] Rather, the attacks on the Rohingya appear to be the product of organisational deviance or, as Punch puts it, the product of a 'rotten orchard'.[193]

Combining this determination with the findings that the human rights violations against the Rohingya fall within the scope of state crime, it becomes evident that the situation in Myanmar constitutes a 'state crime'.[194]

C *How Has the 'Crime' Developed?*

As the previous section outlined, the 'crimes' of the Tatmadaw are a product of organisational deviance, as opposed to individual deviance.[195] This finding that the situation involves a state crime now opens the door for analysis of how the state crime has developed.[196]

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period of many years, and the lack of accountability, there is an indication that those human rights violations are the result of a state policy that involves authorities in the executive, military, and judiciary at all levels.' Human Rights Council, *Progress Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, UN Doc A/HRC/13/48 (10 March 2010) 29 [121]; Renshaw, 'Myanmar's Genocide and the Legacy of Forgetting' (n 163) 464.

[191] Smeulers, 'Perpetrators of International Crimes: Towards a Typology' (n 183) 264.

[192] Punch (n 63) 2.

[193] Ibid.

[194] State crime is defined as 'An area of overlap between two distinct phenomena, (1) the violation of human rights and (2) state organised deviance': Kramer and Michalowski (n 6) 448, citing Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 1) 101–15.

[195] Green and Ward, *State Crime* (n 1) 5; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 1) 110; Chambliss (n 1) 184.

[196] Many scholars have used the crimes of obedience framework to further examine instances that are considered state crimes; Frank Neubacher, 'How Can it Happen That Horrendous State Crimes Are Perpetrated? An Overview of Criminological Theories' (2006) 4(4) *Journal of International Criminal Justice* 787, 791; Herbert Kelman, 'The Policy Context of International Crimes' in André Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press, 2009) 26, 26; Day and Vandiver (n 48); Roxana Marin, 'Structural and Psychological Perspectives on the Perpetrator of Genocide' (2012) 12(2) *Studia Politica: Romanian Political Science Review* 235, 242; Herbert Kelman, 'Dignity and Dehumanization: The Impact of the Holocaust on the Central Themes of My Work' in Herbert Kelman, *Resolving Deep-Rooted Conflicts*, ed Werner Wintersteiner and Wilfried Graf (Routledge, 2016) 38, 44.

The crimes of obedience framework provides the opportunity to achieve a deeper understanding of the underlying issues that enabled the situation to develop.[197] This theory suggests, that due to the involvement of the state in the crimes, there were many factors that enabled the crime to be carried out.[198] This framework encourages one to look beyond the 'direct perpetrator' of a state-linked act of violence and assess the further dimensions of the crime.

To reiterate the theoretical framework of this thesis, crimes of this nature are carried out by the direct perpetrator—usually a low-ranking state official such as a police officer, or in this case, a low-ranking soldier. In an ideal world, an individual's own moral compass would prevent them from indiscriminately killing or torturing another human. But, according to the crimes of obedience framework, the existence of three factors can influence the mindset of a direct perpetrator, ultimately leading to crimes of this nature being carried out.[199] These factors are authorisation, routinisation and dehumanisation.[200] Firstly, when the direct perpetrator is placed under a 'duty to obey', the individual's perspective on right and wrong is determined by the military's chain of command, as opposed to their own moral compass.[201] Secondly, the gravity of crimes of this nature does not become a concern for the direct perpetrator when acts of violence have become routinised, appearing as little more than part of daily routine as a soldier.[202] And thirdly, the direct perpetrator does not see these attacks as morally wrong when the victim is painted as less than human, deserving the harm being caused.[203]

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[197] Kelman and Hamilton (n 3) 17–19; Pali (n 3); Smeulers (n 26); Herbert Kelman, 'The Social Context of Torture: Policy Process and Authority Structure' (2005) 87 *International Review of the Red Cross* 123, 131; V Lee Hamilton, 'Chains of Command: Responsibility Attribution in Hierarchies' (1986) 16(2) *Journal of Applied Social Psychology* 118; Cohen (n 10) 110; Edward Day and Margaret Vandiver, 'Criminology and Genocide Studies: Notes On What Might Have Been and What Still Could Be' (2000) 34(1) *Crime, Law and Social Change* 43,, 44–5; Edward Sherman, 'Social Psychology of Citizens' Obligations to Authority: A Review of Crimes of Obedience' (1989) 17 *American Journal of Criminal Law* 287 ; Leanne Weber, 'The Detention of Asylum Seekers as a Crime of Obedience' (2005) 13(1) *Critical Criminology* 89, 93; Jessica Wolfendale, 'Military Obedience: Rhetoric and Reality' in Igor Primoratz (ed), *Politics and Morality* (Palgrave Macmillan, 2007) 228.

[198] Kelman and Hamilton (n 3) 17–19; Pali (n 3); Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3).

[199] Kelman and Hamilton (n 3) 17–19; Pali (n 3); Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3); Kelman, 'The Social Context of Torture' (n 197) 131; Hamilton (n 197); Cohen (n 10) 110; Day and Vandiver (n 197) 44–5; Sherman (n 197); Weber (n 197) 93; Wolfendale (n 197) 228–46.

[200] Ibid.

[201] This is referred to as authorisation; Kelman and Hamilton (n 3) 17; Stanley Milgram, *Obedience to Authority* (Harper and Row, 1974); Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3) 113; Kelman, 'The Social Context of Torture' (n 197) 131; Day and Vandiver (n 197) 44; Kelman, 'The Policy Context of International Crimes' (n 196) 27.

[202] Kelman and Hamilton (n 3) 18; Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3) 119; Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (Cambridge University Press, 1989) 79.

[203] Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3) 117; Daniel Bar-Tal, 'Causes and Consequences of Delegitimization: Models of Conflict and Ethnocentrism' (1990) 46 *Journal of Social Issues* 65; Susan Opotow, 'Moral Exclusion and Injustice: An Introduction' (1990) 46 *Journal of*

Through this lens, it is a combination of these factors that enables the existence of state crime.[204] If these factors continue to exist, then there is little to stop the direct perpetrators from continuing to carry out harm against the victim population. Combatting the existence of authorisation, routinisation and dehumanisation then becomes paramount, if future instances of state crime are to be prevented.

This section will apply this crimes of obedience framework to the situation in Myanmar, showing how the crimes against the Rohingya (through the combination of authorisation, routinisation and dehumanisation) have developed. By understanding the factors that led to the development of the crimes, further conclusions on the appropriateness of the differing forms of responsibility in international law can be provided in subsequent chapters.[205] This analysis will now begin with a discussion on the direct perpetrators of the attacks, before moving through the three preconditions of state crime, authorisation, routinisation and dehumanisation.[206]

1 *Direct Perpetrators*

The first task is the identification of the 'direct perpetrators' who have been subjected to these factors.

According to a detailed report from the Human Rights Council, it appears that the units involved in the clearance operations carried out against the Rohingya were the 33rd Light Infantry Division and the 99th Light Infantry Division.[207] These divisions that were directly involved in the physical aspects of the attacks in question were led by Brigadier-General Aung Aung and Brigadier-General Than Oo, respectively.[208]

Scholars in this field suggest that the low-level individual perpetrators carrying out state crimes often do not recognise the 'manifest illegality' of the orders they receive from their commanding officers.[209] Smeulers believes that these low-ranking offenders often consider 'manifestly unlawful orders'[210] as tasks that are legitimate or necessary. This is due to the fact that the legitimacy of these orders (and, by extension, their

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Social Issues 1; Staub (n 202) 79; Day and Vandiver (n 197) 45; Kelman, 'The Social Context of Torture' (n 197) 131; Ann Tsang, 'Moral Rationalization and the Integration of Situational Factors and Psychological Processes in Immoral Behavior' (2002) 6(1) *Review of General Psychology* 25, 30; Weber (n 197) 100–2.

[204] Kelman and Hamilton (n 3) 17–19; Pali (n 3); Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3); Day and Vandiver (n 197) 45; Kelman, 'Dignity and Dehumanization' (n 196); Allette Smeulers, 'Perpetrators of International Crimes: Towards a Typology' in Allette Smeulers and Roelof Haveman (eds), *Supranational Criminology: Towards a Criminology of International Crimes* (Intersentia, 2008) 233, 259; Kelman, 'The Social Context of Torture' (n 197) 131.

[205] If the state crime perspective can show what factors have enabled the crimes to be carried out, then international law's capacity to deal with the prevention of future crimes can be discussed in later chapters.

[206] Kelman and Hamilton (n 3) 17–19; Pali (n 3); Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3).

[207] Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (n 66) 10 [52].

[208] Ibid.

[209] Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3) 122.

[210] Such as those that may amount to crimes against humanity or genocide.

own conduct carried out under such orders) becomes distorted.[211] This is achieved through a distorted social context placed upon these individuals through the systems they are a part of, in which they are trained by their superiors to trust the legitimacy of the orders of their superiors.[212] Furthermore, this distorted social context encourages these low-level perpetrators to form the view that these actions are required in order to assist the 'good' in the fight against an othered 'evil'.[213]

Due to this distorted social context in which these direct perpetrators are placed, Smeulers suggests that responsibility for crimes committed in this context should be extended beyond the low-level 'direct' perpetrators who engage in the final, physical aspects of the crimes.[214] For this reason, it becomes more important to consider the actions of higher-ranking officials who have authorised their subordinates to carry out such crimes and enabled such violent acts to become routine.[215]

This does not suggest that low-level direct perpetrators should be entirely removed from accountability for their actions. This specific instance is discussed by Kelman and Hamilton, who have identified that the classic line of those accused of such crimes is that they were 'only following orders'.[216] Kelman and Hamilton are of the view that the defence of 'superior orders' does not carry considerable weight.[217] Kelman and Hamilton argue that, although low-ranking perpetrators may find it difficult to distinguish legal and illegal, in the presence of authorisation the individual will usually choose to carry out the orders in question anyway.[218] This is because in the presence of authority choosing to carry out the manifestly unlawful order is the path of least resistance.[219] The individual does not have to question authority, nor deal with any military repercussions as a result of failing to adhere to the duty to obey.[220] Kelman and Hamilton have also noted that, in many cases, the individual views the existence of superior orders as a safeguard against any future condemnation of such actions.[221] It is due to this path of least resistance that state crimes are still carried out to this day. Breaking the assumption that the existence of superior orders is a viable defence appears to be

[211] Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3) 122.
[212] Ibid. Explaining this further, Neubacher states: 'The perpetrators see themselves in a "no-choice situation" either because they feel their duty lies in obedience or because they feel involved in a "transcendent mission"': Neubacher (n 196) 791, citing Herbert Kelman, 'Violence Without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers' (1973) 29 *Journal of Social Issues* 25, 38.
[213] Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3) 122.
[214] Ibid.
[215] As well as the individuals and entities that have dehumanised the victim population: Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3) 122.
[216] Kelman and Hamilton (n 3) 48.
[217] Ibid.
[218] Ibid.
[219] Ibid.
[220] Ibid.
[221] Ibid.

crucial in the fight against state crime, rendering the low-level perpetrators contributors to the harm of the Rohingya.[222]

With it now being established that the 33rd Light Infantry Division and 99th Light Infantry Division were the direct perpetrators of this instance of state crime in Myanmar,[223] it is possible to extend the focal point for analysis further, looking beyond just the actions that have directly harmed the Rohingya.

2 *Authorisation*

Moving forward from the direct perpetrators, the concept of authorisation is the first factor that can demonstrate how the crimes were possible.

Under the Tatmadaw's chain of command, the direct perpetrators report to General Soe Win, the Deputy Commander-in-Chief, under Senior General Min Aung Hlaing.[224] Under this structure, a low-level Tatmadaw soldier is conditioned to accept a 'duty to obey' as part of their role within the serving military.[225] This effectively overrides the individual's own moral compass, enabling the individual to accept the position of high-ranking military officials as correct—regardless of how unlawful or immoral such viewpoints may seem.[226]

By understanding this concept of authorisation, it becomes evident that these attacks are more than the product of the direct perpetrators. The harm felt by the Rohingya is also a result of the authorisation of the attacks by General Soe Win and General Min Aung Hlaing.

This section will explain how the Tatmadaw's generals authorised the attacks by exploring the explicit orders, implicit orders and the omissions that led the low-level perpetrators to see their crimes as legitimate.

(a) Authorisation through Explicit Orders

The decisions of low-ranking subordinates to carry out these attacks appear to have been influenced by orders from high-ranking members to which these direct perpetrators owe a 'duty to obey'.[227] The reports of

[222] However, there is one sidenote that needs to be placed alongside such an assertion. While the presence of authorisation may not fully exonerate the low-level perpetrator, Kelman and Hamilton suggest that authorisation can be considered a mitigating factor with regard to the determination of accountability. From the lens of state crime, the direct perpetrators of the attack should be dealt with to some degree, although one is encouraged to look beyond the direct perpetrator to see the true extent of what has enabled the crimes to be carried out. Ibid.
[223] Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (n 66) 10 [52].
[224] Ibid.
[225] Kelman and Hamilton (n 3) 17; Cohen (n 10) 110; Kelman, 'The Social Context of Torture' (n 197) 131.
[226] Kelman and Hamilton (n 3) 17. Kelman expands on this, suggesting: 'The role of authorization is strengthened by the fact that torturers, typically, are not just acting within a hierarchy in which they are expected to obey—and have indeed been trained to obey without question.' Kelman, 'The Social Context of Torture' (n 197) 131.
[227] Kelman and Hamilton (n 3) 17; Kelman, 'The Social Context of Torture' (n 197) 131; Day and Vandiver (n 197) 44; Kelman, 'The Policy Context of International Crimes' (n 196) 27.

inquiries into the Tatmadaw's crimes indicate that the attacks were ordered through the Tatmadaw's chain of command.

In reference to the 2017 clearance operations, Tatmadaw Inspector-General Lieutenant-General Aye Win stated that 'all security members abided by the orders and directions of superior bodies'.[228] Furthermore, the Fact-Finding Mission referenced an official statement of 13 November 2017 by General Min Aung Hlaing stating that his men 'strictly followed orders and acted in accordance with the rules of engagement during the recent Rakhine crisis'.[229] If these comments are correct and General Min Aung Hlaing directly ordered the attacks against the Rohingya, then the contribution of the principle of authorisation becomes crystal clear. This would indicate that the attacks against the Rohingya were carried out by the Tatmadaw under the orders of superior officers, to whom the direct perpetrators owed a 'duty to obey'.[230]

However, it is important to note that hard evidence on the existence of these orders is currently unavailable. The unavailability of hard evidence is an important issue in terms of state crime, which only further highlights the power imbalance that exists between the state and the victim population. After all, a state has the ability to protect vital information, which is an important factor in creating a state's impunity. While this is common throughout instances of state crime, this does not change the fact that there is no direct evidence that specifically outlines the orders of Generals Min Aung Hlaing and Soe Win to carry out the attacks against Rohingya.

(b) Authorisation through Implicit Orders

Explicit orders are not the only way that state crimes can be authorised. Kelman suggests that crimes of obedience are justified through implicit orders from superiors, not just explicit.[231] Analysis of the situation as a whole shows that the most senior members of the military openly advocate discrimination against and removal of the victim population. These alternative forms of speech inform the low-level perpetrators that the that removal of the Rohingya population from Myanmar's territory is a goal of the military's highest leaders.

The most problematic speech comes from General Min Aung Hlaing, who has shown a strong desire to assert the state's position that the Rohingya should be removed from Myanmar's territory.[232] As set out in section B of this Chapter, General Min Aung-Hlaing has openly provided statements that blame the Rohingya citizenship issue for the instability in the region, declare the 'Bengali problem' as an unfinished

[228] Human Rights Council, *Detailed Findings 2018* (n 11) 352 [1383].
[229] Ibid.
[230] Kelman and Hamilton (n 3) 17.
[231] Kelman states: 'whether the action is caused or merely justified by explicit or implicit orders from superiors, it can be described as a crime of obedience, on the presumption that it would not have taken place without authorization.' Kelman, 'The Policy Context of International Crimes' (n 196) 27.
[232] Human Rights Council, *Detailed Findings 2018* (n 11) 333 [1328].

issue that previous governments have tried to solve, while also calling for government institutions and the public to defend the country with strong patriotism.[233]

In determining whether to carry out human rights violations of such a nature, Smeulers suggests that low-level perpetrators consider whether they are 'authorised' to do so, taking into account factors such as the acceptability of the order from superior officers, and the possibility of negative ramifications.[234]

There is little doubt that the direct perpetrators would have been aware of the desires and goals of their highest-ranking superior officers who were publicly boasting such views.[235] When making the individual conscious decision to attack the Rohingya alongside the remainder of their military unit, the fact that the highest-ranking military officials openly advocated doing so would have played a major role in this decision.

Furthermore, the chain of command existing within the military structure of the Tatmadaw inherently contains a behavioural norm of a duty to follow direction and act within the bounds of what is considered acceptable by higher authority.[236] Continuing from this logic, the authority of the high-ranking officials enabled the direct perpetrators' own moral compass to be overridden by this duty to act in line with the goals of the military.[237] This 'authorisation' placed pressure on the individual perpetrators' decisions to attack the Rohingya, even if the attacks in question were 'manifestly unlawful'.[238]

(c) Omissions that Show an Acceptance of the Crimes

Along with the explicit and implicit orders, the attacks on the Rohingya were also authorised through the chain of command's refusal to condemn or punish the crimes of subordinate soldiers. With such a strong emphasis on the duty to obey superior orders within a disciplined military structure such as the Tatmadaw,[239] omissions can speak just as loudly as positive actions.

Once more, the central point for discussion is the direct perpetrators' decisions to participate in the attacks. In this instance, the direct perpetrators became aware that other manifestly unlawful actions were not being punished by superior officers.

Before being subjected to these three preconditions, the direct perpetrators' own moral compass would indicate that violently attacking a civilian population may be an immoral or illegal act.[240] Yet, in this

[233] Ibid 333 [1328], 337 [1336], 180 fn 1617.
[234] Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3) 113. See also Kelman and Hamilton (n 3) 17; Cohen (n 10) 110.
[235] Human Rights Council, *Detailed Findings 2018* (n 11) 333 [1328].
[236] Kelman and Hamilton (n 3) 17.
[237] Ibid.
[238] Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3) 106.
[239] Human Rights Council, *Detailed Findings 2018* (n 11) 389 [1541].
[240] Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3) 106; Kelman and Hamilton (n 3) 17.

instance, the most high-ranking superiors who possessed the ultimate symbolic power over these individuals through the duty to obey had not made such a determination.[241] Given the stringent hierarchy of discipline within the Tatmadaw's ranks,[242] the absence of discipline showed the direct perpetrators that these actions were acceptable conduct.

In fact, the Tatmadaw's leadership is not of the opinion that any wrongdoing has been carried out within its ranks. As the Fact-Finding Mission states: 'Senior-General Min Aung Hlaing, appointed Commander-in-Chief in 2011, has consistently denied any Tatmadaw wrongdoing, both in the context of specific operations, such as in Rakhine State in 2016 and 2017, and more generally.'[243]

This lack of condemnation of the attacks indicates to the direct perpetrators that such actions are within the bounds of acceptable conduct of the military, influencing the individual's decision to engage in conduct that would usually be considered unlawful.[244] Given the stringent hierarchy of discipline within the Tatmadaw's ranks,[245] the absence of discipline shows the direct perpetrator that these actions are acceptable conduct.

Through this analysis of the concept of authorisation, it appears that these two military leaders have contributed to the harm of the Rohingya by authorising the attacks through orders implied through the hate speech of the high-ranking commanders, and possibly even explicit orders.[246]

3 *Routinisation*

Moving forward, the concept of routinisation also explains how the direct perpetrators ended up carrying out attacks that would usually be considered illegal or morally wrong. Understanding this concept shows that, by establishing violence as routine within the military's ranks, the Tatmadaw's direct perpetrators viewed these violent acts as normal—even if they would have previously be considered morally challenging.

Much like the concept of authorisation, the nature of military involvement in the clearance operations also required low-level individuals to carry out such orders as an ordinary routine.[247] Enlistment in the military carries an assumption that the enlisting individual will be required to carry out acts of violence at the order of a commanding officer, with no questioning of the orders handed down.[248] As a normal condition of

[241] Human Rights Council, *Detailed Findings 2018* (n 11) 352 [1382].
[242] Ibid 389 [1541].
[243] Ibid 352 [1382].
[244] Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3) 106; Kelman and Hamilton (n 3) 17.
[245] Human Rights Council, *Detailed Findings 2018* (n 11) 389 [1541].
[246] Kelman and Hamilton (n 3) 17–19; Kelman, 'The Policy Context of International Crimes' (n 196) 27.
[247] Kelman and Hamilton (n 3) 18. Day and Vandiver (n 197) 45; Kelman, 'The Social Context of Torture' (n 197) 131; Tsang (n 203) 30; Weber (n 197) 100–2.
[248] '[R]outinization enables them to ignore the overall meaning of the tasks they are performing and eliminates the opportunity to raise moral questions': Kelman, 'The Social Context of Torture' (n 197) 131.

employment, the individual is trained to inflict harm on other members of the human race through means of violence.[249]

The material difference between the normal employment conditions of a low-level solider engaging in armed combat and the perpetration of human rights violations is the morality of harm being caused.[250] Armed combatants in the usual course of warfare see their violence as a necessity in order to protect themselves, their nation's interest or in some cases humanity's interests. The individual in this instance sees the use of violence as morally correct. But the problem in this instance is where the line is drawn. One would usually assume that this line is drawn at the point at which the individual who is subject to the violence is no longer an opposing armed combatant. In reality, this line is not so clear. In fact, academic discourse suggests that this is not a line at all; it is a 'continuum'.[251]

Staub's continuum of destruction explains how a soldier trained to carry out violence against armed combatants could see violence against civilians in a similar light—as part of their usual job or routine.[252] By enlisting in the military and initially carrying out harmful acts considered 'lawful' under normal military conditions, the individual is placed on the initial stages of Staub's continuum.[253] While at first violence may seem confronting, through repetition these acts of violence become little more than a mundane routine carried out in exchange for a pay check. With each violent incident, the individual begins to ignore the overall meaning of the acts, losing the opportunity to raise moral questions.[254] Attacks that would once have been considered somewhat immoral are no longer questioned; the soldier just carries out their duties as part of their daily routine. As the individual progresses down the continuum by carrying out progressively worse immoral actions, the 'manifestly unlawful' acts of murder and torture of civilians ultimately become possible.[255]

As shown by this continuum, the repetition of violent acts within the Tatmadaw's ranks has led to the direct perpetrators failing to question the morality of their actions. Failing to address the crimes of subordinates as they occur enabled these individuals to progress further along the 'continuum of destruction'. If this military structure inherently leads to a system in which individuals are carrying out violence on a regular basis as part of their employment,[256] then it is the role of the high-ranking commanders to ensure that subordinate soldiers engaging in violence are not engaging in criminal conduct.[257]

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[249] Kelman and Hamilton (n 3) 18; Staub (n 202) 79.
[250] Staub (n 202) 79.
[251] Ibid.
[252] Ibid.
[253] Ibid.
[254] Kelman, 'The Social Context of Torture' (n 197) 131.
[255] Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3) 106.
[256] Kelman and Hamilton (n 3) 18.
[257] Staub (n 202) 79.

From this perspective, if lower-scale events such as isolated attacks on civilians, one-off instances of rape or burning of Rohingya property[258] were immediately dealt with, then the direct perpetrators would not have chosen to carry out the large-scale attacks against the Rohingya. If disciplinary measures had been taken, then there would be a far wider gap in the direct perpetrators' perception between routinised violence against military combatants and the large-scale close-quarter attacks on women, children and unarmed men. In such a case, Staub's continuum suggests that these individuals would be far less likely to morally stomach the brutality of a large-scale military offensive, which may impact the direct perpetrators' decision to engage in conduct of such a horrific nature.[259]

This point is touched upon by the Fact-Finding Mission, which refers to 'official investigations' leading to no condemnation of the low-level perpetrators within the military justice system, along with General Min Aung Hlaing's comments that absolve the direct perpetrators of any wrongdoing.[260] The Fact-Finding Mission suggests that the lack of action from the Tatmadaw's high-ranking officials with regard to these attacks has 'set the scene for their repetition'.[261]

As a result, the military structure, along with the failure of the Tatmadaw's high-ranking military commanders to discipline subordinate troops committing criminal acts, has enabled attacks on civilians to be normalised—seen by the direct perpetrators as standard routine within the normal bounds of employment.[262]

4 *Dehumanisation*

The final factor that explains how the attacks against the Rohingya were carried out is dehumanisation.[263]

From this perspective, the direct perpetrators do not see the victim population as human.[264] In the eyes of the perpetrator, there is no moral dilemma in causing harm to this population, as they are not seen as 'human'. In the same vein as a butcher slaughtering an animal for food, the perpetrator does not see the victim in their 'universe of moral obligation'. A perfect example of this comes from one Rakhine civilian who was interviewed, who stated: 'As human beings … we have the right to food, health and other human rights, but when you claim yourself as a Rohingya, that's a different issue.'[265]

The dehumanisation of the Rohingya was built over many decades, through many factors such as British colonialism, global conflict, discriminatory rhetoric pushed by many eras of political leadership, local ethnic tensions and possibly much more. Through the 'anti-Rohingya narrative' the dehumanisation of the

[258] Human Rights Council, *Detailed Findings 2018* (n 11) [1069]–[1095].
[259] Staub (n 202) 79.
[260] Human Rights Council, *Detailed Findings 2018* (n 11) 352 [1382]–[1383].
[261] Ibid 352 [1383].
[262] Kelman and Hamilton (n 3) 18.
[263] Day and Vandiver (n 197) 45; Kelman, 'Dignity and Dehumanization' (n 196); Smeulers, 'Perpetrators of International Crimes:' (n 204) 259; Kelman, 'The Social Context of Torture' (n 197) 131.
[264] Kelman, 'Violence Without Moral Restraint' (n 212).
[265] Green, MacManus and de la Cour Venning (n 80) 53.

Rohingya has become a widespread issue that is rooted in Myanmar's culture, setting the requisite background for state crimes to be carried out.

In demonstrating how dehumanisation set the scene for the clearance operations to take place, this section will begin by explaining how dehumanisation evolves, before showing how historic discrimination shaped the direct perpetrators' view of the victim population in the lead-up to the attacks.

(a) How Does Dehumanisation Evolve?

Explaining how such a position is formed, one of the original crimes of obedience scholars, Kelman, suggests that the ideas of 'community' and 'identity' form two material attributes of what it means to be human.[266] Identity enables an individual to distinguish their own rights from others, and the concept of community provides a stage where such rights are recognised and respected by others.[267] A combination of these two principles allows this individual to be 'humanised'.[268] Dehumanisation, on the other hand, refers to the position in which an individual, for whatever reason, is perceived to be deficient in one of these material attributes, whether it be identity or community.[269]

Within the context of human rights violations, the most relevant humanisation attribute is this idea of *community*. Throughout various studies of atrocities,[270] dehumanisation has been considered to play a major role in formulating the moral disengagement of a community, as it creates a perceived moral boundary within society.[271] Modern research into the linkage between human rights violations and dehumanisation of the victim has led to this phenomenon being referred to as the 'universe of obligation'—a moral universe created by a perpetrator of human rights violations.[272]

Green and Ward provide an explanation of how this 'universe of obligation' is developed, suggesting that it is created through the process of 'othering'.[273] This othering process begins when a particular group within a population is categorised in a manner based upon their perceived differences from the remainder of the community.[274] These differences can vary and be specific to the situation being analysed, including factors such as skin colour, religion and ethnicity.[275] Next, the perpetrator classifies the identified group as an inferior population, by using an 'us vs them mentality' to alienate the target group from the general

[266] Kelman, 'Violence Without Moral Restraint' (n 212).
[267] Ibid.
[268] Ibid.
[269] Ibid.
[270] Bar-Tal (n 203); Opotow (n 203); Staub (n 202) 79.
[271] '[D]ehumanization excludes the victims from the perpetrators' moral community, making it unnecessary to relate to them in moral terms': Kelman, 'The Social Context of Torture' (n 197) 131. See also Opotow (n 203).
[272] Green and Ward, *State Crime* (n 1) 184.
[273] Ibid.
[274] Ibid.
[275] Ibid.

population.[276] This alienation destroys this link of 'community',[277] which had originally allowed the victim to be humanised.[278]

By alienating a target group from the community based on a material difference from the remainder of the community, empathy towards the target population is diminished, as is genuine dialogue between the groups.[279]

The end result of dehumanisation enables the justification of any discriminatory or undesired behaviour that is directed toward this 'inferior group'.[280] Within the 'general population', the psychological moral aspects associated with human rights violations are altered, with feelings of guilt and distress about the harm inflicted upon the 'inferior group' being inhibited.[281] This is due to the fact that the 'inferior group' is considered outside the general population's 'universe of obligation'.[282]

From a civilian level, individuals are considered far less likely to condemn or take action against the acts of the perpetrating military forces, as the military operations appear to be based upon a shared view of a particular issue, appearing to be carried out in the interests of the 'general population'. At the military level, individual members of the armed forces are able to morally distance themselves from the violent acts being carried out, along with reducing the likelihood of such individuals condemning (for lower ranking individuals) or punishing (for higher ranking individuals) other members who have deviated from the acceptable standards of military conduct with relation to violence.[283] Ultimately, research on the issue of dehumanisation indicates that inhibiting the moral emotions of the 'general population' raises the likelihood of discriminatory or undesirable behaviour being carried out against the 'inferior group', with mass-scale atrocities representing the far end of the spectrum of this 'undesirable behaviour'.[284]

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[276] Ibid.

[277] Ibid.

[278] Kelman, 'Violence Without Moral Restraint' (n 212).

[279] Clint Curle, 'Us vs. Them: The Process of Othering', *Canadian Museum for Human Rights* (Web Page, 24 January 2020) <https://humanrights.ca/story/us-vs-them-the-process-of-othering>.

[280] Milica Vasiljevic and G Tendayi Viki, 'Dehumanization, Moral Disengagement, and Public Attitudes to Crime and Punishment' in Paul Bain, Jeroen Vaes and Jacques Phillipe Leyens (eds), *Humanness and Dehumanization* (Psychology Press, 2013) 129.

[281] Roy Baumeister, Arlene Stillwell and Todd Heatherton, 'Guilt: An Interpersonal Approach' (1994) 115(2) *Psychological Bulletin* 243.

[282] Cohen's summary of the concept of dehumanisation provides a further explanation showing how this is achieved. 'Dehumanisation: when the qualities of being human are deprived from the other, then the usual principles of morality do not apply. The enemy is described as animals, monsters, gooks, sub humans. A whole language excludes them from your shared moral universe': Cohen (n 10) 110.

[283] Bernhard Leidner et al, 'Ingroup Glorification, Moral Disengagement, and Justice in the Context of Collective Violence' (2010) 36(8) *Personality and Social Psychology Bulletin* 1115.

[284] Kelman and Hamilton (n 3) 19; Bar-Tal (n 203); Opotow (n 203); Staub (n 202) 79.

(b) Dehumanisation in Myanmar

The conflict in Rakhine State appears to be ultimately fuelled by the 'anti-Rohingya narrative' that has alienated the Rohingya population,[285] removing the group from the majority's 'universe of moral obligation'.[286] As the historical analysis within the organisational deviance discussion has shown, discrimination against the Rohingya is not an isolated nor a recent issue. This is an issue that has stretched across multiple political eras in the past century.

Green, MacManus and de la Cour Venning have already argued that the dehumanisation of the Rohingya was, as of 2015 (before the clearance operations were undertaken), well in effect.[287] Most notable in this discussion is the linkage between the 'anti-Rohingya narrative' and the concept of dehumanisation. It is the view of these scholars that the narrative that the Rohingya are an inferior population has effectively isolated the Rohingya from the remainder of the civilian population.[288]

The anti-Rohingya narrative consists of multiple elements which, when taken together, advocate that the Rohingya race do not exist, and those identifying with the name are doing so with the intention to harm the recognised ethnic groups of Myanmar.[289] The primary identifying factor of the anti-Rohingya narrative is the use of the terms 'Bengali' or 'Rakhine Muslims', or the general refusal to recognise the term 'Rohingya'. This position refutes the very existence of the Rohingya population—holding that the population in question is not a recognised ethnic group of Myanmar, and that they have come to Myanmar as 'illegal Bengali immigrants'.[290] As Green, MacManus and de la Cour Venning suggest, the title 'Bengali' carries multiple assumptions within the community, such as the tendency to infiltrate people to propagate their religion, the population increase through increased illegal migration, and the tendency to take advantage of 'regular' citizens when the opportunity arises.[291] This narrative argues that the Rohingya are a group of non-native illegal Bengali immigrants, or terrorists, who should be isolated from the remainder of the population and removed from the territory of Myanmar.[292] From a crimes of obedience perspective, the direct perpetrators are able to carry out the attacks against the Rohingya due to the justification provided by this narrative.[293] This is further supported by Siddiquee, who states:

> The very word 'Rohingya' is replaced with other words to deny their ethnic identity and thus their rights as citizens of Myanmar. State officials, politico-religious leaders and the general public have converged in accepting the words 'Rakhine Muslims' instead of the 'Rohingya' to craft the official

[285] Green and Ward, *State Crime* (n 1) 184.
[286] Ibid; Kelman, 'The Social Context of Torture' (n 197) 133.
[287] Green, MacManus and de la Cour Venning (n 80) 53.
[288] Ibid 53–8.
[289] Ibid 53.
[290] Ibid 53–8.
[291] Ibid 53.
[292] Ibid; Navine Murshid, 'Bangladesh Copes with the Rohingya Crisis by Itself' (2018) 117(798) *Current History* 129, 130.
[293] Kelman and Hamilton (n 3) 19; Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3) 117.

> and unofficial narratives. These narratives, where denial of their ethnicity remains a central part, plays a crucial role in vilifying and criminalizing the Rohingyas.[294]

From this instigation of the 'othering process',[295] the narrative has effectively been expanded upon over the years to fit specific contexts. In light of the 2016 small-scale attacks on government bases by pro-Rohingya insurgents, for example, the narrative was expanded to refer to the Rohingya as 'terrorists', an assertation that was commonly utilised in later justifications of the clearance operations.[296] This 'enemy of the state' narrative is strikingly consistent with Kelman's 2005 description of how torture can be carried out:

> In contemporary practice torture victims are, or are treated as, non-citizens. The main source of their dehumanization is their designation as enemies of the State, who have placed themselves outside the moral community shared by the rest of the population. They are described as terrorists, insurgents or dissidents who endanger the State and are bent on undermining law and order and destroying the community.[297]

This level of othering that has led to the dehumanisation of the Rohingya is deeply embedded in Myanmar's culture.[298] Othering on this level enables the non-Rohingya population, including the Tatmadaw, to look at the Rohingya in a way that does not afford empathy.[299] In the eyes of these individuals, the Rohingya appear inhuman.[300] At this point the victim is seen as outside of the 'universe of obligation'.

In this instance, the morally questionable behaviour of the Tatmadaw has been justified, and a universe of moral obligation has been established—from which the Rohingya have been excluded. Relating this back to the perpetrators' decisions to attack the Rohingya, the moral dilemma of choosing to harm another human being was removed once more. The Rohingya were categorised based on their perceived differences from the community and were alienated as an inferior group through the anti-Rohingya narrative. This led to a situation in which discriminatory and undesired behaviour directed towards the Rohingya appeared justified. As the Rohingya were seen as outside the perpetrators' universe of obligation, there was no moral obligation to consider the humanity of the Rohingya.

As a pre-condition to state crime, the dehumanisation of the Rohingya enabled the Tatmadaw to carry out violations of human rights without feeling remorse or questioning the 'manifestly unlawful' orders that were passed down through the factors of authorisation and routinisation. From this perspective, repairing the societal fracture in Myanmar is paramount for preventing future state crimes of a similar nature and, by extension, the safe return of the Rohingya to Myanmar' territory.

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[294] Siddiquee (n 98) 95.
[295] Curle (n 279).
[296] 'Transcript: Aung San Suu Kyi's Speech at the ICJ in Full' (n 174).
[297] Kelman, 'The Social Context of Torture' (n 197) 133.
[298] Human Rights Council, *Detailed Findings 2018* (n 11) 272 [1153].
[299] Green, MacManus and de la Cour Venning (n 80) 31–2.
[300] Green and Ward, *State Crime* (n 1) 184; Kelman, 'Violence Without Moral Restraint' (n 212).

D *Findings from the Lens of State Crime*

Analysis of the situation in Myanmar through the lens of state crime has highlighted a number of different points that may provide further context to the discussion at international law concerning the appropriateness of state responsibility for committing genocide.

Firstly, the state crime lens has shown that the situation in Myanmar does involve a 'crime'. The various human rights violations suffered by the Rohingya, particularly the mass indiscriminate killing and torture, were found to have met the definition of 'crime' from Green and Ward's human rights-based approach.[301] These specific human rights violations were found to fall within the 'torture paradigm'—unquestionably evil acts that constitute the highest level of severity.[302]

Secondly, these 'crimes' were found to have been a product of 'organisational deviance' of the state, as opposed to the individual deviance of rogue individuals.[303] By assessing the 'operative goals' of the state, or the 'goals that the members of the state actually work together to achieve',[304] it was found that that the state's organisational goals are to remove the population from Myanmar's territory. The mass killing and torture of the Rohingya civilian population was in line with these goals, and no effort was made by any senior military official to cease or prevent these attacks from being carried out.[305]

Given the Tatmadaw's status as legitimate officials of the state, and the organised, mass nature of the attacks, this state crime perspective has shown that the perpetrators of the attacks were not partaking in isolated events of individual deviance, but rather acting together through their occupation as representatives of the state.[306] The attacks on the Rohingya were a product of a combined effort of all levels of the state's official military, along with a century-long societal fracture. Deviance in this situation extended far beyond the direct perpetrators, becoming an issue of all levels of the state. There should be no mistake that the clearance operations were merely the result of an isolated instance of individual deviance carried out by a small number of 'bad apples'.[307] The human rights violations were carried out with the support of the highest level of the Tatmadaw, who viewed the acts of the direct perpetrators as in line with their own organisational goals. These 'crimes' carried out against the Rohingya population should be considered nothing less than criminal acts carried out by the state itself.

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[301] Green and Ward, *State Crime* (n 1) 7.
[302] Campbell (n 10) 18; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 1) 103. Cohen (n 10) 98.
[303] Green and Ward, *State Crime* (n 1) 5; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 1) 110; Chambliss (n 1) 184.
[304] Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 1) 111.
[305] Human Rights Council, *Detailed Findings 2018* (n 11) 352 [1382].
[306] Chambliss (n 1) 184.
[307] Punch (n 63) 2.

Thirdly, the state crime perspective has shown how the situation has developed, using the crimes of obedience framework.[308] This analysis has shown that the state crime developed through many factors extending beyond the direct perpetrators of the attacks. This state crime was the product of three factors that led to the direct perpetrators carrying out 'manifestly unlawful' acts.[309] The authorisation of the attacks from higher ranking officials in this military setting enabled the direct perpetrators to carry out the attacks without fear of consequences.[310] The routinisation of violence within the direct perpetrators' job description as trained armed combatants desensitised them to violent acts.[311] And finally, the longstanding discriminatory rhetoric towards the Rohingya dehumanised the victim population in the eyes of the perpetrators,[312] allowing the Tatmadaw soldiers to carry out 'manifestly unlawful' acts of violence.[313] This analysis through the crimes of obedience framework has shown that, to prevent state crime being carried out against the Rohingya in future, further steps need to be taken to mitigate these factors. Otherwise, the requisite conditions for harm towards the Rohingya will remain in place.[314]

[308] Kelman and Hamilton (n 3) 17–19.

[309] Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3) 106.

[310] Kelman and Hamilton (n 3) 17; Kelman, 'The Social Context of Torture' (n 197) 131; Day and Vandiver (n 197) 44; Kelman, 'The Policy Context of International Crimes' (n 196) 27.

[311] Kelman and Hamilton (n 3) 18; Day and Vandiver (n 197) 45; Kelman, 'The Social Context of Torture' (n 197) 131; Tsang (n 203) 30; Weber (n 197) 100–2.

[312] Kelman and Hamilton (n 3) 19; Day and Vandiver (n 197) 45; Kelman, 'Dignity and Dehumanization' (n 196); Smeulers, 'Perpetrators of International Crimes' (n 204) 259; Kelman, 'The Social Context of Torture' (n 197) 131.

[313] Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3) 106.

[314] Kelman and Hamilton (n 3) 46; Pali (n 3); Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (n 3) 113.

VII DRAWING FROM STATE CRIME TO REFLECT ON INTERNATIONAL LAW'S APPROACH TO THE ROHINGYA SITUATION

After analysing state crime's approach to the Rohingya crisis, it is important to reflect upon the ways in which the arguments arising from this perspective can shed light on the development of international law.

Deep analysis of the Rohingya situation through the lens of state crime has shown that the harm suffered by the Rohingya is more than a product of individual deviance of members of the Tatmadaw. This analysis has shown that the harm is a product of the organisational deviance of the state, made possible through the of authorisation of the attacks, routinisation of violence within the military and dehumanisation of the victim population. With the state crime approach now examined, it becomes possible to leverage this logic to provide further context to the question concerning the appropriateness of attributing state responsibility to Myanmar.[1]

This chapter will use a state crime viewpoint to reflect on international law's alternative avenues of dealing with the Rohingya crisis, in order to answer the fourth research sub-question: *From the lens of state crime, is individual criminal responsibility sufficient to address the Rohingya crisis? Or can an action for state responsibility provide a meaningful alternative solution?*

To answer this question, this chapter will begin by highlighting the importance of individual criminal responsibility. This discussion will show individual criminal responsibility's strength in addressing the authorisation and routinisation aspects of the attacks, while also highlighting its limitations in addressing the institutional dimensions of the crimes. With these strengths and limitations outlined, this chapter will move forward to discuss the importance of the attribution of state responsibility.[2] By highlighting the ICJ's ability to recognise the institutional dimension of the crime by acknowledging the state's organisational deviance, this discussion will show how state responsibility can address the situation in ways that individual responsibility cannot. The structure of this chapter is as follows:

A *The Value of Individual Criminal Responsibility*
B *The Value of State Responsibility*
C *Findings*

[1] For failing to uphold its obligation to not commit genocide.
[2] For failing to uphold its obligation to not commit genocide.

A *The Value of Individual Criminal Responsibility*

The first avenue of responsibility for critique from the lens of state crime, is the attribution of individual criminal responsibility. Based upon the findings from the state crime analysis, this section will demonstrate the strengths and weaknesses of this form of responsibility. This discussion will highlight the importance of individual criminal responsibility's ability to address authorisation and routinisation, while also criticising its inability to recognise the state's organisational deviance.

To reiterate the findings of earlier chapters, under international criminal law's way of dealing with the situation it is likely that two groups of perpetrators would be found to have breached the *Rome Statute*. The mid-level perpetrators of the Tatmadaw are likely to be found guilty of committing crimes against humanity for deportation or forcible transfer under article 7(1)(d). Their commanders, the high-level perpetrators, are likely to be found to have failed to take reasonable and necessary steps to prevent the crimes of these subordinates under article 28.[3] With these findings being established, it becomes possible to comment on the appropriateness of such a verdict through the lens of state crime. In doing so, this section will assess whether a verdict of individual criminal responsibility against these perpetrators can address the organisational goals of the state,[4] along with mitigating the three preconditions that may allow future state crimes to be carried out.[5]

1 *Addressing Authorisation and Routinisation*

The use of individual criminal responsibility should be commended for its ability to address the factors of authorisation and routinisation. A state crime analysis highlights the importance of looking beyond the actions of the 'direct perpetrator', leading to the analysis of further factors that have led to the development of the harm. Through the exploration in Chapter VI, the issue of deviance within the military was found to have been an important factor in enabling the situation to develop, which was due to its role in authorisation and routinisation.

The nature of the military will always inherently carry the likelihood of authorisation and routinisation, due to the necessary use of violence and the duty to obey. High-level commanders possess an overwhelming amount of influence over subordinate soldiers through orders (whether direct or indirect)[6] and in drawing the line on when violence falls outside of usual military duties.[7] This highlights the importance of high-level

[3] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 7(1)(d) ('*Rome Statute*').
[4] Penny Green and Tony Ward, *State Crime* (Pluto, 2004); William Chambliss, 'State-Organized Crime' (1989) 27(2) *Criminology* 183, 184; Ronald Kramer and Raymond Michalowski, 'War, Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq (2005) 45(4) *British Journal of Criminology* 446, 459.
[5] Herbert Kelman and V Lee Hamilton, *Crimes of Obedience* (Yale University Press, 1989) 46.
[6] See the previous discussion on authorisation.
[7] As established in the discussions from the lens of state crime earlier, these direct perpetrators have been conditioned to carry out acts of a violent nature through their incorporation as everyday routine for a Tatmadaw soldier: Kelman and Hamilton (n 5) 18.

commanders in ensuring that this violence is kept within the accepted bounds of armed combat. Yet, this analysis has shown that Senior General Min Aung Hlaing and Deputy Commander-in-Chief General Soe Win made no attempt to ensure that grave violations of human rights were not carried out within their ranks.[8] Speech from the Tatmadaw's highest commander indicates that these attacks are even encouraged: allowing these attacks to take place enables the generals to push the age-old military ideology that the Rohingya should not reside within Myanmar's territories.[9]

With the power at their disposal and their high degree of control over all levels of the Tatmadaw,[10] the Tatmadaw's highest ranking generals have played a significant role in enabling the Rohingya crisis to develop. It is for this reason that the ICC's focus on higher level offenders should be commended, particularly relating to the duty it creates for high-ranking commanders to exercise control over subordinates.[11]

Mitigating the factor of authorisation is a key part of preventing future escalation of the conflict, which is addressed by this provision, which requires high-ranking commanders to exercise control over subordinates.[12] The punishment of subordinates engaging in these violations[13] would send a clear statement to all subordinates that the Tatmadaw does not authorise the attacks.[14] If future Tatmadaw generals provide no reason for subordinates to believe that attacks on Rohingya civilians are acceptable, low-level soldiers will not view these attacks as 'authorised', reducing their likelihood of deciding to carry out future attacks against the Rohingya. By contrast, if the military's high-ranking commanders still publicly express their desire to remove the Rohingya from the region and fail to act when subordinates act on these desires, future reconciliation and the safe return of the Rohingya remain improbable.

Similarly, by limiting the acts of subordinate troops when violence extends beyond the bounds of acts taken against armed combatants, the progression of low-level soldiers down the 'continuum of destructiveness'[15] is halted. The possibility for military commanders to be found guilty for the crimes of subordinates under

[8] Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/39/CRP.2 (17 September 2018) 389 [1542] ('*Detailed Findings 2018*').

[9] Penny Green, Thomas MacManus and Alicia de la Cour Venning, *Countdown to Annihilation: Genocide in Myanmar* (International State Crime Initiative, 2015) 31–2, 53–5; Human Rights Council, *Detailed Findings 2018* (n 8) 362 [1424].

[10] Human Rights Council, *Detailed Findings 2018* (n 8) 389 [1541].

[11] *Rome Statute* (n 3) art 28(a). The reason for the Court's focus on high-level offenders can be found within the Officer of the Prosecutor's *Policy Paper on Case Selection and Prioritisation*. This policy paper states that 'the Office considers that the responsibility of commanders and other superiors under article 28 of the Statute is a key form of liability, as it offers a critical tool to ensure the principle of responsible command and thereby end impunity for crimes and contribute towards their prevention' See point 444 in Office of the Prosecutor of the International Criminal Court, *Policy Paper on Case Selection and Prioritisation* (International Criminal Court, 2016) <https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf>.

[12] *Rome Statute* (n 3) art 28(a).

[13] As advocated in article 28's provisions on controlling subordinates: *Rome Statute* (n 3) art 28(a).

[14] Kelman and Hamilton (n 5) 17.

[15] Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (Cambridge University Press, 1989) 79.

article 28 of the *Rome Statute* is an important way for the law to address routinisation. High-ranking officials are effectively required by the *Rome Statute* to ensure that an individual does not reach a point on this continuum where this violence exceeds the usual scope of combat and, as the case of Myanmar has shown, these high-ranking individuals will likely be punished if they fail to do so.

For these reasons, an ICC verdict against Senior General Min Aung Hlaing and Deputy Commander-in-Chief General Soe Win is important in stating to future commanders that it is their duty to ensure that crimes are not carried out within their ranks, lowering the potential for further attacks. Given this, it appears that international law's approach to the Rohingya situation can appropriately deal with the factors of authorisation and routinisation through this avenue of the ICC and individual criminal responsibility.

After undertaking this analysis, there appears to be somewhat of a consistency between the two disciplines with regard to how authorisation and routinisation are handled, particularly in relation to the ICC's emphasis on high-level offenders. The crimes of obedience framework has shown that, for peace to be established, high-level military officials at the very minimum cannot remain wilfully blind to human rights violations within their ranks, let alone possess the anti-Rohingya sentiment of previous generations of Tatmadaw commanders. These provisions concerning the obligation on high-ranking commanders to exercise control over subordinates require any future Tatmadaw commanders to ensure that attacks on the Rohingya by subordinate soldiers are dealt with.[16] A verdict against Senior General Min Aung Hlaing and Deputy Commander-in-Chief General Soe Win has the opportunity to show future Tatmadaw commanders that there will be deep repercussions for breaching this provision, while also removing these individuals from active duty.

2 *Addressing the Dehumanisation of the Rohingya*

A second issue is the dehumanisation of the victim population, which also stems from the ideology that the Rohingya should be removed from Myanmar's territory. Acknowledging the wrongdoing of the Tatmadaw could, to some extent, impact this anti-Rohingya narrative.[17] As seen in the legal analysis, a finding of deportation or forcible transfer requires a finding that the Rohingya were 'lawfully present' on Myanmar's territory.[18] Highlighting that that Tatmadaw were violating the Rohingya's rights in the name of an incorrect narrative could possibly be persuasive in changing the public's viewpoint on the Rohingya issue, when combined with a movement from civil society.

[16] *Rome Statute* (n 3) art 28.

[17] As constantly stated in this thesis, the anti-Rohingya narrative is based upon this idea that the Rohingya are illegal immigrants who should not reside on Myanmar's territory: Green, MacManus and de la Cour Venning (n 9) 53–5.

[18] International Criminal Court, *Elements of Crimes*, Doc No ICC-ASP/1/3 (part II-B) (adopted 9 September 2002) art 7(1)(d); Vincent Chetail, 'Is There Any Blood on My Hands? Deportation as a Crime of International Law' (2016) 29(3) *Leiden Journal of International Law* 917, 925–6.

As long as the Rohingya are still othered[19] by this narrative concerning statehood,[20] the group will continue to be marginalised. This lack of empathy will last as long as the Rohingya are seen as outside of the 'universe of moral obligation'.[21] And, as state crime literature suggests, this exclusionary 'universe of moral obligation' will remain in effect until the Rohingya are seen as falling, with other ethnicities, within the idea of the 'community'.[22] To impact this issue and bring the Rohingya back into the perceived idea of community, further education of the people of Myanmar is required from a credible source.

Although a successful action in the ICC will not directly re-humanise the Rohingya, it could provide a positive impact for the Rohingya overall. From a perspective of state crime, it is important to consider that change is created by a movement of the people through civil action, and not the lone outcome of an international tribunal or court.[23] A successful ICC action against the Tatmadaw's highest ranking commanders serves as ammunition for civil action, adding to the dissemination of knowledge and increasing legitimacy to the cause.[24]

Change, through civil society has already begun in Myanmar, despite the current lack of direct action from the international community. The *United Nation's Fact-Finding Mission Report on Myanmar*, which has been cited constantly throughout this thesis, is itself, based upon actors from civil society. Victims have provided interviews which have been conducted by the Mission. Information gathered by research institutes and human rights organizations,[25] along with other civil society organisations such as the International State Crime Initiative have compiled information that has been relied upon in the report.[26] A combined effort throughout civil society has enabled a factual report to be written that provides evidence to the suffering of the Rohingya at the hands of the military.

The gathering and dissemination of knowledge through civil society has led to civil action aiming for change,[27] which can be seen through Myanmar's Civil Disobedience Movement. Myanmar's Civil Disobedience Movement is a militant civil society reaction to the military 2021 Coup, which is a prime

[19] Green and Ward, *State Crime* (n 4) 184.

[20] Green, MacManus and de la Cour Venning (n 9) 54–5; Navine Murshid, 'Bangladesh Copes with the Rohingya Crisis by Itself' (2018) 117(798) *Current History* 129, 130.

[21] Green and Ward, *State Crime* (n 4) 184.

[22] Daniel Bar-Tal, 'Causes and Consequences of Delegitimization: Models of Conflict and Ethnocentrism' (1990) 46 *Journal of Social Issues* 65; Susan Opotow, 'Moral Exclusion and Injustice: An Introduction' (1990) 46 *Journal of Social Issues* 1; Herbert Kelman, 'Violence Without Moral Restraint' (1973) 29 *Journal of Social Issues* 25,.

[23] Penny Green and Tony Ward, *State Crime and Civil Activism: On the Dialectics of Repression and Resistance* (Routledge, 2019); Tony Ward and Penny Green, 'Law, the State, and the Dialectics of State Crime' (2016) 24 (2) *Critical Criminology* 217, 219; Penny Green and Tony Ward, 'Civil Society, Resistance and State Crime' in Elizabeth Stanley, Jude McCulloch (eds) *State Crime and Resistance* (Routledge, 2013) 28.

[24] Green and Ward argue that civil society plays a greater role in exposing and labelling state crime, which provides a deeper impact on the situation than international legal institutions: Penny Green and Tony Ward, 'Civil Society, Resistance and State Crime' in Stanley and McCulloch (eds) *State Crime and Resistance* (n 23) 35.

[25] Human Rights Council, *Detailed Findings 2018* (n 8) 8.

[26] Ibid 243.

[27] Green and Ward, *State Crime and Civil Activism: On the Dialectics of Repression and Resistance* (n 23).

example of a civil society movement in practice.[28] The Civil Disobedience Movement is primarily based upon a joint opposition to the currently serving military government – the very military that has attacked the Rohingya.[29] Siding with the Civil Disobedience Movement against the military regime is deeply supported by the reports of victims, who have had their story told through civil society.[30]

Through solidarity of the people against this regime, civil action has already demonstrated progress concerning the Rohingya. Previously, Aung San Suu Kyi and the NLD have stood against the Rohingya, as can be seen by their support of the military during Suu Kyi's the ICJ speech.[31] Now, the NLD, who have become the 'National Unity Government',[32] are acting as the non-military government in exile, with a new goal of unifying the nation.[33] The National Unity Government has recently appointed a Rohingya as a Minister, demonstrating a stark change in perspective.[34] Change has eventually arisen as a result of a combined sense of civil solidarity against the military regime. This shift in perspective highlights the value of civil society in enacting positive change. The movement to reintegrate the Rohingya back into the community has already begun behind the scenes with the National Unity Government. As this solidarity against the military regime builds, so will the general population's empathy for the Rohingya who are standing beside them.[35]

It is at this point, where international institutions of justice such as the ICC have the ability to add fuel to the flame powering these movements.[36] By playing the same knowledge dissemination role as the *Fact-Finding Mission,* a successful ICC verdict can provide further factual basis to support the Rohingya.[37] By its very nature, discussion in the ICC's lawful presence element has the power to clearly state that the Tatmadaw's high Ranking commanders are wrong - the Rohingya are not 'illegal Bengali Immigrants'. This form of knowledge dissemination, from such a legitimate source, provides a factual backing to contest the anti-

[28] Khin Aung, 'Hope at the end of the tunnel: Myanmar's civil disobedience movement and moving toward a more inclusive Myanmar' in Chosein Yamahata and Makiko Takeda (eds) *Myanmar's Changing Political Landscape: Old and New Struggles* (Springer, 2023) 187-194; Idhamsyah Putra and Muhammad Shadiqi 'Understanding the Supporters and Opponents of Myanmar's Civil Disobedience Movement Against the Military Coup in 2021' (2023) 33(2) *Journal of Community & Applied Social Psychology* 483.
[29] Putra and Shadiqi (n 28).
[30] As can be seen through the Fact-Finding Mission, as recently discussed.
[31] 'Transcript: Aung San Suu Kyi's Speech at the ICJ in Full', *Burma/Myanmar Library* (Web Page, 13 December 2019) <www.burmalibrary.org/en/transcript-aung-san-suu-kyis-speech-at-the-icj-in-full>.
[32] National Unity Government of the Republic of the Union of Myanmar, 'Heads of Government' (Web Page) <https://www.nugmyanmar.org/en/≥; Catherine Renshaw, 'The National Unity Government: Legitimacy and Recognition' In *Myanmar's Changing Political Landscape: Old and New Struggles* (Springer, 2023) 225-241.
[33] National Unity Government of the Republic of the Union of Myanmar, 'About NUG' (Web Page) <https://gov.nugmyanmar.org/about-nug/#:~:text=Interim%20National%20Unity%20Government%20shall%20adopt%20a%20strategy%20for%20eradication,Union%20and%20implement%20the%20strategy>.
[34] Fortify Rights, 'The National Unity Government of Myanmar Appoints Rohingya Human Rights Defender to Ministerial Post' (Web page, June 30, 2023) <https://www.fortifyrights.org/our_impact/imp-mya-2023-06-30/>.
[35] According to the crimes of obedience theory, this empathy would indicate that the Rohingya are moving back inside the 'universe of moral obligation': Green and Ward, *State Crime* (n 4) 184.
[36] Green and Ward, *State Crime* (n 4) 10.
[37] Green and Ward, *State Crime and Civil Activism: On the Dialectics of Repression and Resistance* (n 23).

Rohingya narrative. Based on state crime theory, contesting this narrative can become a catalyst for breaking down the barriers between ethnic groups. [38]

The slow re-humanisation of the Rohingya is currently taking place behind the scenes through civil society,[39] but positive outcomes in the ICC (and as will soon be discussed, the ICJ) can assist by expediting the process. An ICC verdict against the military's leaders furthers the idea that the currently serving military regime should be united against by all people of Myanmar. A verdict of this nature strengthens the Rohingya's claim that they are not 'illegal Bengali Immigrants' and are a mistreated Burmese national group. Although, more still needs to be done to further expedite the Rohingya's reintegration into the community. An action against the Tatmadaw's high ranking generals tells the story that the Rohingya's suffering is only a result of these individuals. To truly assist the Rohingya's plight, this story needs to involve the Rohingya's institutional mistreatment. It is at this point, where a sole reliance on individual criminal responsibility becomes problematic.

3 *Failure to Address the Institutional Dimensions of the Crimes*

While an action for individual criminal responsibility has been found to be an important way of dealing with some aspects of the crimes, it fails deeply in other regards. The underlying organisational goals of the state concerning the removal of the Rohingya population, along with their dehumanisation, cannot be adequately addressed through this avenue of responsibility. As a result, it appears that assuming that individual criminal responsibility is sufficient to deal with all actors involved is a bold perspective that overlooks the institutional dimension of the crimes.[40] This section will now outline the reasons why further action is needed to appropriately address the Rohingya crisis.

An action in the ICC only recognises the deviance of the individuals involved and does not recognise the state's true involvement. Approaching this situation through the lens of state crime has shown that the state itself has been involved, with all levels of the military organisation, over many years. This situation is not the product of a small number of rogue individuals such as the mid-to-high-level perpetrators. This situation is the product of state deviance. There is a longstanding position concerning the statehood of the Rohingya that has become ingrained in the state. All levels of the nation's military have continued to operate under the idea that the Rohingya should be removed from Myanmar's territory.

[38] Daniel Bar-Tal, 'Causes and Consequences of Delegitimization: Models of Conflict and Ethnocentrism' (1990) 46 *Journal of Social Issues* 65; Susan Opotow, 'Moral Exclusion and Injustice: An Introduction' (1990) 46 *Journal of Social Issues* 1; Herbert Kelman, 'Violence Without Moral Restraint' (1973) 29 *Journal of Social Issues* 25.

[39] As can be ssen through the appointment of a Rohingya Minister: Fortify Rights, 'The National Unity Government of Myanmar Appoints Rohingya Human Rights Defender to Ministerial Post' (Web page, June 30, 2023) <https://www.fortifyrights.org/our_impact/imp-mya-2023-06-30/>.

[40] Jennifer Balint, 'Transnational Justice and State Crime' (2014) 13 *Macquarie Law Journal* 147, 151, 156, 159.

An action against the senior members of the Tatmadaw involved in the attacks would aid in the removal of these individuals from duty,[41] in an attempt to discourage others from following the same pathway in the future.[42] But when these individuals are removed from command, they will be replaced by other members of the Tatmadaw who are now accepting higher level positions. With no clear change in goals concerning the Rohingya, the use of individual criminal responsibility to solve the issue appears to be a band-aid solution to the underlying problems that led to the crimes being carried out in the first place. According to the International State Crime Initiative, the international legal system is not an adequate avenue for dealing with state crime, due to its focus on individual responsibility, as opposed to the role of organisations.[43]

Scholarship in the field of critical criminology indicates that this focus on individual deviance exists to ensure that states have impunity for their acts of organisational deviance. As Friedrichs suggests, law is defined by 'the powerful', whether this be individuals, states or even groups of states.[44] These laws then display a bias towards the interests of those creating it.[45] Given this, it must be considered that the historic focus on individual criminal responsibility may have been developed with the interests of the powerful in mind. The state as a coercive apparatus possesses a significant degree of power over the individuals serving as public officials or military commanders. And, as the very fundamental aspects of international law show, the law is created by states.[46] When faced with the accusation that crime has been committed by a public official, it becomes far more favourable to the state to suggest that the problem lies with the individual deviance of a rogue individual, as a focus on individual criminal responsibility assumes. Accepting that crimes have been committed through the organisational deviance of the state itself, and that these crimes are in line with its longstanding organisational goals, is far more problematic for the state as an organisation. By hiding behind a small number of individuals, the state receives a degree of impunity arising from the laws it assisted in creating.[47]

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[41] For comparative purposes, Bemba, a high-ranking military commander, received 16 years' imprisonment under article 28 relating to crimes against humanity and war crimes carried out by subordinates: *Prosecutor v Bemba Gombo (Decision on Sentence Pursuant to Article 76 of the Statute)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08, 21 June 2016) [97].

[42] In the *Bemba* sentencing decision the Court stated that 'Retribution is not to be understood as fulfilling a desire for revenge, but as an expression of the international community's condemnation of the crimes. In this way, a proportionate sentence also acknowledges the harm to the victims and promotes the restoration of peace and reconciliation. With respect to deterrence, a sentence should be adequate to discourage a convicted person from recidivism (specific deterrence), as well as to ensure that those who would consider committing similar crimes will be dissuaded from doing so (general deterrence).' Ibid [11].

[43] 'Criminal law is concerned mainly with individual liability. The study of state crime is more concerned with the role of organizations in committing, perpetrating or condoning crime': 'State Crime', *International State Crime Initiative* (Web Page, 2014) <http://statecrime.org/about-isci/about-state-crime/>.

[44] David Friedrichs, 'Crimes of the Powerful and the Definition of Crime' in Gregg Barak (ed), *The Routledge International Handbook of the Crimes of the Powerful* (Routledge, 2015) 39.

[45] Ibid.

[46] Ibid.

[47] Green and Ward believe that public perception of state conduct is an important factor when considering both the measuring of and response to state crime. In the event of the law determining that harm is a result of the deviant actions

To address this power imbalance, acknowledging that the state itself is the deviant actor—not just its deviant officials—is deeply necessary. Focussing on the deviance of an individual and not the state, and failing to recognise the institutional dimension of the crime, highlights the deep power dynamic that exists between state and victim in this scenario. If the status quo is maintained and the boundaries of the law are not pushed by the 'less powerful', then powerful actors, in this case powerful states, will forever maintain their power on a playing field that should be considered even.

This is supported by Balint, who advocates the acknowledgement of organisational deviance. Balint suggests that focussing overtly on holding an individual accountable[48] means that state-organised mass harm is not dealt with in its entirety.[49] From this perspective, acknowledging these discriminatory state goals provides the foundation for addressing the underlying tensions at the root of the problem.[50]

Until the anti-Rohingya narrative is no longer widely and publicly legitimised by Myanmar's officials of varying levels of influence, there exists a significant danger that further discriminatory actions could be taken against this particular ethnic group in the future. With the state goals concerning the Rohingya's removal remaining, other ways of achieving these goals could be attempted. The state has shown multiple times in the past that it is willing to manipulate the nation's understanding of the Rohingya's citizenship[51] in an attempt to remove the group from its territory.[52] If these goals remain uncontested, what is to stop the state finding an alternative way of removing the Rohingya from its territory in the future?

This analysis has shown that individual criminal responsibility is important for addressing some aspects of the situation, but it is not enough to address the situation in its entirety. To adequately address instances of state crime, more is required. The organisational deviance of the state and the discriminatory rhetoric concerning the victims must be acknowledged. However, individual criminal responsibility still has a place in addressing the situation. It is important for the key perpetrators and instigators of the attacks on the

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of an individual, or small group of individuals, the following public backlash, through condemnation and loss of support, is directed towards the individuals: Penny Green and Tony Ward, 'Law, the State, and the Dialectics of State Crime' (2016) 24 (2) *Critical Criminology* 217, 219.

[48] For crimes that could be considered actions of the state.

[49] Balint has further emphasised state crime's focus on organisational deviance and collective liability, arguing that international law's focus on individual responsibility renders it ill-equipped to address state crime: Balint (n 40).

[50] The full impact of an action against the state will be outlined in further depth while discussing the value of state responsibility shortly.

[51] See operations Dragon King and Clean and Beautiful Nation, as well as the improper application of citizenship law: Maudood Elahi, 'The Rohingya Refugees in Bangladesh: Historical Perspectives and Consequences' in John Rogge (ed), *Refugees: A Third World Dilemma* (Rowman and Littlefield, 1987) 227, 231; Human Rights Watch, *Historical Background* (Report, 2000) <https://www.hrw.org/reports/2000/burma/burm005-01.htm#P112_25491>; UN Human Rights Council, 'Special Session of the Human Rights Council on the Human Rights Situation of the Minority Rohingya Muslim Population and Other Minorities in the Rakhine State of Myanmar: Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein' (Press Release, 5 December 2017) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22487&LangID=E>; Green, MacManus and de la Cour Venning (n 9) 54–5.

[52] See the discussion in Section B of Chapter VI. See also Green and Ward, *State Crime* (n 4) 5; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (2000) 27(1) *Social Justice* 101, 110; Chambliss (n 4) 184.

Rohingya to be held to account. Recognising the role of the Tatmadaw's highest ranking commanders is an important part of addressing the situation.[53] The ICC's ability to look beyond the direct perpetrators of the attacks and consider the role of high-ranking officials should be commended in that regard. But only addressing the situation in this way does not address the full nature of the crimes that have been committed, as the institutional dimension of the crime is not recognised. On top of the outcomes provided by international criminal responsibility, what is needed is change on an organisational level.

B *The Value of State Responsibility*

The second avenue of responsibility that this chapter will critique through the lens of state crime is the attribution of state responsibility. As a result of the analysis in Chapter V, it has become apparent that the Court will likely consider the Tatmadaw's actions to constitute the crime of genocide. These actions were carried out by a de jure organ of the state,[54] which is recognised by the nation's *Constitution*,[55] and carried out in an apparently official capacity.[56] With the state crime approach now determined, it becomes possible to comment on the likely outcomes of the case from this perspective.

This section will highlight the importance of state responsibility in addressing the Rohingya crisis. It will begin by demonstrating the ways in which a judgment of state responsibility can assist in impacting the dehumanisation of the victim population. Next, this section will show the impact of such a decision through the recognition of the state's organisation deviance. Finally, this section will discuss the limitations that a judgment of this nature may have on impacting the current military leadership.

1 *Assisting with the Re-humanisation of the Victim Population*

Firstly, a judgment of state responsibility[57] has the power to show the people of Myanmar that, in this situation, the state is the primary actor of deviance—not the Rohingya. This can provide a meaningful foundation to begin tearing down the anti-Rohingya narrative and the associated dehumanisation.

As can be seen through the analysis through the lens of state crime, the anti-Rohingya narrative has been a multifaceted problem over many years, which has ultimately become its own entity. This anti-Rohingya narrative is based upon the rhetoric that the Rohingya are a deviant group of illegal immigrants who should

[53] According to DeGuzman, 'consistent adherence to a punishment philosophy should enhance the coherence of ICC sentencing practice … promote positive perceptions of the ICC's legitimacy [and] … contribute to the ICC's central mission of building a community of shared criminal law norms at the global level': Margaret DeGuzman, 'Proportionate Sentencing at the International Criminal Court' (2014) *Legal Studies Research Paper Series* 2. See also Balint (n 40) 162–3.

[54] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro (Judgment)* [2007] ICJ Rep 4, [389].

[55] *Constitution of 2008 (Myanmar)* (n 172) arts 337–8.

[56] *Resolution on the Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN Doc A/RES/56/83 (12 December 2001) art 7.

[57] To Myanmar for failing to uphold its obligations to not commit genocide.

not reside on Myanmar's territory[58]—a narrative which has been legitimised by the state on numerous occasions.[59] Analysis has shown that the Rohingya have been dehumanised because they have been removed from the general population's ideal of 'community'.[60] To restore this sense of community and bring the Rohingya back within the 'universe of moral obligation'[61] the crimes of obedience perspective shows that the disruption of the anti-Rohingya narrative is imperative.

Unlike an ICC verdict, an ICJ judgment has the ability to involve the state in the acknowledgement of wrongdoing, immensely increasing its legitimacy and the impact on this narrative. In the event that the ICJ provides a politically safe remedy that is least favourable to The Gambia, a declaratory judgment would assist with the dehumanisation of the victim population. This is due to the symbolic value of the 'authoritative body'[62] declaring that the Rohingya's struggle is a 'grave' matter of the 'highest international significance'.[63] Asserting on the world stage that the state has wronged the Rohingya population would provide the chance to rebut the 'Rohingya are insurgents' stigma set by the state.[64] Yes, some Rohingya have carried out deviant acts.[65] The pro-Rohingya ARSA attacks provided the background for the clearance operations to commence.[66] The basis for the anti-Rohingya narrative can be traced back to the historic tension caused by the undercutting of labour, mass migration and general ideological differences.[67] But, the state has also carried out deviant acts far more frequently and of a graver nature than those ever perpetrated by the Rohingya. The power dynamic between the well-funded, well-staffed and well-armed military force[68] and a small ethnic group leaves the Rohingya vulnerable and powerless—irrespective of the lesser contributions to the instability caused by the Rohingya population.[69]

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[58] Green, MacManus and de la Cour Venning (n 9) 53–5.

[59] For example, see Aung San Suu Kyi's ICJ Speech: 'Transcript: Aung San Suu Kyi's Speech at the ICJ in Full', *Burma/Myanmar Library* (Web Page, 13 December 2019) <www.burmalibrary.org/en/transcript-aung-san-suu-kyis-speech-at-the-icj-in-full>.

[60] Kelman, 'Violence Without Moral Restraint' (n **Error! Bookmark not defined.**).

[61] Green and Ward, *State Crime* (n 4) 184.

[62] Juliette McIntyre, 'The Declaratory Judgment in Recent Jurisprudence of the ICJ: Conflicting Approaches to State Responsibility?' (2016) 29(1) *Leiden Journal of International Law* 177, 194; Alain Pellet, 'Can a State Commit a Crime? Definitely, Yes!' (1999) 10(2) *European Journal of International Law* 425, 434.

[63] McIntyre (n 62) 194; *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Rejoinder of Uruguay)* [2008] ICJ Rep 3, [7.17].

[64] As can be seen by the ICJ speech from the State Counsellor at the time: 'Transcript: Aung San Suu Kyi's Speech at the ICJ in Full' (n 45).

[65] Ibid; Human Rights Council, *Detailed Findings 2018* (n 8) 178 [751].

[66] 'Transcript: Aung San Suu Kyi's Speech at the ICJ in Full' (n 45); Human Rights Council, *Detailed Findings 2018* (n 8) 178 [751].

[67] Moshe Yegar, *The Muslims of Burma* (Otto Harrasowitz, 1972) 29; Aye Chan, 'The Development of a Muslim Enclave in Arakan (Rakhine) State of Burma (Myanmar)' (2005) 3(2) *SOAS Bulletin of Burma Research* 396, 400.

[68] Human Rights Council, *Detailed Findings 2018* (n 8) 24 [90]–[93].

[69] 'Transcript: Aung San Suu Kyi's Speech at the ICJ in Full' (n 45); Human Rights Council, *Detailed Findings 2018* (n 8) 178 [751].

From the theory of state crime, the symbolic value of a decision from an international institution of this nature lies within its ability to support movements from within civil society.[70] Already, Myanmar's people are joining together in solidarity against the military regime.[71] The population is slowly starting to realise that its military has been acting against the interests of Myanmar's people, and the nation's stability. With such a degree of distrust against the currently serving government, now is the time for the people of Myanmar to look back at the situation differently and questions the ethics of the state's actions. It is for this reason that acknowledging the state's institutional treatment of the Rohingya, through an ICJ judgement, can best assist with the dehumanisation of the Rohingya. Acting as another source of knowledge[72] an ICJ judgement against Myanmar can tell the entire story of the Rohingya's mistreatment by the state.[73]

Telling this story in its entirety, from the legitimate background of the ICJ, provides the opportunity to promote empathy amongst Myanmar's general population—including the direct perpetrators within the Tatmadaw. If genocide is considered the gravest crime known to humanity, this shows that the state has engaged in conduct far worse than the small-scale ARSA attacks. At the very least, this can show that the response to ARSA's attacks on state property[74] is disproportionate. Outlining the true nature of the situation in this way can improve the perception of the Rohingya, promoting empathy, and slowly bridging the gap of 'community'. Through this sharing of knowledge and the unification of the people against the state, the Rohingya can be reintegrated into the 'community',[75] move back within the 'universe of moral obligation'[76]and become re-humanised.

There is also the slim possibility that the Court would order further remedies beyond a declaratory judgment, which could have an even stronger impact on the situation on the ground. Through use of the remedy of satisfaction, the ICJ may provide directions that the state must officially acknowledge wrongdoing, as well as issue an apology for the wrongs committed.[77] And, as suggested above in the discussion on the ICC and

[70] Green and Ward, *State Crime and Civil Activism: On the Dialectics of Repression and Resistance* (n 23)' Green and Ward, 'Civil Society, Resistance and State Crime' (n 23) 28; Green and Ward 'Law, the State, and the Dialectics of State Crime' (n 23) 219.
[71] Aung, (n 28)187-194; Putra and Shadiqi (n 28).
[72] Green and Ward, *State Crime and Civil Activism: On the Dialectics of Repression and Resistance* (n 23)
[73] This entire story of the Rohingya's mistreatment by the 'state' includes its proxies such as the RNDP. Rakhine nationalists, the RNDP, have also been the spreading the anti-Rohingya narrative alongside official representatives of state. As the RNDP were a local political party acting under authority of the state, this means that the group technically be distanced from the state. Whether this group, who is effectively acting as a proxy, can be considered as the state is up for debate. For the purpose of this discussion, this thesis treats state proxies as 'state agents', acting under 'state organised deviance'. This means that the RNDP falls within state crime's definition of state. Although, it is acknowledged that the implications of proxies in determining actions of state further highlights the complexity associated with identifying and controlling state crime. Adam Burke, 'New Political Space, Old Tensions: History, Identity and Violence in Rakhine State, Myanmar' (2016) 38(2) *Contemporary Southeast Asia* 258, 268; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 52) 110.
[74] Human Rights Council, *Detailed Findings 2018* (n 8) 348 [1361]–[1384].
[75] Kelman, 'Violence Without Moral Restraint' (n **Error! Bookmark not defined.**).
[76] Green and Ward, *State Crime* (n 4) 184.
[77] *Responsibility of States for Internationally Wrongful Acts* (n 42) art 37.

dehumanisation, the general population are likely to look to the state for guidance in determining what is right and what is wrong. If the state admits to its deviance, the narrative pushed to further this deviance becomes far easier to quash. Furthermore, if this is combined with the remedies sought by means of restitution and compensation, the impact on this narrative will be very strong.

2 *Ability to Recognise the Institutional Dimension of the Crimes*

Secondly, acknowledging the state's organisational deviance is important in impacting the state goals that led to the Rohingya crisis.

To reiterate points from the commentary on the ICC's ability to address the situation, Balint is of the belief that focussing overtly on holding an individual accountable for actions that could be considered actions of the state means that the overall 'story' of state organised mass harm is not dealt with in its entirety.[78] This discussion has highlighted the importance of altering the underlying state goals which provided the reason for the attacks on the Rohingya to take place. While there remains an organisational goal to remove the Rohingya from Myanmar's territory, the Rohingya will always be in danger of future attempts to fulfill this goal. If these organisational goals were to be changed, there would be no need for the mass killing and torture of the Rohingya.

From the perspective of state crime, Balint has highlighted the symbolic importance of a shift in focus from individual responsibility to state responsibility, which may provide the necessary start to breaking down these state goals in the future:

> [w]e continue to grapple with the institutional dimensions of crimes such as genocide and apartheid in accountability for state crime. We have not developed new legal concepts to encapsulate this form of harm. We are still mostly focused on individual legal processes. And while addressing the individuals—the key perpetrators and instigators of these acts, and the victims and survivors—is critical, in order to fully address these kinds of crimes their institutional dimensions must be recognised.[79]

It is for these reasons, that the overall 'story' of the harm must be told from a legitimate source. When considering the heavy anti-Rohingya sentiment in Rakhine State and the public support for the clearance operations,[80] it is clear there is a significant amount of work that needs to be done to repair the societal divide that has been exacerbated by the state's continuous incitement of the issue. If the value in an ICJ judgment surrounding state responsibility lies primarily within the symbolic value of the decision,[81] then this may provide the necessary starting point for disrupting the state goals concerning the citizenship of the Rohingya that have been ingrained at the most basic level of the community.

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[78] Balint (n 40).
[79] Ibid 159.
[80] Green, MacManus and de la Cour Venning (n 9) 31–2, 53–5.
[81] Balint (n 40) 163.

A declaratory judgment of state responsibility in the ICJ could serve as the foundation for redirecting the understanding of the situation for all within Myanmar with the aim of moving forward to reconstruction and reconciliation.[82] This decision, from arguably the highest Court on the international stage, has the opportunity to 'draw a line'[83] and show that the situation in Myanmar is not just the product of individuals engaged in ethnic conflict. Such a decision has the opportunity to state, loud and clear, that the events that have transpired within Myanmar are an abuse of state power in clear violation of global humanitarian standards, which have led to great suffering by a civilian population.[84] Such a decision has the opportunity to recognise the institutional dimension of the crime by outlining that the state is no longer functioning correctly and requires a thorough reassessment of its values and goals.[85]

The use of state responsibility could have a greater impact on the ground.[86] To contest the longstanding anti-Rohingya narrative, education is of paramount importance. The people of Myanmar need to be shown that the position that the state has been pushing for many years now has led to the victim population suffering the gravest atrocities known to humanity. Identifying that the goals of a governing power are not consistent with the society's beliefs and moral standards is a far more valuable tool for enacting change[87] than the alternative—siding with the governing power against an individual labelled as the sole actor of deviance.

Over time, this change in understanding of the Rohingya's plight may eventually translate into a change in state goals, lessening the impact of the inherent bias favouring states that international law carries.[88] When discussing the invasion of Iraq, Kramer and Michalowski refer to the 'butterfly effect'—a phenomenon in which one small event in time can be the catalyst for a chain reaction of events that can ultimately lead to a

[82] Ibid.

[83] Ibid.

[84] As Chazal and Marmo state, 'A violation of international law and principles, even if it does not imply a direct violation of domestic law, still offers a high standard against which state activities should be compared. By using international standards as a benchmark, new forms of state harm have been analysed as criminal, for instance crimes against humanity and global forms of crimes that affect large populations, such as gendercide and mass killing': Nerida Chazal and Marinella Marmo, *Transnational Crime and Criminal Justice* (Sage, 2016) 196.

[85] Acknowledging that deviance extends beyond a single individual and that the problem exists on an institutional level indicates that these state goals are inconsistent with universal understandings of right and wrong. Placing this in context, Stanley and McCulloch suggest that social activism and peaceful resistance may arise from acknowledgement that deviance extends to the state itself. This could be helpful in tearing down the anti-Rohingya narrative: Elizabeth Stanley and Jude McCulloch, *State Crime and Resistance* (Routledge 2014) 226.

[86] The impact of a judgment is strengthened when combined with the remedy of satisfaction, which is likely to be issued in the event of a judgment of genocide against Myanmar. This would create an even stronger opportunity to quash the legitimacy of the anti-Rohingya narrative. The remedy of satisfaction may involve directions to the state to officially acknowledge wrongdoing, as well as to issue an apology for the wrongs committed. With the combined power of the determination that the state has committed genocide, and the remedies that follow, the anti-Rohingya narrative may begin to be broken down after decades of societal fracture: *Responsibility of States for Internationally Wrongful Acts* (n 42) art 37.

[87] As Brysk suggests, reduced support for a governing power is not limited to overtly noticeable public displays: Alyson Brysk, *Speaking Rights to Power: Constructing Political Will* (Oxford 2013).

[88] Friedrichs, 'Crimes of the Powerful and the Definition of Crime' (n 44).

wave of change.[89] It is hard to predict exactly how a judgment of state genocide will directly impact the situation on the ground and the degree of impact it will have. But looking at the situation in its entirety and assessing the full 'story'[90] indicates that there is, at the very minimum, an opportunity. Perhaps even in a different political setting, recognising the deviance of the state itself will provide an opportunity to take a good hard look at the organisational goals and policies of the state. Until then, educating the people of Myanmar is crucial, and ensuring that the state's conduct in this regard is found to be completely unacceptable should remain a high priority.

Even further impact on this point is possible if the Court orders the proposed guarantees of non-repetition in the form of institutional reform and vetting of future leaders. If this remedy is granted, the power of the decision could be elevated beyond the symbolic value of advocating organisational change and provide a deep, significant practical difference. Institutional reform, when combined with the vetting of future leaders, provides the ability to remove the 'bad apples' and slowly begin to revive the orchard that has become rotten through decades of deviance. Use of this remedy in practice, however, appears unlikely. This is owing primarily to the fact that the two parties have not yet discussed this option,[91] and the Court may be hesitant to impose such a burden on Myanmar, given its current political situation.[92]

Ultimately, the key to addressing Myanmar's organisational deviance at this point is education. Tearing down the anti-Rohingya narrative is no easy feat and will likely take years of hard work to achieve. A significant global finding of this nature may be the catalyst needed to kick-start a shift in thinking from within Myanmar. Such a decision would be a first step on the long pathway towards reconciliation, and possibly even the peaceful return of the Rohingya to Rakhine State.

3 *Inability to Address Authorisation and Routinisation*

While state responsibility has proven to be important in addressing dehumanisation, and the state's organisational deviance, it does not adequately address the factors of authorisation and routinisation.

The current political climate in Myanmar, in which the military has seized power over the civilian government,[93] places a level of doubt over the practical benefit of a primarily symbolic judgment. In theory, a sincere and committed effort by the government to educate the population to disrupt the state ideologies concerning the citizenship of the Rohingya could have the positive impact that is needed. In practice, a sincere and committed effort of such nature from the current military government appears to be very

[89] Kramer and Michalowski (n 4) 463.
[90] Balint (n 40) 163.
[91] Assurance and guarantees have only been sought in the form of citizenship for the Rohingya, which appears legally inappropriate. This is due to the distance of the causal link between the wrongful act and the remedy sought.
[92] As Myanmar's current leader has been heavily involved with the genocidal acts carried out against the Rohingya, non-compliance is a high possibility, as is the potential of further attacks against the Rohingya in retaliation.
[93] Nehginpao Kipgen, 'The 2020 Myanmar Election and the 2021 Coup: Deepening Democracy or Widening Division' (2021) 52(1) *Asian Affairs* 1.

unlikely. Since the 2021 coup, Myanmar has been under the control of the very military that carried out the human rights violations against the Rohingya.[94] The Tatmadaw's highest level commander at the time of the clearance operations, who has openly and commonly expressed hate speech concerning the Rohingya population,[95] is even acting as the state's current leader.[96]

As a result, it must be considered that a judgment of this nature is not likely to have a significant impact on the authorisation of future attacks,[97] or the routinisation of the Tatmadaw's violence.[98] With the military's structure effectively remaining as is, with no significant change in leadership or organisational goals, the doorway for future instability remains open. While one would like to look on the current military government with a degree of optimism, the harsh reality of the situation is that the symbolic value of an ICJ judgment of state genocide would not likely have a significant impact on the way in which Myanmar is currently being governed. While it could potentially play a role in de-legitimizing the current military government, there is little to suggest that an ICJ verdict would provide a meaningful impact in the Tatmadaw's control of the state —whether directly, or from behind the scenes.[99]

Ultimately, it appears that a judgment of state responsibility can have a powerful effect on dealing with the non-tangible aspects of the crimes, such as narratives, dehumanisation and unwritten organisational goals. The importance of a decision of state responsibility lies primarily with the symbolic nature of the judgment and the ability to recognise the institutional dimension of the crimes. But, as the lens of state crime has shown, addressing the situation in its entirety requires the tangible aspects of the crime to be dealt with as well. To fully address the situation, key figures in the military who authorised the attacks and enabled human rights violations to become a routine part of daily life for the Tatmadaw soldiers must also be held responsible to ensure that these horrific acts are not repeated in the future.

C *Findings*

State responsibility for committing genocide is important, because individual criminal responsibility, on its own, is not sufficient to address the situation in its entirety. To best address the situation, both individual criminal responsibility and state responsibility need to operate in tandem.

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[94] Ibid.

[95] Human Rights Council, *Detailed Findings 2018* (n 8) 333 [1328], [1336].

[96] Ingrid Jordt, Tharaphi Than and Sue Ye Lin, *How Generation Z Galvanized a Revolutionary Movement Against Myanmar's 2021 Military Coup* (ISEAS-Yusof Ishak Institute, 2021); Adiningtyas Dwiputri Samsoerizal, Eri Radityawara Hidayat and Achmed Sukendro, 'The Role of The International Community in Establishing Democracy in Myanmar' (2021) 5(4) *International Journal of Social Science and Business* 522.

[97] Kelman and Hamilton (n 5) 17.

[98] Ibid 18.

[99] As can be seen by the return of the military junta after resolving the previous military dictatorship, and the power of the military over the civilian government during civilian rule: Udai Bhanu Singh, 'Do the Changes in Myanmar Signify a Real Transition' (2013) 37(1) *Strategic Analysis* 101.

Through the analysis of both legal avenues that are currently dealing with the situation, the way in which individual criminal responsibility and state responsibility can work together to address a situation in the most effective manner has been brought to light. This understanding of how the two alternative forms of responsibility can complement each other highlights the need for state responsibility.[100]

This state crime approach advocates recognising the state as the deviant actor,[101] as well as addressing the factors of authorisation, routinisation and dehumanisation that have enabled the situation to develop.[102] Through a combination of both individual and state responsibility, all of these goals can be achieved, to some degree. Analysis of international criminal law's approach to the situation has highlighted the strengths of dealing with the high-ranking military officials[103] who have assisted in establishing the factors of authorisation[104] and routinisation,[105] and even dehumanisation. Meanwhile, the weaknesses have been found to be the failure to recognise the institutional dimension of the attacks.[106] In stark contrast to this, the analysis of a judgment of state responsibility[107] has highlighted the importance of the symbolic value of the judgment and the recognition of the institutional dimension of the crimes,[108] along with the dehumanisation of the victim population. Furthermore, this state crime approach provides a deeper insight in concerning how the ICC and ICJ cases can impact the situation on the ground. From this perspective, these decisions act as ammunition for the movements taking place within civil society.[109] Both ICC and ICJ outcomes have a key role to play in highlighting deviance that has occurred, which can give fuel to movements that arise.

This analysis shows that the previous ideology concerning responsibility, which only recognises that individuals are capable of committing crimes, needs to evolve. As has been shown by this analysis, individual criminal responsibility is not enough on its own to combat state crimes, such as the attacks on the Rohingya. To have a true impact on the situation on the ground, the institutional dimension and the dehumanisation of the victim population must be addressed. As shown above, an ICJ judgment against the state for *committing* genocide possesses the ability to address this.

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[100] For committing genocide.

[101] Green and Ward, *State Crime* (n 4) 5; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 52) 110; Chambliss (n 4) 184.

[102] Kelman and Hamilton (n 5) 46; Brunilda Pali, 'Crimes of (Dis)Obedience: Radical Shifting of the Criminological Gaze', *Security Praxis* (Web Page, 1 October 2018) <https://securitypraxis.eu/crimes-of-disobedience/>; Alette Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (2019) 17 *Journal of International Criminal Justice* 105, 113.

[103] *Rome Statute* (n 3) art 28.

[104] Kelman and Hamilton (n 5) 17.

[105] Ibid 18.

[106] Balint (n 40) 151, 156, 159.

[107] Even if only through a declaratory judgment and no other remedies.

[108] Balint (n 40) 151, 156, 159.

[109] Green and Ward, *State Crime and Civil Activism: On the Dialectics of Repression and Resistance* (n 23)' Green and Ward, 'Civil Society, Resistance and State Crime' (n 23) 28; Green and Ward 'Law, the State, and the Dialectics of State Crime' (n 23) 219.

For this reason, there is an important place in international law for both individual criminal responsibility and state responsibility when it comes to combatting state crimes. A judgment against the state enables the institutional dimension and the dehumanisation of the Rohingya to be recognised. But a judgment against the state fails to address the problem of corrupt military officials who will likely remain in power,[110] which highlights the need for the continued use of individual criminal responsibility. This deeper context from the state crime perspective highlights the importance of the differing roles that both individual criminal responsibility and state responsibility can play in combatting state crimes. In order to provide the most impactful solution in the quest for peace and stability in Myanmar, these differences need to be embraced.

[110] See the outcome of the 2021 coup, in which the Tatmadaw seized power of Myanmar: Kipgen, 'The 2020 Myanmar Election and the 2021 Coup' (n 93).

VIII CONCLUSION

This thesis has shown that to combat state crimes, it is important for both ICC and ICJ working in tandem. In this instance, the use of individual criminal responsibility is applauded for its ability to address the role of the military's high-ranking officials. While individual criminal responsibility was considered unable to recognise the state as a deviant actor, or to impact the underlying organisational goals and discriminatory rhetoric, an action in the ICJ for *committing* genocide is able to achieve this. As a result, the attribution of state responsibility to Myanmar for *committing* genocide in the ICJ is an important step forward for these two courts to operate in idyllic tandem.

To bring this overarching discussion to a close, this conclusory chapter will summarise how this conclusion was reached, in relation to the research questions initially posed. With this logic finalised, the value of the lens of state crime for research of this nature will be reflected upon, before outlining the potential space for further research in this area. Finally, the importance of the outcome of *The Gambia v Myanmar* will be reflected upon through concluding remarks.

A *Answering the Research Questions*

Relating back to the research questions posed in Chapter I, this thesis asked the overarching research question: *From the perspective of state crime, should state responsibility be attributed to Myanmar for committing genocide?* This overarching question was answered through considering four sub-questions.[1] The way in which these sub-questions and, in turn, the overarching research question were answered will now be explained.

1 *Who, if Anyone, is an Action in the ICC Likely to Involve?*

Analysing the ICC's approach to the Rohingya crisis has shown that it is likely that two groups of perpetrators would be found to have breached the *Rome Statute*. The mid-level perpetrators in the Tatmadaw were found likely to be guilty of committing crimes against humanity for deportation or forcible transfer under article 7(1)(d) of the *Rome Statute*.[2] And their commanders, the high-level perpetrators, were found likely to be found to have failed to take reasonable and necessary steps to prevent the crimes of these subordinates under article 28.[3]

[1] 1) Who, if anyone, is an action in the ICC likely to involve? 2) Can genocidal conduct be attributed to Myanmar in the ICJ, and if so what remedies may follow? 3) How does the lens of state crime approach the Rohingya crisis? 4) From the lens of state crime, is individual criminal responsibility sufficient to address the Rohingya crisis? Or can an action for state responsibility provide a meaningful alternative solution?

[2] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 7(1)(d) ('*Rome Statute*').

[3] Ibid.

2 *Can Genocidal Conduct be Attributed to Myanmar in the ICJ, and if so, what Remedies May Follow?*

As a result of the analysis of the ICJ's dealings with the Rohingya crisis, it has become apparent that the Court will likely consider the Tatmadaw's actions to constitute the crime of genocide. These actions were carried out by a de jure organ of the state,[4] which is recognised by the nation's *Constitution*,[5] and carried out in an apparently official capacity.[6] As a result, it was determined that genocidal conduct can legally be attributed to Myanmar. When assessing the available remedies, it was found that the most realistic outcome will be an order to cease the internationally wrongful acts of genocide and a declaratory judgment outlining that Myanmar's wrongful act constitutes a 'grave' matter of the 'highest international significance' through the means of 'satisfaction'.[7]

3 *How does the Lens of State Crime Approach the Rohingya Crisis?*

Moving forward to the state crime perspective, analysis has shown that the Rohingya crisis is not just the product of a small number of deviant individuals. This analysis has shown that the attacks on the Rohingya are a product of a combined effort of all levels of the state's official military, along with a century-long societal fracture. From this perspective, it was found that that the state's organisational goals are to remove the Rohingya population from Myanmar's territory. The mass killing and torture of the Rohingya civilian population was in line with these goals, and no effort was made by any senior military official to cease or prevent these attacks from being carried out.[8]

Deviance in this situation extends far beyond the direct perpetrators, becoming an issue of all levels of the state. The human rights violations were carried out with the support of the highest level of the Tatmadaw, who viewed the acts of the direct perpetrators as in line with their own organisational goals. These 'crimes' carried out against the Rohingya population should be considered nothing less than criminal acts carried out by the state itself.

Furthermore, this analysis has shown that there is an array of factors that created the Rohingya crisis. The authorisation of the attacks by higher ranking officials in this military setting enabled the direct perpetrators

[4] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro (Judgment)* [2007] ICJ Rep 4, [389] ('*Bosnian Genocide Case*') [389].
[5] *Constitution of 2008* (Myanmar) arts 337–8.
[6] *Resolution on the Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN Doc A/RES/56/83 (12 December 2001) art 7.
[7] This discussion acknowledged the fluid nature of the proceedings and the importance of further negotiation between the Court and the parties in reaching a final outcome. While the remedies mentioned here appear to be the most realistic outcome, this discussion did not rule out the possibility of further 'more optimistic' remedies being reached, potentially through the means of restitution, compensation and guarantees of non-repetition.
[8] Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/39/CRP.2 (17 September 2018) 352 [1382].

to carry out the attacks without fear of consequences.[9] The routinisation of violence within the direct perpetrators' job description as trained armed combatants desensitised member of the Tatmadaw to violent acts.[10] And finally, the longstanding discriminatory rhetoric about the Rohingya dehumanised the victim population in the eyes of the perpetrators,[11] allowing the Tatmadaw soldiers to carry out 'manifestly unlawful' acts of violence.[12] This analysis has shown that, to prevent state crime being carried out towards the Rohingya in future, further steps need to be taken to mitigate these factors. Otherwise, the requisite conditions for harm towards the Rohingya will remain in place.

In summary, this state crime approach advocates the need to recognise the state as the deviant actor,[13] as well as to address the factors of authorisation, routinisation and dehumanisation that have enabled the situation to develop.[14]

4 *From the Lens of State Crime, is Individual Criminal Responsibility Sufficient to Address the Rohingya Crisis?*

Commenting on international law's approach from the lens of state crime has provided a deeper, alternative insight into the law's ability to deal with state crimes. This discussion has shown that international criminal law may be an effective tool for dealing with individuals who are involved in the military hierarchy and have played tangible roles in enabling subordinate troops to carry out state crimes.[15] From the perspective of state crime, individual criminal responsibility can address the authorisation and routinisation of the attacks against

[9] Herbert Kelman and V Lee Hamilton, *Crimes of Obedience* (Yale University Press, 1989) 17; Herbert Kelman, 'The Social Context of Torture: Policy Process and Authority Structure' (2005) 87 *International Review of the Red Cross* 123, 131; Edward Day and Margaret Vandiver, 'Criminology and Genocide Studies: Notes On What Might Have Been and What Still Could Be' (2000) 34(1) *Crime, Law and Social Change* 43, 44; Herbert Kelman, 'The Policy Context of International Crimes' in André Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press, 2009) 26, 27.

[10] Kelman and Hamilton (n 9) 18; Day and Vandiver (n 9) 45; Kelman, 'The Social Context of Torture' (n 9) 131; Ann Tsang, 'Moral Rationalization and the Integration of Situational Factors and Psychological Processes in Immoral Behavior' (2002) 6(1) *Review of General Psychology* 25, 30; Leanne Weber, 'The Detention of Asylum Seekers as a Crime of Obedience' (2005) 13(1) *Critical Criminology* 89 100–2.

[11] Kelman and Hamilton (n 9) 19; Day and Vandiver (n 9) 45; Herbert Kelman, 'Dignity and Dehumanization: The Impact of the Holocaust on the Central Themes of My Work' in Herbert Kelman, *Resolving Deep-Rooted Conflicts*, ed Werner Wintersteiner and Wilfried Graf (Routledge, 2016) 38; Allette Smeulers, 'Perpetrators of International Crimes: Towards a Typology' in Allette Smeulers and Roelof Haveman (eds), *Supranational Criminology: Towards a Criminology of International Crimes* (Intersentia, 2008) 233, 259; Kelman, 'The Social Context of Torture' (n 9) 131.

[12] Alette Smeulers, 'Why Serious International Crimes Might Not Seem "Manifestly Unlawful" to Low-Level Perpetrators' (2019) 17 *Journal of International Criminal Justice* 105, 106.

[13] Penny Green and Tony Ward, *State Crime* (Pluto, 2004) 5; Penny Green and Tony Ward, 'State Crime, Human Rights, and the Limits of Criminology' (2000) 27(1) *Social Justice* 101, 110; William Chambliss, 'State-Organized Crime' (1989) 27(2) *Criminology* 183, 184.

[14] Kelman and Hamilton (n 9) 46; Brunilda Pali, 'Crimes of (Dis)Obedience: Radical Shifting of the Criminological Gaze', *Security Praxis* (Web Page, 1 October 2018) <https://securitypraxis.eu/crimes-of-disobedience/>; Smeulers (n 12) 113.

[15] *Rome Statute* (n 2) art 28.

the Rohingya, showing that punitive measures such as criminal sanctions may be appropriate in these circumstances.

However, this discussion did show that focussing on a small number of select individuals alone is not enough to address the situation in its entirety. Individual criminal responsibility cannot have a significant impact on dehumanisation and discriminatory state goals. From this perspective, individual criminal responsibility provides the state organisation with a degree of impunity. By suggesting that these crimes are the product of a small number of 'bad apples', the narrative is shifted away from the state's organisational deviance and placed upon the small number of deviant individuals.

Alternatively, this analysis has shown that state responsibility for international crimes is a powerful tool for dealing with situations involving dehumanisation and discriminatory state goals. To combat these issues involving narrative, misinformation and discrimination, education and information is key. Through this logic, the symbolic value of an ICJ judgment and the acknowledgement of wrongdoing by the state as a result of such a decision are immensely valuable. The acknowledgement of wrongdoing under the ICJ's powers concerning state responsibility[16] and remedies that acknowledge the state's contribution to the harm[17] finally allow the discriminatory narratives and state goals to be addressed.

Based on this, it has become evident that individual criminal responsibility is not enough to address the situation on its own; state responsibility can have a meaningful additional impact on the situation.

5 *From the Perspective of State Crime, Should State Responsibility be Attributed to Myanmar for Committing Genocide?*

With a state crime critique of the law's differing approaches to the Rohingya crisis, it finally becomes possible to answer the overarching research question: *From the perspective of state crime, should state responsibility be attributed to Myanmar for committing genocide?*

Based upon the findings of this thesis, the answer to this question is a resounding yes.

The analysis of international law's approach to the Rohingya situation has shown that the ICC and ICJ have the opportunity to appropriately combat instances of state crime when working in tandem. Although individual criminal responsibility is important in addressing certain aspects of the crimes,[18] this thesis has shown that it is not sufficient to address the situation in its entirety. By labelling a small number of individuals as deviant, the wider 'story' of harm is ignored. As shown in this thesis, ICC action on its own fails to identify the deviance of the state as an organisation, which leaves the underlying issues of discriminatory state goals and dehumanisation unaddressed. On the other hand, an action for state

[16] *Bosnian Genocide Case* (n 4) [173].

[17] See the remedy of satisfaction: *Responsibility of States for Internationally Wrongful Acts* (n 6) art 34.

[18] The ICC has proven an effective method of dealing with authorisation and routinisation through the potential to hold high-ranking military commanders responsible for the crimes of subordinates.

responsibility in the ICJ[19] provides the opportunity to address these shortcomings of individual criminal responsibility.

Even if *The Gambia v Myanmar* may only lead to the largely symbolic remedy of satisfaction, this action provides significant further value in addressing dehumanisation and acknowledging state organisational deviance, in ways that the ICC cannot. It is for this reason that is important that state responsibility for committing genocide is made possible in the ICJ.

The attribution of state responsibility to states who have *committed* genocide is an appropriate, necessary and important evolutionary step in the development of international law. The present case of *The Gambia v Myanmar* provides a rare opportunity to develop the law further and allow the institutional dimension of state crimes to finally be recognised.[20]

B *Value of the Lens of State Crime*

With this thesis coming to a close, it is time to reflect on the value of the lens of state crime within the discipline of international law, and the space for further research that arises from the use of this lens for interdisciplinary research concerning the development of international law. While this thesis has highlighted the importance of attributing state responsibility for committing genocide, this analysis has also shown the importance of the lens of state crime in academic literature. The value of the lens of state crime, along with its limitations, will now be reflected upon.

1 *Strengths of Using State Crime to Comment on International Law*

State crime theory has great value in its ability to assess a situation from a wider viewpoint and to highlight the deeper foundational issues and factors that enabled such a situation to exist. This alternative viewpoint has enabled new arguments on longstanding discussion points within the space of international law to be brought to light.

In particular, this alternative viewpoint has shone new light on the issue of state responsibility for international crimes. Arguments such as those concerning the institutional redundancy between the ICJ and the ICC[21] and the contradictions of the principle of individual responsibility[22] were appropriately addressed through demonstration. This added further logistical points to advocacy for state responsibility for

[19] Regarding state responsibility for *committing* genocide.

[20] It is noted that, although this is a significant step, it still only applies to the crime of genocide specifically at this point in time.

[21] *State Responsibility Comments and Observations Received by Governments*, UN GAOR, 50th sess, Agenda Item 2; UN Doc A/CN.4/488 and Add 1–3 (25 March, 30 April, 4 May, 20 July 1998) 120–1.

[22] Green and Ward, *State Crime* (n 13) 5; Green and Ward, 'State Crime, Human Rights, and the Limits of Criminology' (n 13) 110; Chambliss (n 13) 184.

international crimes in light of the upcoming ICJ case that has the opportunity to deliver a landmark decision on this matter.[23]

When considering criticism of traditional legal research's narrow nature and inability to answer the 'macro-questions' concerning principles, general concepts and problems that the law in its current form may possess,[24] the value of state crime's value in this space is even stronger. The concept of state responsibility in the past has remained somewhat stagnant, which is primarily due to the constant rehashing of longstanding ideologies.[25] Strictly legal research on the issue of state responsibility for international crimes will forever be burdened with a deep-rooted focus on individual criminal responsibility, an ideology that has been ingrained in the basis of legal systems. 'Crime' and 'criminals' will always be benchmarked to the specific bounds of the law itself.[26] If this viewpoint continues to be followed, many instances of harm and contributors to such harm will always be overlooked.

State crime theory enables an entirely new way of approaching a problem that is free from the inherent drawbacks of remaining strictly within the discipline of international law. By assessing a situation from a wide lens, taking into consideration the deep roots of how the situation has developed to the point of reaching mass harm, state crime theory can provide commentary on the 'macro questions'[27] and foundational aspects of international law that cannot be answered from strictly within the discipline.

2 *Limitations of Using State Crime in the Legal Space*

Despite these strengths, there are some necessary limitations that must be considered in the discussion of the appropriateness of state crime's place within international law's discourse. The primary limitation has been found to lie within the horizontal nature of the discipline of international law.[28]

One limitation is that it is impractical to implement such changes in a direction that is not in line with hegemonic states of influence.[29] The most relevant and challenging limitation lies within the fact that international law is inherently political,[30] potentially causing practical issues from an international relations

[23] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Application Instituting Proceedings and Request for Provisional Measures)* (International Court of Justice, General List No 178, 11 November 2019).
[24] Martha Siems, 'The Taxonomy of Interdisciplinary Research: Finding the Way out of the Desert' (2009) 7(1) *Journal of Commonwealth Law and Legal Education* 5.
[25] See the literature review.
[26] David Friedrichs, 'Crimes of the Powerful and the Definition of Crime' in Gregg Barak (ed), *The Routledge International Handbook of the Crimes of the Powerful* (Routledge, 2015) 39.
[27] Siems (n 24).
[28] Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford University Press, 2005) 225–6.
[29] Joseph Masciulli and Mikhail Molchanov, 'Hegemonic Power' 1 *Encyclopedia of Global Studies* 788, 790; Thomas Volgy, *Resistance to Hegemony Within the Core* (University of Pittsburgh, 2005) 1–2; Susan Strange, *Toward a Theory of Transnational Empire* (Sigma Publishing, 1989) 165; Sait Yilmaz, 'State, Power and Hegemony' (2010) 3(1) *International Journal of Business and* Social *Science* 192, 205.
[30] Ibid.

perspective. If it were to be found that a state has breached the *Genocide Convention* through the act of *committing* genocide, then many concerning practical questions arise: If being a signatory to the *Genocide Convention* means that states are likely to be found to have committed genocide, does that mean certain states will withdraw from the convention? This limitation has been noted by many scholars in the past, and is an issue described as being forever prevalent.[31] In relation to interdisciplinary research and the use of the lens of state crime, this becomes increasingly problematic, which is primarily due to the practical aspects of adopting alternative principles that may not be in line with the interests of major powers on the international stage.[32]

3 *Addressing these Limitations from a Perspective of State Crime*

From a lens of state crime, these limitations provide further reasons why the study of state deviance and the law should be focussed on. This is due to the power of states in creating the law.

As shown through the criminological perspective, the fight against the commission of state crimes in the realm of international law is inherently an uphill battle due to the contrasting interests of those creating the laws. The state crime perspective stems from the background of critical criminology and is based upon ideologies that critique the law through a fundamentally different perspective that challenges the individuals and entities in power.[33] For example, the *crimes of the powerful* framework prompts the argument that laws are created by those in power and, as a result, represent the interests of those in power.[34] As state crime scholars argue, international law is not 'universal' and does not represent the interests of humanity as a whole.[35] International law is developed by states, and often powerful states play a greater role in influencing the laws that are created.[36] When considering this, it becomes important to take into account that the term 'state crime' is inherently at odds with the ideologies behind these hegemons, by suggesting that states themselves can commit crimes. If international law is created by these powerful actors for their own interests, as critical criminology suggests,[37] then this means that any recommendations arising from the lens of state crime are likely to be met with strong resistance within the space of international law.

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[31] Goldsmith and Posner (n 28); Keith Suter, 'The Successes and Limitations of International Law and the International Court of Justice' (2010) 20(4) *Journal of Medicine, Conflict and Survival* 350.

[32] Dawn Rothe and David Friedrichs, 'The State of the Criminology of Crimes of the State' (2006) 33(1) *Social Justice* 147.

[33] Ibid; Majid Yar, 'Critical Criminology, Critical Theory and Social Harm' in Steven Hall and Simon Winlow (eds), *New Directions in Criminological Theory* (Routledge, 2012) 70; Walter DeKeseredy and Molly Dragiewicz, *Handbook of Critical Criminology* (Routledge, 2011).

[34] Friedrichs, 'Crimes of the Powerful and the Definition of Crime' (n 25).

[35] Ronald Kramer and Raymond Michalowski, 'War, Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq (2005) 45(4) *British Journal of Criminology* 446, 469; Dianne Otto, 'Rethinking the Universality of Human Rights Law' (1997) 18 *Australian Year Book of International Law* 1; Mrinalini Sinha, *Feminisms and Internationalisms* (Blackwell Publishers, 1999).

[36] Ethan Nadelmann, 'Global Prohibition Regimes: The Evolution of Norms in International Society' (1990) 44(4) *International Organization* 479, 526.

[37] Ibid.

These are notable considerations and do hold a significant degree of merit. As is constantly stated in the analysis of international law, the inherently political and horizontal nature of international law has always struggled with this limitation, and it would be foolish to assume that any recommendations from the perspective of state crime would fare any differently. Although, if this logic was to be stringently followed, does this mean that any discussion concerning the development of the law for the betterment of humanity and detriment of powerful actors will always be futile? Does the influence of powerful self-interested hegemons on the creation of international law mean that all critique must serve the interests of these powers to be considered a valid and practical recommendation?

If this logistical pathway was to be taken in the academic world, it would be disheartening. One should not refuse to theorise a better world because of the political implications associated with their practical challenges. If these laws were never challenged from the academic community for this reason, then the hegemonic influence and power imbalance that has plagued the practical space of international law would follow into the academic space.

With this in mind, it becomes arguable that these 'limitations' should be considered to serve as even further reason to adopt the lens of state crime within the open-minded and creative realm of academia. If such a power imbalance does exist in the practical space of international law, then it becomes increasingly important to counteract this in the academic space, with an increased focus on holding states accountable for deviant conduct. It is at this point that the value of the academic realm comes to light. The most appropriate avenue for eventual positive change through the use of this lens appears to be through scholars adopting this approach for critiquing purposes, building a deep foundational basis for informing future decisions concerning the application and development of international law. As a result, it is hoped that individuals in the academic field can build upon this research to normalise use of the state crime lens in the future.

While international law may serve the interests of power,[38] the very same legal system is also based upon foundations of hope and aspiration for a better world, and scholars should aspire to do the same. Some forms of international law,[39] along with international institutions,[40] have been built from the ground up by aspiring to prevent horrific atrocities from reoccurring—atrocities not dissimilar to those seen in Myanmar. The very foundations of international law were developed with the aim of the prevention of further atrocities in mind. Even though the practical difficulties surrounding the implementation of any recommendations on the development of international law should always be kept in the back of one's mind, scholars, who's views are free from the bounds of such practicalities, should forever be thinking of developing a better world.

[38] Friedrichs, 'Crimes of the Powerful and the Definition of Crime' (n 25).

[39] For example, the *Genocide Convention* recognises 'that at all periods of history genocide has inflicted great losses on humanity' and aims 'to liberate mankind from such an odious scourge'. *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) Preamble ('*Genocide Convention*').

[40] For example, the ICC was established with the aim 'to hold those responsible accountable for their crimes and to help prevent these crimes from happening again.' 'About the Court', *International Criminal Court* (Web Page) <https://www.icc-cpi.int/about/the-court>.

Perhaps one day these idealistic dreams of academics may find practical implementation in the real world. State crime scholars argue that international institutions of justice are merely considered as tools for civil society to bring about change.[41] The very concept of Civil society acts as a corrective measure to an over-reliance on international institutions of justice which carry this bias toward the powerful. Exactly how this change could take place is non-tangible and can often appear as overly optimistic. Although, the fact that international law is built with an inherent bias toward benefiting the powerful should not mean that the development of international law for the better of humanity is abandoned. If international law is based on what powerful actors have determined to be in their best interest, then it needs to be considered that these interests can be changed. States, and their legitimacy, rely on the support of their people to function correctly.[42] With enough push from civil society, it becomes possible for a state's interests to change. One day, international law, which is made by states, may even be able to be changed for the better.

The case in question provides a perfect example of such an opportunity to assist the powerless. The chance for state crimes to be acknowledged in the ICJ in the upcoming case of *The Gambia v Myanmar* provides a rare opportunity for the 'underdog' to advance in a longstanding fight against state-sanctioned injustice and atrocity crimes. Yes, the finding that a state breached the *Genocide Convention* through the act of *committing* genocide may lead to some states withdrawing from the *Genocide Convention* if allegations of genocide arise. On the other hand, in this case, there would still be one more state held responsible for committing grave human rights violations than there was yesterday. With the existence of such a strong power imbalance between states and individuals, such an instance should be considered by scholars as nothing less than a victory of the highest degree.

For the most part, this thesis has managed to steer clear of adding the third discipline of international relations into the discussion and there is no requirement to engage in such a further discussion at this point. Combatting state crimes through the development of the law will forever carry this limitation[43] and becoming caught up on this point in the world of academia will only further aid the impunity of states engaging in criminal conduct. Despite this limitation being ever present, the gravity and horrors associated with state crimes render it necessary to take any possible step in the right direction. Whether it be through the theorising of a better world or pushing for small-scale victories in the infrequent opportunities that arise, these opportunities need to be taken. And the pathway to achieving both of these tasks begins with acceptance and promotion of the ideologies from the lens of state crime within international law's academic space.

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[41] Penny Green and Tony Ward, *State Crime and Civil Activism: On the Dialectics of Repression and Resistance* (Routledge, 2019); Penny Green and Tony Ward, 'Civil Society, Resistance and State Crime' in Elizabeth Stanley, Jude McCulloch (eds) *State Crime and Resistance* (Routledge, 2013) 28; Tony Ward and Penny Green, 'Law, the State, and the Dialectics of State Crime' (2016) 24 (2) *Critical Criminology* 217, 219.

[42] Penny Green and Tony Ward, 'Legitimacy, Civil Society, and State Crime' (2000) 27(4) *Social Justice* 82, 76.

[43] International law will always be political as hegemony will forever be prevalent. See Goldsmith and Posner (n 28); Masciulli and Molchanov (n 29) 790; Volgy (n 29) 1–2; Strange (n 29) 165; Yilmaz (n 29) 205.

C *Space for Further Research*

Upon the closure of this thesis, there becomes three primary areas in which the space for further research is identified. The first area for further research relates to the overarching discussion in the academic space which this thesis intends to occupy. The second is the use of theoretical concepts from the discipline of critical criminology for providing context to the development of international law. And finally, there are questions concerning the state responsibility for the civilian government's omissions that have been pushed to the side in this thesis as a matter of scope.

1 *The Overarching Discussion on the Attribution of State Responsibility for International Crimes*

As stated in the introduction, this thesis only aimed to provide a new viewpoint to be considered when approaching the inevitable question of the attribution of state responsibility. It is acknowledged that there are many opposing viewpoints on the appropriateness of attributing state responsibility for criminal acts. Providing an alternative viewpoint as well as weighing up these considerations requires a scope far bigger than a thesis of this nature. Given this, there is space for further research to weigh up these arguments alongside the benefits of attributing state responsibility for genocide that have been outlined in this thesis.

While there are numerous discussion points concerning the appropriateness of state responsibility for committing crimes, the most lengthy and inclusive discussion in the past has arisen in response to the International Law Commission's draft articles on state responsibility and the rejection of draft article 19. This article introduced the idea that states can be responsible for committing crimes.[44] The first complaint about draft article 19 was that its inclusion would result in an institutional redundancy of international crimes, as the Security Council and the ICC already deal with international crimes.[45] Secondly, it was argued that state responsibility for international crimes may contradict the principle of individual responsibility.[46] And thirdly, there was concern surrounding the clarity of the issue of standing and who, if anyone, can, and should, bring action to the Court for an internationally wrongful act that amounts to an international crime.[47] Outside of the discussion concerning the draft articles, there is a further substantial argument that state responsibility for international crimes would promote the concept of the collective responsibility of a state's

[44] Draft article 19 included an outline of what constitutes a state crime, essentially providing a list of wrongful acts considered internationally wrong, that could result in the perpetrating state bearing responsibility: 'An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime'. See Shabtai Rosenne, *The International Law Commission's Draft Articles on State Responsibility* (Martinus Nijhoff, 1991) 172; Antonio Cassese, *Five Masters of International Law: Conversations with R-J Dupuy, E Jiménez R Jennings, L Henkin and O Schachter* (Hart Publishing, 2011) 214.

[45] *State Responsibility Comments and Observations Received by Governments* (n 21) 100, 120–1; *State Responsibility First Report on State Responsibility, by Mr. James Crawford, Special Rapporteur*, UN GAOR, 50th sess, Agenda Item 2; UN Doc A/CN.4/490 and Add 1–7 (24 April, 1, 5, 11 and 26 May, 22 and 24 July, 12 August 1998).

[46] See the various concerns relating to individual criminal responsibility in *State Responsibility Comments and Observations Received by Governments* (n 21) 114, 115, 121.

[47] See the various concerns relating to individual criminal responsibility in ibid 100.

population for the actions of their leaders.[48] These criticisms should serve as a starting point for future discussion of the primary arguments of this thesis in the academic field.

2 *Further Use of the Lens of State Crime for Commenting on the Development of International Law*

If the lens of state crime is to be considered a valuable tool for scholars to utilise in the assessment and critique of the development of international law, it will open up multiple avenues of research.

Firstly, there may now exist the opportunity to critique the international law definition of what constitutes a crime through further interdisciplinary application of state crime theory. When undertaking the analysis of the specific case study chosen, the question whether the situation in question could be considered to be both a state crime from the perspective of critical criminology and an international crime from the viewpoint of international law was addressed. Whereas within the case study in question both instances were considered a 'harm' or 'crime' from their relevant disciplines, there exists the possibility for these two answers to not align.

From the state crime perspective, there may be instances in which human rights violations carried out by a state could be considered a crime, but do not meet the requirements of international law to be considered as such. [49] By analysing instances of state crime which may not be entirely covered by international law, the limitations of international law could be brought to light. Due to this, the gap between the two frameworks for determining what constitutes a 'crime' may provide the ability to critique international law's concepts concerning which acts or omissions constitute a crime.

Secondly, with state crime being considered a valuable tool for the critique of international law, the doorway could be opened for use of further theories beyond the crimes of obedience lens that was adopted for the purpose of this thesis. This thesis focussed on one of the state crime theories to analyse the development of international law on grave violations of human rights carried out under the guise of a state. If a situation is labelled a state crime, there are further theories that can be used to analyse the situation.

For example, the theory of 'techniques of neutralisation' shows ways in which powerful leaders can deny either their participation in crimes, or the existence of the crimes.[50] Within international law, this may be relevant in the discussion concerning combatting impunity for high-ranking individuals. Similarly, the 'crimes of the powerful' approach highlights the inherent drawbacks in the development of international law

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[48] Steven Freeland, 'A Prosecution too Far? Reflections on the Accountability of Heads of State Under International Criminal Law' (2010) 41 *Victoria University of Wellington Law Review* 179.

[49] 'State Crime', *International State Crime Initiative* (Web Page, 2014) <http://statecrime.org/about-isci/about-state-crime/>.

[50] Gresham Sykes and David Matza, 'Techniques of Neutralization: A Theory of Delinquency' (1957) 22(6) *American Sociological Review* 664; Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (John Wiley & Sons, 2013).

based upon the horizontal nature and use of politics.[51] This may be used to comment on the political aspects of international law and encourage scholars in the field to ask why laws are created in such a way. Aspects such as Western hegemony surrounding the development of the law can be critiqued from this view.

3 *State Responsibility for the Civilian Government's Omissions*

Due to the nature of the research question, discussion on determining state responsibility in the ICJ has focussed on Myanmar's breaches for *committing* genocide. It is noted that there are other potential breaches that may be possible to attribute to Myanmar. Primarily, this includes the question as to whether the civilian government at the time of the clearance operations could be found to have failed to prevent and or punish genocidal conduct carried out on Myanmar's territory.[52] While this discussion may not provide any meaningful impact to the overarching arguments made throughout this thesis,[53] this is an area that is likely to be a material point of discussion during the upcoming case. As a result, significant further research into whether the civilian government has failed to prevent and punish genocide is recommended.

Ultimately, it appears that there are many directions in which scholars could use state crime for interdisciplinary purposes in the discipline of international law and doing so is deeply encouraged. The fight against state-sanctioned atrocities is both an uphill battle, and of grave significance from a humanitarian standpoint, and the most practical way forward at this time is through the initiation of academic discussion on the issue from within the field of international law.

D *Concluding Remarks*

The development of international law concerning the attribution of state responsibility for the crime of genocide would provide the opportunity for a bold, yet necessary, next step in the longstanding fight against the commission of atrocity crimes.

The situation in Myanmar is nuanced and complex, and there appears to be no simple solution to bring immediate peace and stability to the region. These nuances are not only a reflection on the specific instance in Myanmar—by the involvement of the state itself, this is a reflection on state crime on the whole. Instances of state crime will always be complex, and there will never be a 'one-size-fits-all' solution that can be applied to all situations of state crime. From this state crime perspective, in the fight to minimise, deter and

[51] Friedrichs, 'Crimes of the Powerful and the Definition of Crime' (n 25); David Friedrichs, 'Rethinking the Criminology of Crimes of States: Monumental, Mundane, Mislabelled and Miscalculated Crimes' (2015) 4(4) *International Journal for Crime, Justice and Social Democracy* 106, 107.

[52] *Genocide Convention* (n 39) art I.

[53] This area for discussion was omitted in this thesis because it provided no meaningful impact to the overarching arguments. For example, if it could be argued that Myanmar 'only' failed to prevent and punish genocide (and not committed genocide), then the full extent of the state's involvement in the commission of harm is not addressed adequately. This draws the attention to the individual members of the Tatmadaw as the deviant actors in the situation, while allowing the state to hide behind a veil of legitimacy. To truly address the institutional dimension of the crime, acknowledging the state's role in *committing* the harm is required – regardless of whether the state's failure to prevent and punish genocide can be established.

repair instances of state crime, what appears to be needed are tools. We need a selection of tools that can be applied to a specific situation, if an analysis of the totality of the situation deems it is necessary. In this instance, it appears that the ability to attribute state responsibility for committing genocide could be a valuable new tool in the international community's proverbial toolbox.

The reason that *The Gambia v Myanmar* possesses such a strong possibility of pushing the previous limits on state responsibility is its stark distinction in areas where the *Bosnian Genocide Case* in the ICJ failed.[54] The nuances surrounding the Former Republic of Yugoslavia and the relevant forces operating under a former state left the focal point for analysis within the *Bosnian Genocide Case* on a different issue.[55] This case ultimately focussed on whether the relevant faction's actions could be attributed to a state, when there existed a degree of separation.[56]

The Gambia v Myanmar, on the other hand, does not suffer from such a burden. The facts of the case can clearly be distinguished from those in the previous ICJ dealings with genocide; such a degree of separation between military faction and state does not exist.[57] Through national legislation, both the Tatmadaw and the civilian government at the time, the National League for Democracy, openly accepted the legitimacy of the military faction's role as the army of the state,[58] rendering it a *de jure* organ of the state under international law.[59] This clear link between perpetrators of genocidal acts and a state is unprecedented in ICJ proceedings.[60] Within this case lies the answers to deeper questions concerning the ICJ and its role in the attribution of state responsibility for genocide.

All that lies in the way of such a determination is the controversial question whether it is appropriate to hold on the international stage that a state—not an individual—has committed a criminal act.[61] While individual criminal responsibility is an important aspect of addressing the situation, punishing a small number of high-ranking individuals in the ICC[62] is not enough on its own to address the overarching state goals concerning the Rohingya population. A judgment of state responsibility in the ICJ, on the other hand, would recognise

[54] *Bosnian Genocide Case* (n 4) [415].
[55] Ibid [386]–[395].
[56] Ibid [396]–[415].
[57] Ibid.
[58] *Constitution of 2008* (Myanmar) art 338.
[59] *Bosnian Genocide Case* (n 4) [389].
[60] The closest a court has come to a verdict of a state *committing* genocide is the *Bosnian Genocide Case*: Marko Milanović, State Responsibility for Genocide' (2006) 17(3) *European Journal of International Law* 553; *Bosnian Genocide Case* (n 4) [415].
[61] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro (Joint Declaration of Judges Shi and Koroma)* [2007] ICJ Rep 4, 279.
[62] *Rome Statute* (n 2) art 28; point 44 of Office of the Prosecutor of the International Criminal Court, *Policy Paper on Case Selection and Prioritisation* (International Criminal Court, 2016) <https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf>.

the institutional dimension[63] of the crime, highlighting the need for change concerning the underlying organisational goals concerning the Rohingya.

It is for these reasons that the opportunity for the ICJ to attribute state responsibility for committing the crime of genocide for the first time in history should not be taken lightly. This is a significant turning point for the development of international law that will not only impact the understanding of the law itself, but set the scene for eventual positive change in situations of state crime.

[63] Jennifer Balint, 'Transnational Justice and State Crime' (2014) 13 *Macquarie Law Journal* 147, 151, 156, 159.

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