



KU LEUVEN  
FACULTEIT RECHTSGELEERDHEID  
Academiejaar 2016 - 2017

**The Genocide You Have Never Heard of:  
The Case of the Rohingya People**

Promotor: Prof. Dr. K. LEMMENS

Masterscriptie, ingediend door  
Eva ALBERS  
Bij het eindexamen voor de graad van  
MASTER IN DE RECHTEN





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## **PREFACE**

My thesis “The Genocide You Have Never Heard of: The Case of the Rohingya People” was written in order to obtain my master’s degree of Law at the KU Leuven in the summer of 2017. Writing it has been an intense process with ups and downs, but the subject never ceased to interest me. I did not know a lot about the Rohingya people when I started writing, but after thorough research I became more and more captivated by their plight. I developed a strong feeling of indignation at the world’s indifference.

It has been an exciting experience for me to write about my favorite legal topics, i.e. human rights and international criminal law. Since the predicament of the Rohingya people is not that well-known (yet) in the legal world, it was at times challenging to find authoritative sources on the situation. I have mainly drawn upon reports and investigations by human rights organizations on the matter.

I would like to thank a few people who helped me a great deal along the way. First of all, I am very grateful to my promotor, Prof. Dr. Koen Lemmens, for his guidance during the process and willingness to answer my questions, however big or small. A special thanks to Michel Peremans, a family friend who introduced me to the case of the Rohingya people in Myanmar and their unjust treatment. His sense of justice and energy has inspired me to write this thesis.

I would also like to thank my dearest friend, Charlotte Bonamie, for motivating me and always challenging me, whatever journey I dive into. I want to express my deepest gratitude to my parents. I thank them for their wise and honest words. I could not be where I am today if it wasn’t for their unconditional love and support.

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Yes I am a Rohingya  
Yes I am from Myanmar  
I too am a Human  
I too am part of this world.  
I too wanna have a life just like you.  
Don't wipe me out  
In a genocide...

*Ali Johar*

## INTRODUCTION

The Rohingya people are a Muslim and ethnic minority in Myanmar. They have been living parallel lives from the Buddhist majority population in Rakhine State (formerly known as Arakan State). The Rohingya population is estimated at one million, of which approximately 800 000 live in Rakhine State. The Rakhine Buddhists are a community of around 2 million people.

The two groups have a long history of conflicts, dating back to British colonial times. The Buddhists consider Rohingya illegal immigrants and are consistently persecuting them. The Rohingya people have been stripped of their citizenship (Burma Citizenship Law of 1982) and are deprived of all legal rights. Ever since the 1970's, Rohingya flee to Bangladesh and other neighboring countries, but they are not welcome there either. Since the recent violent conflicts in 2012 in Myanmar, each year thousands of Rohingya flee the country by sea hoping to reach Bangladesh, but they are often pushed back to sea by Bangladesh Border Guards. Those who do reach Bangladesh alive are resettled in camps far away from the mainland "to avoid conflicts with the Bangladeshis".



The situation of the Rohingya is more violent and hopeless than ever. In my master's thesis, I will entertain two closely related questions: does the predicament of the Rohingya people in Myanmar qualify as a genocide and if it does, can it be brought before the International Criminal Court?

Concerning the specific situation of the Rohingya people, there is few legislation and jurisdiction to be found. However, the deteriorating situation of the Rohingya's in recent years appears to have caught the attention of legal scholars, as the output of jurisprudence concerning this topic is definitely on the rise. Drawing on this emerging body of legal writings, but going beyond it at the same time, I will make a legally compelling case that by the standards of international law the current situation of the Rohingya people must be acknowledged as a genocide. In order to do so, I will apply a literature study in a qualitative, descriptive and exploratory manner. The most important legislative document regarding genocide in international law is the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Genocide Convention)<sup>1</sup>, which has been drafted after the atrocities committed by the Nazi regime in World War II. I will also look at the Rome Statute of the

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<sup>1</sup> UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948.



International Criminal Court of 1998 (Rome Statute).<sup>2</sup> The Rome Statute established the ICC and clarifies its jurisdiction and procedures.

The first chapter of this thesis will give background information on the historical origin of the conflict between Muslim Rohingya and Buddhist Rakhinese, and how the violence between both groups escalated in 2012. Moreover, this chapter sets out in what manner this violent relationship is still present up to this day.

In the second chapter, the history and basic requirements of the concept of genocide are set out, followed by an application of these material and mental requirements in the specific case of the Rohingya people by means of the Genocide Convention and the Rome Statute.

Thirdly, this thesis will give the reader information on the history and the current jurisdiction of the International Criminal Court in The Hague, and whether the international community can challenge the ongoing human rights violations in Myanmar whatsoever.

The final chapter then answers the two key questions mentioned before: whether the predicament of the Rohingya people in Myanmar qualifies as a genocide and if so, can it be brought before the International Criminal Court?

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<sup>2</sup> UN General Assembly, *Rome Statute of the International Criminal Court*, A/CONF.183/9, 17 July 1998.

## **I Background Information: Rohingya People**

Up to this day, there is controversy about the historical origin of the Rohingya Muslims. The Rohingya are descendants from Muslim Arabs, Moors, Persians... who have been present for centuries in Rakhine. The first wave of Muslim immigration occurred in the seventh century when Muslim sailors arrived and integrated without any difficulty. The second wave of immigration then began in the fifteenth century until the Konbaung Dynasty of Myanmar conquered Rakhine in 1784. The Konbaung Dynasty pursued an expansionist policy which soon led to the first Anglo-Burmese War of 1824 with British India. The war was ended in favor of British India by the peace treaty of Yandabo (1826), according to which Myanmar agreed, amongst other things, to cede Rakhine. Under British rule, Muslim and Hindu Indians were deliberately relocated to Rakhine and the population expanded from less than 100 000 to more than one million inhabitants.<sup>3</sup> The ethnic and religious diversity caused communitarian tensions, which worsened after the second World War and the Japanese invasion between 1942 and 1945. The growing violence caused Buddhists to leave, while Muslims fled the center of Myanmar for Rakhine. The different ethnic and religious groups are involved in violent conflicts up to this day.<sup>4</sup>

After being a British colony for over a century, Myanmar declared its independence in 1948 as a parliamentary democracy, but the authorities turned out in favor of the Buddhists. Muslims were replaced by Buddhists in the administration, the land lost by Buddhists to Muslims were recovered and the freedom of Muslims was limited. The Union Citizenship Act of 1948 did not list the Rohingya people as an “indigenous race”, but had the possibility to apply for identity cards if they could prove that their ancestors lived in Myanmar for at least two generations. They were recognized as an ethno-linguistic group in the early years of Myanmar’s independence.<sup>5</sup>

### **1. Under military rule until 2011**

The political situation did not remain stable for long. In 1962, a military coup took place, led by General U Ne Win. An isolationist policy with a socialist economic program was established. Under the military rule of General U Ne Win, the process of erasing the Rohingya’s identity and rights began. The military government also commenced the physical destruction by conducting several

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<sup>3</sup> “International Mission of Inquiry: Burma. Repression, Discrimination and Ethnic Cleansing in Arakan”, *International Federation of Human Rights League* report, April 2000 n° 290/2, 5.

<sup>4</sup> “International Mission of Inquiry: Burma. Repression, Discrimination and Ethnic Cleansing in Arakan”, *International Federation of Human Rights League* report, April 2000 n° 290/2, 5.

<sup>5</sup> Constitution of the Union of Burma, Chapter II, para. 11(i) (1947); The Union Citizenship Act of Burma, para. 3 (1) and 4 (1948); Allard K. Lowenstein International Human Rights Clinic at Yale Law School, “Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.”, October 2015, 7; COWLEY, A. and ZARNI, M., “The Slow-Burning Genocide of Myanmar’s Rohingya”, *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 689-695.

military operations against the Rohingya population. These were officially conducted to expel Rohingya who allegedly wanted to establish their own independent Islamic State in northern Rakhine State. To put the discrimination and repression of Rohingya Muslims into perspective, it is important to know that the Rohingya are thus mainly settled in Rakhine and form one of the largest ethnic minorities there (besides the Rakhine Buddhists). Rakhine has an interesting geopolitical position: it is the meeting point between Muslim and Hindu Asia and Buddhist Asia, and it is an important potential outlet for China towards the Indian Ocean. It is a crucial buffer State in terms of national security for the Myanmar government.<sup>6</sup>

The Myanmar government and the Rakhine Buddhist community traditionally claim that the Rohingya are “Bengali’s”, or illegal immigrants from Bangladesh who immigrated during the British colonial period.<sup>7</sup> To justify the discrimination and repression of these people, the government often refers to the following official statement:

“In actual fact, although there are 135 national races in Myanmar today, the so-called Rohingya people are not one of them. Historically, there has never been a “Rohingya” race in Myanmar (...) Since the first Anglo-Myanmar war in 1824, people of Muslim faith from the adjacent country illegally entered Myanmar, particularly Rakhine State. Being illegal immigrants they do not hold immigration papers like other nationals of the country.”<sup>8</sup>

The war of independence in Bangladesh and economic difficulties in the 1970’s caused another wave of Muslim immigration. The military government of Myanmar decided to put a hold to this immigration with the King of Dragons (*Nagamin*) operation in 1978. They conducted identity checks in Rakhine State<sup>9</sup> in order to take measures against “foreigners who infiltrated themselves illegally”<sup>10</sup>. The identity checks turned into a reign of terror and violence, aimed at forcing the Muslims to leave

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<sup>6</sup> COWLEY, A. and ZARNI, M., “The Slow-Burning Genocide of Myanmar’s Rohingya”, *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 689-695; “International Mission of Inquiry: Burma. Repression, Discrimination and Ethnic Cleansing in Arakan”, *International Federation of Human Rights League* report, April 2000 n° 290/2, 5.

<sup>7</sup> COWLEY, A. and ZARNI, M., “The Slow-Burning Genocide of Myanmar’s Rohingya”, *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 689-695; KIPGEN, N., “Conflict in Rakhine State in Myanmar: Rohingya Muslims’ Conundrum”, *Journal of Muslim Minority Affairs*, 2013, 33:2, 300; SOUTHWICK, K., “Preventing Mass Atrocities Against the Stateless Rohingya in Myanmar: a Call for Solutions”, *Journal of International Affairs*, Spring/Summer 2015, 68, 2; ProQuest Central, 139; <http://www.cfr.org/human-rights/understanding-myanmar/p14385>.

<sup>8</sup> U Ohn Gyaw, Foreign Affairs minister, 21 February 1992, quoted by HRW/A; “International Mission of Inquiry: Burma. Repression, Discrimination and Ethnic Cleansing in Arakan”, *International Federation of Human Rights League* report, April 2000 n° 290/2, 5.

<sup>9</sup> Rakhine became a state in 1974.

<sup>10</sup> Declaration of the Minister of the Interior and of Religious Matters, 16 November 1977.

the country. Hundreds of thousands fled to Bangladesh.<sup>11</sup> The Bangladeshi authorities did not welcome the Rohingya with open arms but placed them into refugee camps, without food or humanitarian help. After international condemnation, Myanmar's General U Ne Win repatriated many refugees. The United Nations High Commissioner on Refugees (UNHCR) took part in this Golden Bird repatriation operation, even though there was no proof of significant improvement in the human rights situation.<sup>12</sup> On the contrary, the persecution continued and the new Citizenship Law of 1982 even worsened their situation. Myanmar is an ethnic diverse country and based on this new Citizenship Law one can still become a Myanmar citizen, even if one is a member of an ethnic group that is not listed as a national one.<sup>13</sup> As mentioned before, the list of Myanmar's 135 "national races" does not include the Rohingya, but they can apply for citizenship based on records of their family's historical residence. After the military coup of 1962, however, fewer and fewer Rohingya were granted citizenship based on their ancestors' civic status. The Citizenship Law prohibits Rohingya people from obtaining equal access to citizenship at all, rendering a majority of Rohingya stateless.<sup>14</sup> Many Rohingya kept fleeing to Bangladesh for more than twenty years to come.

In 1992 the border security Nay-Sat Kut-kwey, better known by its acronym NaSaKa, was established by the military junta. It operated in the northern part of Rakhine State until 2013, under the control of the Ministry of Border Affairs. The NaSaKa acted as an absolute ruler over the Rohingya population by forcing them either to pay a weekly fee - that they clearly could not afford -, or to perform manual labor such as construction work or agricultural work. The Myanmar government denied that this constituted any form of forced labor. In 2004 three people were sentenced to death for high treason because they contacted the International Labor Organization to report the forced labor.<sup>15</sup>

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<sup>11</sup> COWLEY, A. and ZARNI, M., "The Slow-Burning Genocide of Myanmar's Rohingya", *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 700; "International Mission of Inquiry: Burma. Repression, Discrimination and Ethnic Cleansing in Arakan", *International Federation of Human Rights League* report, April 2000 n° 290/2, 6; "Allard K. Lowenstein International Human Rights Clinic at Yale Law School, "Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.", October 2015, 8.

<sup>12</sup> "International Mission of Inquiry: Burma. Repression, Discrimination and Ethnic Cleansing in Arakan", *International Federation of Human Rights League* report, April 2000 n° 290/2, 6; COWLEY, A. and ZARNI, M., "The Slow-Burning Genocide of Myanmar's Rohingya", *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 710-711; Allard K. Lowenstein International Human Rights Clinic at Yale Law School, "Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.", October 2015, 8.

<sup>13</sup> The Union Citizenship Act of Burma, para. 3, 4. (1982).

<sup>14</sup> Allard K. Lowenstein International Human Rights Clinic at Yale Law School, "Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.", October 2015.

<sup>15</sup> "International Mission of Inquiry: Burma. Repression, discrimination and ethnic cleansing in Arakan", *International Federation of Human Rights League* report, April 2000 n° 290/2, 7; COWLEY, A. and ZARNI, M., "The Slow-Burning Genocide of Myanmar's Rohingya", *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 709; Allard K. Lowenstein International Human Rights Clinic at Yale Law School, "Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.", October 2015, 10.

## 2. Unrest in 2012

Former military General Thein Sein became president of Myanmar in 2011. He undertook political reforms by improving Myanmar's international relations, decreasing media censorship and freeing hundreds of political detainees (including the current leader of the National League for Democracy party Aung San Suu Kyi). Nevertheless, he did not improve the situation of Rohingya people. The hate campaigning and violent attacks continued, and came to a boil in 2012.

On May 28<sup>th</sup> 2012, a Buddhist woman was allegedly raped and murdered by three Muslim men in Rakhine State. The three men were arrested by the authorities. Local Rakhine individuals blamed the Rohingya Muslims for this violent act and started distributing pamphlets throughout Myanmar to call for retribution. On June third, approximately three hundred Rakhinese attacked a bus of Muslim travelers and beat them to death. Following this attack, the Myanmar government declared that it would establish a committee to investigate the "organized lawless and anarchic acts" in Rakhine State.<sup>16</sup>

The riots and violence spread through Rakhine State. Rakhine and Rohingya people clashed in the townships of Maungdaw and Sittwe, but State security forces did not intervene to stop the violence. On June 10<sup>th</sup>, President Thein Sein declared a state of emergency in Rakhine state. The military took over administrative functions and a curfew was imposed, but the violence continued. The riot police and the army even joined forces with the Rakhine Buddhists in attacking the Rohingya population.<sup>17</sup> The government forces arbitrarily arrested Rohingya men and boys, raped women and the Rakhine Buddhists restricted Rohingyas' freedom of movement by blocking them from public spaces, hospitals and schools.

In August, the UNHCR stated that 80 000 people were displaced by the violence in and around Maungdaw and Sittwe Township. Most Rohingya were put in internally displaced persons' (IDP) camps by the government. According to an official statement of the Myanmar National Human Rights Commission in July 2012, basic needs of food, clothing, shelter and health were met. The one-page short statement did not mention the ongoing violence and persecution by government forces and local

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<sup>16</sup> "Four Killed as Rohingya Muslims Riot in Myanmar: Government", *Reuters*, June 8<sup>th</sup> 2012, <http://www.reuters.com/article/us-myanmar-violence-idUSBRE85714E20120608>; "All You Can Do is Pray. Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State", *Human Rights Watch* report, April 2013, 21; Allard K. Lowenstein International Human Rights Clinic at Yale Law School, "Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.", October 2015, 19.

<sup>17</sup> "Emergency in Myanmar State Following Riots", *Al Jazeera*, June 11<sup>th</sup> 2012, <http://www.aljazeera.com/news/asia-pacific/2012/06/2012610144345611570.html>; "All You Can Do is Pray. Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State", *Human Rights Watch* report, April 2013, 21; Allard K. Lowenstein International Human Rights Clinic at Yale Law School, "Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.", October 2015, 16.

Rakhinese.<sup>18</sup> In October 2012, the violence escalated in nine townships of Rakhine State. Approximately 40 000 people are displaced.<sup>19</sup>

### 3. Present Day Conflict

Today, most Rohingya still live in guarded and unsanitary camps or in isolated villages. The government does not allow (enough) food rations inside the camps and the prices of food and water increased more than fifty percent since 2012. Some Rohingya resorted to drinking sea water and eating glue in order to survive. Moreover, the army and government restricted the access of humanitarian workers to the camps and villages. This causes serious problems for pregnant women since they do not receive health care or medicines, nor are they allowed to go to hospitals outside the camps. After publicly speaking out about treating Rohingya who are victims of violent attacks, Médecins Sans Frontières (MSF) got banned from the country in February 2014 by the Myanmar authorities. The ban was widely criticized, and MSF was allowed to resume limited operations in January 2015. It reopened health clinics in Rakhine State and treated 3 480 people in the four first weeks already.<sup>20</sup> “In MSF's 22 years of presence in Myanmar, MSF has proven that it delivers health care to people based solely on need, irrespective of race, religion, gender, HIV status or political affiliation”, the organization stated.<sup>21</sup>

In 2014, official documents leaked to the media in which the government outlined a plan to relocate Rohingya to permanent camps instead of back to their homes. Human Rights Watch called the plan “a blueprint for permanent segregation and statelessness that appears designed to force them to flee the country”.<sup>22</sup> The plan also stipulates how Rohingya could gain citizenship in the light of the 1982

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<sup>18</sup> “Statement No. (4/2012) of Myanmar National Human Rights Commission concerning incidents in Rakhine state in June 2012”, Myanmar National Human Rights Commission, 11 July 2012, [http://burmalibrary.org/docs14/NHRC-Rakhine\\_Statement-NLM2012-07-11.pdf](http://burmalibrary.org/docs14/NHRC-Rakhine_Statement-NLM2012-07-11.pdf); Allard K. Lowenstein International Human Rights Clinic at Yale Law School, “Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.”, October 2015, 22.

<sup>19</sup> “All You Can Do is Pray. Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State”, *Human Rights Watch* report, April 2013, 22.

<sup>20</sup> ZAVIS, A., “Myanmar Orders Doctors Without Borders to Cease Operations”, *LA Times*, 28 February 2014, <http://articles.latimes.com/2014/feb/28/world/la-fg-wn-myanmar-orders-doctors-without-borders-to-cess-operations-20140228>; MOTLAGH, J., “These Aren’t Refugee Camps, They’re Concentration Camps, and People Are Dying in Them”, *Time*, 17 June 2014, <http://time.com/2888864/rohingya-myanmar-burma-camps-sittwe/>; DIZARD, W., “Doctors Without Borders Resume Work in Myanmar After Government Shutdown”, *Al Jazeera America*, 21 January 2015, <http://america.aljazeera.com/articles/2015/1/21/rohingya-muslims.html>; Allard K. Lowenstein International Human Rights Clinic at Yale Law School, “Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.”, October 2015, 29-31.

<sup>21</sup> ZAVIS, A., “Myanmar Orders Doctors Without Borders to Cease Operations”, *LA Times*, 28 February 2014, <http://articles.latimes.com/2014/feb/28/world/la-fg-wn-myanmar-orders-doctors-without-borders-to-cess-operations-20140228>.

<sup>22</sup> “Burma: Government Plan Would Segregate Rohingya”, *Human Rights Watch*, 3 October 2014, <https://www.hrw.org/news/2014/10/03/burma-government-plan-would-segregate-rohingya>; Allard K. Lowenstein

Citizenship Law. Only those who accept the pejorative label of “Bengali” may acquire citizenship. Rohingya who refuse this label will be denied citizenship and will be placed in closed camps for an indefinite period of time. Human Rights Watch urges international governments to reject this discriminatory plan which embeds ethnic cleansing, even though Win Myaing, the official Buddhist spokesperson of Rakhine State government, denies these allegations: “They all tell lies (...) How can it be ethnic cleansing? They are not an ethnic group.”<sup>23</sup>

In October 2016, a militant group of Rohingya attacked three border posts in Rakhine State. Nine police officers were killed. Eight of the Rohingya attackers were killed, and two captured.<sup>24</sup> An immediate lockdown of the area was ordered and humanitarian agencies were denied access so that the military could conduct an “area clearance operation”.<sup>25</sup> The Myanmar government published an investigation report of the attacks in which it denied the commission of genocide, or any human rights abuses against the Rohingya. The report instead accuses the Rohingya of burning down their own houses and committing conspiratorial terrorist attacks.<sup>26</sup>

### **3.1. Human Rights Reports: OHCHR Report**

In the aftermath of these attacks, several human rights organizations published reports on the ongoing human rights violations by the Myanmar government against the Rohingya. This chapter will focus on the report published by the UN Office of the High Commissioner for Human Rights (OHCHR) on 3 February 2017. The OHCHR drafted a report after interviewing more than 200 Rohingya who fled to Bangladesh. Since October 2016, approximately 66 0000 Rohingya have crossed the border with Bangladesh, either by paying excessive fees to smugglers or simply by floating across the river while holding onto a plastic container or barrel.<sup>27</sup> The testimonies collected by the OHCHR, indicate that Myanmar army and police are jointly conducting violent operations to clear the area. Rakhine

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International Human Rights Clinic at Yale Law School, “Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.”, October 2015, 33.

<sup>23</sup> SZEP, J., “Special Report – In Myanmar, Apartheid Tactics Against Minority Muslims”, *Reuters*, 15 May 2013, <http://www.reuters.com/article/us-myanmar-rohingya-specialreport-idUSBRE94E00020130515>; Allard K. Lowenstein International Human Rights Clinic at Yale Law School, “Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.”, October 2015, 32.

<sup>24</sup> “Myanmar: Security forces target Rohingya during vicious Rakhine scorched-earth campaign”, *Amnesty International*, 19 December 2016, <https://www.amnesty.org/en/latest/news/2016/12/myanmar-security-forces-target-rohingya-viscious-scorched-earth-campaign/>; “‘There Are No Homes Left’: Rohingya Tell of Rape, Fire and Death in Myanmar”, *The New York Times*, 10 January 2017; “Flash Report of OHCHR mission to Bangladesh. Interviews with Rohingya’s fleeing from Myanmar since 9 October 2016”, *United Nations Human Rights Office of The High Commissioner*, 3 February 2017, 7.

<sup>25</sup> “Flash Report of OHCHR mission to Bangladesh. Interviews with Rohingya’s fleeing from Myanmar since 9 October 2016”, *United Nations Human Rights Office of The High Commissioner*, 3 February 2017, 8.

<sup>26</sup> Interim Report of the Investigation Commission of Maungtaw, 3 January 2017.

<sup>27</sup> “Flash Report of OHCHR mission to Bangladesh. Interviews with Rohingya’s fleeing from Myanmar since 9 October 2016”, *United Nations Human Rights Office of The High Commissioner*, 3 February 2017, 6.

Buddhists are helping either the army and police forces in their operations, while also committing violence on their own.<sup>28</sup> The OHCHR report specifies which ongoing violations are committed by the army and police:

### 3.1.1 *Killings*

According to the testimonies, the Myanmar army, police and Rakhine Buddhists use different methods to kill Rohingya. Many victims are killed by random shooting or use of grenades, often during the night or early in the morning when it is dark and therefore harder to see for the security forces who they are firing at, and difficult for the victims to see where they can flee to. Several witnesses report that they were specifically targeted and shot at close range, and that the army or Rakhine Buddhists go from house to house attacking Rohingya. Influential people like Imams or teachers are often targeted.<sup>29</sup> Others are stabbed or beaten to death, often in front of their family or friends. Often houses are also set on fire with families still inside. An 18-year-old girl testifies:

“It was around 3 am in the morning; we were sleeping, when military attacked our village. We ran outside in panic, leaving my five-year-old brother behind in the house. The military came and set fire to the house, burning my brother alive. We found his burnt body in the morning, after the military had left the village.”

The OHCHR report states that the coordinated burning of people and property proves the deliberate destruction of the Rohingya people.<sup>30</sup>

The security forces do not spare children. Several mothers witnessed their children being attacked in front of their eyes:

“They beat and killed my husband with a knife. They went into my house. Five of them took off my clothes and raped me. My eight-month-old son was crying of hunger when they were in my house

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<sup>28</sup> “Flash Report of OHCHR mission to Bangladesh. Interviews with Rohingya’s fleeing from Myanmar since 9 October 2016”, *United Nations Human Rights Office of The High Commissioner*, 3 February 2017, 11-12.

<sup>29</sup> “Myanmar: Security forces target Rohingya during vicious Rakhine scorched-earth campaign”, *Amnesty International*, 19 December 2016, <https://www.amnesty.org/en/latest/news/2016/12/myanmar-security-forces-target-rohingya-viscious-scorched-earth-campaign/>; “Flash Report of OHCHR mission to Bangladesh. Interviews with Rohingya’s fleeing from Myanmar since 9 October 2016”, *United Nations Human Rights Office of The High Commissioner*, 3 February 2017, 14-15.

<sup>30</sup> “Flash Report of OHCHR mission to Bangladesh. Interviews with Rohingya’s fleeing from Myanmar since 9 October 2016”, *United Nations Human Rights Office of The High Commissioner*, 3 February 2017, 16-17.



because he wanted to be breastfeed, so to silence him they killed him too with a knife. I thought I would die, but I survived.”<sup>31</sup>

### 3.1.2 *Enforced Disappearance*

Many of the interviewees also mentioned that some of their family members are missing after being taken away by security forces. Mostly strong men and boys are taken away, or women and girls of a fertile age. Influential people (Imams, business men, preachers, village leaders, ...) were also rounded up for questioning. The army and police thinks they can provide information about rebels.<sup>32</sup>

### 3.1.3 *Sexual Violence*

The OHCHR report states that 52% of the women they have interviewed are victims of rape or other forms of sexual violence, the youngest one being 11 years old. Usually women and girls are raped by more than one man. In most cases, some of the perpetrators hold the victim by pinning her legs and hands or by pressing rifles or knives against the victim’s face, chest or belly, while another penetrates her. In the most horrendous scenarios, women or girls are raped in front of their children. One of the mothers told OHCHR:

“They held me tight and I was raped by one of them. My five-year-old daughter tried to protect me, she was screaming, one of the men took out a long knife and killed her by slitting her throat.”<sup>33</sup>

Besides mental consequences such as depression, persistent fear or insomnia, many women also suffer from physical injuries after being raped: bleedings, urinary and vaginal infections, abdominal pain, difficulties to walk, ... and so on. Most victims do not have access to health care.

Other forms of sexual violence are even more widespread than rape. Often women are subjected to invasive body searches in public. During these searches, women are touched and hit in their private body parts. The military conducts these body searches to intimidate and humiliate women and to obtain money and jewelry that they could be hiding.

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<sup>31</sup> “Flash Report of OHCHR mission to Bangladesh. Interviews with Rohingyas fleeing from Myanmar since 9 October 2016”, *United Nations Human Rights Office of The High Commissioner*, 3 February 2017, 18-19.

<sup>32</sup> “Flash Report of OHCHR mission to Bangladesh. Interviews with Rohingyas fleeing from Myanmar since 9 October 2016”, *United Nations Human Rights Office of The High Commissioner*, 3 February 2017, 19-20.

<sup>33</sup> “Myanmar: Security forces target Rohingya during vicious Rakhine scorched-earth campaign”, *Amnesty International*, 19 December 2016, <https://www.amnesty.org/en/latest/news/2016/12/myanmar-security-forces-target-rohingya-viscious-scorched-earth-campaign/>; “Flash Report of OHCHR mission to Bangladesh. Interviews with Rohingyas fleeing from Myanmar since 9 October 2016”, *United Nations Human Rights Office of The High Commissioner*, 3 February 2017, 18; 20-22.

### 3.1.4 *Physical Assault*

The most commonly used form of physical assault is the beating of people with bamboo sticks, gun butts, slingshots or catapults and metal sticks. When being beaten, the perpetrators often shout offensive things about Rohingya people not belonging in Myanmar, being ‘Bengali’s’ who should go back to their country etc. People are also forced to sit in stress positions, meaning they have to sit in a very uncomfortable position in the burning sun (often holding arms on their head or neck and facing the ground) for several hours - or even days - without any food or water.

Many Rohingya are also the victim of mental torture. As mentioned before, security forces and Rakhine Buddhists make victims watch their family members being raped, killed or tortured in front of their own eyes. These horrific actions are meant to cause mental suffering, humiliation and fear.

The different forms of physical and psychological assault constitute torture, cruel inhuman or degrading treatment.<sup>34</sup>

### 3.1.5 *Arbitrary Detention*

Many men have been taken away by the army and police since October 2016 (*supra*). OHCHR had the chance to talk to some people who either escaped their detention, or were released. The interviewees describe how they were held in detention without being officially charged, and unable to contact their family. Detainees are ill-treated and victim of inhumane detention conditions. The Special Rapporteur of human rights in Myanmar released a press statement in January after meeting some (ex-)detainees:

“Except for one suspect whose family knew that the detainee had rights and sought a lawyer for him, the other prisoners did not have legal representation. They did not seem informed of the charges, if any, against them apart from being aware that they could be suspected of being associated with the attackers against the Border Guard posts on 9 October. Some had not been in communication with their family for the two or three months since they had been arrested. (...) The prison officials told me that there are more than 450 individuals detained in Buthidaung in relation to the attack.”<sup>35</sup>

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<sup>34</sup> Art. 3 ECHR; UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984; “Flash Report of OHCHR mission to Bangladesh. Interviews with Rohingyas fleeing from Myanmar since 9 October 2016”, *United Nations Human Rights Office of The High Commissioner*, 3 February 2017, 22-28.

<sup>35</sup> “Myanmar: Security forces target Rohingya during vicious Rakhine scorched-earth campaign”, *Amnesty International*, 19 December 2016, <https://www.amnesty.org/en/latest/news/2016/12/myanmar-security-forces-target-rohingya-viscious-scorched-earth-campaign/>; “Flash Report of OHCHR mission to Bangladesh. Interviews with Rohingyas fleeing

### 3.1.6 *Destruction or Occupation of Territory*

The army and Rakhine Buddhists specifically target Rohingya homes, schools and mosques to burn down. They also force owners to destroy their own property. The extensive burning has also been documented separately by Human Rights Watch and Amnesty International.<sup>36</sup>

Other interviewees describe how security forces destruct or confiscate (sources of) food. Since the Rohingya's freedom of movement is restricted, they have limited access to farmland, fishing waters, markets and paddy fields. Therefore, they are not able to produce food and suffer health problems.<sup>37</sup>

The security forces also confiscate Rohingya identification documents<sup>38</sup>, which illustrates the intention to take away their identity (also think about the Citizenship act of 1982) and the denial of their existence as an independent ethnic group.

### 3.1.7 *Ethnic and Religious Discrimination*

Many of the testimonies describe how the military or Rakhine Buddhists express feelings of hatred towards the Rohingya because of their ethnic origin and religion. While raping women or beating men and children, the perpetrators shout that the Rohingya must 'go back to where they came from', or to 'call your Allah to come and save you'<sup>39</sup>. The restrictions that were already placed on their freedom of movement and religious practices were tightened after the attacks of 9 October 2016.<sup>40</sup>

## 3.2. **Media Coverage**

After reading one of the testimonies in the OHCHR report on an eight-month-old baby who was reportedly killed while his mother was raped by security officers<sup>41</sup>, UN High Commissioner Zeid

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from Myanmar since 9 October 2016", *United Nations Human Rights Office of The High Commissioner*, 3 February 2017, 29-30.

<sup>36</sup> "Burma: Military Burned Villages in Rakhine State. Witnesses and Satellite Imagery Reveal Pattern of Burnings", *Human Rights Watch*, 13 December 2016, <https://www.hrw.org/news/2016/12/13/burma-military-burned-villages-rakhine-state>; "We are at breaking point.' Rohingya: persecuted in Myanmar, neglected in Bangladesh", *Amnesty International* report, 19 December 2016.

<sup>37</sup> "Flash Report of OHCHR mission to Bangladesh. Interviews with Rohingyas fleeing from Myanmar since 9 October 2016", *United Nations Human Rights Office of The High Commissioner*, 3 February 2017, 33-34.

<sup>38</sup> "Flash Report of OHCHR mission to Bangladesh. Interviews with Rohingyas fleeing from Myanmar since 9 October 2016", *United Nations Human Rights Office of The High Commissioner*, 3 February 2017, 35.

<sup>39</sup> "Flash Report of OHCHR mission to Bangladesh. Interviews with Rohingyas fleeing from Myanmar since 9 October 2016", *United Nations Human Rights Office of The High Commissioner*, 3 February 2017, 15; 27.

<sup>40</sup> "Flash Report of OHCHR mission to Bangladesh. Interviews with Rohingyas fleeing from Myanmar since 9 October 2016", *United Nations Human Rights Office of The High Commissioner*, 3 February 2017, 35.

<sup>41</sup> "Flash Report of OHCHR mission to Bangladesh. Interviews with Rohingyas fleeing from Myanmar since 9 October 2016", *United Nations Human Rights Office of The High Commissioner*, 3 February 2017, 18.

Raad al-Hussein said in a press statement: "What kind of 'clearance operation' is this? What national security goals could possibly be served by this?"<sup>42</sup>

The human rights violations against the Rohingya's were covered by influential media like the New York Times, BBC and Al Jazeera.<sup>43</sup> The media mainly points out the minimalist response of Myanmar's leader and Nobel Peace Prize winner, Aung San Suu Kyi. She is the civilian leader of the government and shares power with the military.<sup>44</sup> In December 2016, she asked the international community for their understanding of the situation in Rakhine State in an exclusive interview with Channel News Asia:

"But I would appreciate it so much if the international community would help us to maintain peace and stability and to make progress in building better relations between the two communities instead of always drumming up calls for bigger fires of resentment, if you like".<sup>45</sup>

In early April 2017, the BBC confronted Suu Kyi with the recent OHCHR report, but she bluntly answered that ethnic cleansing "is too strong an expression to use for what is happening."<sup>46</sup> Myanmar also rejected the UN Human Rights Council decision to further investigate the findings of the OHCHR report. Only one day after this rejection, the Myanmar Army officially stated that the Rohingya's are "Bengali's" and therefore no Myanmar citizens.<sup>47</sup>

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<sup>42</sup> "Devastating cruelty against Rohingya children, women and men detailed in UN human rights report", *United Nations Human Rights Office of The High Commissioner* Statement, 3 February 2017.

<sup>43</sup> "Myanmar detains police officers over Rohingya beating video", *BBC*, 2 January 2017, <http://www.bbc.com/news/world-asia-38487067>; "There Are No Homes Left': Rohingya Tell of Rape, Fire and Death in Myanmar", *The New York Times*, 10 January 2017, <https://www.nytimes.com/2017/01/10/world/asia/rohingya-violence-myanmar.html? r=1>; "Hundreds of Rohingyas' killed in Myanmar crackdown", *Al Jazeera*, 3 February 2017, <http://www.aljazeera.com/news/2017/02/rohingyas-killed-myanmar-crackdown-170203101817841.html>; "Pope Francis decries atrocities on Rohingya Muslims", *Al Jazeera*, 8 February 2017, <http://www.aljazeera.com/news/2017/02/pope-francis-decries-atrocities-rohingya-muslims-170208110807388.html>.

<sup>44</sup> "Is The Lady listening? Aung San Suu Kyi accused of ignoring Myanmar's Muslims", *CNN*, 25 November 2016, <http://edition.cnn.com/2016/11/17/asia/myanmar-rohingya-aung-san-suu-kyi/>; "Myanmar's leader faulted for silence as army campaigns against Rohingya", *New York Times*, 1 December 2016, <https://www.nytimes.com/2016/12/01/world/asia/myanmars%2Dleader%2Dfaulted%2Dfor%2Dsilence%2Das%2Darmy%2Dcampaigns%2Dagainst%2Drohingya.html? r=0>; "We are at breaking point.' Rohingya: persecuted in Myanmar, neglected in Bangladesh", *Amnesty International* report, 19 December 2016, 35-37; "Dit lijkt sterk op Rwanda, Darfoer, Bosnië en Kosovo", *De Standaard*, 31 december 2016, [http://www.standaard.be/cnt/dmf20161231\\_02652649](http://www.standaard.be/cnt/dmf20161231_02652649).

<sup>45</sup> "Exclusive: Focus on resolving difficulties in Rakhine rather than exaggerating them, says Suu Kyi", *Channel News Asia*, 3 December 2016, <http://www.channelnewsasia.com/news/asiapacific/exclusive-focus-on-resolving-difficulties-in-rakhine-rather- than/3337068.html>.

<sup>46</sup> "Myanmar: Aung San Suu Kyi Exclusive Interview", *BBC*, 5 April 2017, <http://www.bbc.com/news/world-asia-39510271>; "Aung San Suu Kyi Denies Ethnic Cleansing of Rohingya", *Al Jazeera*, 6 April 2017, <http://www.aljazeera.com/news/2017/04/aung-san-suu-kyi-denies-ethnic-cleansing-rohingya-170406081723698.html>;

<sup>47</sup> "Myanmar Army Chief Rules Out Rohingya Citizenship", *Al Jazeera*, 27 March 2017, <http://www.aljazeera.com/video/news/2017/03/myanmar-army-chief-rules-rohingya-citizenship-170327141825350.html>.

It is remarkable, however, that only Human Rights organizations seem to speak out about the precarious situation of the Rohingya situation. Few international leaders have publicly taken a stand against the obvious failure of Aung San Suu Kyi and the still rather new democratic government. A conspicuous exception is Barack Obama, who visited Myanmar three times during his presidency. He visited Myanmar for the first time in 2012 to praise the democratic reform of the country, but also mentioned the violence against the Rohingya people:

"The Rohingya ... hold within themselves the same dignity as you do, and I do. National reconciliation will take time, but for the sake of our common humanity, and for the sake of this country's future, it's necessary to stop incitement and to stop violence."<sup>48</sup>

In 2015, Obama again addressed the situation in Rakhine State. He said that if Myanmar wants to succeed in its transition to democracy, the oppression of the Rohingya's must stop.<sup>49</sup>

Perhaps the fiercest criticism of Aung San Suu Kyi's policy, however, came from a group of global leaders and Nobel Peace Prize winners who lambasted her in an open letter on Facebook, in December 2016. The signatories condemn her inaction and openly refer to the earlier tragedies in Rwanda, Darfur, Bosnia and Kosovo.<sup>50</sup>

## Summary

The Muslim Rohingya's are persistently oppressed and persecuted by Buddhist majority in Rhakine State. The Myanmar army and police forces have started a "cleaning operation" since the latest violent conflict in October 2016. Humanitarian help is banned from the area. Human rights organizations have established severe human rights violations.

The hatred towards the Rohingya's and their social exclusion is accepted by the Buddhist population. Civilians take part in the attacks against the Rohingya's, without any interference of government officials or police forces. The violence causes many Rohingya families to flee to Bangladesh or Thailand by boat, where they are put in refugee camps or forced to perform cheap labor.

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<sup>48</sup> "Obama Offers Praise, Pressure on Historic Myanmar Trip", *Reuters*, 19 November 2012, <http://www.reuters.com/article/us-asia-obama-myanmar-idUSBRE8AI04320121119>.

<sup>49</sup> "Obama Calls on Myanmar to End Rohingya Discrimination", *Al Jazeera*, 1 June 2015, <http://www.aljazeera.com/news/2015/06/obama-calls-myanmar-rohingya-discrimination-150601200038243.html>;

"Obama Says Myanmar Needs to End Discrimination of Rohingya to Succeed", *Reuters*, 1 June 2015, <http://www.reuters.com/article/us-usa-myanmar-obama-idUSKBN00H37C20150601>.

<sup>50</sup> "Global Leaders Warn Aung San Suu Kyi over Rohingya", *Al Jazeera*, 31 December 2016, <http://www.aljazeera.com/news/2016/12/urged-rohingya-human-crisis-161230202804249.html>.

## **II Genocide**

In the judgment against Jean Kambanda, who was the Prime Minister of Rwanda during the Rwandan genocide of 1994, the International Criminal Tribunal for Rwanda said that genocide constitutes ‘the crime of crimes’. Without trivializing other international crimes, genocide is considered the most serious crime of them all and its perpetrators must be sentenced appropriately.<sup>51</sup>

Unfortunately, there has been an international culture of impunity around the crime of genocide for a long time. Only in exceptional cases are perpetrators of genocide held accountable for their crimes, which can be explained by the fact that a genocide is generally executed with complicity of the State where it takes place. Therefore, most (domestic) legal systems throughout history failed at prosecuting the perpetrators and their accomplices.<sup>52</sup>

This chapter starts with a succinct overview of the most prominent precedent cases of genocide, all committed in the twentieth century. It is important to be aware of these precedents of genocide because they can function as a comparison for the current persecution of the Rohingya people.

Subsequently, this chapter will scrutinize the legal history of the prohibition of genocide. Genocide was mainly left unpunished in the beginning of the previous century, but because of the numerous atrocities committed throughout the following decades the international community has drafted several legal documents.

### **1. History**

#### **1.1. Precedents of Genocide**

##### *1.1.1 Armenian Massacre (1915-1919)*

During World War I, the Turkish government carried out mass deportations and massacres against the Armenian people in the Ottoman empire and its successor State, the Republic of Turkey. The Armenians are a Christian minority in the Ottoman Empire and had been living there since centuries already. During the war, they were accused of siding with the Russians - which a few of them indeed did – and were therefore viewed as internal enemies.<sup>53</sup>

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<sup>51</sup> *Prosecutor v. Kambanda*, ICTR, 4 September 1998, para 16; SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 10-11; SCHABAS, W.A. *The International Criminal Court. A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, 119.

<sup>52</sup> SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 17-18.

<sup>53</sup> DADRIAN, V. N., “The Turkish Military Tribunal’s Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Series”, *Holocaust and Genocide Studies*, 1997, 29; MELSON, R., *Revolution and Genocide. On the Origins of the Armenian Genocide and the Holocaust*, Chicago, The University of Chicago Press, 1992, 143.

Talaat Pasha (the Minister of the Interior), Enver Pasha (the Minister of War) and Djemal Pasha (a military leader) formed the infamous military triumvirate known as the “Three Pasha’s”. They were the leaders of the Committee of Union and Progress (CUP), a political organization that was responsible for ordering the massacres and deportations which ultimately lead to the death of between 1 and 1.5 million Armenians.<sup>54</sup>

### **Bringing the perpetrators to justice?**

On 30 October 1918, an armistice was reached between the Ottoman Empire and the Allied powers. Following the signing of the armistice, a Commission on Responsibilities and Sanctions was set up to examine the practices of “barbarous and illegitimate methods of warfare... including offenses against the laws and customs of war and the principles of humanity”, as mentioned in the Treaty of Sèvres<sup>55</sup>. The treaty stipulated the responsibility of Turkey and provided a basis for the international adjudication for war crimes. The trials were never held.

Even though the international trials promised by the Allies never got off the ground, domestic courts-martial trials were held in the Ottoman Empire. One should keep in mind that at the time the term ‘genocide’ did not yet exist (*infra* on Raphael Lemkin). The principal indictment of these domestic trials therefore stipulated “the massacre and destruction of the Armenians (...) as part of a centrally directed plan”.<sup>56</sup> On 5 July 1919, the Turkish courts-martial rendered its verdict and found the leaders of the CUP guilty of attempting to destroy the Armenians, in a premeditated and organized manner. The defendants were sentenced either to death in absentia, or to fifteen years of hard labor. However, the sentences were never carried out because the newly established Turkish government rejected the verdict.

Nevertheless, the verdict of the courts-martial has an important legal value. It was the first time that Ottoman-Turkish State officials were held accountable for the crimes they committed, and Turkey

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<sup>54</sup> DADRIAN, V. N., “The Turkish Military Tribunal’s Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Series”, *Holocaust and Genocide Studies*, 1997, 29; MELSON, R., *Revolution and Genocide. On the Origins of the Armenian Genocide and the Holocaust*, Chicago, The University of Chicago Press, 1992, 142; 146-147.

<sup>55</sup> Treaty of Sèvres, 10 August 1920; MELSON, R., *Revolution and Genocide. On the Origins of the Armenian Genocide and the Holocaust*, Chicago, The University of Chicago Press, 1992, 149; POWER, S., ‘Een probleem uit de hel’ *Amerika, het Westen en het tijdperk van de genocide*, Amsterdam, Contact, 2003, 68.

<sup>56</sup> MELSON, R., *Revolution and Genocide. On the Origins of the Armenian Genocide and the Holocaust*, Chicago, The University of Chicago Press, 1992, 150.

accepted its responsibility in the matter back then.<sup>57</sup> Today, however, Turkey has not (yet) officially acknowledged its responsibility and involvement in the systematic massacre of the Armenians.

A joint declaration of France, Great Britain and Russia describes the massacres as “new crimes of Turkey against humanity and civilization”. This was probably the first time that the term “crimes against humanity” was used in international law. The question is whether the destruction of the Armenians was in fact more than a crime against humanity. Did it constitute the crime of crimes: a genocide?<sup>58</sup>

The Turkish government did not cover up their responsibility for the harm inflicted upon the Armenians. The Minister of War Enver Pasha himself said the following in a conversation with Henry Morgenthau, the American ambassador at the time:

“We have this country under control. I have no desire to shift the blame on to our underlings and I am entirely willing to accept the responsibility myself for everything that has taken place. The Cabinet itself has ordered the deportations. I am convinced that we are completely justified in doing this owing to the hostile attitude of the Armenians toward the Ottoman government, but we are the real rulers of Turkey, and no underling would dare proceed in a matter of this kind without our orders.”<sup>59</sup>

It is disputed whether the conduct of the Ottoman Empire ascertains the intent to destroy the Armenians as a group, in whole or in part.<sup>60</sup> The indictment of the Turkish government states that the deportations entailed “massacres ... as acts subsidiary to a centrally directed plan.” Moreover, the indictment cites the testimony of General Vehib Pasha (General in the Ottoman Empire and commander of the Third Army):

“The massacre and destruction of the Armenians and the plunder and pillage of their goods were the results of decisions reached by Ittihad’s Central Committee<sup>61</sup> ... The atrocities were carried out under a program that was determined upon and involved a definite case of premeditation. It was ascertained that these atrocities and crimes were encouraged by the district attorneys whose dereliction of judicial

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<sup>57</sup> DADRAN, V. N., “The Turkish Military Tribunal’s Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Series”, *Holocaust and Genocide Studies*, 1997, 30; MELSON, R., *Revolution and Genocide. On the Origins of the Armenian Genocide and the Holocaust*, Chicago, The University of Chicago Press, 1992, 152.

<sup>58</sup> SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 20.

<sup>59</sup> MELSON, R., *Revolution and Genocide. On the Origins of the Armenian Genocide and the Holocaust*, Chicago, The University of Chicago Press, 1992, 148.

<sup>60</sup> Art. II Genocide Convention; art. 6 Rome Statute.

<sup>61</sup> Ottoman Turkish name for the Committee of Union and Progress (CUP).



duties in face of their occurrence and especially their remaining indifferent renders them accessories to these crimes”<sup>62</sup>

The indictment of the top leaders of the Turkish government states that the perpetrators carried out the deportations and massacres of the Armenian people with premeditation and intent. This was affirmed by the eventual verdict.<sup>63</sup>

### 1.1.2 *The Holocaust (1940-1945)*

The Holocaust - or Shoah (Hebrew for “the catastrophe”) - was the genocide of approximately six million Jews by the German Nazi regime during World War II. The National Socialist German Workers Party (NSDAP) came into power after Germany’s defeat in World War I and the failure of its democratic successor State, the Weimar Republic (1918-1933). The Nazi’s created a new political structure, named the Third Reich. The success of this new State was mainly based on the charisma of its Führer Adolf Hitler. The Nazi regime was characterized by polarization, racism and antisemitism. MELSON describes very clearly the ideology of Nazi antisemitism:

“(…) a uniquely good and gifted biological collectivity called the “Aryans” were destined to rule the earth for a thousand years, but they were opposed in this venture by a singularly wicked race called the “Jews”. By manipulating political and economic power, the Jews dominated the Aryans in Germany. Moreover, by controlling Bolshevik Russia the Jewish world conspiracy was preventing the Aryans from expanding east-ward and achieving the requisite Lebensraum (living space) and empire that would assure their well-being”.<sup>64</sup>

This deep feeling of antisemitism eventually led to the systematic mass destruction of Jews all over Europe.

In sum, there were three stages throughout the Nazi rule in handling the “Jewish problem” (*Judenfrage*):

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<sup>62</sup> DADRIAN, V. N., “Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications”, in *The Yale Journal of International Law*, Vol. 14, Nr. 2, 1989, 300-301; MELSON, R., *Revolution and Genocide. On the Origins of the Armenian Genocide and the Holocaust*, Chicago, The University of Chicago Press, 1992, 151.

<sup>63</sup> Turkish Military Tribunal, 5 July 1919; DADRIAN, V. N., “Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications”, in *The Yale Journal of International Law*, Vol. 14, Nr. 2, 1989, 301; MELSON, R., *Revolution and Genocide. On the Origins of the Armenian Genocide and the Holocaust*, Chicago, The University of Chicago Press, 1992, 152.

<sup>64</sup> MELSON, R., *Revolution and Genocide. On the Origins of the Armenian Genocide and the Holocaust*, Chicago, The University of Chicago Press, 1992, 171-174; 193-198; 206.

### 1) The prewar stage (1933-39)<sup>65</sup>

The destruction of the Jewish population was not (yet) a priority to the Nazi's and therefore less radical than in the years to come. However, Jews were listed and excluded from social and economic life. The three infamous Nuremberg laws<sup>66</sup> were published in 1935 to restrict Jewish public life and depriving them from their civil rights and German identity. The laws even prohibited sexual relations between Jews and "Aryan" Germans.

The exclusion and expulsion of Jews reached a peak during *Kristallnacht* in 1938. During the night of 9 to 10 November, a widespread Jewish pogrom took place. Jewish businesses, synagogues, schools etc. were demolished. Around 100 Jews were killed. Even though most non-Jewish Germans condemned the violent attacks, *Kristallnacht* was only the starting point of a radical persecution of Jewish people.<sup>67</sup>

### 2) The interim stage (1939-41)<sup>68</sup>

The Nazi's did not know yet what to do with Jews during the first years of World War II. They were randomly killed or expelled to ghetto's in the countryside. These deportations were executed by the paramilitary organization of the Nazi's, called the *Schutzstaffel* (better known as the SS). Many died of starvation, diseases or the cold.

Public transport was forbidden to Jews and the military controlled the use of telephones and mail. This meant that if Jews already found a way to flee their homes, it was impossible to contact their families and loved ones left behind. Many families did not know if their relatives were still alive.

### 3) The stage of the Final Solution or extermination (1941-45)<sup>69</sup>

At the Wannsee Conference in 1942, the Nazi's officially agreed on "the Final Solution to the Jewish problem". They left the earlier idea of deportation to the east, and instead opted for extermination

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<sup>65</sup> MELSON, R., *Revolution and Genocide. On the Origins of the Armenian Genocide and the Holocaust*, Chicago, The University of Chicago Press, 1992, 217-228; WÜNSCHMANN, K., "Cementing the Enemy Category: Arrest and Imprisonment of German Jews in Nazi Concentration Camps", *Journal of Contemporary History*, Vol. 45, No. 3, 577.

<sup>66</sup> *Nürnberger Gesetzen: Reichsbürgergesetz, Gesetz zum Schutze des Deutschen Blutes und der Deutschen Ehre und Reichsflaggengesetz*, 15 September 1935.

<sup>67</sup> MELSON, R., *Revolution and Genocide. On the Origins of the Armenian Genocide and the Holocaust*, Chicago, The University of Chicago Press, 1992, 225-227.

<sup>68</sup> DRIX, S., *Witness to Annihilation. Surviving the Holocaust. A Memoir*, Washington, Brassey's Inc., 1994, 22; MELSON, R., *Revolution and Genocide. On the Origins of the Armenian Genocide and the Holocaust*, Chicago, The University of Chicago Press, 1992, 228-232.

<sup>69</sup> MELSON, R., *Revolution and Genocide. On the Origins of the Armenian Genocide and the Holocaust*, Chicago, The University of Chicago Press, 1992, 232-240.

camps to systematically destroy all Jews once and for all. These extermination camps were built to predominantly gass Jews – together with persecuted minorities who were deported to these camps – with the effective Zyklon B<sup>70</sup> gas. Jews were also killed by mass executions or forced labor in inhuman conditions.

### **Bringing the perpetrators to justice?**

The Allied forces installed the Nuremberg Tribunal in November 1945 to prosecute war criminals for 1) crimes against peace, 2) crimes against humanity, 3) war crimes and 4) the conspiracy to commit the three criminal acts mentioned before.<sup>71</sup> The Nuremberg Tribunal convicted and sentenced several dominant leaders and accomplices of the Nazi regime, such as Hermann Göring, Joachim von Ribbentrop and Albert Speer. The importance of these trials will be further addressed in the next part of this chapter concerning the evolution of the legal concept of genocide.

The horrendous crimes committed by the Nazi regime in World War II called for the creation of a legal term to designate the crime of the destruction of an entire human group.<sup>72</sup> The term genocide was coined by World War II survivor Raphael Lemkin, a Polish Jew who fled his native country after the Nazi occupation. He wanted to invent a word that could capture the destructive nature of the crimes committed by the Nazi regime, a word that would cause outrage and shivering. He merged the Latin words *genos* (race, kin, tribe) and *caedere/occidere* (to kill, to fall): genocide signifies a coordinated attempt to destroy the essential foundations of the life of national groups, with the aim of annihilating the group.<sup>73</sup> Lemkin published detailed legal arguments in his book *Axis Rule in*

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<sup>70</sup> “Zyklon B is the trade name of a cyanide-based pesticide invented in Germany in the early 1920s. (...) The product is infamous for its use by Nazi Germany during the Holocaust to murder approximately one million people in gas chambers installed at Auschwitz-Birkenau, Majdanek, and other extermination camps.” Source: [https://en.wikipedia.org/wiki/Zyklon\\_B](https://en.wikipedia.org/wiki/Zyklon_B)

<sup>71</sup> *Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945; Article 6 Nuremberg Charter (Charter of the International Military Tribunal), 8 August 1945.

<sup>72</sup> M. LATTIMER, *Genocide and Human Rights*, Hampshire, Ashgate, 2007, 5; LEMKIN, R., “Genocide as a Crime under International Law”, *American Journal of International Law*, 1947, 147; TAMS, C.J., BERSTER, L. and SCHIFFBAUER, B., *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*, München, Verlag C.H. Beck oHG, 2015, 5.

<sup>73</sup> LATTIMER, M., *Genocide and Human Rights*, Hampshire, Ashgate, 2007, 5; LEMKIN, R., *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington, Carnegie Endowment for International Peace, 1944, 79; LEMKIN, R., “Genocide as a Crime under International Law”, *American Journal of International Law*, 1947, 147; POWER, S., ‘Een probleem uit de hel’ *Amerika, het Westen en het tijdperk van de genocide*, Amsterdam, Contact, 2003, 63; TAMS, C.J., BERSTER, L. and SCHIFFBAUER, B., *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*, München, Verlag C.H. Beck oHG, 2015, 6.

*Occupied Europe*. The term caught on in the international community.<sup>74</sup> The Washington Post wrote on 3 December 1944:

“Genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”<sup>75</sup>

Lemkin dedicated his life to the international recognition of the crime of genocide. The biggest reward for his hard work was the creation of the Genocide Convention of 1948 (*infra*).

### 1.1.3 *Cambodia (1975-1979)*

In April 1975, the Khmer Rouge took control in Cambodia. Khmer Rouge was a communist political party (or simply a criminal organization<sup>76</sup>) influenced by the socialist ideas of Stalin and Mao. They believed in a classless agrarian society. As soon as they had seized Phnom Penh, they ordered the evacuation of the entire city to the countryside, where the deported townspeople were forced to work on farms. Because the Khmer Rouge soldiers confiscated or destroyed the vehicles, approximately 2 million citizens had to walk. Many died on their way because of starvation, heat or diseases. Others were sent outside the city to the so-called Killing Fields to be executed.<sup>77</sup>

What characterizes the Cambodian Genocide is that the Khmer Rouge did not target specific minorities because they were “different”, unlike the persecution of Jews by the Nazi’s or the oppression of the Armenians by the Ottoman Empire. In order to establish a classless society, one had to erase all religious, cultural or ethnic differences between people. The Khmer Rouge targeted Vietnamese and Chinese ethnic minorities, Muslim, Buddhist and Catholic religious minorities, educated professionals and intellectuals or anyone affiliated with the previous government and other

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<sup>74</sup> GELLATELY, R. and KIERNAN, B., “The Study of Mass Murder and Genocide”, in GELLATELY, R. and KIERNAN, B. (eds.), *The Specter of Genocide. Mass Murder in Historical Perspective*, New York, Cambridge University Press, 2003, 5; LEMKIN, R., *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington, Carnegie Endowment for International Peace, 1944; POWER, S., ‘Een probleem uit de hel’ *Amerika, het Westen en het tijdperk van de genocide*, Amsterdam, Contact, 2003, 62-66.

<sup>75</sup> *Genocide*, Washington Post, 3 December 1944.

<sup>76</sup> ETCHESON, C., *After the Killing Fields. Lessons from the Cambodian Genocide*, Westport, Praeger, 2005, 4.

<sup>77</sup> BALINT, J., *Genocide, State Crime and the Law*, Oxon, Routledge, 2012, 16-17; DICKLITCH, S and MALIK, A, “Justice, Human Rights, and Recconciliation in Postconflict Cambodia” in *Human Rights Review*, December 2010, Volume 11, Issue 4, 516-517; POWER, S., ‘Een probleem uit de hel’ *Amerika, het Westen en het tijdperk van de genocide*, Amsterdam, Contact, 2003, 112; RODMAN, P. W., “Grantmanship & the Killing Fields”, in *Commentary*, New York, March 1996, 101.3, 52.

foreign (capitalist) governments. The Cambodian Genocide is also known as an auto-genocide, because the Khmer Rouge did not spare its own Cambodian citizens from the mass killings.<sup>78</sup> 20 percent of Cambodia's population was killed during the Khmer Rouge regime.<sup>79</sup>

### **Bringing the perpetrators to justice?**

Many attempts were made to fight the impunity of the Khmer Rouge perpetrators. In 1979, the People's Revolutionary Tribunal convicted Khmer Rouge leader Pol Pot and his brother-in-law, Ieng Sary, of committing genocide. However, sentences were never imposed since Ieng Sary was pardoned by the government and Pol Pot was never captured. Pol Pot eventually died in 1998 without ever having been punished for his crimes. Critics call their trial a "show trial" since it did not meet the required standards for due process. Afterwards, several low-level perpetrators were tried in domestic Cambodian courts. It is unknown how many people precisely were brought before these courts and in which circumstances the procedures were held.<sup>80</sup>

In 2003, almost 30 years after the genocide, the UN and Cambodia finally agreed to establish the Extraordinary Chambers of the Courts of Cambodia (ECCC). Article 1 of the ECCC Law<sup>81</sup> stipulates that the purpose of the court is "to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979". The crime of genocide as defined in the Genocide Convention is included in the jurisdiction of the ECCC.<sup>82</sup>

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<sup>78</sup> BALINT, J., *Genocide, State Crime and the Law*, Oxon, Routledge, 2012, 16; DICKLITCH, S and MALIK, A, "Justice, Human Rights, and Recociliation in Postconflict Cambodia" in *Human Rights Review*, December 2010, Volume 11, Issue 4, 516-517; ETCHESON, C., *After the Killing Fields. Lessons from the Cambodian Genocide*, Westport, Praeger, 2005, 7; POWER, S., 'Een probleem uit de hel' *Amerika, het Westen en het tijdperk van de genocide*, Amsterdam, Contact, 2003, 113; RODMAN, P. W., "Grantmanship & the Killing Fields", in *Commentary*, New York, March 1996, 101.3, 52; SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 138.

<sup>79</sup> DICKLITCH, S and MALIK, A, "Justice, Human Rights, and Recociliation in Postconflict Cambodia" in *Human Rights Review*, December 2010, Volume 11, Issue 4, 516; POWER, S., 'Een probleem uit de hel' *Amerika, het Westen en het tijdperk van de genocide*, Amsterdam, Contact, 2003, 114; RODMAN, P. W., "Grantmanship & the Killing Fields", in *Commentary*, New York, March 1996, 101.3, 51.

<sup>80</sup> ETCHESON, C., *After the Killing Fields. Lessons from the Cambodian Genocide*, Westport, Praeger, 2005, 130-131; JARVIS, H., "Trials and Tribulations: The Long Quest for Justice for the Cambodian Genocide", in MEISENBERG, S. M. and STEGMILLER, I. (eds.), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law*, The Hague, T.M.C. Asser Press, 2016, 16; MARKS, S. P., "Elusive Justice for the Victims of the Khmer Rouge", in *Journal of International Affairs*, Spring 1999; 52; 2, 700; SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 419-420.

<sup>81</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003.

<sup>82</sup> Art. 4 ECCC Law; JARVIS, H., "Trials and Tribulations: The Long Quest for Justice for the Cambodian Genocide", in MEISENBERG, S. M. and STEGMILLER, I. (eds.), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law*, The Hague, T.M.C. Asser Press, 2016, 21.

Nuon Chea and Khieu Samphan were two key members of the Khmer Rouge regime. They are the only ones charged with genocide before the ECCC up to today. The allegations include carrying out genocide against the Cham Muslims and Vietnamese people. The trial hearings commenced on 17 October 2014 and are still ongoing.<sup>83</sup>

#### 1.1.4 *Bosnia (1992-1995)*

The former Socialist Federal Republic of Yugoslavia (SFRY) consisted of six republics. In 1991, the Serbian president Slobodan Milošević arrogated more power to the Socialist Republic (SR) Serbia, which led to the independence of SR Slovenia and SR Croatia. Bosnia was the most ethnically diverse Republic of the SFRY at the time, with a population of 44 percent Muslims, 35 percent orthodox Serbs and 18 percent catholic Croats. As Serbia gained more power in Yugoslavia, it was most likely that the Serbian citizens of Bosnia would receive preferential treatment. In 1992, Bosnia held a referendum for independence. 99,4 percent voted in favor. The Bosnian Serbs, however, did not accept the Bosnian independence. With the support of president Milošević, they started persecuting non-Serbs and destroying cultural and religious places of Muslims and Croats. Extinguishing non-Serbs would lead to the creation of a ‘Greater Serbia’, an ethnically homogeneous State. The use of concentration camps, rape camps and mass killings eventually led to the death of approximately 300 000 Bosnians.<sup>84</sup>

The Bosnian Serbs called the destructive and humiliating attacks on Bosnian – mainly Muslim – civilians ‘ethnic cleansing’. This rather euphemistic term strongly resembles the *Säuberung* policy of the Nazi’s: making Germany *Judenfrei*, free of Jews.<sup>85</sup> After the Bosnian war, a Commission of Experts appointed by the UN Security Council stated:

“55. The expression ‘ethnic cleansing’ is relatively new. Considered in the context of the conflicts in the former Yugoslavia, ‘ethnic cleansing’ means rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area. ‘Ethnic cleansing’ is contrary to international law.

56. Based on the many reports describing the policy and practices conducted in the former Yugoslavia, ‘ethnic cleansing’ has been carried out by means of murder, torture, arbitrary arrest and

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<sup>83</sup> ECCC - Case 002/02.

<sup>84</sup> BALINT, J., *Genocide, State Crime and the Law*, Oxon, Routledge, 2012, 17-18; POWER, S., ‘Een probleem uit de hel’ *Amerika, het Westen en het tijdperk van de genocide*, Amsterdam, Contact, 2003, 279-281; 282.

<sup>85</sup> BALINT, J., *Genocide, State Crime and the Law*, Oxon, Routledge, 2012, 17-18; POWER, S., ‘Een probleem uit de hel’ *Amerika, het Westen en het tijdperk van de genocide*, Amsterdam, Contact, 2003, 281; SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 9; 221; 224; 226.

detention, extra-judicial executions, rape and sexual assaults, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property. Those practices constitute crimes against humanity and can be assimilated to specific war crimes. Furthermore, such acts could also fall within the meaning of the Genocide Convention.”<sup>86</sup>

However, it is debatable whether ethnic cleansing can be equated with genocide. Ethnic cleansing, unlike genocide, is not a legal term. It stands for the expulsion of a civilian population from a territory, but not necessarily for the total extermination of that population. The people are driven away or deported and often only the elite of the targeted group is killed, as a threat to the other people. However, depending on the circumstances, if the use of violence escalates, ethnic cleansing can be qualified as a genocide. The UN General Assembly drafted a resolution claiming that the ethnic cleansing of the Bosnian people was a form of genocide.<sup>87</sup>

### **Bringing the perpetrators to justice?**

After the Yugoslavian wars, the United Nations established the International Criminal Tribunal of the former Yugoslavia (ICTY) in 1993. The ICTY is an *ad hoc* tribunal which implies that its scope of application is limited to a certain territory and certain crimes. Therefore, the ICTY is an “international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991”.<sup>88</sup> The establishment of the ICTY is a milestone in the international process of holding perpetrators of human rights violations responsible for their actions. The concept of individual criminal responsibility had been addressed in the Nuremberg Trials already, but the ICTY differs from the Nuremberg Tribunal in that it was established by the international community, while the Nuremberg Tribunal has been accused of merely rendering the victor’s justice.<sup>89</sup>

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<sup>86</sup> “Interim Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)”, UN Doc. S/1993/35374, para. 55-56; “Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)”, UN Doc. S/1994/674, para. 129-130; CLARK, R. S. and SANN, M. (eds.), *The Prosecution of International Crimes*, New Brunswick, Transaction Publishers, 1996, 165.

<sup>87</sup> UN General Assembly, *Resolution on the Situation in Bosnia and Herzegovina*, A/RES/47/121, 18 December 1992; GELLATELY, R. and KIERNAN, B., “The Study of Mass Murder and Genocide”, in GELLATELY, R. and KIERNAN, B. (eds.), *The Specter of Genocide. Mass Murder in Historical Perspective*, New York, Cambridge University Press, 2003, 19-20; SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 224-234.

<sup>88</sup> UN Security Council, *Statute of the International Criminal Tribunal for the former Yugoslavia*, 25 May 1993; CLARK, R. S. and SANN, M. (eds.), *The Prosecution of International Crimes*, New Brunswick, Transaction Publishers, 1996, 170; SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 112-115; WERLE, G., *Principles of International Criminal Law*, Oxford, Oxford University Press, 2009, 270.

<sup>89</sup> CLARK, R. S. and SANN, M. (eds.), *The Prosecution of International Crimes*, New Brunswick, Transaction Publishers, 1996, 166; LESCURE, K. and TRINTIGNAC, F., *International Justice for Former Yugoslavia. The Working of the International Criminal Tribunal of The Hague*, The Hague, Kluwer Law International, 1996, 3-5.

In 2001, the ICTY rendered its first conviction of genocide: general Radislav Krstić was found guilty of the genocide committed in Srebrenica and was sentenced to 46 years of imprisonment. Srebrenica was declared a “safe area” by the UN Security Council in 1993. It was an enclave populated by Bosnian Muslims, most of them already fled their homes in nearby villages. In July 1995, the Bosnian Serbs began attacking Srebrenica under the command of general Ratko Mladić and general Radislav Krstić. The Serb army deported the Muslims to the UN headquarter in Potočari, where they then separated women and children from men and boys. The men were beaten, humiliated and executed. Between seven and eight thousand men were executed between 13 and 19 July 1995. The ICTY found that “genocide was committed in Srebrenica” and that general Krstić was guilty of “aiding and abetting genocide”.<sup>90</sup>

Besides general Krstić, the ICTY has convicted only a few people of committing or aiding genocide during the Bosnian war: Vujadin Popović, Ljubiša Beara and Drago Nikolić<sup>91</sup>; Radovan Karadžić<sup>92</sup> and Zdravko Tolimir<sup>93</sup>. General Ratko Mladić is still on trial on the account of genocide.

### 1.1.5 Rwanda (1994)

The Rwandan genocide was the most efficient mass killing of the twentieth century. Approximately one million Tutsi’s and Hutu moderates were killed in only hundred days’ time.<sup>94</sup> Even though Hutu’s and Tutsi’s share the same language, religion and traditions, the relation between the two major Rwandan groups has been rather tense since the colonization of Rwanda by Germany and then Belgium. It was only during this period of colonialism that the Europeans labeled the Tutsi’s and Hutu’s as distinct races based on their physical appearance and social status, in order to better understand the complexities of African society. By favoring the Tutsi’s and granting them the best

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<sup>90</sup> *Prosecutor v. Radislav Krstic*, ICTY, 2 August 2001; *Prosecutor v. Radislav Krstic*, ICTY (Appeals Chamber), 19 April 2004; POWER, S., ‘Een probleem uit de hel’ *Amerika, het Westen en het tijdperk van de genocide*, Amsterdam, Contact, 2003, 433-448; WERLE, G., *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2009, 245; <http://www.icty.org/en/press/radislav-krstic-becomes-first-person-be-convicted-genocide-icty-and-sentenced-46-years>

<sup>91</sup> *Prosecutor v. Popovic et al.*, ICTY (Appeals Chamber), 30 January 2015.

<sup>92</sup> *Prosecutor v. Karadžić*, ICTY, 24 March 2016.

<sup>93</sup> *Prosecutor v. Tolimir*, ICTY, 8 April 2015.

<sup>94</sup> CLARK, P., *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers*, New York, Cambridge University Press, 2010, 12; MELVERN, L., “The Past is Prologue: Planning the 1994 Rwandan Genocide”, in CLARK, P. and KAUFMAN, Z. D. (eds.), *After Genocide*, New York, Columbia University Press, 2009, 21; POWER, S., ‘Een probleem uit de hel’ *Amerika, het Westen en het tijdperk van de genocide*, Amsterdam, Contact, 2003, 375; WERLE, G., *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2009, 254.



social positions in society, the colonizers incited a feeling of inferiority among the Hutu's. This led to an extreme hatred towards the Tutsi's.<sup>95</sup>

After the decolonization of Rwanda, the violence between the two majority groups escalated to an unseen level in 1994, triggered by the death of Rwandan president Habyarimana in April 1994. The president was flying home from a meeting of heads of State together with the president of Burundi, Ntaryamira, when their plane was shot down by air missiles shot from Kigali, the capital of Rwanda. The perpetrators are still unknown.<sup>96</sup> Military officer Théoneste Bagosora took control after the president's death. He established an interim government, consisting of only Hutu party leaders. Bagosora and his supporters set out a well-defined strategy to give the violence an ethnic spin. They told citizens to unite against their "common enemy", clearly aiming at the Tutsi civilians and the Tutsi-led Rwandan Patriotic Front (RPF). The Rwandan genocide was as much inspired by a racist ideology as the Holocaust or the Armenian genocide.<sup>97</sup> Different, however, was the large scale of participation of ordinary Hutu citizens (sometimes even priests and pastors). Extremist media sources such as the Radio Télévision Libre des Mille Collines (RTLNC) spread racist propaganda against Tutsi's. Their broadcasts reached many Hutu citizens, who then joined the military forces in the massacre of the Tutsi's using machetes, sticks or other farming instruments. Their participation contributed to the speed and great extent of the Rwandan genocide.<sup>98</sup>

### **Bringing the perpetrators to justice?**

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<sup>95</sup> BORNKAMM, P. C., *Rwanda's Gacaca Courts: Between Retribution and Reparation*, New York, Oxford University Press, 2012, 9-10; CLARK, P., *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers*, New York, Cambridge University Press, 2010, 16-18; MELSON, R., "Modern genocide in Rwanda: Ideology, Revolution, War and Mass Murder in an African State", in GELLATELY, R. and KIERNAN, B. (eds.), *The Specter of Genocide. Mass Murder in Historical Perspective*, New York, Cambridge University Press, 2003, 328-329.

<sup>96</sup> CLARK, P., *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers*, New York, Cambridge University Press, 2010, 14; DES FORGES, A., "Leave none to tell the story" *Genocide in Rwanda*, New York, Human Rights Watch, 1999, 181-182; KAYIGAMBA, J. B., "Without Justice, No Reconciliation: A Survivor's Experience of Genocide", in CLARK, P. and KAUFMAN, Z. D. (eds.), *After Genocide*, New York, Columbia University Press, 2009, 41; POWER, S., 'Een probleem uit de hel' *Amerika, het Westen en het tijdperk van de genocide*, Amsterdam, Contact, 2003, 369.

<sup>97</sup> CLARK, P., *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers*, New York, Cambridge University Press, 2010, 14; DES FORGES, A., "Leave none to tell the story" *Genocide in Rwanda*, New York, Human Rights Watch, 1999, 196; 202-203; KAYIGAMBA, J. B., "Without Justice, No Reconciliation: A Survivor's Experience of Genocide", in CLARK, P. and KAUFMAN, Z. D. (eds.), *After Genocide*, New York, Columbia University Press, 2009, 36; MELSON, R., "Modern genocide in Rwanda: Ideology, Revolution, War and Mass Murder in an African State", in GELLATELY, R. and KIERNAN, B. (eds.), *The Specter of Genocide. Mass Murder in Historical Perspective*, New York, Cambridge University Press, 2003, 326.

<sup>98</sup> CLARK, P., *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers*, New York, Cambridge University Press, 2010, 12-13; MELSON, R., "Modern genocide in Rwanda: Ideology, Revolution, War and Mass Murder in an African State", in GELLATELY, R. and KIERNAN, B. (eds.), *The Specter of Genocide. Mass Murder in Historical Perspective*, New York, Cambridge University Press, 2003, 334; 337.

As always, the international community was initially very reluctant to use the word genocide, fearing the legal and moral obligations that would ensue from recognizing this type of crime. Only on June 8<sup>th</sup> did the UN Security Council officially use the word “genocide” in its resolution.<sup>99</sup>

In November 1994 the International Criminal Tribunal for Rwanda (ICTR) was established. After the example of the ICTY, it is an *ad hoc* tribunal. The ICTR has jurisdiction over crimes committed in Rwanda from 1 January 1994 until 31 December 1994. It held almost exclusively trials on the crime of genocide.<sup>100</sup> On 2 September 1998, the ICTR rendered the first conviction ever of genocide by an international tribunal.<sup>101</sup> The ICTR formally closed in December 2015, completing 58 cases in 21 years.<sup>102</sup>

In addition to the ICTR established by the UN Security Council, Rwanda also initiated domestic criminal proceedings against perpetrators of the Rwandan genocide. The first trials were held in 1996, but quickly it became clear that the Rwandan judicial system lacked the experience to grant a fair trial. In 2001, the Transitional National Assembly of Rwanda established the *gacaca* courts. *Gacaca* stands for an ancient form of dispute resolution used at the local level, with the participation of the local population and carried out by local leaders. *Gacaca* courts focus not so much on prosecution and punishment, but rather on finding the truth, peace, healing, forgiveness and reconciliation. Victims play a bigger role here than in more conventional criminal courts. To ensure that the locals can speak freely and to create a communal environment, lawyers are banned from the *gacaca*.<sup>103</sup> It is a very informal way of rendering justice that is often criticized because it does not meet the international standards of a fair trial. Being community courts, the *gacaca* courts only address crimes committed within and against a certain community. The leading perpetrators of the genocide are tried before conventional criminal courts or the ICTR because of the legal complexity of their cases.<sup>104</sup> The *gacaca* courts completed their work in 2012 after approximately 1,9 million people appeared.

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<sup>99</sup> UN Security Council, *Resolution on extension of the mandate and deployment of the 2 additional battalions of the UN Assistance Mission for Rwanda and settlement of the conflict in Rwanda*, S/RES/925, 8 June 1994; DES FORGES, A., “Leave none to tell the story” *Genocide in Rwanda*, New York, Human Rights Watch, 1999, 636-644; “Officials Told to Avoid Calling Rwanda Killings Genocide”, *New York Times*, 9 June 1994, <http://www.nytimes.com/1994/06/10/world/officials-told-to-avoid-calling-rwanda-killings-genocide.html>.

<sup>100</sup> Art. 1 UN Security Council, *Statute of the International Criminal Tribunal for Rwanda*, 8 November 1994; SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 455.

<sup>101</sup> *Prosecutor v. Jean-Paul Akayesu*, ICTR (Trial Chamber), 2 September 1998; *Prosecutor v. Jean-Paul Akayesu*, ICTR (Appeals Chamber), 1 June 2001. Note that on 1 May 1998, Jean Kambanda already plead guilty on the account of genocide, confirmed in *Prosecutor v. Jean Kambanda*, ICTR (Trial Chamber), 4 September 1998.

<sup>102</sup> <http://unictr.unmict.org/en/cases>.

<sup>103</sup> CLARK, P., *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers*, New York, Cambridge University Press, 2010, 3-4; 31; 83; SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 418.

<sup>104</sup> BORNKAMM, P. C., *Rwanda’s Gacaca Courts: Between Retribution and Reparation*, New York, Oxford University Press, 2012, 45.

## 1.2. The Legal Prohibition of Genocide

Throughout these horrendous events in the twentieth century, the criminal responsibility for human rights violations has gained importance. Legal scholars, genocide survivors, diplomats and UN employees from all over the world helped step by step to fight the persistent culture of impunity. It is debatable whether they really succeeded in their work, but important changes certainly have been made in the criminalization of genocide.

The international community has also become more aware of the individual criminal responsibility of perpetrators of international crimes such as genocide. By convicting individual perpetrators, one can avoid stigmatizing an entire group of people. For example, not all Germans are responsible for the Holocaust, nor all Hutu's for the destruction of the Tutsi's. Nevertheless, it is essential to victims to not be forgotten. Their lives will most likely never be the same again after what they have been through, but it is often important for victims that the rest of the world knows what happened and who is responsible for their suffering. Sometimes a mere conviction may suffice to sooth a victim's psychological pain.

### *1.1.1. After World War I*

After World War I, the international protection of human rights became a more serious concern. The demand to hold perpetrators responsible for mass crimes translated itself in the early development of international criminal law. Moreover, the international community recognized that national minorities had to be protected from their own government, bearing in mind the mass destruction of the Armenian people.<sup>105</sup>

The Treaty of Versailles<sup>106</sup> held German Emperor William II of Hohenzollern responsible for crimes committed during World War I. The former Emperor had unfortunately already fled to The Netherlands and was granted asylum there by the time the Treaty was concluded. He was never brought before a criminal court.<sup>107</sup> Nevertheless, the Versailles Treaty turned out to be a remarkable step in the development of international criminal law. It was the first time that the idea of individual

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<sup>105</sup> SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 19.

<sup>106</sup> Treaty of Peace with Germany (Treaty of Versailles), 28 June 1919.

<sup>107</sup> WERLE, G., *Principles of International Criminal Law*, Oxford, Oxford University Press, 2009, 4.

criminal liability under international law was acknowledged. This idea of individual accountability would, however, only be implemented after the atrocities committed during the next World War.<sup>108</sup>

### 1.1.2. Nuremberg Trials

“So habe ich, einstweilen nur im Osten, meine Totenkopfverbände bereitgestellt mit dem Befehl, unbarmherzig und mitleidslos Mann, Weib und Kind polnischer Abstammung und Sprache in den Tod zu schicken. Nur so gewinnen wir den Lebensraum, den wir brauchen. Wer redet heute noch von der Vernichtung der Armenier?”<sup>109</sup>

With these words Adolf Hitler expressed his intention to carry out a genocide. The reference to the Armenian people indicates that he was confident his actions would go unpunished, and he was not entirely wrong to think that, considering the inertia of domestic legal systems (cf. *supra*).

Still lacking a name for the destruction of ethnic or religious groups, the president of the United States of America Franklin Roosevelt spoke in March 1944 about “the wholesale systematic murder of the Jews of Europe” and stated that “none who participate in these acts of savagery shall go unpunished”.<sup>110</sup> After defeating the Germans, the Allied forces established the Nuremberg Tribunal in the Fall of 1945 (*supra*). This Tribunal tried the major war criminals based on the Nuremberg Charter. Article 6 (1) of the Charter was explicitly linked to the brand-new term invented by Raphael Lemkin (*supra*). The Nuremberg Tribunal explicitly charged several war criminals with the crime of genocide. The term was even addressed during the trials: British prosecutor Sir David Maxwell Fyfe told defendant Konstantin Von Neurath that genocide entailed “a co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups with the aim of annihilating the groups themselves” and the French prosecutor Auguste Champetier de Ribes said that “this is a crime so monstrous, so undreamt of in history through the Christian era up to the birth of Hitlerism, that the term “genocide” had to be coined to define it”. However, the final judgment of

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<sup>108</sup> WERLE, G., *Principles of International Criminal Law*, Oxford, Oxford University Press, 2009, 6-7; SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 21-24; 26.

<sup>109</sup> “I have placed my death-head formations in readiness - for the present only in the East - with orders to them to send to death mercilessly and without compassion, men, women, and children of Polish derivation and language. Only thus shall we gain the Lebensraum which we need. Who, after all, speaks today of the annihilation of the Armenians?” Hitler’s Obersalzberg speech, August 1939, <http://www.armenian-genocide.org/hitler.html>; POWER, S., ‘Een probleem uit de hel’ *Amerika, het Westen en het tijdperk van de genocide*, Amsterdam, Contact, 2003, 44; SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 1.

<sup>110</sup> SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 36.

the Nuremberg Tribunal did not mention the term genocide in their lengthy conviction of the perpetrators, even though precisely describing what genocide actually entails.<sup>111</sup>

### 1.1.3. General Assembly Resolution 96 (I)

Shortly after the final judgment of the Nuremberg Tribunal, the newly established UN General Assembly prepared a resolution on genocide. Resolution 96 (I) defines what genocide is and officially recognizes it as a crime under international law for which private individuals and officials can be held accountable. Moreover, it strongly encourages the international community to draft the necessary legislation to prevent and punish the crime of genocide. Even though resolutions of the UN General Assembly are not a binding source of law, this resolution has great authority since it was adopted unanimously and without any debate.<sup>112</sup> It was a first step towards the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) of 1948.

### 1.1.4. Genocide Convention (1948)

The Genocide Convention<sup>113</sup> constituted the first legally binding instrument to criminalize genocide. Article I of the Genocide Convention firstly introduces genocide as an international crime, regardless of any link with an armed conflict.<sup>114</sup> Secondly, it expresses the obligation of States to prevent and to punish the crime of genocide. Thus, States have three essential obligations: a duty to prevent genocide, a duty to punish its perpetrators and a duty not to commit genocide themselves. The Convention does not, however, specify what the prevention of genocide entails.<sup>115</sup>

Article II of the Genocide Convention then defines genocide:

“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;

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<sup>111</sup> *France et al. v. Göring et al.*, International Military Tribunal (Nuremberg), 1 October 1946; SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 43-44.

<sup>112</sup> UN General Assembly, *Resolution on The Crime of Genocide*, 11 December 1946; SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 52-58; WERLE, G., *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2009, 255.

<sup>113</sup> UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948.

<sup>114</sup> Usually, genocides occur in situations of war. The Armenian genocide was committed during the first World War, the Holocaust during the second. Cambodia and Bosnia were also involved in internal wars when the respective genocides happened. However, in the case of the Rohingya's – as in Rwanda – there is no armed conflict going on. On the contrary, the newly established democratic regime is on the rise (and supported by the international community). As in Rwanda, the international community fails to appreciate the urgency of the situation.

<sup>115</sup> SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 81-83; TAMS, C.J., BERSTER, L. and SCHIFFBAUER, B., *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*, München, Verlag C.H. Beck oHG, 2015, 34.

- (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.”

The five subparagraphs are an exhaustive list of criminal acts establishing the crime of genocide. These acts represent the material or physical element of genocide. Either an act of commission or an act of omission can embody this material element. Three of the acts require the proof of the act itself and proof of a result as an outcome of the act: killing members of a group, causing serious bodily or mental harm to members of the group, and forcibly transferring children of the group to another group. Not all crimes have to be present to constitute the crime of genocide. The other two acts require the proof of the act itself and proof of the specific intent of the perpetrator. The commission or omission of just one of the acts suffices.<sup>116</sup>

Furthermore, genocide also comprises a mental element. Article II of the Convention stipulates that the acts ought to be committed with the intent to do harm. Unfortunately, the Convention does not define intent, nor does it describe how to prove intent. It was only with the establishment of the International Criminal Court that the mental element of genocide was further explained. In order to be responsible for committing genocide (or any other crime within the jurisdiction of the Court), a person has to have both intent and knowledge. The Rome Statute stipulates that ‘a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events’, and that ‘‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.’<sup>117</sup> Roughly, one can distinguish between two legal positions: a purpose-based approach that focuses on the notion of intent, being the personal motives of the perpetrator, or a knowledge-based approach that focuses on the collective plan or policy of a State or group.<sup>118</sup>

Article II also restricts the scope of its application to genocide committed against a national, ethnical, racial or religious group. This restrictive list is characterized by the fact that group membership is

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<sup>116</sup> SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 176-178.

<sup>117</sup> Article 30 Rome Statute; SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 241-242.

<sup>118</sup> SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 242-243.

generally determined by birth. Being a member of a group is therefore something spontaneous, beyond the control of the individuals constituting the group.

National groups are clearly connected because of their nationality, while an ethnic group essentially shares a common cultural tradition and common history, often found in a specific geographical region. Members of an ethnic group do not necessarily share “racial” characteristics, as opposed to a racial group of course. Race is based on similar physical characteristics. Religious groups have the same faith, excluding atheistic groups.<sup>119</sup>

Article III specifies the acts that fall within the scope of the Convention. This includes taking part in a conspiracy to commit genocide, the direct and public incitement to commit genocide, the attempt to commit genocide or the complicity in genocide. Of course, all the State Parties had to agree upon the common meaning of concepts like conspiracy, attempt and complicity since it addresses the issue of criminal participation. States also wanted to avoid that forbidding the incitement to commit genocide would interfere with the freedom of expression. Article IV of the Convention then states that public officials can also be held accountable for committing the previously stipulated undertakings.<sup>120</sup>

It took almost 50 years to officially enforce the Convention for the first time, i.e. during the ICTY and ICTR trials. It is remarkable that the Convention does not grant States the international jurisdiction to prosecute genocide, but only allows the prosecution by international courts such as the ICTY and ICTR in the past and the ICC today. These *ad hoc* international tribunals showed, however, that it is impossible to bring every single perpetrator to justice. Critics underline that the ICTY and ICTR were not able to prosecute all alleged perpetrators of the respective Bosnian and Rwandan genocide.<sup>121</sup>

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<sup>119</sup> SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 117-150; WERLE, G., *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2009, 258-263.

<sup>120</sup> SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 83; 176.

<sup>121</sup> ETCHESON, C., *After the Killing Fields. Lessons from the Cambodian Genocide*, Westport, Praeger, 2005, 129; GELLATELY, R. and KIERNAN, B., “The Study of Mass Murder and Genocide”, in GELLATELY, R. and KIERNAN, B. (eds.), *The Specter of Genocide. Mass Murder in Historical Perspective*, New York, Cambridge University Press, 2003, 5-6; SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 57; WERLE, G., *Principles of International Criminal Law*, Oxford, Oxford University Press, 2009, 245; 254-256; “Rwanda Genocide: the Fight to Bring the Perpetrators to Justice”, *The Guardian*, 2 April 2014, <https://www.theguardian.com/world/2014/apr/02/rwanda-genocide-fight-justice>; “Rwanda Genocide: International Criminal Tribunal Closes”, *BBC*, 14 December 2015, <http://www.bbc.com/news/world-africa-35070220>.

### 1.1.5. Rome Statute

The Genocide Convention implicitly required the establishment of a competent international tribunal that could try people charged with genocide or any of the other acts stipulated in the Convention. It was only in 1998 that the International Criminal Court saw the light of day.<sup>122</sup>

The Rome Statute forms the legal basis of the ICC (*supra*). The ICC is the first permanent criminal court that has international jurisdiction to prosecute the crime of genocide. It is one of the core international crimes that falls within the Court's jurisdiction. The Court even has inherent jurisdiction over the crime of genocide, as opposed to the other core crimes. This means that by merely ratifying the Rome Statute, State parties agree that the Court has jurisdiction over the crime of genocide. For the other crimes (crimes against humanity, war crimes, the crime of aggression, torture and apartheid), State parties must opt-in to the jurisdiction of the Court. This shows that States still see genocide as the crime of crimes.<sup>123</sup>

Article 6 Rome Statute is an exact copy of article II of the Genocide Convention.<sup>124</sup> When further examining whether the case of the Rohingya people can be brought before the ICC, this thesis will mainly focus on the Rome Statute.

## 2. The Case of the Rohingya People

The living conditions of Rohingya people in Rakhine State have become more and more precarious over the last few years. Legal experts say that their persecution might be aimed at the extermination of the group, and therefore could be called a genocide.<sup>125</sup> As mentioned before, article II of the Genocide Convention requires two elements to be at hand: firstly, a material element (the presence of at least one of the five acts stipulated in the subparagraphs), and secondly a mental element (“intent to destroy”).

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<sup>122</sup> Article VI Genocide Convention; SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 101.

<sup>123</sup> SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 103-104.

<sup>124</sup> WERLE, G., *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2009, 255-256.

<sup>125</sup> COWLEY, A. and ZARNI, M., “The Slow-Burning Genocide of Myanmar’s Rohingya”, *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3; “International Mission of Inquiry: Burma. Repression, Discrimination and Ethnic Cleansing in Arakan”, *International Federation of Human Rights League* report, April 2000 n° 290/2; Allard K. Lowenstein International Human Rights Clinic at Yale Law School, “Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.”, October 2015.



## 2.1. Material Elements

### 2.1.1. Acts

Article II of the Genocide Convention and article 6 of the Rome Statute contain an exhaustive list of criminal acts with regard to the crime of genocide. Both an act of commission and an act of omission can constitute one of the following criminal offences:

*i) Killing members of the group;*

The act of killing must be intentional, but not necessarily premeditated.<sup>126</sup> Human rights organizations, UN agencies and Rohingya refugees themselves have reported mass killings by the Myanmar army, police and NaSaKa (Myanmar border security force). Human Rights Watch defines the killing as “*organized and planned*”.<sup>127</sup>

*ii) Causing serious bodily or mental harm to members of the group;*

In the Eichmann case, the Jerusalem court stated that serious bodily or mental harm could be caused by “the enslavement, starvation, deportation and persecution... and [the] detention [of Jewish people] in ghettos, transit camps, and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings and to suppress them and cause them inhumane suffering and torture.”<sup>128</sup> The Trial Chamber of the ICTY explained this criminal act by saying it includes: “acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beating, threats of death, and harm that damages health or causes disfigurement or injury.”<sup>129</sup> Similarities with the current situation of the Rohingya people are legion. Ever since the first riots in 2012, houses are being burnt down and women being raped. Thousands have been displaced and put into guarded camps where they have limited access to food and medical care. Many have already died from starvation or ordinary injuries. Moreover, their freedom of movement has been restricted, which means they cannot visit public places, nor can they go to schools or hospitals. This forms an apparent violation of their basic human rights.

It is often more challenging to prove mental harm, but it is obvious that for example rape and degrading treatment can cause damage on a mental level. The act of verbal labelling constitutes

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<sup>126</sup> TRIFFTERER, O. and AMBOS, K. (eds.), *Rome Statute of the International Criminal Court. A Commentary*, München, C.H. Beck, 2016, 138.

<sup>127</sup> “All You Can Do is Pray. Crimes against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State”, *Human Rights Watch* report, April 2013.

<sup>128</sup> *Israël v. Eichmann*, District Court of Jerusalem, 12 December 1961; SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 182.

<sup>129</sup> *Prosecutor v. Stakic*, ICTY, 31 July 2003, para 516; SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 183.

degrading treatment. The Myanmar government uses an anti-Rohingya rhetoric aimed at further marginalizing and humiliating this people. Influential Buddhist monks hold provocative speeches against Muslims, and the government consistently refers to Rohingya as “Bengali’s”, a term used to brand illegal immigrants.

*iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*

The Rwanda Tribunal stated that this expression implies “*inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.”<sup>130</sup> As mentioned before, houses of Rohingya Muslims are being burnt and survivors are placed in camps where they are denied any medical care, basic hygiene and food. An article in *Time Magazine* stated that several neighborhoods in Rakhine State turned into “de facto open-air prisons, with the movement of inhabitants tightly restricted by armed guards.”<sup>131</sup>

Rohingya women are persistently being raped by government officials, and pregnant women are denied access to hospitals right outside the camps. Local people refuse to do business with Rohingya people which renders most families without any income. This cruel and absurd treatment is undoubtedly meant to further exacerbate the plight of the Rohingya.

*iv) Imposing measures intended to prevent births within the group;*

These measures include sterilization, compulsory abortion, segregation of sexes, forced birth control and obstacles to marriage.<sup>132</sup> In the judgment mentioned earlier, the ICTR stated that “rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate”.

The Rohingya are subject to two kind of measures. First, they need permission from the government to marry. They are also required to pay a fee, which is often prohibitive. Secondly, they are allowed to have only two children, otherwise they are imprisoned.

*v) Forcibly transferring children of the group to another group.*

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<sup>130</sup> *Prosecutor v. Akayesu*, ICTR, 2 September 1998, para. 506; SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 190; TRIFFTERER, O. and AMBOS, K. (eds.), *Rome Statute of the International Criminal Court. A Commentary*, München, C.H. Beck, 2016, 138.

<sup>131</sup> WADE, F. “Burma’s Rohingya Are Now Being Forced to Live in Squalid Ghettos Watched by Guards,” *Time*, 4 Feb 2014.

<sup>132</sup> *Prosecutor v. Akayesu*, ICTR, 2 September 1998, para. 507; TRIFFTERER, O. and AMBOS, K. (eds.), *Rome Statute of the International Criminal Court. A Commentary*, München, C.H. Beck, 2016, 138.

This is the only act stipulated in the Rome Statute and the Genocide Convention that does not seem to be at hand in the case of the Rohingya people.

In closing, one can most definitely say that the Rohingya people are subject to several of the horrendous crimes stipulated in the Rome Statute and the Convention. The inhumane treatment of and the violence against Rohingya falls within the material scope of the crime of genocide as defined by the Genocide Convention and the Rome Statute.

### *2.1.2. Group*

Besides the existence of one or more criminal acts, the definition of genocide requires the perpetrator(s) to have the intent to destroy, in whole or in part, a protected group. The Genocide Convention specifies that the target must be a national, ethnical, racial or religious group of people.<sup>133</sup> The Rohingya people share a common history, culture, language and religion. They are persecuted by the Myanmar government exactly because of their common characteristics.

#### *i) National Group*

Ever since the Citizenship Law of 1982, the Rohingya people no longer qualify as citizens of Myanmar. Their identity has been taken away from them. Being non-nationals of Myanmar, who share a common history, culture and language, they could still qualify as a national group.

#### *ii) Ethnical Group*

Even though the government does no longer officially recognize them as an ethnical group, the Buddhist majority definitely sees them as distinct group that does not share the same history or culture. The majority refers to them as ‘Bengali’ or ‘Kala’, pejorative terms used to stigmatize them and thus to reaffirm time and again the ethnic chasm between themselves and the Rohingya..<sup>134</sup>

#### *iii) Racial Group*

Rohingya people have a different physical appearance from the Buddhist citizens of Myanmar. They have a darker skin color and different facial features. This could qualify them as an individual racial group.

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<sup>133</sup> Art. II Genocide Convention.

<sup>134</sup> Allard K. Lowenstein International Human Rights Clinic at Yale Law School, “Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.”, October 2015.

iv) *Religious Group*

Being Muslims, they qualify as a religious group, different from the Buddhist majority.

## 2.2. Mental Element

Article II of the Genocide Convention stipulates that genocide consists of violent acts committed “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group” (similar definition in article 6 of the Rome Statute). The Buddhist majority perpetrates violent acts against the Rohingya people, but it is very difficult to prove that they actually intend to destroy the group, in whole or in part. According to the Rome Statute, this mental element or the *mens rea* of genocide means that the crime is committed with intent and knowledge.<sup>135</sup> However, the case law is rather reluctant to use the requirement of knowledge and, based on the wording of article II of the Genocide Convention, finds that the intent to commit genocide suffices.<sup>136</sup> If this intent is not proven the crime can still be punished, but not as a genocide.<sup>137</sup>

The intent to destroy Rohingya’s is indeed rather difficult to prove. However, everything in the way the Buddhist majority treats the Rohingya’s, physically as well as mentally, indicates that they are less interested in the recognition and the protection of this Rohingya culture than in their extermination.

## 2.3. Consequences

To label the Rohingya predicament a genocide is to imply that the international community has a responsibility to use appropriate diplomatic, humanitarian and other peaceful means to protect the victims.<sup>138</sup> However, Myanmar’s proximity to China and India is of great strategic importance to the international community, which goes a long way towards explaining why the international community is so extremely reluctant to qualify the plight of the Rohingya as a genocide. To acknowledge this would enhance the pressure to intervene, something the international community prefers to shy away from as it would jeopardize their diplomatic relations with the newly reformed Myanmar government and they might damage their economic interests in the region at large.

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<sup>135</sup> Art. 30 Rome Statute.

<sup>136</sup> SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 243; TAMS, C.J., BERSTER, L. and SCHIFFBAUER, B., *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*, München, Verlag C.H. Beck oHG, 2015, 132-156.

<sup>137</sup> SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 257.

<sup>138</sup> KINGSTON, L.N., “Protecting the world’s most persecuted: the responsibility to protect and Burma’s Rohingya minority”, *The International Journal of Human Rights*, 2015, 1164; United Nations General Assembly, ‘2005 World Summit Outcome’, 15 September 2005, 30.

Professor William A. Schabas (former president of the International Association of Genocide Scholars), however, has a clear opinion on the matter:

"When you see measures preventing births, trying to deny the identity of the people, hoping to see that they really are eventually, that they no longer exist; denying their history, denying the legitimacy of their right to live where they live, these are all warning signs that mean it's not frivolous to envisage the use of the term genocide."

If the international community does not take up its responsibility to help out, Rohingya's will keep fleeing to Bangladesh, Malaysia or Thailand by crossing the sea in rubber boats. Already hundreds of Rohingya's have died at sea.

### **Summary**

The genocides committed in the twentieth century are all based on ideology, left or right, determined to create a utopia. In order to create this utopian society, the elected power often targets a group because of its national, racial, religious or ethnical differences. It is only by annihilating this inferior group, by "purifying" society, that the world can flourish. Because genocides often occur during times of war or revolution, the public is very sensitive to polarization and even eager to find a scapegoat. This explains why the population often participates in the oppression of the targeted group. The authority in power idealizes their own group (cf. *Übermensch* of the Nazi's) and underlines that the targeted group of people is inferior and does not belong. They use this polarization in society to hold on to their power.<sup>139</sup>

Raphael Lemkin is a key figure in the development of the criminalization of genocide. It was only after he coined the term that the international community could come to a definition: article II of the Genocide Convention includes the first international legal definition of genocide. This chapter examined the different elements of this definition with regard to the situation in Rakhine State today, and concluded that the predicament of the Rohingya's falls within its material scope.

It is painfully clear that the international community has failed to address the problems that led to each of these genocides in the previous century. Political interests and diplomatic caution withheld

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<sup>139</sup> KIERNAN, B., "Twentieth-Century Genocides: Underlying Ideological Themes from Armenia to East Timor", in GELLATELY, R. and KIERNAN, B. (eds.), *The Specter of Genocide. Mass Murder in Historical Perspective*, New York, Cambridge University Press, 2003, 29-52; WEITZ, E. D., "The Modernity of Genocides: War, Race and Revolution in the Twentieth Century", in GELLATELY, R. and KIERNAN, B. (eds.), *The Specter of Genocide. Mass Murder in Historical Perspective*, New York, Cambridge University Press, 2003, 53-74.

other States and the UN from intervening and condemning these human rights violations. One can easily draw a parallel with the situation in Rhakine State today, but States all over the world are reluctant to use the word genocide. Indeed, genocide is a very strong term, but it was invented to capture the horror of the crime. Under international law as it stands today, the case of the Rohingya's constitutes a genocide, yet the international community fails to act.

### **III. The ICC**

The twentieth century saw death and destruction on a massive scale: two World Wars, the Vietnam War, Mao's and Stalin's mass killings, genocides – the list goes on. Many of the perpetrators of these horrific crimes were never convicted, and often not even prosecuted. Over the years, the idea grew that a permanent international criminal court was needed to actually punish these perpetrators under the rules of international law. For a long time, The Hague Conventions of 1899 and 1907 were the only multilateral treaties concerning international legal rules and customs of war on land. They were drafted to impose obligations on States, but not to hold individual perpetrators accountable for their actions.<sup>140</sup> Due to the two World Wars, The Hague Conventions were enforced for the first time during the Nuremberg trial of 1946. During this trial, however, the most prominent members of Nazi Germany were individually prosecuted for three categories of crimes: crimes against peace, war crimes and crimes against humanity. The atrocities committed against the Jewish people were categorized as crimes against humanity, even though the Prosecutors used the – new – term “genocide” (*supra*). Two years after the Nuremberg Trials, the Convention for the Prevention and Punishment of the Crime of Genocide was adopted.<sup>141</sup>

The previous chapter has proven that the predicament of the Rohingya people constitutes a genocide. This chapter will address whether the perpetrators can be brought to justice. The crime of genocide can only be prosecuted by courts with specific international jurisdiction. According to article VI of the Genocide Convention, perpetrators should be tried by a tribunal of the State where the genocide was committed. However, this territorial jurisdiction tends to fail in practice, either because the perpetrators are still in power in that State, or because a State decides to no longer dwell upon the past and simply wants to forget about the atrocities committed on its territory. Article VI also foresees in the establishment of an international penal court that has “jurisdiction with respect to those

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<sup>140</sup> The Hague Conventions are incorporated in art. 8, (2) b), e) and f) Rome Statute.

<sup>141</sup> SCHABAS, W.A., *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2007, 1-8.

Contracting Parties which shall have accepted its jurisdiction.” The ICTY and ICTR were the first international criminal tribunals established, notably restricted in time and space.<sup>142</sup>

The ICC is based on the Rome Statute, adopted by 120 States in 1998.<sup>143</sup> This Statute grants the ICC international jurisdiction for the crime of genocide (as well as crimes against humanity, war crimes and the crime of aggression).<sup>144</sup> Article 6 of the Rome Statute is an exact copy of article II of the Genocide Convention.

This chapter examines the jurisdiction of this Court regarding genocide: who can prosecute which crimes? Is there a duty to prosecute international crimes? And what does criminal liability entail on an international level?

## 1. Jurisdiction

The Rome Statute stipulates the four core international crimes within its jurisdiction *ratione materiae*: genocide, crimes against humanity, war crimes and aggression. The territoriality principle and the active personality principle require that these crimes be committed within the territory of a State Party, or by a national of one of the State Parties (or a State that has accepted the jurisdiction of the ICC in a particular case).<sup>145</sup>

As stipulated before, the Rome Statute was originally adopted by 120 States in 1998. Today 124 States are party to the Statute.<sup>146</sup> This does not mean that the ICC is universally accepted. Some very important nations do not support the ICC: The United States of America, Russia, China and other important Asian countries (India, Vietnam, Laos...) are no party to the Rome Statute.<sup>147</sup>

According to article 11 Rome Statute, the ICCs jurisdiction *ratione tempore* implies that the ICC can only prosecute the four crimes mentioned above if they are committed after 1 July 2002, the day the

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<sup>142</sup> SCHABAS, W.A., *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 57; 410; 443.

<sup>143</sup> Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998; WERLE, G., *Principles of International Criminal Law*, Oxford, Oxford University Press, 2009, 25.

<sup>144</sup> Art. 5 and 6 Rome Statute.

<sup>145</sup> Art. 12 (2), (3) Rome Statute; WERLE, G., *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2009, 84.

<sup>146</sup> Effective as of March 2016.

<sup>147</sup> CRYER, R., FRIMAN, H., ROBINSON, D. and WILMSHURST, E., *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2014, 166; WERLE, G., *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2009, 23-24.

Rome Statute entered into force.<sup>148</sup> The most obvious violent crimes against the Rohingya people were committed after the occurrences in 2012 and again in 2016, which means that they would qualify to be brought before the ICC.

## 2. Myanmar and the ICC

Highly problematic in the case of the Rohingya people is the fact that Myanmar is no State Party to the Rome Statute. Therefore, article 12 (1) of the Rome Statute does not apply. This paragraph indicates that when becoming a State Party, every State automatically accepts the jurisdiction of the ICC regarding the four core international crimes. Since Myanmar is no State party to the Court, this automatic recognition does not apply.

Article 13 of the Rome Statute gives other possibilities to bring proceedings regarding the genocide of the Rohingya people before the ICC. According to this article, there are three different ways to initiate the proceedings before the ICC, also known as trigger mechanisms:

- a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.<sup>149</sup>

However, article 12 (2) of the Rome Statute says that in case of a referral of a situation by either a State Party (cf. article 13 a) of the Rome Statute) or the Prosecutor *proprio motu* (cf. article 13 c) of the Rome Statute), the territorial State and/or the State of nationality of the accused must accept the Court's jurisdiction. If the accepting State is no State Party to the Rome Statute, it ought to explicitly submit a declaration to the Registrar.<sup>150</sup> It goes without saying that Myanmar would not be inclined to accept the Court's jurisdiction and therefore risk being prosecuted for genocide.

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<sup>148</sup> SCHABAS, W.A., *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, 276; SCHABAS, W.A., *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2007, 65-71; WERLE, G., *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2009, 86.

<sup>149</sup> WERLE, G., *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2009, 91, 93;

<sup>150</sup> Art. 12 (3) Rome Statute.



Article 13 b) of the Rome Statute offers another option, namely the referral by the UN Security Council. Based on its powers under Chapter VII of the United Nations Charter (UNC), the Security Council has the power to refer cases to the ICC independently of the territory of the crime or the nationality of the perpetrator. This means that the Security Council can act in situations where perpetrators would otherwise enjoy impunity in their domestic jurisdiction.<sup>151</sup> The first time that the UN Security Council referred a situation to the ICC, was the case of Darfur (Sudan) in 2005.<sup>152</sup> Only in February 2011 did it render its second – and so far latest referral, this time concerning the situation in Libya.<sup>153</sup> The ICC Prosecutor has indicted perpetrators in both cases, but in neither one have the perpetrators been brought to trial.<sup>154</sup>

Critics blame the Security Council for being a political organ. The United States, Russia and China, being permanent members of the Security Council, can veto decisions of the Council, including possible referrals to the ICC. However, these States are no party to the ICC. Their political and diplomatic ties explain the (in)action of the Security Council and jeopardize its impartiality and independence, says Human Rights Watch.<sup>155</sup> This also explains why the Security Council has failed to refer the war crimes and crimes against humanity committed in the conflict in Syria. Russia and China, being allies to the Assad government, veto every action by the Council.<sup>156</sup>

It is very likely that the permanent members of the Security Council will also be rather reluctant to refer the situation in Myanmar to the ICC. In fact, the Council wanted to release a press statement last March to address the precarious human rights situation of the Rohingya people, but the statement was blocked by Myanmar's neighbor country China, backed by Russia. Without consensus, such

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<sup>151</sup> Art. 12 (2) Rome Statute in reverse; VAN SCHAACK, B. and SLYE, R. C., *International Criminal Law and Its Enforcement*, New York, Foundation Press, 2007, 66; WERLE, G., *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2009, 64, 84-85; "UN Security Council: Address Inconsistency in ICC Referrals: Use Debate on International Court to Forge a More Principled Relationship", Human Rights Watch, 16 October 2012, <https://www.hrw.org/news/2012/10/16/un-security-council-address-inconsistency-icc-referrals>.

<sup>152</sup> UN Security Council, *Resolution Referring Situation of Darfur to Prosecutor ICC*, RES/1593, 31 March 2005; WERLE, G., *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2009, 64, 85.

<sup>153</sup> UN Security Council, *Resolution Referring Situation of Libya to Prosecutor ICC*, RES/1970, 26 February 2011.

<sup>154</sup> "UN Security Council: Address Inconsistency in ICC Referrals: Use Debate on International Court to Forge a More Principled Relationship", Human Rights Watch, 16 October 2012, <https://www.hrw.org/news/2012/10/16/un-security-council-address-inconsistency-icc-referrals>.

<sup>155</sup> "UN Security Council: Address Inconsistency in ICC Referrals: Use Debate on International Court to Forge a More Principled Relationship", Human Rights Watch, 16 October 2012, <https://www.hrw.org/news/2012/10/16/un-security-council-address-inconsistency-icc-referrals>.

<sup>156</sup> "The Security Council's Appalling Record of Referring Situations to the ICC", *Justice in Conflict*, 23 May 2014, <https://justiceinconflict.org/2014/05/23/the-security-councils-appalling-record-of-referring-situations-to-the-icc/>.

press statements cannot be released.<sup>157</sup> The USA has also recently lifted some of its sanctions on Myanmar because the government had made “substantial progress in improving human rights.”<sup>158</sup>

### 3. Universal Jurisdiction and the Duty to Prosecute

International crimes are crimes committed against the international community as a whole. This international nature is a reason for the international community to universally prosecute and punish these crimes, but it also offers every country the authority to prosecute international crimes. The prosecution is therefore not limited to the State where the crime was committed. International crimes are by definition no domestic matters. This universal jurisdiction prevents loopholes in the prosecution of international crimes: it is only when a jurisdiction close to the crime is unwilling to prosecute, that third states or international courts can step in to avoid impunity.<sup>159</sup>

Broader than the authority to prosecute, is the duty to prosecute. This implies that the international community and the States can even be obligated to prosecute international crimes in certain circumstances. Every State has the principal duty to prosecute a genocide when committed on its territory, or hand over the perpetrators when caught on their territory: *aut dedere, aut judicare* (either extradite, or prosecute). It is, however, unclear to what extent third states have a similar duty to prosecute.<sup>160</sup>

#### 3.1. Universal Jurisdiction of the ICC?

As mentioned before, the ICC is primarily bound by a territorial principle and by an active personality principle. This would imply that the situation in Myanmar falls without its jurisdiction, since Myanmar is no State Party to the Rome Statute (neither signed nor acceded). If Myanmar’s domestic legal order is unwilling to prosecute the perpetrators and if a referral by the UN Security Council fails, can the ICC then invoke its universal jurisdiction to commence proceedings in the situation of the Rohingya people? Although it would be logical that an international criminal court would indeed

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<sup>157</sup> “China, Russia Block UN Council Concern About Myanmar Violence”, *Reuters*, 17 March 2017, <http://www.reuters.com/article/us-myanmar-rohingya-un-idUSKBN16O2J6>.

<sup>158</sup> USA Sanctions Program: <https://www.treasury.gov/resource-center/sanctions/Programs/pages/burma.aspx>; “Obama Lifts Some Sanctions Against Myanmar”, *New York Times*, 2 December 2016, <https://www.nytimes.com/2016/12/02/us/politics/obama-lifts-sanctions-myanmar.html>.

<sup>159</sup> CRAWFORD, J., *Brownlie’s Principles of Public International Law*, Oxford, Oxford University Press, 2012, 468; CRYER, R., FRIMAN, H., ROBINSON, D. and WILMSHURST, E., *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2014, 56-57; WERLE, G., *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2009, 64-68.

<sup>160</sup> Article IV, V and VI Genocide Convention; CRYER, R., FRIMAN, H., ROBINSON, D. and WILMSHURST, E., *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2014, 56-57; WERLE, G., *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2009, 68-70.

enjoy international criminal jurisdiction, the State Parties to the Rome Statute rejected the idea of universal jurisdiction during the negotiations.<sup>161</sup> The ICC can thus not prosecute Myanmar on the basis of universal jurisdiction.

### **3.2. Duty to Prosecute?**

The Rome Statute does not specify whether the ICC itself has the principal duty to prosecute, but the preamble states that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” This means that a State has the duty to punish perpetrators of crimes committed on their territory (the State of commission). Article 17 expresses the principle of complementarity by adding that the Court only acts when domestic jurisdictions are “unwilling or unable genuinely to carry out the investigation or the prosecution.” This implies that even if the Court has jurisdiction over a certain situation, it will not necessarily take on the case.<sup>162</sup> Myanmar is trying its best to cover up the precarious situation that the Rohingya people are in. The State will definitely not initiate proceedings on the account of genocide, especially because government officials and Myanmar military and police forces are involved in the persecution of the Rohingya’s.

Since State officials are often involved in the commission (or covering up) of genocide, the practical relevance of the duty to prosecute of the State of commission is rather limited. To fill this loophole in international criminal prosecution, third states should also be obliged to prosecute international crimes such as genocide. The Rome Statute does not address this.<sup>163</sup>

## **4. Criminal Responsibility**

The Nuremberg Tribunal said that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>164</sup> This sentence reflects the idea of individual criminal responsibility. The ICC tries individuals, not states. The difficulty with international crimes is that they are committed on a large scale, which means that many people are involved. However, there is a

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<sup>161</sup> Article 12 Rome Statute; SCHABAS, W.A., *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, 277-283; WERLE, G., *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2009, 64.

<sup>162</sup> SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2007, 171-172; WERLE, G., *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2009, 71.

<sup>163</sup> WERLE, G., *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2009, 70-72.

<sup>164</sup> *France et al. v. Göring et al.*, International Military Tribunal (Nuremberg), 1 October 1946.

difference between the actual perpetrators and the organizers of the crime. Are they all responsible in the same way?<sup>165</sup>

Article 25 (3) of the Rome Statute sets out the different types of criminal participation:

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
  - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
  - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
  - (c) 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;
  - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
    - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
    - (ii) Be made in the knowledge of the intention of the group to commit the crime;
  - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
  - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent

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<sup>165</sup> Article 25 Rome Statute, SCHABAS W.A., *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2007, 210-211; SCHABAS, W.A., *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, 421-424.

of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

#### **4.1. Principal Liability: Article 25 (3) (a) of the Rome Statute**

Three types of offenders are principally liable: those who physically commit the crime; those who commit a crime indirectly through another person; and those who co-perpetrated the crime by controlling essential tasks.<sup>166</sup>

In the case of the persecution of the Rohingya, military and police forces are principally liable for physically committing the crimes of killing, rape, beating and setting houses on fire. Buddhist Rakhinese civilians who endorse and encourage the violence are liable, too. When military or police forces instruct the Rakhinese to attack the Rohingya's, they can be charged with the indirect commission of genocide. If they commit the violence together with the civilians in a coordinated manner, they can be charged with the co-perpetration of genocide. Moreover, when State authorities fail to intervene they can be accused of commission by omission which could amount to principal liability as stipulated in article 25 (3) (a) of the Rome Statute.

#### **4.2. Secondary Liability: Article 25 (3) (b), (c), (d) of the Rome Statute**

Secondary or accessory liability concerns people who participate in committing a crime as an accomplice (paragraphs (b) and (c)) or as a contributor to the crime (paragraph (d)). The term secondary liability does not capture the importance of the role of these perpetrators. Even though they do not participate in the physical violence, their responsibility cannot be underestimated. The ICC therefore prefers to base its conviction on the principle of co-perpetration mentioned in article 25 (3) (a) of the Rome Statute.<sup>167</sup>

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<sup>166</sup> SCHABAS, W.A., *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, 427-430.

<sup>167</sup> SCHABAS, W.A., *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, 431.

Paragraphs (b) and (c) are two complementary bases for complicity. The liability of an accomplice does not require that the principal perpetrator is already charged with the crime concerned. This means that even if the offenders who committed the physical violence against the Rohingya's are not prosecuted, government officials can still be held liable for ordering or facilitating the violence.<sup>168</sup>

Paragraph (d) then imposes liability when a person contributes to the commission of a crime, with the intention to commit the specific crime. The ICC considers this provision "a residual form of accessory liability which makes it possible to criminalize those contributions to a crime which cannot be characterized as ordering, soliciting, inducing, aiding, abetting or assisting."<sup>169</sup> Since the perpetrators in the situation of the Rohingya's qualify under the previous provisions, it does not seem necessary to invoke paragraph (d).

### **Summary**

The Myanmar authorities – supported by Rakhinese Buddhists – are responsible for the genocide committed against the Rohingya's and they should be brought to justice. The ICC is the ideal institution to try the perpetrators. Unfortunately, Myanmar is no State Party to the Rome Statute, which complicates things. A referral from the UN Security Council would be the solution, but is highly unlikely because of the political interests of its permanent members. The ICC has no universal jurisdiction over international crimes, and the Rome Statute does not stipulate the duty to prosecute for third states.

The ICC is a court of last resort in the prosecution of genocide and other international crimes, so its importance cannot be overestimated. Even the mere threat to commence proceedings in case of the Rohingya's would send a powerful statement to the international community.<sup>170</sup>

## **IV. Conclusion: A Hidden Genocide?**

This master's thesis has argued that the persistent oppression, humiliation and persecution of the Rohingya's constitute a genocide under international law as it stands today. The legal consequences of this qualification are significant. For one, it throws a light on the inadequate functioning of the

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<sup>168</sup> SCHABAS, W.A., *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, 431-436.

<sup>169</sup> *Prosecutor v. Lubanga*, ICC (Pre-Trial Chamber), 29 January 2007; SCHABAS, W.A., *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, 436.

<sup>170</sup> IBRAHIM, A., *The Rohingyas. Inside Myanmar's Hidden Genocide*, London, Hurst & Company, 2016, 129;135.

ICC. Being one of the core international crimes, genocide falls within the jurisdiction of the ICC. In turning a blind eye to the Rohingya's plight, the ICC fails to honor its own *raison d'être*.

One could counter that since Myanmar is no State Party to the ICC it cannot be tried by it. However, the founding States of the ICC decided that, acting under Chapter VII of the UN Charter, the UN Security Council also should have the power to refer situations, even when crimes are committed by a non-State Party, or on the territory of a non-State Party. Unfortunately, this power is doomed to remain largely ineffective, as some of the permanent members of the Security Council – China and Russia – veto any further investigation in Rakhine State.

The tragedy of the Rohingya's poses not just legal or institutional challenges. It highlights the impotence of the international community when it comes to undoing or preventing human rights violations. As the Rwandan situation taught us, "key to allowing the violence to escalate to genocide was international silence."<sup>171</sup> If the international community is to avoid a similar debacle in Myanmar, it is imperative that it should speak out against the outrageous situation.

It could, for instance, put pressure on the Myanmar government to restore citizenship to the Rohingya people. It goes without saying that citizenship is a most significant form of empowerment that allows people to partake in elections and thus to exert pressure on their political leaders. Moreover, to be a citizen is to be a legal subject, which means that one can protect and secure one's interests in court.

The road towards full recognition of the Rohingya's as human beings and citizens may still be long and fraught with obstacles, but every attempt, every act by the international community that purports to redeem their plight is preferable to the sinister sound of silence.

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<sup>171</sup> IBRAHIM, A., *The Rohingyas. Inside Myanmar's Hidden Genocide*, London, Hurst & Company, 2016, 108.

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