Displacement of the Rohingya Before the ICJ and the ICC: Same Conduct, Different Crimes in International Law?

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ABSTRACT

This article analyses the ongoing proceedings before the ICJ and the ICC relating to the suppression and persecution of the Rohingya in Myanmar. It outlines the legitimacy of standing of the Gambia to institute proceedings against Myanmar based on the erga omnes nature of the obligation to prevent genocide, and what are the possible outcomes of these proceedings. It also analyses the ongoing investigations at the ICC and the process leading to the authorisation thereof. The focus is pointed to forcible deportation and its legal qualification as a different crime. Moreover, proceedings in the domestic courts of Argentina in light of complementarity and universality are also discussed. The article also focuses on differences and similarities between the proceedings before ethe ICJ and the ICC. Furthermore, the article provides an overview of potential challenges which the international community may face if the two international courts qualify the same conduct as different crimes under different legal regimes.

Keywords: Rohingya, displacement, genocide, ICJ, ICC, jurisdiction, crimes against humanity, State responsibility

Introduction

On 11 November 2019, The Gambia instituted proceedings against Myanmar before the International Court of Justice (ICJ). In those proceedings, which are still under consideration, The Gambia alleges that Myanmar violated the Convention on the Prevention and Punishment of the Crime of Genocide by committing acts of genocide against members of the Rohingya. Both countries are parties to the Genocide Convention. On 14 November 2019, the Pre-trial Chamber of the

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International Criminal Court (ICC), acknowledging that the ICC may exercise its jurisdiction over the alleged crimes committed against the Rohingya, granted the request made by the Prosecutor to investigate alleged violations which took place in the territory of Myanmar and Bangladesh. The case before the ICJ raises an important issue over the legal standing of a non-injured State (The Gambia) while invoking the responsibility of another State (Myanmar) for violations of a norm of *jus cogens* (prohibition of Genocide) from which obligations *erga omnes* are derived. More specifically, the judgment to be rendered by the ICJ shall answer the question of whether a non-injured State may claim, in addition to the cessation of the internationally wrongful acts which violate obligations *erga omnes*, reparation in favour of the victims of those wrongful acts. The investigation before the ICC, in turn, raises an important issue regarding the jurisdiction of the International Criminal Court. The question is whether the ICC may exercise its jurisdiction over acts that take place partially on the territory of a State which is not a party to the Rome Statute and partially on the territory of a State party to the Rome Statute. Additionally, the ICC shall determine whether those acts qualify as crimes under its jurisdiction.

There is an undisputed complementarity between the jurisdiction of both international courts when dealing with internationally wrongful acts which are crimes under international law. Whilst the ICJ may establish State responsibility for the commission of an internationally wrongful act, the ICC may determine the individual responsibility for the commission of the same act. However, while exercising jurisdiction over the same acts, the ICJ and the ICC may diverge on the scope of their jurisdiction and the classification of a particular act under international law. The fact that both the ICJ and the ICC are simultaneously exercising their jurisdiction over the same acts potentially raise key issues regarding the fragmentation of international law.

The objective of the present article is to provide a commentary on recent developments regarding litigation proceedings in the ICJ and ICC in relation to alleged crimes committed against the Rohingya ethnic minority group in Myanmar. The article will also outline and highlight some of the challenging issues that have emerged from these developments, such as legal standing before the ICJ and the right of a non-injured State to seek reparations on behalf of victims of violations of obligations *erga omnes*; complementarity between ICJ and ICC proceedings and its implications on the possible fragmentation of international law; duplication of criminal proceedings in the domestic courts of Argentina and the territorial scope of the ICC's jurisdiction in relation to the crime of deportation.

The first part of the present article provides an overview of the ongoing proceedings instituted by the Gambia against Myanmar for alleged violations of the Genocide Convention before the ICJ. The second part analyses the legal process at

the ICC starting from its ruling on jurisdiction finishing with possible outcomes of the investigation. The last part examines points of convergence and divergence between the two proceedings and the potential impact of these two proceedings on international law.

1. Judicial Review of Alleged Genocide at the ICJ

1.1. Prevention and prohibition of Genocide: a jus cogens norm from which obligations erga omnes derive

The ICJ has expressly recognized that the prohibition of genocide is a norm of *jus cogens*. In Armed Activities on the Territory of the Congo, it underscored the peremptory nature of the prohibition of genocide.[1] A few years later, in one of the cases concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide, the ICJ recalled that the norm prohibiting genocide was a peremptory norm of international law.[2] The International Law Commission (ILC) has also stated in commentaries on articles 26 and 40 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) that the prohibition of genocide was widely regarded as a peremptory norm of international law.[3] Furthermore, the prohibition of genocide is firmly recognized as one of the few generally accepted examples of *jus cogens* by scholars[4] and in State practice.[5] The prohibition of genocide was included among the non-exhaustive list of

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[1] International Court of Justice, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility*, Judgment, *ICJ Reports 2006*, pp. 31-32, para. 64, available at: https://www.icj-cij.org/public/ files/case-related/126/126-20060203-JUD-01-00-EN.pdf (All internet references were accessed in July 2021).

[2] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *ICJ Reports 2007,* pp. 110-111, para. 161, available at: https://www.icj-cij.org/public/ files/case-related/91/091-20070226-JUD-01-00-EN.pdf.

[3] United Nations, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, commentaries on Article 26, p. 85, para. 5, and commentaries on Article 40, pp. 112-113, para. 4, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[4] Anthony Aust, *Handbook of International Law*, Cambridge University Press, New York, 2005, p. 11.

[5] The recognition of the prohibition of genocide as a norm of *jus cogens* can also be found in State practice. The domestic courts of countries such as Switzerland, Canada and the United States have recognized the prohibition of genocide as a norm of *jus cogens*. See: United Nations, International Law Commission, Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur, p. 37, para. 81, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/024/33/PDF/N1902433.pdf?OpenElement.

peremptory norms of general international law (*jus cogens*), which forms part of the proposed draft conclusions presented by Special Rapporteur Dire Tladi in his fourth report to the ILC on peremptory norms of general international law.[6]

All norms of *jus cogens*, including the prohibition of genocide, create obligations *erga omnes*, meaning that all States belonging to the international community are bound by such peremptory norms of international law and that all of them have an interest in the observance and protection thereof.[7] However, it should not be construed that all norms giving rise to obligations *erga omnes* are also necessarily *jus cogens* norms. Other non-peremptory norms of international law (for example, the protection of the natural environment and biodiversity) can also trigger the application of obligations *erga omnes*.

The *Institut de Droit* International defines an obligation *erga omnes* as either:

> (a) an obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action; or
> (b) an obligation under a multilateral treaty that a state party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all these States to take action.[8]

As the ICJ has repeatedly acknowledged throughout its jurisprudence, the obligations to prevent and punish genocide are *erga omnes*.[9] The fact that an obligation

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[6] *Ibid.*, p. 63, para. 137.

[7] *Ibid.*, pp. 42-43, paras. 108-109. While the *jus cogens* character of a norm relates to its peremptory substantive nature, the *erga omnes* character of an obligation concerns the scope of application and the recipients of the norm, in other words, the fact that the norm applies to all states and that all of them have an interest in its observance and protection. See: Alain Pellet "Conclusions", in Christian Tomuschat, Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes,* Martinus Nijhoff Publishers, Leiden, 2006, p. 418; Malcom N. Shaw, *International Law*, Cambridge University Press, New York, 2008, p.124.

[8] Institut de Droit International, Krakow Session 2005, Resolution on obligations *erga omnes* in international law, available at: http://www.idi-iil.org/app/uploads/2017/ 06/2005_kra_01_en.pdf.

[9] The Court did so in Barcelona Traction, Armed Activities on the Territory of the Congo and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia). The ICJ also stated that those same obligations were *erga omnes partes* in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) and in the Order of 23 January 2020 in The Gambia v. Myanmar. See: Marco Longobardo, "The Standing

is *erga omnes*—or owed towards the international community as a whole or to all state parties in a treaty—has a major impact on the question of legal standing.

1.2. Legal standing of The Gambia before the ICJ (including the possible involvement of other members of the international community)

In the *South West Africa* case, the ICJ concluded that there was no *actio popularis*—a right of any State of the international community to bring a claim before the Court invoking a public interest—recognized under international law at that time.[10] This 1966 judgment has been widely criticized[11] and the ICJ itself abandoned its reasoning just a few years later in Barcelona Traction.[12] Moreover, in 2001, the ILC adopted article 48 of the ARSIWA, which guarantees the right of any State other than the injured State to invoke the responsibility of a State for a breach of an obligation *erga omnes*.[13] In Barcelona Traction, the International Court of Justice outlined the difference between bilateral and *erga omnes* obligations. The ICJ highlighted that:

> in particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[14]

The distinction made by the ICJ in Barcelona Traction was regarded as the Court's acceptance of the existence of an *actio popularis* in international law.[15] Thus, in claims regarding alleged breaches of *erga omnes* obligations, the State bringing the

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of Indirectly Injured States in the Litigation of Community Interests before the ICJ: Lessons Learned and Future Implications in Light of The Gambia v. Myanmar and Beyond", *International Community Law Review*, vol. 23, 2021, p. 8.

[10] International Court of Justice, *Southwest Africa, Second Phase*, Judgment, *ICJ Reports 1966*, p. 47, para. 88, available at: https://www.icj-cij.org/files/case-related/46/046-19660718-JUD-01-00-EN.pdf.

[11] Alexander Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press, New York, 2006, p. 519.

[12] M. Longobardo, above note 9, p. 6.

[13] Chittharanjan F. Amerasinghe, *Diplomatic Protection*, Oxford University Press, New York, 2008. p. 33.

[14] International Court of Justice, *Barcelona Traction, Light and Power Company, Limited*, Judgment, *ICJ Reports 1970*, p. 32, para. 33, available at: https://www.icj-cij.org/ public/files/case-related/50/050-19700205-JUD-01-00-EN.pdf.

[15] M. Longobardo, above note 9, pp. 12-13.

claim before the ICJ would not need to demonstrate its individual interest to have its *locus standi* recognized.[16] Thus, due to the evolution of international law, especially after the adoption of article 48 of the ARSIWA, the circumstances that led the ICJ to deny *locus standi* to Liberia and Ethiopia to bring a claim against South Africa in *South West Africa* are no longer compatible with contemporary international law.[17] Article 48 of the ARSIWA reads:

> 1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
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> (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
> (b) the obligation breached is owed to the international community as a whole.
>
> 2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
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> (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
> (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.[18]

As the ILC underlined in the commentaries of article 48:

> in case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is

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[16] A. Orakhelashvili, above note 11, p. 523.

[17] Jamal Seifi, "Peremptory Norms and the Jurisdiction of the International Court of Justice" in James Crawford et al. (eds.), *The International Legal Order: Current Needs and Possible Responses – Essays in Honour of Djamchid Momtaz*, Brill Nijhoff, Leiden, 2017, p. 164; United Nations, Draft Articles on Diplomatic Protection with commentaries, 2006, p. 51, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/ 9_8_2006.pdf.

[18] United Nations, Articles on the Responsibility of States for Internationally Wrongful Acts, above note 3.

> highly desirable that some State or States be in a position to claim reparation, in particular restitution. In accordance with paragraph 2 (b), such a claim must be made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached.[19]

The substantive rules of *jus cogens*, and the relevant obligations *erga omnes* arising therefrom,[20] are capable of creating legal consequences on the interpretation and application of certain procedural rules, such as rules relating to *locus standi* or the legitimacy to appear in court. In cases concerning the violation of a bilateral obligation, only an injured State would have legitimacy to bring a claim against a responsible State before an international court. Nevertheless, in the event of a violation of an obligation *erga omnes*, all States would have the legitimacy to bring a claim against the State responsible for breaching the said obligation, in view of the fact that it is owed to the international community as a whole.[21] In Questions Relating to the Obligation to Prosecute or Extradite, the ICJ stated that all States Parties to the Convention against Torture (CAT) had a common interest in ensuring that acts of torture did not occur, and that if they did, the perpetrators would not stay unpunished. This common interest meant that the obligations under the CAT were owed by one State Party to all other States Parties. Those obligations were *erga omnes partes*, meaning that each State Party would have an interest in its protection and fulfilment.[22] In this case brought before the ICJ by Belgium against Senegal, the Court found that obligations *erga omnes partes* arising from the duty to prosecute or extradite persons responsible for acts of torture had a legal effect on the *locus standi*. The ICJ held that Belgium's legitimacy to bring a claim rested on its legal interest in the observance and fulfilment of obligations *erga omnes partes* by Senegal, and that therefore, Belgium could invoke Senegal's responsibility for failing to prosecute or

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[19] *Ibid.,* p.127, para. 12.

[20] It should be noted that while all obligations arising from norms of *jus cogens* are *erga omnes*, not all obligations *erga omnes* derive from norms of *jus cogens*. United Nations, International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, A/CN.4/L.702, 18 July 2006, pp. 22-23, para. 38, available at: http://legal.un.org/docs/?symbol=A/CN.4/L.702.

[21] Stefan Talmon, "Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished", *Leiden Journal of International Law*, vol. 25, 2012, p. 995; United Nations, ILC, Fragmentation of International Law, above note 20, p. 193, para. 380.

[22] Erika de Wet, "Invoking obligations *erga omnes* in the twenty-first century: Progressive developments since Barcelona Traction", *South African Yearbook of International Law*, vol. 37, 2013, p. 15; See also: International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal),* Judgment, *ICJ Reports 2012*, p. 449, paras. 67-68, available at: https://www.icj-cij.org/files/case-related/144/144-20120720-JUD-01-00-EN.pdf.

extradite Hissène Habré, the former president of Chad, who allegedly committed acts of torture in breach of *erga omnes* obligations under the CAT.[23] As Weatherall notes, the general legal interest of all States in the performance of obligations *erga omnes* confers the legal right of States to invoke the international responsibility of a State in breach of such obligations, which in turn informs the question of standing. "[24] The common interest in the protection of obligations owed to the international community as a whole is what guarantees legitimacy for a State—even a non-injured State—to bring claims before the ICJ regarding the breach of an obligation *erga omnes*.[25] When there is a violation of a norm of *jus cogens*, or an obligation *erga omnes*, all States of the international community have the legitimacy to bring a claim before the ICJ, even if their state interests have not been directly affected by that violation.[26]

Due to the *jus cogens* character of the substantive norm that prohibits the crime of genocide, the *locus standi* should be automatically fulfilled for all States seeking to invoke responsibility for breaches of the *erga omnes* obligations derived from that norm.[27] Arguing that the prohibition of genocide is a norm of *jus cogens*[28] and that the obligations under the Genocide Convention are owed *erga omnes* and *erga omnes partes*[29] (meaning that "any State party to the Genocide Convention is entitled to invoke the responsibility of another State party for the breach of its

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[23] Questions relating to the Obligation to Prosecute or Extradite, (Belgium v. Senegal), above note, 22, p. 450, paras. 69-70.

[24] Thomas Weatherall, *Jus Cogens: International Law and Social Contract*, Cambridge University Press, Cambridge, 2015, p. 398.

[25] *Ibid.*, p. 400.

[26] A. Orakhelashvili, above note 11, p. 518.

[27] J. Seifi, above note 17, p. 996.

[28] International Court of Justice, *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, p. 14, para. 20.

[29] The obligations arising from the prohibition of genocide are both *erga omnes* and *erga omnes partes*. On the one hand, they are obligations *erga omnes* due to the *jus cogens* character of the prohibition of genocide, which means that all members of the international community are bound by them and have an interest in their observance. On the other hand, they are *erga omnes partes* as they derive from the Genocide Convention, which means that all States Parties to that treaty, among which The Gambia and Myanmar, are bound by them and have an interest in their enforcement. In Barcelona Traction, the ICJ made a distinction between *erga omnes partes* obligations, which "are conferred by international instruments of a universal or quasi-universal character", and *erga omnes* obligations which "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide (…)". International Court of Justice, *Barcelona Traction, Light and Power Company, Limited*, above note 14, p. 32, para. 34.

obligations, without having to prove a special interest"[30]), The Gambia brought claims against Myanmar before the ICJ requesting the Court to adjudge and declare that Myanmar: (a) has breached and continues to breach its obligations under the Genocide Convention (...); (b) must cease forthwith any such ongoing internationally wrongful act and fully respect its obligations under the Genocide Convention (...); (c) must ensure that persons committing genocide are punished by a competent tribunal, including before an international penal tribunal (...); (d) must perform the obligations of reparation in the interest of the victims of genocidal acts who are members of the Rohingya group (...); and (e) must offer assurances and guarantees of non-repetition of violations of the Genocide Convention.[31]

The Gambia claims that the wrongful acts committed by Myanmar against members of the Rohingya, such as mass displacement,[32] constitute violations of a *jus cogens* norm from which obligations *erga omnes* derive and that therefore, all States of the international community have a legal interest in their protection. For this reason, The Gambia asserts that it has legal standing to invoke the responsibility of Myanmar for alleged acts of genocide committed against Rohingya individuals and to claim that Myanmar must be compelled to fulfil its obligations as determined by the Genocide Convention and to make reparation to those injured by those acts.[33]

1.3. Legal standing of the Gambia to request reparation for victims of violations

The ILC's draft conclusion 17 on peremptory norms of general international law, adopted by the Drafting Committee in 2019, reads:

> 1. Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in which all States have a legal interest. 2. Any State is entitled to invoke the responsibility of

[30] The Gambia also submitted that "if a special interest were required with respect to alleged breaches of obligations *erga omnes partes*, in many cases no State would be in a position to make a claim against the perpetrator of the wrongful act". International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),* Order of 23 January 2020, pp. 12-13, para. 40.

[31] Above note 28, pp. 57-58, para. 112.

[32] Among the numerous actions perpetrated against the Rohingyas which amounted to genocide, the United Nations Independent Fact-Finding Mission on Myanmar found that mass deportation was one of them. United Nations, Report of the detailed findings of the Independent Fact-Finding Mission on Myanmar, 17 September 2018, p. 364, para. 1440, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf.

[33] Above note 28, pp. 41-43, paras. 123-127.

> another State for a breach of a peremptory norm of general international law (*jus cogens*), in accordance with the rules on the responsibility of States for internationally wrongful acts.[34]

Despite recognizing that a non-injured State might invoke the responsibility of another State for a breach of a norm of *jus cogens*, draft conclusion 17 states that this shall be done in accordance with the rules on the responsibility of States for internationally wrongful acts, thus, falling short of acknowledging that a non-injured State might request reparation on behalf of victims who are nationals of a third State. For this reason, in order to address the question regarding the legal standing of The Gambia, one must refer to the ARSIWA. According to Article 48 (2) (a) of the ARSIWA, which has undoubtedly codified customary international law, all States have the legitimacy to invoke the responsibility of a State responsible for a breach of an *erga omnes* obligation and to claim the cessation of the internationally wrongful act and guarantees of non-repetition.[35] However, whether a State other than the injured State or the State of nationality of the victims would have *locus standi* to claim reparation in the interest of the injured State, or of the beneficiaries of the breached obligation *erga omnes*, is still controversial. This is because the ILC highlighted that article 48 (2-b) did not codify customary international law. According to the ILC, this norm should be seen as the progressive development of international law, "which is justified since it provides a means of protecting the community or collective interest at stake".[36]

Even though there is still a lack of State practice in support of the customary nature of the norm established in article 48 (2-b), as claims presented by non-injured States are usually limited to the cessation of the violation and guarantees of non-repetition,[37] the claim regarding reparation brought by The Gambia in its application

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[34] United Nations, International Law Commission, Text of the draft conclusions on peremptory norms of general international law (jus cogens), A/CN.4/L.936, p. 4, available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/G19/147/22/ PDF/G1914722.pdf?OpenElement.

[35] Giorgio Gaja, *The Protection of General Interests in the International Community: General Course on Public International Law* (2011), Collected Courses of The Hague Academy of International Law, Leiden, Martinus Nijhoff Publishers, 2014, pp. 107-108.

[36] As the ILC pointed out: "*In particular, the focus of action by a State under article 48 – such State not being injured in its own account – is likely to be on the very question whether a State is in breach and on cessation if the breach is a continuing one*". United Nations, Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries, above note 3, p. 127, para. 12.

[37] Elena Crespo Navarro, "El Proyecto de Artículos de la Comisión de Derecho Internacional sobre la Protección Diplomática: La Protección de las Personas Físicas, "*Revista Española de Derecho Internacional,* vol. 57, No.1 (Enero-Junio 2005), p. 237; Enrico Milano, "Diplomatic Protection and

instituting proceedings against Myanmar before the ICJ indicates the emergence of some State practice in favour of the article 48 (2-b).[38] Some scholars already support the possibility of a non-injured State claiming reparation in favour of those who were substantially affected by the violation of an *erga omnes* obligation. As Cannizzaro notes: "article 48(2) makes clear that the obligation to reparation is owed erga omnes. Consequently, every State of the international community is entitled to claim the performance of this obligation without the need to have a special interest."[39] The Institut de Droit International also supports the legitimacy of non-injured States to invoke the international responsibility of the State responsible for breaching obligations *erga omnes* and to claim reparation in favour of those injured by those violations.[40]

All States of the international community play a fundamental role when facing violations of *jus cogens* and obligations *erga omnes*. They can—and should—act in favour of the injured persons, not only invoking the responsibility of the State responsible for those violations but also claiming reparation in favour of the victims.[41] In the case against Myanmar before the ICJ regarding alleged acts of genocide committed by Myanmar against members of the Rohingya ethnic group, not only did The Gambia claim the cessation of the wrongful act and guarantees of non-repetition, it also claimed reparation in favour of the Rohingya victims.[42] The ICJ thus had to

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Human Rights before the International Court of Justice: Re-Fashioning Tradition?", *Netherlands Yearbook of International Law*, vol. XXXV, 2004, p. 115.

[38] Gaja highlights that cases in which States that were not directly affected by violations of *erga omnes* obligations invoke the responsibility of the State responsible for those violations are rare. He mentions two cases before the ICJ: *East Timor*, brought by Portugal on behalf of the people of East Timor against Australia, and *Questions Relating to the Obligation to Prosecute or Extradite*, brought by Belgium against Senegal for breaches of *erga omnes* obligations set forth in the Convention against Torture. G. Gaja, above note 35, pp. 100-101.

[39] Enzo Cannizzaro, "Is There an Individual Right to Reparation? Some Thoughts on the ICJ Judgment in the Jurisdictional Immunities Case", in Denis Alland *et al* (eds.), *Unité et diversité du droit international: Ecrits en l'honneur du professeur Pierre-Marie Dupuy*, Martinus Nijhoff Publishers, Leiden, 2014, p. 498.

[40] According to the *Institut de Droit International*: "When a State commits a breach of an obligation *erga omnes*, all the States to which the obligation is owed are entitled, even if they are not specially affected by the breach, to claim from the responsible State in particular: (...) (b) performance of the obligation of reparation in the interest of the State, entity or individual which is specially affected by the breach". Institut de Droit International, Resolution on Obligations *Erga Omnes* in International Law, Krakow Session, 2005, above note 8, article 2 (b).

[41] Andrea Gattini, "The Dispute on Jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?", *Leiden Journal of International Law*, vol. 24, 2011, p. 196.

[42] Application institution proceedings, above note 28, p. 38, para. 112; International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),* Order of 23 January 2020, p. 2, para. 2.

assess whether it had *prima facie* jurisdiction to hear the case and to determine provisional measures, as requested by The Gambia in its application instituting proceedings.[43] The ICJ found that it had *prima facie* jurisdiction to hear the claims and that The Gambia had *prima facie* legal standing to present the claims against Myanmar, and decided to determine certain provisional measures.[44] As the provisional measures requested by The Gambia did not relate to the claim regarding the obligation to make reparation in favour of the victims of the acts of genocide, it is still to be seen whether the ICJ will sustain the legal standing of The Gambia regarding the claim for reparation when rendering the judgment on the merits. If it does, the judgment will be a milestone for the international protection of human rights, as it will recognize the right considered by the ILC as a progressive development in the commentaries on article 48 (2-b) of the ARSIWA, as part of international law as it stands today. This judgment will pave the way for non-injured States to bring claims requesting reparation on behalf of victims of *jus cogens* violations irrespective of their nationality.

2. Proceedings at the International Criminal Court

2.1. Challenging jurisdiction at the International Criminal Court

The international community has become increasingly concerned after numerous reports[45] highlighted the commission of serious human rights violations against the Rohingya minority group in Myanmar. Thereafter, calls to activate processes before the International Criminal Court gained momentum. Consequently, on 9 April 2018, the Prosecutor of the ICC applied to the President of the Pre-trial Division and requested for a ruling on the potential jurisdiction of the Court.[46] In the exercise of her right under Article 19(3) of the Rome Statute to seek a ruling from the Court regarding a question of jurisdiction or admissibility,[47] the Prosecutor argued that

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[43] *Ibid.,* Order of 23 January 2020, p. 6, paras. 16-17.

[44] *Ibid.*, p. 13, para. 42.

[45] High Commissioner for Human Rights, Opening Statement to the 36th session of the Human Rights Council, 11 September 2011; see also OHCHR, Brutal attacks on Rohingya meant to make their return almost impossible – UN human rights report, 11 October 2017; see also Report of the Special Rapporteur on the situation of human rights in Myanmar, Advance Unedited Version, A/HRC/37/70, 9 March 2018.

[46] International Criminal Court, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar,* Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 9 April 2018, available at: https://www.icc-cpi.int/CourtRecords/ CR2018_02057.PDF

[47] Article 19(3) of the Statute empowers the Prosecutor to "seek a ruling from the Court regarding a question of jurisdiction or admissibility". As explained by the Prosecutor:

although Myanmar is not a State Party to the Rome Statute, the ICC may nevertheless exercise jurisdiction under Article 12(2-a) of the Statute because an essential legal element of the crime—crossing an international border—occurred on the territory of a State which is a party to the Rome Statute.[48] After thoroughly examining Prosecutor's motion, the Pre-trial Chamber concluded: that the acts of deportation presented in the Prosecutor's request can be reviewed under the framework for crimes against humanity; that the fact that such acts were initiated in a State not Party to the Statute and completed in a State Party to the Statute suffices to find that they fall within the ambit of Article 12(2)(a) of the Statute; and that the ICC has jurisdiction over the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh.[49] With no objections related to the jurisdiction of the ICC, this decision formally paved the way for the Prosecutor to initiate the investigation *proprio motu* under Article 15 of the Rome Statute.

Consequently, the Prosecutor referred the matter to the Pre-trial Chamber, seeking authorisation to investigate crimes within the jurisdiction of the ICC in which at least one element occurred in the territory of Bangladesh, within the context of two waves of violence in Rakhine State on the territory of Myanmar, as well as any other crimes which are sufficiently linked to these events.[50] Her request was granted on 14 November 2019.[51] In its decision, the Pre-trial Chamber re-examined, *inter alia,* the issue of jurisdiction and, in reference to the objective territoriality principle, ubiquity principle and constitutive element approach, found that "the alleged deportation of

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this concise provision is necessarily broad in its scope—for example, it refers generally to any "question of jurisdiction", and thus permits the Prosecution to request a ruling on the full range of jurisdictional matters arising under the Statute including articles 5-8bis (substantive jurisdiction), 11 (temporal jurisdiction), 12 (territorial and personal jurisdiction), and 13-15ter (triggers for jurisdiction). Article 19(3) is not confined to any particular stage of proceedings — in its own terms, it draws no distinction between a requested ruling on the Court's jurisdiction in a particular case or a situation as a whole.

See: International Criminal Court, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar,* Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 9 April 2018, above note 46, paras. 52-53.

[48] Prosecution's Request for a Ruling on Jurisdiction, above note 46, para. 2.

[49] International Criminal Court, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" No: ICC-RoC46(3)-01/18, 6 September 2018, Part VI.

[50] International Criminal Court, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Request for authorisation of an investigation pursuant to article 15, ICC-01/19, 4 July 2019.

[51] International Criminal Court, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar,* Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Pre-Trial Chamber III, ICC-01/19, 14 November 2019.

civilians across the Myanmar-Bangladesh border, which involved victims crossing that border, clearly establishes a territorial link on the basis of the actus reus of this crime (i.e. the crossing into Bangladesh by the victims)."[52]

The territorial and personal jurisdiction of the ICC is strictly limited to the States Parties whose nationals commit alleged crimes or in whose territory a crime in question was committed.[53] *Commentaries* to the Rome Statute further explain that the jurisdictional nexus is present when the territorial State (where the crime occurred) or the State of the nationality of the accused are States Parties. These are the two primary bases of jurisdiction over offenses in international criminal law and are universally accepted.[54] Therefore, the crime that commences in the territory of a non-State Party, but which might continue in the territory of a State Party, certainly challenges the conventional understanding of the jurisdictional nexus for the ICC. That Myanmar is not a party to the Rome Statute precludes the ICC from relying on strict territoriality and active nationality in relation to crimes committed in Myanmar's territory by nationals of Myanmar.[55] Although extra-territoriality appears novel in relation to international crimes, the approach itself is well established in international law. The Pre-trial Chamber also referred to numerous State legislation and international treaties to which Myanmar is a State Party and which support criminal proceedings based on extra-territorial jurisdiction. Most importantly, the Chamber cited the constructive element theory, referring to the well-known *Lotus* case[56] while finding that customary international law does not prevent States from asserting jurisdiction over acts that took place outside their territory on the basis of the territoriality principle.[57] Challenging this finding, Gomez argues that

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[52] *Ibid.*, para. 62.

[53] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), art. 12(2).

[54] Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn.), C.H. Beck, Hart, Nomos, 2016, p. 681.

[55] Marta Bo, "Crimes against the Rohingya: ICC Jurisdiction, Universal Jurisdiction in Argentina, and the Principle of Complementarity", *Opinio Juris* blog, 23 December 2019, available at: http://opiniojuris.org/2019/12/23/crimes-against-the-rohingya-icc-jurisdiction-universal-jurisdiction-in-argentina-and-the-principle-of-complementarity/.

[56] Permanent Court of International Justice, S.*S. Lotus (Fr. v. Turk.),* 1927 *P.C.I.J. (ser. A) No. 10* (Sept. 7). In which the Court held that "The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty." (para. 50).

[57] Above note 51, para. 56.

"although Lotus's status in international law is notable, it is unclear whether citing only one case is sufficiently persuasive."[58]

Consequently, to persuade the Chamber to employ the extra-territoriality principle regarding international crimes, the Prosecutor had to demonstrate that the crimes alleged are of a transboundary nature, meaning that the commission of such crimes allows for the crossing of internationally recognized borders of at least one State. Article 7 of the Rome Statute applies the term "deportation or forcible transfer of population"[59] as one of the acts, which could potentially be qualified as crimes against humanity provided that other contextual elements which are enumerated in the same article (the so-called *chapeau* elements) are met. The juxtaposition of the acts of deportation and forcible transfer raised the question of whether those are two different dimensions of the same crime, or that they constitute two separate crimes. Notably, a forcible transfer does not necessarily have a cross-border character, therefore the Prosecutor suggested that under the Statute, deportation and forcible transfer constitute two separate offenses, notwithstanding their inclusion in the same provision, and that deportation is a separate crime which inevitably transcends States' international borders of.[60] Her views appeared convincing to the Pre-trial Chamber, which agreed with the presented argumentation while establishing the ICC's jurisdiction.[61]

Meanwhile, the Elements of Crimes of the Rome Statute specifies that the perpetrator must have "[deported] or forcibly transferred […] one or more persons to another State or location […]".[62] As interpreted by the Pre-trial Chamber:

> the Elements of Crimes link the conduct and the destinations. In more specific terms, "deported" is linked to the destination of "another State", while "forcibly transferred" is linked to the destination of "another […] location". This means that, provided that all other requirements are met, the displacement of persons lawfully residing in an area to another State amounts to deportation, whereas such displacement to a location within the borders of a State must be characterized as a forcible transfer.[63]

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[58] Carlos E. Gomez, "The International Criminal Court's Decision on the Rohingya Crisis: The Need for a Critical Redefinition of Trans-border Jurisdiction to Address Human Rights", *California Western International Law Journal*, Vol. 50, No. 1 [2020], p.192.

[59] Rome Statute, above note 53, art. 7(1-d).

[60] Above note 46, Section B.1.

[61] Above note 49, paras. 53 et al.

[62] Rome Statute, above note 53, Elements of Crimes, art. 7(1-d), para. 1.

[63] Above note 49, para. 55.

Given the inevitably transboundary nature of the crime of deportation and the fact that the deportation of the Rohingya people took place from Myanmar to Bangladesh (a State Party to the Rome Statute), the Pre-trial Chamber concluded that:

> the inclusion of the inherently transboundary crime of deportation in the Statute without limitation as to the requirement regarding the destination reflects the intentions of the drafters to, inter alia, allow for the exercise of the Court's jurisdiction when one element of this crime or part of it is committed on the territory of a State Party.[64]

Thus, the scope of the investigation into the situation in Bangladesh and Myanmar is strictly limited by the crimes, at least one element of which was executed in Bangladesh, or any other third State Party to the Rome Statute. Concerning the material scope of the investigation, the Pre-trial Chamber authorized the commencement of the investigation in relation to any crime within the jurisdiction of the ICC (other than deportation) provided that such crimes were committed—at least in part—in the territory of Bangladesh, or in the territory of any other State Party or State making a declaration under Article 12(3) of the Statute and provided that these crimes have sufficient linkage with the situation of Rohingya crisis.[65] In light of the above findings, the scope of investigations will therefore include any crime where the conduct, *including its consequences*, occurred at least in part in the territory of a State Party. This cross-boundary element will thus limit the selection of incidents that will form the basis for charges before the ICC.[66]

Extension of the jurisdiction of the ICC to events that occurred in the territory of a State which is not a party to the Rome Statute was challenged by Myanmar, which abstained from participation in the proceedings before the Pre-trial Chamber claiming that such proceedings gravely violated its State sovereignty.[67] Myanmar also stressed that extending the ICC's jurisdiction to the conduct in question would circumvent the principles enshrined in the Vienna Convention on the Law of the Treaties, which holds that a treaty does not create either obligations or rights for a third State without its consent.[68] However, the Chamber observed "that

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[64] *Ibid.*, para. 71.

[65] Above note 51, para.126.

[66] Above note 55.

[67] Above note 49, para. 35, footnote 55.

[68] Vienna Convention on the Law of the Treaties, 1155 UNTS 331, 23 May 1969 (entered into force on 27 January 1980), art. 34.

under particular circumstances, the Statute may have an effect on States not Party to the Statute, consistent with principles of international law."[69] Indeed, the Commentaries to the Rome Statute also suggest that this does not present a case of a non-State Party being bound thereto and of the ICC overreaching its jurisdiction, but rather of the individual being amenable to the jurisdiction of the ICC where crimes are committed in the territory of a State Party.[70] Although the authors of the Commentaries described a situation of the ICC exercising personal jurisdiction over a national of a non-State Party to the Rome Statute, the same approach should equally apply to territorial jurisdiction, where part of a crime occurs on the territory of State Party to the Rome Statute, even though other elements of that crime were executed in the territory of a non-State Party.

Article 12(2-a) of the Rome Statute confers jurisdiction on the ICC if "*one or more* States, on the *territory* of which the conduct in question occurred, are parties to the Statute." The Chamber relied on the textual interpretation of the word "conduct", declaring that it is a broad term that encompasses the consequences of the act. Given the transboundary nature of the crime of deportation, the expulsion of Rohingya refugees to the territory of Bangladesh, a State Party to the Rome Statute, constituted an important element of the crime of deportation triggering the ICC's jurisdiction over the dispute.[71] By widely interpreting the territorial scope of the ICC's jurisdiction, the Chamber, *inter alia,* referred to the effects doctrine, according to which a State may assert territorial jurisdiction if the crime takes place outside the State territory but produces effects within the territory of the State.[72] Until 2018, over one million Rohingya refugees had sought refuge in Bangladesh, which is already one of the most densely populated regions of the world. The ICC implied that even if the elements of the crime were not present in its territory, the effects of the crime of deportation did manifest in Bangladesh, which is a State Party.[73]

The question here is whether the gravity and scale of the deportation are determinant factors in finding that deportation indeed caused an "effect" for Bangladesh or any individual who would possibly seek asylum outside Myanmar could also create such "effect" for the country where he/she flees. In other words, if not for the mass influx of refugees in Bangladesh, could the Pre-trial Chamber still

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[69] Above note 49, para. 44.

[70] O.Triffterer, K.Ambos, above note 54, p. 682.

[71] Tanushree Nigam "Basis and Implications of the ICC's Ruling against Myanmar", *Blog of the Public International Law and Policy Group*, December 2019, available at: https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/5/22/basis-and-implications-of-the-iccs-ruling-against-myanmar.

[72] Above note 51, para. 56.

[73] Above note 71.

authorize the commencement of investigations assuming that all contextual elements of the crime of deportation were met, but deported persons would flee in various countries—several or all of which could be States Parties to the Rome Statute? Even though the Pre-trial Chamber acknowledged that the Prosecutor may extend the investigation to alleged crimes committed at least in part on the territory of other States Parties, it still stayed silent on the issue of whether the gravity and scale of the deportation would be a necessary requirement to produce an "effect" for the State which accommodates the refugees. The Pre-trial Chamber's decision left open the question of whether the massive nature of the influx is the qualifying feature for the crime of deportation, for purposes of establishing territorial jurisdiction based on the effects doctrine.

The Pre-trial Chamber's ruling on jurisdiction and decision on the authorization of an investigation into the situation in Bangladesh/ Myanmar potentially have serious implications for future situations brought before the ICC. Notably, these decisions demonstrate that: first, territories and nationals of non-States Parties are not immune from falling under the ICC's jurisdiction if at least one element of an alleged crime occurred in the territory of the State Party or the conduct which led to the commission of the crime had consequences in the territory of the State Party; second, crimes that are essentially transboundary in nature can fall under the ICC's jurisdiction if one of the States concerned is a party to the Rome Statute; and third, in case of transboundary crimes, the investigation and ICC's proceedings are strictly limited with the episodes of alleged crimes, which either occurred in the territory of the State Party or produced significant effects for that State.

2.2. Crime of Deportation: Subsumed under Crimes Against Humanity, but not under Genocide

Qualification of alleged acts committed against the Rohingya people as crimes against humanity is directly based on the Rome Statute which lists the crime of deportation as one of the acts subsumed under Article 7 thereof.[74] In order to convince the ICC that crimes against humanity were in fact committed, it should be proven that deportation took place as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.[75] The term "attack" should be interpreted as a course of conduct involving the multiple commission of acts against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.[76] Given that many sources

[74] Rome Statute, above note 53, art. 7(1-d).

[75] *Ibid.*, art. 7(1).

[76] *Ibid.*, art. 7(2-a).

referred to in the proceedings pointed to the heavy involvement of several government forces and other State agents, there existed a reasonable basis to believe that there may have been a State policy to attack the Rohingya.[77]

Although the Pre-trial Chamber authorized investigation for the alleged crime of deportation and persecution[78] and held that there is no need to assess whether other crimes within the jurisdiction of the ICC may have been committed, it nevertheless did not preclude the possibility that such alleged crimes could be part of the Prosecutor's future investigation.[79] The Chamber also stressed that the Prosecutor was neither bound to investigate solely the events outlined in her Request nor by their provisional legal characterisation.[80] By stating this, the Pre-trial Chamber gave the Prosecutor a wide margin of appreciation to qualify alleged conduct as one of the crimes under the ICC's jurisdiction and to provide the legal classification of conduct different from the one provided at the stage of authorisation of investigation. The only limitation for the Prosecutor is that any crimes, which she may potentially claim as having been committed, should have been executed partially in the territory of Bangladesh, and that therefore crimes that were commenced and completed in Myanmar without bearing a cross-border nature are beyond the purview of the future investigation.

In addition to the crime of deportation and persecution, the Prosecutor also alleged that the crime of "other inhumane acts" could also be committed during events leading to the Rohingya crisis.[81] However, the Chamber's determination that the Prosecutor may alter her request at the later stage of investigation paves the way for challenging the commission of other crimes under the ICC's jurisdiction.

One of such crimes can be genocide, which falls under the ICC's jurisdiction.[82] To determine whether conduct qualifies as genocide or not, firstly it should be found that acts listed in the Rome Statute were committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. The Statute provides an exhaustive list of the acts, which can be considered as conduct that led to the commission of genocide.[83] Although the list is complete, and other

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[77] Above note 51, para. 92

[78] *Ibid.*, para. 110.

[79] *Ibid.*, para. 96.

[80] Alessandra Spadaro, "Introductory Note to the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar Decision to Authorize Investigation (ICC) and The Gambia v. Myanmar Order for Provisional Measures (ICJ)", *International Legal Materials by the American Society of International Law*, 2020, p. 1.

[81] Above note 50, paras. 123 et al.

[82] Rome Statute, above note 53, article 6.

[83] *Ibid.* Such 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

acts, even if they are intended to destroy a protected group, cannot be considered as genocidal conduct, enumerated acts still provide an opportunity for wider interpretation. The definition of Genocide in the Rome Statute is replicated from the Genocide Convention of 1948.[84] The Commentaries to the Statute explicitly exclude that genocide covers what is known today as ethnic cleansing because it was never the intention of the drafters of the Genocide Convention.[85] However, if ethnic cleansing is employed as a method to commit acts provided in the Statute, it can also easily become an act that may be qualified as genocide. In other words, ethnic cleansing, as such, is not sufficient to find that the required act for genocide happened, but if the policy of ethnic cleansing was used, for example, to deliberately inflict on the group conditions of life calculated to bring about its physical destruction in whole or in part, it can be qualified as genocide.

This issue was widely discussed by the ICJ in Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro), in which it held that the term ethnic cleansing is in practice used, by reference to a specific region or area, to mean "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area".[86] The ICJ further noted that:

> It [ethnic cleansing] can only be a form of genocide within the meaning of the Convention if it corresponds to or falls within one of the categories of acts prohibited by the Convention. Neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent 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 the destruction of that group, nor is such destruction an automatic consequence of the displacement. This is not to say that acts described as "ethnic cleansing" may never constitute genocide, if

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.

[84] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 (entered into force 12 January 1951), art.II.

[85] O.Triffterer, K.Ambos, above note 54, p. 136.

[86] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, *ICJ Reports 2007*, p. 43, para. 190.

> 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 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.[87]

As it is demonstrated, ICJ interpreted ethnic cleansing as an act, which, *inter alia,* encompasses deportation and thus having potential to be a transboundary in nature. However, the Rome Statute does not refer to ethnic cleansing in category of acts, which are explicitly prohibited under it. Notwithstanding the absence of specific reference to ethnic cleansing in the Rome Statute, it seems from the ICJ's assertion that ethnic cleansing can still be used as a method to commit genocide, provided that other essential elements, such as special intent, protected group, etc. are met.

Genocidal intent is a subjective element, which according to the Elements of Crimes of the Rome Statute might be different from the mental element for other crimes and needs to be decided by the ICC on a case-by-case basis.[88] Indeed, it will not be easy to prove that acts of deportation were committed with a specific intent to destroy in part or in full a Rohingya group. However, as indicated by the Independent Fact-Finding Mission under the United Nations (UN) mandate:

> the systematic stripping of human rights, the dehumanizing narratives and rhetoric, the methodical planning, mass killing, mass displacement, mass fear, overwhelming levels of brutality, combined with the physical destruction of the home of the targeted population, in every sense and on every level make the mission believe to conclude, on reasonable grounds, that the factors allowing the inference of genocidal intent are present and that it is now for a competent prosecutorial body and court of law to investigate and adjudicate cases against specific individuals to determine individual guilt or innocence.[89]

Based on the above considerations, it becomes clear that alleged conduct leading to deportation, apart from being subsumed under crimes against humanity,

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[87] *Ibid.*

[88] Rome Statute, above note 53, Elements of Crimes, art.6 (introduction-c).

[89] Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2, 17 September 2018, above note 32, paras. 1440-1441, p. 358.

can also be qualified as genocide under the Rome Statute if all the essential requirements for such qualification are met. Certainly, there is an obvious overlap between the definitions of genocide and crimes against humanity, as set out in the Rome Statute, and it will be up to judges to decide whether to allow cumulative convictions or not should charges proceed based on both provisions.[90] Additionally, as explained above, the Prosecutor is not restricted from raising the issue of genocide at a later stage of the investigation, which makes it completely realistic that charges of genocide may still emerge in subsequent proceedings.

In conclusion, the crime of deportation can be considered both as an act leading to the commission of crimes against humanity and genocide. In the latter situation, deportation as part of the policy of ethnic cleansing should fit under any category of acts prohibited specifically under the genocide clause of the Rome Statute and such deportation should have been carried out with a special intent to destroy fully or in part the protected group. Based on available information and in compliance with procedural limitations, the Prosecutor is free to proceed with charges for both crimes against humanity and genocide, as in both circumstances at least one element of the crime (crossing the border) occurred in Bangladesh. Furthermore, if all other contextual elements are met, the Prosecutor is even allowed to charge persons for both crimes for the same conduct leaving it up to the judges to decide on which charge will be confirmed during the conviction phase.

2.3. Complementarity and Universality: Proceedings before the Domestic Courts of Argentina

On 11 November 2019, a few days before the ICC's Pre-trial Chamber authorized the Prosecutor to commence investigations into the situation in Bangladesh and Myanmar, a domestic court in Argentina received an application by the Burmese Rohingya Organization UK (BROUK) to adjudicate alleged claims of genocide and crimes against humanity committed against the Rohingya people based on the principle of universal jurisdiction.[91] The petitioners claimed that reported systematic oppression and discrimination, ethnic cleansing, applying isolation measures, directing attacks, sexual and gender-based violence and other atrocities amounted to the commission of two international crimes: genocide and crimes against humanity.[92] BROUK claimed that its legal standing is based on the principle of universal jurisdiction, which permits all States to exercise jurisdiction over crimes under international law and allows for the ability to investigate and prosecute individuals suspected of responsibility for war crimes and crimes against humanity, torture,

[90] O.Triffterer, K.Ambos, above note 54, p.142.

[91] Application of BROUK, available at: https://burmacampaign.org.uk/media/Com plaint-File.pdf.

[92] *Ibid.*, pp. 18-33.

genocide and enforced disappearances, regardless of where the crime was committed or the nationality of the suspect or victim.[93]

The Argentinian court rejected the case, holding that it would duplicate the investigation launched by the ICC. Upon appeal, the Federal Appeals Court in Buenos Aires overturned the previous decision not to pursue a case against military and civilian leaders of Myanmar for their role in atrocities committed against the Rohingya people[94]—a move that was largely hailed by civil rights defender organisations globally.[95] These organisations argued that the ICC's jurisdiction is limited to crimes that have occurred across the border, whereas an investigation under the principle of universal jurisdiction would be able to look into crimes committed against the Rohingya inside Myanmar.[96] These two litigations mark the first time that an investigation of international crimes based on universal jurisdiction begins in parallel with ICC investigations, which raises important questions regarding the application of the principle of complementarity in relation to the exercise of universal jurisdiction by a State.

The scope of investigations in Argentina is much wider being based on universality than the scope of the investigation at the ICC, which is strictly limited to transboundary crimes. Thus, these two parallel proceedings should continue hand in hand, complementing each other in enforcing justice for the victims of atrocities. However, if the prosecution would investigate the same episodes against the same persons and eventually convict them in one court, this would prevent the other court to proceed with the case since it would be in breach of the double-jeopardy rule, which is well-established principle of criminal law[97] and is also enshrined in the Rome Statute.[98] Therefore in some instances, this complementary nature of two parallel proceedings may well become concurrent. Indeed, at the commencement of and during an ICC investigation, concurrent investigations or prosecutions at the national level must be taken into consideration by the Prosecutor while assessing the admissibility of *potential cases* subject to an investigation by the ICC.[99]

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[93] Official Statement by the BROUK, available at: https://www.brouk.org.uk/argen tinean-courts-urged-to-prosecute-senior-myanmar-military-and-government-officials-for-the-rohingya-genocide/.

[94] Official Statement by the BROUK, available at: https://www.brouk.org.uk/ argentinean-judiciary-moves-closer-to-opening-case-against-myanmar-over-rohingya-genocide/.

[95] See joint statement of some civil right defender organizations, available at: https://crd.org/2020/06/23/the-european-burma-network-welcomes-prospect-of-continued-argentinian-investigation-into-atrocity-crimes-against-the-rohingya/.

[96] *Ibid.*

[97] William A. Schabas, *The International Criminal Court (2nd Edition): A Commentary on the Rome Statute,* Oxford University Press, 2016, p. 503.

[98] Rome Statute, above note 53, art. 20.

[99] Above note 55.

Notably, Argentina's move to proceed with the investigation based on universal jurisdiction follows the recommendations issued by the UN Independent Fact-Finding Mission in Myanmar, which encouraged Member States of the UN to exercise jurisdiction to investigate and prosecute alleged perpetrators of serious crimes under international law committed in Myanmar.[100] Invoking universal jurisdiction is not novel for domestic courts globally. However, universal jurisdiction is usually relied on when all other means of prosecution appear to be ineffective and despite this, to ensure that justice is served. In the present situation, it is obvious that ICC can be considered as an effective international mechanism to execute justice for Rohingya victims of deportation. Therefore, it is not clear whether the proceedings in the Argentinian courts will complement the ICC's mandate or will challenge the admissibility of some cases brought before the trial chamber by the Prosecutor.

3. Points of Convergence and Divergence between Proceedings before the ICJ and the ICC

After analyzing ongoing proceedings related to the alleged crimes against the Rohingya both at the ICJ and the ICC, this article will discuss what expectations there are on the potential outcomes of these proceedings and to what extent such outcomes can challenge the uniformity of international law, if at all. In particular, the present chapter will analyse whether two proceedings in different international courts on the same subject could complement one another or potentially hinder enforcement of justice globally.

One of the similarities between these two proceedings is that the jurisdiction of both courts to review the issue is challenged. In the case of the ICJ, it is contended whether The Gambia is legally capable to bring the claim against Myanmar, while the ICC deals with the legality of extending its own jurisdiction to alleged crimes which originated on the territory of a non-Member State, when at least one element of the crime occurred on the territory of a Member State. One thing which we should not expect from both courts is for them to invoke the same mode of responsibility because the ICJ explicitly deals with State responsibility, while the ICC can only impose responsibility on individuals. Perhaps the most striking point in these proceedings is the legal qualification of conduct. Whereas the ICJ is limited to discussing whether Myanmar (as a State) committed genocide or not, the ICC so far seems to examine if the same conduct (the displacement of Rohingyas) amounts to crimes against humanity. These points certainly raise questions regarding the

[100]Compilation of all recommendations made by the Independent International Fact-Finding Mission on Myanmar, to the Government of Myanmar, armed organizations, the UN Security Council, Member States, UN agencies, the business community and others. A/HRC/42/CRP.6, 16 September 2019, para. 102.

interplay between these two proceedings and whether results from both proceedings can impact the uniformity of international law.

Once the proceedings are fully completed before these two international courts, we may face the reality that they each qualify the same conduct as different crimes. The question here is whether this should be considered the globalisation of international law or the fragmentation thereof. On globalisation and fragmentation, authors have argued that globalisation encompasses notions of interdependence and linkages between problems and solutions, whereas fragmentation implies isolation and disconnection between regimes and institutions.[101] It should also be noted that fragmentation is defined as the emergence of specialized and autonomous rules or rule complexes, legal institutions, and spheres of legal practice.[102] Although fragmentation itself does not imply an inherently positive or negative value judgment, it reflects an unprecedented regulatory and institutional expansion of international law or a positive demonstration of the responsiveness of legal imagination to social change.[103]

From the outset, it should be outlined that the applicable law is different in these two proceedings. The ICJ applies the Genocide Convention, which sets a different legal regime than the Rome Statute, which is the applicable law under the ICC proceedings. However, if we assume that the same conduct could potentially be qualified as two different crimes, it certainly implies "regulatory expansion of international law and demonstration of responsiveness of legal imagination to social change."

The objective of the present article is neither to assess whether the phenomenon of fragmentation is positive or negative nor to explicitly argue that disparate qualification of the same conduct is a clear example of fragmentation. In contrast, the article merely argues that the qualification of the same conduct as two different crimes by two international courts can challenge the uniformity of international law. Without a doubt, it is indeed a positive development that nowadays various institutional and legal regimes can provide avenues for mass atrocities, such as crimes against humanity or genocide, to be properly addressed at

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[101]Keren N. Scott 'Managing Fragmentation through Governance: International Environmental Law in a Globalised World' in Andrew Byrnes *et. al* (eds.), *International Law in the New Age of Globalization*, Martinus Nijhoff Publishers, Leiden/Boston, 2013, p. 207.

[102]ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*, Finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682, 13 April 2006, 11, para.8.

[103] For effects of fragmentation see: Anne Peters, "The refinement of International Law: From Fragmentation to Regime Interaction and Politicization", *International Journal of Constitutional Law*, 15(3), 2017, 671-704.

the international level. Nevertheless, those regimes should ideally complement one another, rather than be concurrent to each other. The uniformity of international law can be challenged by the fact of two different international legal instruments (the Genocide Convention and the Rome Statute) and two different institutional regimes (the ICJ and the ICC) diverging on their legal qualification of the same conduct under international law. This may raise questions on whether international law is fragmented on the crime of deportation and possibly lead to a different interpretation of this crime under the Genocide Convention and Rome Statute.

As the proceedings continue, both international courts face challenging issues to be discussed during the hearings. One of such issues is whether legal standing at the ICJ somehow undermines the enduring requirement of consent to jurisdiction,[104] or whether the extension of the ICC's territorial jurisdiction over crimes which originated in non-Member State but transcended to territories of Member State violates the former's state sovereignty. However, jurisdictional issues are not so significant once the courts start reviewing the merits of the case. During this stage, legal qualification can potentially become the subject of disagreement between these two courts. Indeed, we have previously already witnessed the ICJ's displeasure in its *Genocide* judgment[105] when it employed a different control test for the same set of events, than that relied on by the International Criminal Tribunal for the Former Yugoslavia in the well-known *Tadic* case.[106] Notably, in those proceedings, both courts applied different legal norms. Therefore, it can be expected that in Rohingya litigations, qualification of displacement as different crimes by two courts can also create disagreement among them.

Conclusion

Based on the above considerations, the chances of the displacement of the Rohingya people being differently qualified as international crimes by the ICJ and the ICC are arguably high. However, the ruling of the ICC's pre-trial Chamber left the possibility for the Prosecutor to change such legal qualification in subsequent stages of the proceedings. For purposes of international humanitarian law or international criminal law, it is immaterial whether such displacement is qualified as a crime against humanity or if genocide by displacement is a prohibited act during armed conflict. However, divergent consideration by two different courts on the legal

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[104]Priya Urs, "Obligations *erga omnes* and the question of standing before the International Court of Justice", *Leiden Journal of International Law*, vo.24, issue 2, 2021, pp. 518-521.

[105]*Genocide case*, above note 86, paras. 402 et al.

[106]International Criminal Tribunal for Former Yugoslavia, *Proescutor v. Dusko Tadic,* Judgment of the Appeals Chamber, Case No.: IT-94-1-A, 15 July 1999, para. 145.

qualification of the same conduct can potentially raise concerns over the uniformity of international law.

On the one hand, it could be argued that this is a clear demonstration of the expansion of international law because under one proceeding the State may be held responsible for genocide, while under the other proceeding individual perpetrators may be punished for mass atrocities. This is indeed a strong indication of the globalisation of international law, as two institutional and legal systems complement each other in ensuring that justice is served globally. However, on the other hand, different qualifications of the same conduct raise the question of whether the current state of international law is so fragmented and disintegrated that, different institutional and legal regimes have ended up qualifying the same conduct as different crimes. The purpose of this article was not to answer these questions, but rather to outline that in case proceedings continue before both international courts, these are the points which are likely to attract the most attention. But given that both proceedings are at relatively very early stages, it may be too early to convincingly claim what impact their outcome could have on the future of international law.