

JUSTICE FOR THE ROHINGYA: THE INTERNATIONAL CRIMINAL COURT’S  
OPPORTUNITY TO END IMPUNITY FOR GENDER-BASED VIOLENCE IN MYANMAR

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## INTRODUCTION

The Rohingya people have been referred to by the United Nations as one of the most persecuted minority groups in the world.<sup>1</sup> About one million Rohingya reside in Myanmar, where, for decades, successive governments have progressively stripped them of their civil and political rights. The government of Myanmar denies them citizenship, rendering them effectively stateless. Rohingya communities face systemic discrimination in every aspect of life from birth to death, including access to education, employment, healthcare, travel, and marriage. This continual dehumanization and persecution has escalated into repeated waves of state-led violence against the Rohingya, most recently beginning in 2016 and 2017. During these so-called “clearance operations,” the government engaged in unlawful killings, rape, torture, enforced disappearances, and arbitrary detentions of innocent Rohingya.<sup>2</sup> As a result of the violence, hundreds of thousands of Rohingya refugees have fled their homes in Myanmar to seek safety in Bangladesh and other nearby countries. Today, roughly one million Rohingya refugees live in countries neighboring Myanmar, the majority in refugee camps in the Cox’s Bazaar region of Bangladesh.<sup>3</sup> There, they remain in limbo, enduring the challenges of the overcrowded camps while unable to safely return home to Myanmar and lacking the legal status to build new lives in Bangladesh.

Numerous efforts have emerged in recent years to bring about accountability and justice for the Rohingya people, including fact-finding investigations, a case before the International Court of Justice, and a case in Argentinian court based on universal jurisdiction. One of the most promising efforts is an International Criminal Court (“ICC”) investigation into the situation in Bangladesh and Myanmar. But despite the hope this investigation holds, its scope is limited by the specific jurisdictional requirements of the Court laid out in the Rome Statute. The limited jurisdiction threatens to exclude the worst crimes from the scope of the investigation and to hamper true accountability efforts. This Note examines the ICC investigation, with a focus on finding interpretive methods to expand the jurisdictional scope to incorporate the most serious atrocities committed against the Rohingya, in particular, those involving sexual and gender-based violence. At stake is a precedent that States cannot escape accountability by simply refusing to ratify international instruments and confining their atrocities within their own borders.

Part I of this Note provides a brief overview of the decades of structural discrimination and cyclical violence against the Rohingya people. Part II will discuss the ICC investigation and focus on how the court’s jurisdictional limitations over this matter threaten to exclude the bulk of sexual and gender-based violence and other crimes perpetrated by Myanmar. Part III will then present an argument for expanding the jurisdictional scope of the investigation. More specifically, this Note starts by

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<sup>1</sup> *Human Rights Council opens special session on the situation of human rights of the Rohingya and other minorities in Rakhine State in Myanmar*, UNITED NATIONS HUM. RTS. COUNCIL (Dec. 5, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22491>.

<sup>2</sup> GLOB. JUST. CTR., *DISCRIMINATION TO DESTRUCTION: A LEGAL ANALYSIS OF GENDER CRIMES AGAINST THE ROHINGYA* 7 (2018), [https://www.globaljusticecenter.net/files/Discrimination\\_to\\_Destruction.pdf](https://www.globaljusticecenter.net/files/Discrimination_to_Destruction.pdf).

<sup>3</sup> *Rohingya Refugee Crisis Explained*, U.N. HIGH COMM’R FOR REFUGEES (Aug. 25, 2021), <https://www.unrefugees.org/news/rohingya-refugee-crisis-explained/>.

focusing on sexual and gender-based violence as a particular hallmark of the atrocities committed against Rohingya. It argues that accountability efforts must not fall into the historical pattern of overlooking sexual and gender-based crimes as mere byproducts of conflict. It then argues that a close reading of ICC decisions supports the inclusion of sexual and gender-based violence crimes as coercive elements of the crimes against humanity of deportation, persecution, and inhumane acts. However, viewing sexual and gender-based violence as an element alone is insufficient given the severity of the atrocities. Invoking principles of jurisdiction—particularly the passive personality principle, the concept of effects jurisdiction, and the objective territoriality principle—thus helps justify an expanded jurisdictional theory that incorporates sexual and gender-based violence as a standalone crime within the scope of the ICC’s jurisdiction. Nevertheless, even if the jurisdictional scope of the investigation is expanded in such a way, there is a long road ahead on the path to justice for the Rohingya. Part IV will identify and examine some key additional barriers to the ICC’s justice efforts that must be considered as the Court’s work continues.

## I. HISTORY OF INJUSTICES AGAINST THE ROHINGYA

### A. *The Rohingya People*

Muslims make up about four percent of the population of Myanmar, a largely Buddhist country.<sup>4</sup> The majority of Muslims in Myanmar refer to themselves as Rohingya, a minority ethnic group that practices a “Sufi-inflected variation of Sunni Islam.”<sup>5</sup> There are approximately one million Rohingya in Myanmar and 3.5 million Rohingya worldwide.<sup>6</sup> The majority of Rohingya live in the northern part of Rakhine State (formerly known as “Arakan State”) on the west coast of Myanmar near Bangladesh and India.<sup>7</sup> The Muslim population of Rakhine State is roughly divided into two groups: those indigenous to the region whose ancestors have lived there for centuries, and those whose ancestors arrived during the British colonial period running from 1824 to 1948.<sup>8</sup> The Rohingya consider themselves to be part of the former group, tracing their origins in today’s Rakhine State to the fifteenth century, when thousands of Muslims arrived in the former Arakan Kingdom.<sup>9</sup> However, successive Myanmar governments and Buddhist nationals refute these historical ties and view the Rohingya as descendants of those who arrived during the British colonial administration.<sup>10</sup>

In fact, the name “Rohingya” is highly contested. The people identify as an ethnic group with a distinct language and culture, and the name is a self-selected moniker that is thought to roughly translate to “from Arakan,” thereby asserting the group’s historical ties to the land. Neither the government nor Rakhine Buddhist groups recognize this label; they view the Rohingya as “illegal immigrants” from

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<sup>4</sup> *World Directory of Minorities and Indigenous People: Muslims and Rohingya*, MINORITY RTS. GRP. INT’L. (June 2019), <https://minorityrights.org/minorities/muslims-and-rohingya/>.

<sup>5</sup> Eleanor Albert & Lindsay Maizland, *The Rohingya Crisis*, COUNCIL ON FOREIGN RELS. (Jan. 23, 2020), <https://www.cfr.org/background/rohingya-crisis>.

<sup>6</sup> *Id.*

<sup>7</sup> MINORITY RTS. GRP. INT’L., *supra* note 4.

<sup>8</sup> *Id.*

<sup>9</sup> Albert & Maizland, *supra* note 5.

<sup>10</sup> MINORITY RTS. GRP. INT’L., *supra* note 4.

Bangladesh and prefer to instead call them “Bengalis,” a foreign label rejected by the Rohingya.<sup>11</sup> This core disparity of views underlies the decades of systemic discrimination and violence perpetrated against the Rohingya people by the government of Myanmar. This Note refers to the people in question as “Rohingya,” in keeping with their preferred method of self-identification. The ICC and prominent NGOs also use the term “Rohingya,” as does the United Nations General Assembly, which has called upon the government of Myanmar to allow this self-identification.<sup>12</sup>

### B. History of Systemic Discrimination and Repression

The Rohingya are widely considered to be among the most persecuted minorities on the planet.<sup>13</sup> Because of the government’s refusal to grant the Rohingya citizenship, they have no legal documentation and are effectively stateless. The Rohingya face discriminatory obstacles in every aspect of life, including access to education, employment, healthcare, travel, and marriage.<sup>14</sup> In addition to this system of discrimination, they also disproportionately face other forms of repressive violence at the hand of Myanmar security forces, including arbitrary arrests and detention, forced labor, confiscation of property, extortion, and sexual and gender-based violence.<sup>15</sup> The Independent Investigative Fact-Finding Mission for Myanmar confirmed in 2018 that “this severe, systemic and institutionalized oppression, from birth to death, amounts to persecution.”<sup>16</sup>

The authorities arbitrarily deny the Rohingya legal status and identity in violation of international and domestic law.<sup>17</sup> The Convention on the Rights of the Child provides that all children have the right to be registered immediately after birth, without discrimination of any kind.<sup>18</sup> Yet reports from Northern Rakhine State indicate that authorities there stopped formally issuing birth certificates to Rohingya in the 1990s with no explanation.<sup>19</sup> Rohingya children must instead be registered on a “household list” through a complicated unwritten procedure laden with arbitrary fees and severe consequences for noncompliance.<sup>20</sup> Citizenship is similarly restricted. Though the Rohingya were considered citizens of Myanmar (then known as Burma) under the 1948 Constitution and civilian administration, their status was downgraded after a 1962 coup in which a military junta took control of the country.<sup>21</sup> The 1974 Constitution does not officially recognize the Rohingya as one of the 135 “national races”; consequently, they are effectively not covered under the 1982 Citizenship Act,

<sup>11</sup> Albert & Maizland, *supra* note 5; *Myanmar: The Politics of Rakhine State*, INT’L. CRISIS GRP. (Oct. 22, 2014), <https://www.crisisgroup.org/asia/south-east-asia/myanmar/myanmar-politics-rakhine-state>.

<sup>12</sup> See G.A. Res. 73/264, Situation of human rights in Myanmar (Dec. 22, 2018) (explaining why the General Assembly adopted the term “Rohingya”); Human Rights Council Res. 39/2, Situation of human rights of Rohingya Muslims and other minorities in Myanmar (Sept. 27, 2018).

<sup>13</sup> UNITED NATIONS HUM. RTS. COUNCIL, *supra* note 1.

<sup>14</sup> MINORITY RTS. GRP. INT’L., *supra* note 4.

<sup>15</sup> U.N. Hum. Rts. Council, Rep. of the detailed findings of the Independent Int’l Fact-Finding Mission on Myanmar, ¶¶ 607–23, U.N. Doc. A/HRC/39/CRP.2 (Sept. 17, 2018).

<sup>16</sup> *Id.* at ¶ 622.

<sup>17</sup> *Id.* at ¶ 460–98.

<sup>18</sup> Convention on the Rights of the Child art. 7, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456.

<sup>19</sup> *Id.* at ¶ 464.

<sup>20</sup> *Id.*

<sup>21</sup> MINORITY RTS. GRP. INT’L., *supra* note 4.

which requires that citizens either be recognized under the Constitution or be able to prove that their ancestors arrived in the country prior to 1823.<sup>22</sup> Due to the lack of documentation to prove the latter requirement, Rohingya are discriminatorily denied citizenship. In a 2013 plea for reform of the citizenship law, Human Rights Watch astutely predicted that this “law creates a permanent underclass that is exploited with impunity, creating significant resentments [liable to] explode when security forces take advantage of the legal vulnerability of stateless persons through abuse.”<sup>23</sup>

Lack of citizenship and other government abuses have led to discriminatory restrictions on Rohingya in every aspect of life. Rohingya are excluded from a large number of jobs which are restricted to citizens, including public school teachers, university lecturers, government doctors and health personnel.<sup>24</sup> Furthermore, lack of citizenship means that the Rohingya do not have the automatic right to education, work, or social services guaranteed to others in Myanmar and must instead obtain authorization through complex and time-consuming processes.<sup>25</sup> In 2001, the Myanmar government additionally imposed travel restrictions in many areas of northern Rakhine State with high concentrations of Rohingya, requiring a pass to travel from one place to another.<sup>26</sup> The difficulty and cost of obtaining these passes means that a number of key rights have been curtailed, including visits to hospitals, visits to the market to buy food, travel to employment opportunities, and travel to attend school.<sup>27</sup> Government restrictions also impact the private lives of many Rohingya. To get married, Rohingya must obtain special permission from the government through a complicated and humiliating process.<sup>28</sup> Myanmar imposed a strict two-child policy for Rohingya in northern Rakhine State, violating their right to determine the spacing of their children and depriving Rohingya women of fundamental reproductive health rights.<sup>29</sup>

Hate speech has played a large role in dehumanizing and “othering” the Rohingya, thereby fueling the discrimination against them. Anti-Rohingya groups use social media platforms like Facebook to spread racist language and images that promote violence against the Rohingya, normalizing this hateful content.<sup>30</sup> State-run

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<sup>22</sup> *Id.*

<sup>23</sup> *Activists call for review of Myanmar’s citizenship law*, THE NEW HUMANITARIAN (May 3, 2013), <https://www.thenewhumanitarian.org/feature/2013/05/03/activists-call-review-myanmar-s-citizenship-law>.

<sup>24</sup> MINORITY RTS. GRP. INT’L., *supra* note 4.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> FORTIFY RTS., POLICIES OF PERSECUTION: ENDING ABUSIVE STATE POLICIES AGAINST ROHINGYA MUSLIMS IN MYANMAR 30 (Feb. 2014), [https://www.fortifyrights.org/downloads/Policies\\_of\\_Persecution\\_Feb\\_25\\_Fortify\\_Rights.pdf](https://www.fortifyrights.org/downloads/Policies_of_Persecution_Feb_25_Fortify_Rights.pdf).

<sup>29</sup> *Id.* at 24.

<sup>30</sup> Facebook itself has acknowledged that its platform was used to “foment division and incite offline violence” in Myanmar. In 2018, Facebook deactivated the account of the commander-in-chief of the Myanmar military, Senior General Min Aung Hlaing, and other military officials and organizations, and shut down numerous networks that sought to incite violence against Rohingya by removing 484 pages, 157 accounts, and 17 groups. See Matthew Smith, *Facebook Wanted to Be a Force for Good in Myanmar. Now It Is Rejecting a Request to Help With a Genocide Investigation*, TIME (Aug. 18, 2020), <https://time.com/5880118/myanmar-rohingya-genocide-facebook-gambia/>. Despite this seeming commitment to combat hate speech against the Rohingya, in 2020, Facebook refused to cooperate with

media, like newspapers and journals, spread articles stating that Rohingya do not belong in Myanmar, that they are less than human, and that they are a threat to the government and Buddhist citizens of Myanmar.<sup>31</sup>

### C. 2016-2017 Violence and Refugee Emergency

The systematic discrimination and dehumanization of the Rohingya has erupted in waves of state violence in 1978, 1991, 1992, 2001, and most recently in 2012, 2016, and 2017. The cycle of violence, rebellion, and government crackdown, together with the institutionalized systemic measures described above has led millions of Rohingya to flee Myanmar in the 1960s, 1980s, 1990s, and 2010s. The recent extreme state-led violence and mass expulsion of Rohingya in 2016 and 2017 is most relevant to examine the ongoing ICC investigation. As described above, the decades before 2016 were marked by the gradual erosion of Rohingya rights in every aspect of life, culminating in a state-sanctioned and institutionalized system of oppression. Additionally, the state instigated violence between the Rohingya and other ethnic groups in 2012, resulting in mass arrests and arbitrary long-term detention of Rohingya in squalid “displacement camps.”<sup>32</sup> The Myanmar government has consistently failed to hold accountable perpetrators of abuses against the Rohingya, which tacitly gives them a stamp of approval.<sup>33</sup>

In October 2016, an armed group known as the Arakan Rohingya Salvation Army (“ARSA”) attacked security posts in northern Rakhine State, leading to the deaths of nine officers.<sup>34</sup> In response, Myanmar Security Forces (known as the Tatmadaw) initiated a wave of violent attacks against the Rohingya in Rakhine State, the vast majority of whom were unarmed and had never taken part in any violence against the state.<sup>35</sup> During these so-called “clearance operations,” the Tatmadaw engaged in unlawful killings, rape, torture, enforced disappearances, and arbitrary detentions of Rohingya.<sup>36</sup> In August 2017, ARSA followed up with a second round of larger and more coordinated attacks. Again, the Tatmadaw responded with violence against innocent Rohingya on a mass scale, including more indiscriminate killings, rape, torture, beatings, and forced displacement.<sup>37</sup> Reports indicate, however, that the Tatmadaw were systematically planning for these escalated clearance operations against the Rohingya even before ARSA’s 2017 attacks.<sup>38</sup>

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The Gambia’s application in U.S. federal court seeking information to help it hold Myanmar accountable for genocide at the ICJ. *Id.*

<sup>31</sup> *Burma’s Path to Genocide: Chapter III Weakened*, U.S. HOLOCAUST MEM’L. MUSEUM, <https://exhibitions.ushmm.org/burmas-path-to-genocide/chapter-3/hate-speech-that-claims-rohingya-do-not-belong-in-burma>.

<sup>32</sup> U.N. Hum. Rts. Council, *supra* note 15, at ¶ 748.

<sup>33</sup> *Id.*

<sup>34</sup> GLOB. JUST. CTR., *supra* note 2, at 7.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 8.

<sup>38</sup> FORTIFY RTS., “THEY GAVE THEM LONG SWORDS”: PREPARATIONS FOR GENOCIDE AND CRIMES AGAINST HUMANITY AGAINST ROHINGYA MUSLIMS IN RAKHINE STATE, MYANMAR (July 2018), [https://www.fortifyrights.org/downloads/Fortify\\_Rights\\_Long\\_Swords\\_July\\_2018.pdf](https://www.fortifyrights.org/downloads/Fortify_Rights_Long_Swords_July_2018.pdf).

The UN High Commissioner for Human Rights has called the ongoing violence a “textbook example of ethnic cleansing.”<sup>39</sup> As a result of the violence, hundreds of thousands of Rohingya who survived suffered injuries and lost family members, property, and the ability to safely live in their homeland. Victims, including many women, assert that August 2017 was a turning point for them and that they had no choice but to leave Myanmar if they wanted to save their lives.<sup>40</sup> Refugees took perilous journeys on foot and by boat to seek safety in neighboring countries, including Malaysia (which is hosting 101,000 Rohingya refugees), India (hosting 18,000), and with smaller numbers settling in Indonesia, Nepal, Thailand and other countries in the region. The majority, however, fled to neighboring Bangladesh. Today, nearly 900,000 Rohingya refugees have sought safety in the Cox’s Bazaar region of Bangladesh and are living in the Kutupalong and Nayapara camps, the most densely populated refugee camps in the world.<sup>41</sup> Of these people, half of whom are women and children, approximately 75% arrived in September 2017, when they joined nearly 200,000 refugees who had fled previous waves of violence.<sup>42</sup> Rohingya have no prospects for permanent resettlement in Bangladesh or other countries in the region; instead they remain in limbo in the overcrowded camps, where they face risks from monsoons, fires, and disease, and are at the mercy of food and supplies provided by humanitarian agencies.<sup>43</sup> Their best hope is to pursue pathways to justice and reconciliation that will allow them to return home to Myanmar as full citizens.

## II. OVERVIEW OF THE INTERNATIONAL CRIMINAL COURT INVESTIGATION

There are several ongoing attempts by the international community, in various stages, to bring about justice for the Rohingya. The Independent International Fact-Finding Mission for Myanmar developed a 440-page report in September 2018 detailing the abuses in Myanmar and calling for the investigation and prosecution of perpetrators.<sup>44</sup> The Independent Investigative Mechanism for Myanmar then took up the gauntlet and today continues to collect evidence for future prosecution.<sup>45</sup> The Permanent People’s Tribunal, an independent international opinion tribunal developed to examine violations of human rights took up the case of Myanmar, concluding in September 2017 that Myanmar is guilty of committing genocide against the Rohingya.<sup>46</sup> In November 2019, The Gambia initiated proceedings at the International Court of Justice, alleging that Myanmar violated the Genocide

<sup>39</sup> *Darker and more dangerous: High Commissioner updates the Human Rights Council on human rights issues in 40 countries*, U.N. HUMAN RTS. COUNCIL (Sept. 11, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22041>.

<sup>40</sup> ICC-01/19, Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ¶ 28 (Nov. 14, 2019) [hereinafter “Pre-Trial Chamber III Decision”].

<sup>41</sup> *Rohingya Refugee Crisis Explained*, *supra* note 3.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> U.N. HUMAN RTS. COUNCIL, *supra* note 15.

<sup>45</sup> U.N. HUMAN RTS. COUNCIL, *Independent Investigative Mechanism for Myanmar*, <https://www.ohchr.org/EN/HRBodies/HRC/IIMM/Pages/Index.aspx>.

<sup>46</sup> PERMANENT PEOPLES’ TRIBUNAL, STATE CRIMES ALLEGEDLY COMMITTED IN MYANMAR AGAINST THE ROHINGYAS, KACHINS AND OTHER GROUPS (Sept. 2017), <http://permanentpeopletribunal.org/wp-content/uploads/2017/11/PPT-on-Myanmar-Judgment-FINAL.pdf>.

Convention. The Court has since put in place provisional measures requiring certain actions from Myanmar, and Myanmar has begun investigating the allegations, though activists maintain that the government continues to attack Rohingya villages.<sup>47</sup> Also in November 2019, the Burmese Rohingya Organisation UK filed a petition in an Argentinian court on the basis of universal jurisdiction, calling on the court to initiate an investigation into the genocide and crimes against humanity perpetrated against the Rohingya; at time of writing, the court is in the process of determining if this would duplicate the ICC investigation.<sup>48</sup> Between 2018 and 2020, the United States and European Union imposed sanctions, including travel bans and asset freezes against high-ranking Myanmar military officials.<sup>49</sup> Lastly, organizations have launched petitions and boycotts in an attempt to force companies to stop doing business with Myanmar military-owned corporations.<sup>50</sup>

Despite the promise of these efforts, progress is slow and perhaps the greatest hope for justice remains with an ICC investigation and eventual trials. In 2019, the ICC Pre-Trial Chamber (“the Chamber”) authorized the Prosecutor of the ICC to proceed with an investigation of alleged crimes against Rohingya victims within the court’s jurisdiction.<sup>51</sup> However, although the ICC is an attractive forum for bringing awareness and justice to the Rohingya, the investigation is limited by the jurisdictional constraints of the court. The Court’s recognition of jurisdiction over a sub-set of crimes is a positive development, but nevertheless threatens to exclude a large number of crimes committed solely in Myanmar from the justice effort, including sexual violence crimes. The next section analyzes the current limits of the ICC investigation and ways to interpret the Court’s prior rulings that expand its jurisdictional scope to incorporate the full gamut of crimes into any future ICC prosecutions stemming from the investigation. It argues that the sexual and gender-based violence that occurred in Myanmar should be investigated and analyzed both as a coercive element of the three crimes against humanity of deportation, persecution, and inhumane acts, as well as standalone crimes against humanity of rape and sexual violence.

#### A. *Why the International Criminal Court is a Promising Forum*

The ICC is not without its problems: Critics point to its cumbersome and lengthy proceedings; its few convictions; its historical exclusion of certain crimes (including gender-based violence); its disproportionate focus on crimes committed in African nations; and a lack of universality that creates double standards in favor of

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<sup>47</sup> Katherine Southwick, *Leveraging International Justice for Lasting Peace in Myanmar*, JUST SEC. (Aug. 4, 2020), <https://www.justsecurity.org/71819/leveraging-international-justice-for-lasting-peace-in-myanmar/>.

<sup>48</sup> *Complainant Files a Criminal Complaint of Genocide and Crimes Against Humanity Committed Against the Rohingya Community in Myanmar—Universal Jurisdiction*, BURMA CAMPAIGN, <https://burmacampaign.org.uk/media/Complaint-File.pdf>; *Rohingya genocide: Argentine court moves closer to opening case against Myanmar*, THE DAILY STAR (June 2, 2020), <https://www.thedailystar.net/rohingya-crisis/news/rohingya-genocide-argentine-court-moves-closer-opening-case-against-myanmar-1907933>.

<sup>49</sup> Southwick, *supra* note 47.

<sup>50</sup> *Id.*

<sup>51</sup> Press Release, ICC, ICC judges authorise opening of an investigation into the situation in Bangladesh/Myanmar, ICC-CPI-20191114-PR1495 (Nov. 14, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>.



powerful nations.<sup>52</sup> But despite these shortcomings, it remains a promising forum for Rohingya justice efforts due to the lack of domestic avenues, the ICC's expertise and well-suited mandate, and the weighty message its work sends to the international community.

There are undeniably no domestic options for accountability. Discriminatory structures and stigma against the Rohingya are deeply entrenched in Myanmar.<sup>53</sup> The state has shown resistance to the ICC's justice efforts by denying wrongdoing.<sup>54</sup> Additionally, the ongoing unrest in Myanmar makes domestic legal remedies virtually impossible.<sup>55</sup>

In contrast, the ICC's structures and expertise with international criminal law are well-suited to such an investigation and eventual prosecution. The ICC was created specifically to prosecute the exact types of serious crimes perpetrated against the Rohingya—genocide, crimes against humanity, war crimes, and the crime of aggression—making the Court an expert in this area of criminal law. A key principle of international criminal law is command responsibility, or the idea that those higher in a chain of command bear more responsibility for international crimes because they had the most knowledge of and control over the system.<sup>56</sup> The Rome Statute establishes that superiors are “criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under [their] effective authority and control, as a result of [their] failure to exercise control properly over such subordinates.”<sup>57</sup> The Court's expertise in command responsibility will be crucial to prosecuting crimes against the Rohingya, which were largely ordered by high-ranking officials and carried out by lower-level soldiers.<sup>58</sup> Additionally, the ICC is familiar with issues likely to arise here, such as uncooperative states<sup>59</sup> and the challenges of cross-border prosecutions.<sup>60</sup>

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<sup>52</sup> See, e.g., Elizabeth Wilmschurst, *Strengthen the International Criminal Court*, CHATHAM HOUSE (June 12, 2019), <https://www.chathamhouse.org/2019/06/strengthen-international-criminal-court>; Kristin J. Smith, *The case for the International Criminal Court: Why it deserves our support*, ABA J. (Nov. 27, 2019), <https://www.abajournal.com/news/article/the-case-for-the-international-criminal-court-why-it-deserves-our-support> (discussing these criticisms).

<sup>53</sup> See discussion *supra* Part I.

<sup>54</sup> See discussion *infra* Part IV.

<sup>55</sup> *Id.*

<sup>56</sup> See *In re Yamashita*, 327 U.S. 1, 15 (1946) (creating and justifying the doctrine of command responsibility).

<sup>57</sup> Rome Statute art. 28.

<sup>58</sup> U.N. Human Rights Council, Rep. of the independent int'l. fact-finding mission on Myanmar, ¶ 1533, U.N. Doc. A/HRC/39/64 (Sept. 12, 2018) (“There is no doubt that the troops who participated in operations in Kachin, Rakhine and Shan States in the period under review were under the effective control of their commanders and under the leadership of the Commander-in-Chief, Senior-General Min Aung Hlaing.”)

<sup>59</sup> See, e.g., Michelle Nichols, *ICC complains of lack of cooperation, wants more U.N. support*, REUTERS (Oct. 17, 2012), <https://www.reuters.com/article/us-crime-un-icc/icc-complains-of-lack-of-cooperation-wants-more-u-n-support-idUSBRE89G1M720121017>; Terrence Chapman & Stephen Chaudoin, *People like the International Criminal Court — as long as it targets other problems in other countries*, WASH. POST (Jan. 20, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/20/people-like-the-international-criminal-court-as-long-as-it-targets-other-problems-in-other-countries/>.

<sup>60</sup> The ICC is currently investigating two other situations in which the criminal conduct does not fall entirely within one state's territory: crimes alleged to have been committed in the Palestinian territories occupied by Israel and war crimes committed in connection with the armed conflict in Afghanistan, which include alleged crimes taking place on the territories of Romania, Lithuania and Poland. International Criminal Court, *Investigations: Situation in the State of Palestine*, ICC-01/18, <https://www.icc->

The ICC also strongly emphasizes victim involvement: The Rome Statute requires the Prosecutor to consider the “interests of victims” in deciding whether to open an investigation,<sup>61</sup> to “respect the interests and personal circumstances of victims” during the investigation,<sup>62</sup> and requires the Court to “protect the safety, physical and psychological well-being, dignity and privacy of victims.”<sup>63</sup> The ICC allows victims to participate in all stages of proceedings, even beyond their role as witnesses and even if they are not pursuing reparations.<sup>64</sup> Since the ICC granted victims participatory rights in 2006, the Prosecutor has prioritized their participation.<sup>65</sup> Though victim involvement can be complicated, as courts run the risk of endangering or retraumatizing victims with potentially no positive outcome, thousands of Rohingya have already shown a willingness to share their stories.<sup>66</sup> The presence of a Court with the structures in place for effective victim participation thus becomes especially important to ensure that victims willing to share what they went through have a forum to do so. Victims’ stories not only strengthen the case against their abusers, but the process of sharing their experiences is itself an important step toward healing and restorative justice.<sup>67</sup>

An ICC investigation leading to indictments and/or convictions for high-level perpetrators is perhaps the best hope for true justice for the Rohingya in the international community. The concept of justice has multiple definitions, including recognition of suffering and discrimination, accountability for perpetrators, deterrence of future crimes, and long-term reconciliation within impacted communities. The ICC presents a prospect for at least the first three.<sup>68</sup> While deliberating whether to authorize an investigation into the situation in Myanmar and Bangladesh, the ICC received 339 victim representations submitted on behalf of over 470,000 Rohingya victims.<sup>69</sup> These victims insisted that it be conveyed to the ICC Judges “how important it is to them to have an acknowledgment that the Rohingya as a . . . recognizable group by virtue of a common culture, identity and religion were victims of atrocious crimes exclusively based on their ethnicity and religion.”<sup>70</sup> The Court’s work also has the potential to play an important deterring effect: One victim noted that despite its limitations, as a result of the ICC’s investigation and prosecution, “the perpetrators will think twice about

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[cpi.int/palestine](http://www.cpi.int/palestine); International Criminal Court, *Investigations: Situation in the Islamic Republic of Afghanistan*, ICC-02/17, <https://www.icc-cpi.int/afghanistan>.

<sup>61</sup> Rome Statute art. 53.

<sup>62</sup> *Id.* at art. 54.

<sup>63</sup> *Id.* at art. 68.

<sup>64</sup> Booklet, *Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court*, [http://www.powicc-cpi.int/library/victims/VPRSBooklet En.pdf](http://www.powicc-cpi.int/library/victims/VPRSBooklet%20En.pdf) (describing the different roles of victims before the ICC, procedures and protections in place, and distinguishing between participation in proceedings and seeking an order of reparations from the Court).

<sup>65</sup> Oumar Ba, *What Jean-Pierre Bemba’s Acquittal by the ICC Means*, AL JAZEERA (June 13, 2018), <https://www.aljazeera.com/opinions/2018/6/13/what-jean-pierre-bembas-acquittal-by-the-icc-means>.

<sup>66</sup> Pre-Trial Chamber III Decision, *supra* note 40, at ¶¶ 20–22.

<sup>67</sup> See Susana SaCouto, *Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project*, 18 MICH. J. OF GENDER & L. 297, 314–317 (2012).

<sup>68</sup> For a discussion of the shortcomings of international criminal courts in achieving long-term reconciliation, see discussion *infra* Part IV.

<sup>69</sup> Pre-Trial Chamber III Decision, *supra* note 40, at ¶¶ 20–22.

<sup>70</sup> *Id.* at ¶ 33.

committing these crimes again.”<sup>71</sup> Many victims view the investigation as an opportunity to hold perpetrators accountable in a reasonable timeframe, thereby not only preventing future crimes but also allowing Rohingya refugees to return to their homeland.<sup>72</sup>

Undoubtedly, the investigation is groundbreaking and provides a source of hope for many Rohingya that their suffering will be publicized and condemned on an international scale. However, there are clear limitations to the currently accepted scope of the ICC investigation. This scope must be expanded to ensure that the investigation covers as many as possible of the violent atrocities committed against the Rohingya.

### B. *Limitations on the Jurisdictional Scope of the ICC Investigation*

The ICC is a court of limited jurisdiction. For it to assert authority over a particular situation, that situation must be referred to the Court in one of three ways: the ICC Prosecutor can independently launch an investigation; the UN Security Council, acting under Chapter VII of the Charter of the United Nations, can refer a situation for investigation; or a Rome Statute State Party can refer the situation.<sup>73</sup> Additionally, the situation must fall within the subject-matter, temporal, and territorial or personal jurisdiction of the Court:

- *Subject-Matter Jurisdiction:* The ICC has jurisdiction over the most serious crimes of concern to the international community: genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>74</sup>
- *Temporal Jurisdiction:* Additionally, the ICC has jurisdiction only with respect to crimes committed after the Rome Statute came into force on July 1, 2002.<sup>75</sup> For those States which became a Party to the statute after this date, the Court’s jurisdiction covers only those crimes committed after the entry into force of the Statute for that State.<sup>76</sup> Myanmar is not a State Party to the Rome Statute, and Bangladesh ratified it on March 23, 2010.<sup>77</sup>
- *Territorial or Personal Jurisdiction:* Unless the Security Council referred the situation to the ICC, the accused must have either committed the crime in question within the territorial jurisdiction of the ICC or while a national of a State within that territorial jurisdiction.<sup>78</sup> The territorial jurisdiction includes the territory of Rome Statute States Parties and states that by formal declaration accept the ICC’s jurisdiction with respect to the crime.<sup>79</sup>

On April 9, 2018, then-ICC Prosecutor Fatou Bensouda filed a request seeking a ruling from the Pre-Trial Chamber on whether the ICC may exercise jurisdiction

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<sup>71</sup> *Id.* at ¶ 38.

<sup>72</sup> *Id.*

<sup>73</sup> Rome Statute art. 13.

<sup>74</sup> *Id.* at art. 5.

<sup>75</sup> *Id.* at art. 11(1).

<sup>76</sup> *Id.* at art. 11(2).

<sup>77</sup> For a list of all States Parties to the Rome Statute, *see* U.N. TREATY COLLECTION, STATUS OF TREATIES: ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=XVIII-10&chapter=18&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XVIII-10&chapter=18&clang=en) (last accessed March 23, 2022).

<sup>78</sup> Rome Statute art. 12(2).

<sup>79</sup> *Id.* at art. 12(3).

over alleged deportations of Rohingya people from Myanmar to Bangladesh.<sup>80</sup> Specifically, she sought authorization to investigate “crimes within the jurisdiction of the Court in which at least one element occurred on the territory of Bangladesh, and which occurred within the context of two waves of violence in Rakhine State on the territory of Myanmar, as well as any other crimes which are sufficiently linked to these events.”<sup>81</sup> After reviewing *amicus curiae* submissions from numerous human rights groups and observations from Myanmar and Bangladeshi authorities, the Court concluded on September 6, 2018 that it may assert jurisdiction if at least one element of a crime within the Court’s jurisdiction is committed on the territory of a State Party to the Rome Statute.<sup>82</sup> On July 4, 2019, the Prosecutor officially requested the Pre-Trial Chamber to authorize an investigation into the situation in Bangladesh/Myanmar, in particular citing “deportation, other inhumane acts and persecution committed against the Rohingya people” and seeking authorization to open an investigation into alleged crimes within the jurisdiction of the Court in which at least one element occurred on the territory of Bangladesh.<sup>83</sup> The Court approved this on November 14, 2019 after reviewing victims’ representations and other supplementary materials.<sup>84</sup>

On its face, the Court’s rulings on jurisdiction and granting the investigation explicitly allow for only a limited jurisdictional scope for the investigation. Since Myanmar itself is not a State Party to the Rome Statute, the investigation would be limited exclusively to crimes with one element occurring in Bangladesh. Because of this territorial requirement, the main crime discussed by the Court is deportation, or the displacement of people lawfully residing in an area to another State.<sup>85</sup> The Court has noted that the legal interest protected by this crime is “the right of individuals to live in the State in which they are lawfully present.”<sup>86</sup> The Court has interpreted deportation as an open-conduct crime, meaning that perpetrators can commit different acts, including rape and sexual violence, that amount to the required expulsion.<sup>87</sup> However, these additional acts would then be considered elements of the crime of deportation, and perpetrators would not be held accountable for them as standalone crimes. Crimes occurring solely within Myanmar would be excluded from the scope of the investigation. The investigation is also temporally limited, at a maximum including only offenses occurring after Bangladesh ratified the Rome Statute in 2010. Overall, this jurisdictional scope seems to exclude as individual crimes

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<sup>80</sup> ICC-RoC46(3)-01/18-1, President of the Pre-Trial Division, Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ¶¶ 1, 63 (Apr. 9, 2018) [hereinafter “Request for Ruling on Jurisdiction”].

<sup>81</sup> ICC-01/19-7, Pre-Trial Chamber III, Request for authorisation of an investigation pursuant to article 15, ¶ 20 (July 4, 2019).

<sup>82</sup> ICC-RoC46(3)-01/18, Pre-Trial Chamber I, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute” (Sept. 6, 2018) [hereinafter “Pre-Trial Chamber I Decision”].

<sup>83</sup> Press Release, Int’l Criminal Court, ICC Prosecutor, Fatou Bensouda, requests judicial authorisation to commence an investigation into the situation in Bangladesh/Myanmar (July 4, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1465>.

<sup>84</sup> See Pre-Trial Chamber III Decision, *supra* note 40.

<sup>85</sup> Pre-Trial Chamber I Decision, *supra* note 82, at ¶ 55.

<sup>86</sup> *Id.* at ¶ 58.

<sup>87</sup> *Id.* at ¶ 61.

many of the worst offenses committed against the Rohingya which occurred solely in Myanmar, particularly sexual and gender-based offenses.

### III. AN ARGUMENT FOR EXPANDING THE ICC'S JURISDICTIONAL SCOPE

The limited jurisdictional scope of the ICC investigation seriously hampers accountability efforts. Given the severity of the crimes committed, trying perpetrators for the crime of deportation alone would be insufficient. Though deportation is undoubtedly a serious crime, it does not include the extreme physical violence of crimes like rape, torture, and genocide. Justice cannot be achieved for Rohingya victims and survivors without finding a way to incorporate more of the sexual violence and other crimes committed against them into the scope of the investigation. Furthermore, this seminal investigation of crimes against the Rohingya marks the first time the ICC has found that it has jurisdiction over acts committed across borders on the basis of one State's ratification of the Rome Statute.<sup>88</sup> The jurisdictional scope must be expanded to hold perpetrators accountable for more crimes in order to avoid setting a precedent that States can commit any atrocities with impunity as long as they avoid ratifying international instruments and confine their atrocities within their own borders. This section will analyze the prospect of expanding the investigation's jurisdictional scope to include a greater array of crimes, particularly sexual and gender-based offenses.

#### A. *Significance of Sexual and Gender-Based Violence*

##### 1. *Use of Sexual and Gender-Based Violence Against the Rohingya*

While all Rohingya have been targeted by both the ongoing systematic discrimination and cyclical violence, gender has played a crucial role in the design and commission of atrocities.<sup>89</sup> Sexual and gender-based violence is a particular hallmark of Myanmar's treatment of the Rohingya. Even before the clearance operations, the Tatmadaw regularly used abduction, rape, gang rape, and other sexual violence in conjunction with forced labor, evictions, unlawful tax collections, and other forms of discrimination against Rohingya communities.<sup>90</sup> The United Nations and civil society organizations have reported patterns of widespread rape and sexual violence in the context of military operations in Myanmar for at least the past 30 years.<sup>91</sup> In 1995, the Special Rapporteur on the human rights situation in Myanmar reported signs that "soldiers view rape as a right, and that sometimes it is encouraged by officers."<sup>92</sup>

Rape and sexual violence were perpetrated on an egregious scale during the clearance operations. Survivors of the 2016 and 2017 violence, the majority of whom

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<sup>88</sup> *Myanmar's Referral to the International Criminal Court: Five Things You Should Know*, CHATHAM HOUSE (Sept. 10, 2018), <https://medium.com/chatham-house/myanmars-referral-to-the-international-criminal-court-five-things-you-should-know-2cb5ea7d21b> ("This is the first time a request of this kind has been made on the court and touches on an important issue: how do you ensure justice and accountability when crimes occur in one country that is not a signatory to the court but impact another country which is a signatory to the court?").

<sup>89</sup> GLOB. JUST. CTR., *supra* note 2, at 1.

<sup>90</sup> U.N. Hum. Rts. Council, *supra* note 15, at ¶¶ 438–43.

<sup>91</sup> *Id.* at ¶ 1373.

<sup>92</sup> *Id.*

are now refugees in Bangladesh, recount frequent instances of rape, gang rape, mutilation, sexual harassment, and other forms of sexual violence while in Myanmar.<sup>93</sup> These atrocities were sanctioned and even overwhelmingly carried out by government forces, including high-ranking officials. Survivors identify the perpetrators of sexual violence as the Tatmadaw, the Border Guard Police, the Myanmar Government, the Myanmar Police Force and other local authorities, members of the local population, and Buddhist monks.<sup>94</sup> Gang rape was particularly common; 80% of instances of rape corroborated by the Independent International Fact-Finding Mission on Myanmar were gang rape, and 82% of those gang rapes were perpetrated by the Tatmadaw.<sup>95</sup> Gendered crimes were not limited to sexual violence: Rohingya women were often murdered in particularly dehumanizing ways, such as being burned alive or killed by knives used to slaughter animals.<sup>96</sup> The Tatmadaw regularly used humiliation and physical and mental torture, including detention and the killing of victims' children.<sup>97</sup> While the majority of victims were women, there are also accounts of third-gender persons being subjected to this sexual violence.<sup>98</sup>

As the international community begins to recognize the urgent need for justice and accountability for the many crimes committed against the Rohingya, it is essential that any accountability mechanism take into account the victims of sexual and gender-based violence. These serious offenses must be given the weight they deserve as serious standalone crimes.

## 2. *Sexual and Gender-Based Violence Should be Treated as an Independent Crime*

Before the 1990s, the prevailing understanding of conflict viewed rape as an inevitable consequence of war.<sup>99</sup> The late 1990s and early 2000s saw numerous breakthroughs in the investigation and prosecution of sexual violence as an international crime. The statutes of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") explicitly classify rape as a crime against humanity for the first time in history. Namely, the ICTY Trial Chamber held in *Prosecutor v. Akayesu* and in *Prosecutor v. Gacumbitsi* that acts of rape and sexual violence intended to destroy a particular group of people can in and of themselves constitute a form of genocide.<sup>100</sup> The Rome Statute is also groundbreaking in its recognition and prioritization of measures to end impunity for sexual and gender-based crimes. The Statute considers sexual and gender-based crimes to be among the "most serious crimes of concern to the international community as a whole."<sup>101</sup> It requires that the ICC take appropriate measures to ensure effective investigation and prosecution of crimes, "in particular where it involves sexual

<sup>93</sup> Pre-Trial Chamber III Decision, *supra* note 40, at ¶ 31.

<sup>94</sup> *Id.* at ¶ 35.

<sup>95</sup> U.N. Hum. Rts. Council, *supra* note 15, at ¶ 1372.

<sup>96</sup> GLOB. JUST. CTR., *supra* note 2, at 1.

<sup>97</sup> U.N. Hum. Rts. Council, *supra* note 15, at ¶ 1372.

<sup>98</sup> Pre-Trial Chamber III Decision, *supra* note 40, at ¶ 31.

<sup>99</sup> Diane Lupig, *Investigation and Prosecution of Sexual and Gender-Based Crimes Before the International Criminal Court*, 17(2) J. GENDER, SOC. POL'Y & L. 1, 17 (2009).

<sup>100</sup> See *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 733; see also *Prosecutor v. Gacumbitsi*, Case No. ICTR 2001-64-T, Judgment, ¶¶ 291–293 (June 17, 2004).

<sup>101</sup> Rome Statute pmbl.

violence, gender violence or violence against children.”<sup>102</sup> In the words of ICC Prosecutor Bensouda, “[it] was high time that such crimes cease to be regarded as ‘inevitable byproducts’ of war and receive the serious attention that they deserve.”<sup>103</sup>

But despite the increasing recognition of sexual violence atrocities during wartime as crimes in and of themselves, there have been relatively few prosecutions of these crimes.<sup>104</sup> The ICTY Chief Prosecutor, Serge Brammertz, has noted a tendency among judges to view sexual and gender-based crimes as the opportunistic acts of uncontrolled soldiers, amounting to “collateral damage” separate from the main conflict.<sup>105</sup> In discussing the Yazidi genocide, Michelle Jarvis, Deputy Head of the International, Impartial and Independent Mechanism for Syria lamented that “the suffering of women and girls has been used to underscore the outrages of the conflict, but strangely those voices drop out when it comes to accountability efforts.”<sup>106</sup>

When faced with the facts of the sexual abuse of the Rohingya people, it is clear that these atrocities were not mere context or inevitable casualties of war, but were independent crimes designed to further the Myanmar government’s systemic regime of discrimination, crimes against humanity, and genocide against the Rohingya.<sup>107</sup> There is a clear record of evidence overwhelmingly showing that the Rohingya were specifically targeted on account of their ethnicity and religion.<sup>108</sup> Survivors of the sexual violence have recalled that the perpetrators referred to them in a derogatory and discriminatory manner during the attacks.<sup>109</sup> The Fact-Finding Mission on Myanmar found that the crimes and the manner in which they were perpetrated were “similar in nature, gravity, and scope to those that have allowed genocidal intent to be established in other contexts.”<sup>110</sup> Though the deeply entrenched culture of discrimination and impunity has normalized such violence in Myanmar, the extreme scale, brutality, and systematic nature of the sexual and gender-based violence

<sup>102</sup> *Id.* at art. 54(1)(b).

<sup>103</sup> Fatou Bensouda, *Gender and Sexual Violence Under the Rome Statute*, in FROM HUMAN RIGHTS TO INTERNATIONAL CRIMINAL LAW: STUDIES IN HONOUR OF AN AFRICAN JURIST, THE LATE JUDGE LAÏTY KAMA 401, 416 (Emmanuel Decaux et al. eds., 2007).

<sup>104</sup> Hikmet Karcic & Tanya L. Domi, *We Need a Better Way to Prosecute Sexual Assault in Conflict*, FOREIGN POL’Y (Mar. 9, 2022), <https://foreignpolicy.com/2022/03/09/rape-sexual-assault-war-crime-justice-kosovo/> (“Though rape and sexual assault committed during conflict are legally considered atrocity crimes, they are rarely prosecuted by international and national courts.”).

<sup>105</sup> *Prosecuting Sexual Violence in Conflict and the Future of International Criminal Justice*, COUNCIL ON FOREIGN RELS. (June 13, 2017), <https://www.cfr.org/event/prosecuting-sexual-violence-conflict-and-future-international-criminal-justice>.

<sup>106</sup> Danielle Hites (@Danielle\_GJC), TWITTER (Aug. 3, 2020, 10:55 AM), [https://twitter.com/Danielle\\_GJC/status/1290300182198919174](https://twitter.com/Danielle_GJC/status/1290300182198919174).

<sup>107</sup> The Global Justice Center’s detailed analysis finds strong evidence of systematic and widespread crimes against humanity (including rape, sexual violence, forced displacement, torture, persecution, and killing) and genocide against the Rohingya through the commission of specifically designed gender crimes. The gender-based crimes were an integral component of the atrocities, for example, as a driver of forced displacement and a way to prevent births within Rohingya communities. GLOB. JUST. CTR., *supra* note 2, at 9, 20, 37.

<sup>108</sup> See OFF. OF THE HIGH COMM’R FOR HUM. RTS., REPORT OF OHCHR MISSION TO BANGLADESH: INTERVIEWS WITH ROHINGYAS FLEEING FROM MYANMAR SINCE 9 OCTOBER 2016 42–43 (Feb. 3, 2017); U.N. Hum. Rts. Council, Report of the Special Rapporteur on the situation of human rights in Myanmar, ¶¶ 42–49, U.N. Doc. A/HRC/37/70 (Mar. 9, 2018).

<sup>109</sup> Pre-Trial Chamber III Decision, *supra* note 40, at ¶ 35.

<sup>110</sup> U.N. Hum. Rts. Council, *supra* note 58, at ¶ 85.

over such a long period of time indicates that it was used as a deliberate tactic to intimidate, terrorize, and punish the Rohingya.<sup>111</sup>

Nevertheless, international justice efforts worryingly tend to minimize these crimes. In fact, the ICC itself has already shown signs of treating gender crimes as mere context. The Court has stated that it does not have jurisdiction over certain coercive acts, including rape, and will consider them solely to establish the contextual elements of crimes against humanity.<sup>112</sup> However, as Section III.B. of this Note will discuss, the Court's precedent must be interpreted to allow for an investigation that incorporates these gender-based acts as crimes in and of themselves. True accountability and justice for the Rohingya requires rejecting the notion of sexual violence as an inevitable byproduct of war and taking sexual and gender-based violence crimes against the Rohingya for what they are: independent crimes whose perpetrators must be held accountable and whose victims' suffering must be acknowledged. Given the strong gender components of this conflict, as the ICC investigation proceeds and, hopefully, leads to accountability mechanisms for the perpetrators, it is imperative that a gender perspective is incorporated at all stages and that perpetrators are specifically held accountable for their sexual and gender-based violence crimes.

#### B. *Interpretive Mechanisms for Expanding the Investigation's Jurisdictional Scope*

A closer look at the wording of prior ICC decisions shows that the Court's analysis can be interpreted in a way that leaves open space to expand the investigation to cover a wider scope of crimes. First, the sexual and gender-based violence that occurred in Myanmar should be investigated and analyzed as a coercive element of the three crimes against humanity of deportation, persecution, and inhumane acts. This easily fits within the Court's interpretation of the Rome Statute.<sup>113</sup> However, viewing sexual and gender-based violence as an element alone is insufficient given the severity of the atrocities. So, secondly, these crimes should also be prosecuted as constituting the crime against humanity of rape and sexual violence. Though the latter is a more controversial use of jurisdiction and requires a bigger interpretive leap, the Court's opinions thus far can and should be interpreted to include both. This section focuses on sexual and gender-based violence crimes, as these crimes have been committed on an enormous scale and played a significant role in the repression and destruction of Rohingya community over the past several decades.<sup>114</sup> A complete discussion of the many crimes perpetrated against the Rohingya is beyond the scope of this Note, but they should all be considered in a similar analysis.

##### 1. *Sexual and Gender-Based Violence as a Contextual Element*

Crimes involving sexual and gender-based violence can be included within the Court's jurisdiction because sexual and gender-based violence makes up an element of the crimes against humanity of deportation, persecution, and inhumane acts. The Court has unequivocally found that it may exercise jurisdiction over crimes when part

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<sup>111</sup> U.N. Hum. Rts. Council, *supra* note 15, at ¶ 1374.

<sup>112</sup> Pre-Trial Chamber III Decision, *supra* note 40, at ¶ 93.

<sup>113</sup> See discussion *infra* sec. II.B.1.

<sup>114</sup> See *supra* Part II.A.1.



of the criminal conduct occurs on the territory of a State Party.<sup>115</sup> Since the atrocities against the Rohingya are commonly understood to have occurred in Myanmar, this raises interpretation questions regarding the legal definition of conduct and what it means for conduct to have occurred.<sup>116</sup> Does a crime occur when certain conduct is ordered or when the effect comes about? The Chamber makes clear that only *part* of the criminal conduct must have occurred on the territory of a State Party for the Court to have jurisdiction. Specifically, in analyzing the plain meaning and context of “conduct,” along with the intent of the drafters, the Chamber concludes that “conduct” is used in a factual manner and is meant to capture the *actus reus* element of a crime within the subject-matter jurisdiction of the Court.<sup>117</sup> The *actus reus* element may encompass the consequences of conduct: The act of a perpetrator may cause a victim to behave in a certain way, and that subsequent action is something for which the perpetrator is responsible. In such cases, both the act and the consequence must be established to make out the crime.<sup>118</sup> In other words, the Chamber reasons that certain crimes have not occurred unless and until the consequence comes about; otherwise, the act simply constitutes an attempt.

In the context of this investigation, the main crime proposed by the Prosecutor is the crime of deportation. The Rome Statute includes deportation as one of the crimes against humanity that fall under the subject-matter jurisdiction of the Court, defining the crime as the “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present.”<sup>119</sup> The completion of this crime is the victims’ response of leaving Myanmar in reaction to the perpetrators’ coercive acts. The Prosecutor alleges that the coercive acts of the perpetrators, which took place exclusively in Myanmar, forced the Rohingya to cross the border into Bangladesh, where the *actus reus* of the crime of deportation was completed.<sup>120</sup> The Pre-Trial Chamber II has previously held in *Prosecutor v. Ruto et al.* that deportation is an open-conduct crime and that a “perpetrator may commit several different conducts which can amount to ‘expulsion or other coercive acts.’”<sup>121</sup> The force required includes both physical force and coercion, including “fear of violence, duress, detention, psychological oppression or abuse of power... or by taking advantage of a coercive environment.”<sup>122</sup> Conduct that would qualify includes “deprivation of fundamental rights, killing, sexual violence, torture, enforced disappearance, destruction and looting.”<sup>123</sup> This means that a whole host of atrocities—even if perpetrated solely in Myanmar—can be included under the jurisdiction of the Court’s investigation as long as they can be linked as a cause of the Rohingya exodus to Bangladesh. Sexual and gender-based violence crimes certainly fall within this scope and can be included to establish the contextual elements of deportation. Sexual violence was so pervasive that almost every woman and girl in the makeshift

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<sup>115</sup> Pre-Trial Chamber III Decision, *supra* note 40, at ¶ 43.

<sup>116</sup> *Id.* at ¶ 45.

<sup>117</sup> *Id.* at ¶¶ 46–49.

<sup>118</sup> *Id.* at ¶ 50.

<sup>119</sup> Rome Statute arts. 7(1)(d)-7(2)(d).

<sup>120</sup> Pre-Trial Chamber III Decision, *supra* note 40, at ¶ 53.

<sup>121</sup> *Prosecutor v. Ruto et al.*, ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 244 (Jan. 23, 2012).

<sup>122</sup> INT’L CRIM. CT., ELEMENTS OF CRIMES, art. 7(1)(d), n.12 (2011).

<sup>123</sup> Pre-Trial Chamber I Decision, *supra* note 82, at ¶ 61.

settlements in Cox's Bazar is either a survivor or a witness to numerous instances of sexual assault, rape, or other gendered violence.<sup>124</sup> It was a major push factor for displacement. Not only was it widespread, but rape and sexual violence were often committed in public, traumatizing and harming entire communities.<sup>125</sup>

This rationale can also apply to sexual and gender-based violence as a contextual element of other crimes against humanity with a link to Bangladesh. Another example is the crime of “[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.”<sup>126</sup> The sexual and gender-based violence against the Rohingya amounts to persecution on the basis of gender, and can also be viewed as persecution on the basis of their religion and ethnic group.<sup>127</sup> Crucially, the persecutory conduct must be connected to another crime enumerated elsewhere in the Rome Statute. Forced displacement can serve as this requisite connected crime. Forced displacement can itself constitute an underlying act of persecution because it is a discriminatory denial of a fundamental right, the freedom of movement and residence.<sup>128</sup> Displacement is also closely linked to sexual and gender-based violence: As discussed above, the sexual and gender-based violence contributed to the cross-border deportation of the Rohingya.<sup>129</sup> Therefore, since the crime of deportation fits within the Court's jurisdiction because of the link to Bangladesh, then the Court can also be said to have jurisdiction over the crime of persecution and its contextual elements of sexual and gender-based violence.<sup>130</sup>

The third such crime with a clear link to Bangladesh is the crime of inhumane acts. Article 7(1)(k) of the Rome Statute establishes a crime against humanity that includes “[o]ther inhumane acts...intentionally causing great suffering, or serious injury to body or to mental or physical health.”<sup>131</sup> Since their deportation, the Rohingya live in appalling conditions in Bangladesh and are prevented from returning to Myanmar by the government of Myanmar's unwillingness to create favorable conditions for repatriation.<sup>132</sup> The Court has noted that preventing the return of the Rohingya falls within Article 7(1)(k) of the Statute because international human rights

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<sup>124</sup> GLOB. JUST. CTR., *supra* note 2, at 27.

<sup>125</sup> *Id.* at 26.

<sup>126</sup> Rome Statute art 7(h).

<sup>127</sup> See GLOB. JUST. CTR., *supra* note 2, at 13–20 (describing that targeting on the basis of gender, sexual violence, discriminatory laws and policies, denial of citizenship, restrictions on marriage and family planning, movement restrictions, and access to health care constitute persecution of the Rohingya, with a particular gender dimension).

<sup>128</sup> *Id.* at 26 (“Discrimination against women, even when based on their sex and gender, is also ‘inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class.’”) (Citing Comm. on the Elimination of Discrimination against Women, Gen. recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, at ¶ 18, U.N. Doc. CEDAW/C/GC/28 (2010)).

<sup>129</sup> See *supra* notes 120–25 and accompanying text.

<sup>130</sup> GLOB. JUST. CTR., *supra* note 2, at 20.

<sup>131</sup> Rome Statute art. 7(1)(k).

<sup>132</sup> *Bangladesh, Burmese junta initiate Rohingya repatriation talks*, RADIO FREE ASIA (Jan. 28, 2022), <https://www.rfa.org/english/news/myanmar/talks-01282022152309.html>.

law establishes that nobody may be arbitrarily deprived of the right to enter their own country.<sup>133</sup> Preventing their entry causes great suffering and serious injury, rendering their future uncertain and forcing them to continue living in terrible conditions.<sup>134</sup> Though not as clearly connected to this crime as to deportation and persecution, the sexual and gender-based violence can nevertheless be linked to this as context and as a contributor to the continuing suffering and deplorable conditions for survivors in Bangladesh. Rape and sexual violence in Myanmar left survivors with severe physical and mental injuries and scars. This not only contributed to their forceful eviction from Myanmar, but the woefully inadequate lack of services for survivors in the camps in Bangladesh ensures their continuing suffering.<sup>135</sup>

## 2. *Sexual and Gender-Based Violence as an Individual Crime*

### *Interpretation of the Rome Statute*

Incorporating sexual and gender-based violence into the jurisdictional scope of the investigation as a contextual element of another crime is a positive development, but that alone is insufficient to fully address the severity of the crimes. Perpetrators of sexual and gender-based violence should also be investigated and prosecuted for the crime against humanity of rape and sexual violence and other related crimes beyond deportation. This requires a more challenging interpretive leap, but is a necessary development in the Court's jurisprudence to ensure that perpetrators do not escape accountability for the worst of their crimes.

The Rome Statute sets out “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” as a standalone crime against humanity.<sup>136</sup> Rape is defined as an invasion by the perpetrator of “the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.”<sup>137</sup> The invasion must be committed by force, threat of force or coercion, by taking advantage of a coercive environment, or against someone incapable of giving consent.<sup>138</sup> The sexual and gender-based violence committed by government forces against the Rohingya undoubtedly meets the elements of the crime against humanity of rape.<sup>139</sup>

The challenge is fitting these individual crimes within the jurisdiction of the ICC, given that the rape and other gender-based violence occurred solely in Myanmar. This requires interpreting the Rome Statute's jurisdictional requirements in light of

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<sup>133</sup> See, e.g., International Covenant on Civil and Political Rights art. 12(4), Dec. 19, 1966, S. Treaty. Doc. No. 95-20, 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination art. 5(d)(ii), Dec. 21, 1965, T.I.A.S. 94-1120, 660 U.N.T.S. 195; International Convention on the Suppression and Punishment of the Crime of Apartheid art. 2(c), July 18, 1976, 1015 U.N.T.S. 243 (generally supporting the right to enter one's own country).

<sup>134</sup> Pre-Trial Chamber I Decision, *supra* note 82, at ¶ 78.

<sup>135</sup> Skye Wheeler, *Failing Rohingya Rape Victims in Bangladesh*, HUM. RTS. WATCH (Feb. 23, 2018), <https://www.hrw.org/news/2018/02/23/failing-rohingya-rape-victims-bangladesh>.

<sup>136</sup> Rome Statute art. 7(g).

<sup>137</sup> ELEMENTS OF CRIMES, *supra* note 122, at art. 7(1)(g)-1.

<sup>138</sup> *Id.*

<sup>139</sup> GLOB. JUST. CTR., *supra* note 2, at 21–23.

legal principles and the wording of the Court’s decisions. The Rome Statute states that the ICC can exercise its jurisdiction if “[t]he State on the territory of which the conduct in question occurred” is a State Party.<sup>140</sup> The Statute must be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in light of the object and purpose of the Statute.<sup>141</sup> The Rome Statute makes clear that the ICC was created as a mechanism to effectively investigate, combat impunity, and ensure accountability for international crimes.<sup>142</sup> The Court’s decisions allow for a broad interpretation of the territorial jurisdiction requirements that would permit the inclusion of sexual and gender-based violence. In examining the Situation in Bangladesh/Myanmar, the Court found that “a restrictive reading of article 12(2)(a) of the [Rome] Statute, which would deny the Court’s jurisdiction on the basis that one or more elements of a crime within the jurisdiction of the Court or part of such crimes was committed on the territory of a State not Party to the Statute, would not be in keeping with such an object and purpose.”<sup>143</sup> The Court also found that “the drafters of the [Rome] Statute intended to allow the Court to exercise its jurisdiction pursuant to article 12(2)(a) of the Statute in the same circumstances in which States Parties would be allowed to assert jurisdiction over such crimes under their legal systems.”<sup>144</sup> The Court affirms this reasoning in its rulings on the Situation in the State of Palestine; Judge Kovacs interpreted this holding to mean that the Prosecutor can exercise investigative powers “under the same circumstances that would allow Palestine, as a State Party, to assert jurisdiction over such crimes under its legal system.”<sup>145</sup> In short, the Court has made clear that it allows a more permissive reading of the territorial jurisdiction provisions that is in line with the Statute’s object of promoting accountability and that it allows jurisdiction over crimes which the state would have jurisdiction to prosecute in a domestic proceeding.

### *Relevant Jurisdictional Principles*

Invoking principles of jurisdiction helps conceptualize sexual and gender-based violence as standalone crimes within the ICC’s jurisdiction. The three most relevant principles are the passive personality principle, the concept of effects jurisdiction, and the objective territoriality principle. Creative argumentation using these three principles presents an opportunity to meaningfully expand the investigation’s scope.

First, under the passive personality principle, a state may exercise jurisdiction over conduct committed outside its territory by a person who is not its national so long as the victim of the conduct was its national.<sup>146</sup> One challenge to the invocation of this principle is that Bangladesh generally does not recognize principles like passive

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<sup>140</sup> Rome Statute art. 12(2)(a).

<sup>141</sup> Vienna Convention art. 31(1).

<sup>142</sup> Rome Statute pmb., ¶¶ 4–9.

<sup>143</sup> Pre-Trial Chamber I Decision, *supra* note 82, at ¶ 70.

<sup>144</sup> *Id.*

<sup>145</sup> Situation in the State of Palestine, ICC-01/18-143-Anx1, Judge Peter Kovacs’ Partly Dissenting Opinion, ¶ 370 (Feb. 5, 2021).

<sup>146</sup> RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 411 (AM. L. INST. 2018).

personality.<sup>147</sup> The ICC references the penal legislation of Bangladesh and the interpretation offered by the Supreme Court of Bangladesh in *Abdus Sattar v. State*, which declare that the exercise of criminal jurisdiction by a State requires the commission of one of the legal parts of the crime on its territory.<sup>148</sup> The Court expresses support for interpreting the Rome Statute in line with the domestic jurisdiction of States Parties, noting that the object and purpose of the Rome Statute grants to it the power “to assert jurisdiction over the most serious crimes of concern to the international community... on the basis of approaches to criminal jurisdiction that are firmly anchored in international law and *domestic legal systems*.”<sup>149</sup>

Nonetheless, passive personality is an accepted, if controversial, principle of international public law and is relevant to the analysis of an international court’s proceedings.<sup>150</sup> Critics have argued that this theory of jurisdiction goes against established tenets of criminal justice because it potentially violates state sovereignty.<sup>151</sup> Additionally, perpetrators cannot anticipate to which State’s laws they will be subject, as they will usually not know the victim’s nationality.<sup>152</sup> However, the latter argument is a weak one in the face of the serious violations of customary international law and international treaty law perpetrated by Myanmar against the Rohingya. The *Lotus* principle, a foundational principle of international law, can be used to provide support for passive personality jurisdiction. This principle, derived from the 1927 *Case of the S.S. Lotus (France v. Turkey)* before the Permanent Court of International Justice, states that sovereign states can exercise jurisdiction as they wish as long as there is no prohibitive rule to the contrary.<sup>153</sup> By drawing on the *Lotus* principle, one can argue that the fact that international law does not explicitly authorize passive personality jurisdiction does not imply that international law outlaws it.<sup>154</sup> In the modern day, the practice of states seems to find jurisdiction on the basis of passive personality reasonable, at least for a limited set of serious crimes.<sup>155</sup> Some states even exercise passive-personality jurisdiction over crimes committed against residents, in addition to nationals.<sup>156</sup> Overall, there is an argument to be made that the sexual and gender-based

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<sup>147</sup> SWISS INST. OF COMPAR. L., COMPAR. STUDY OF NAT’L LEGAL FRAMEWORKS GOVERNING CRIM. ACCOUNTABILITY FOR OFFENCES COMMITTED ABROAD AND/OR ON UN MISSIONS 4 (Aug. 2, 2017), <https://www.isdc.ch/media/1440/e-2017-15-16-086-criminal-accountability.pdf>.

<sup>148</sup> Tanushree Nigam, *Basis and Implications of the ICC’s Ruling Against Myanmar*, PUB. INT’L L. AND POL’Y GROUP (Dec. 22, 2019), <https://www.publicinternationallawandpolicygroup.org/lawyer-justice-blog/2020/5/22/basis-and-implications-of-the-iccs-ruling-against-myanmar>.

<sup>149</sup> Pre-Trial Chamber I Decision, *supra* note 82, at ¶ 70 (emphasis added).

<sup>150</sup> John G. McCarthy, *The Passive Personality Principle and Its Use in Combatting International Terrorism*, 13 FORDHAM INT’L L. J. 298, 307 (1989) (“Although the validity of the passive personality principle was the subject of controversy during the early part of this century, over the last two decades the international community has increasingly accepted the use of the passive personality principle.”).

<sup>151</sup> CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 93 (Oxford, 2d ed. 2015).

<sup>152</sup> *Id.*

<sup>153</sup> Permanent Court of International Justice, *SS Lotus (Fr. v Turk.)*, PCIJ Reports, Series A, No. 10, 19 (1927) (“[A]ll that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction ; within these limits, its title to exercise jurisdiction rests in its sovereignty”); Ryngaert, *supra* note 145, at 22-26 (“under *Lotus*, States could set rules for persons, property and acts outside their territory in the absence of a prohibitive rule, provided that they enforce these rules territorially”).

<sup>154</sup> *Id.* at 95.

<sup>155</sup> *Id.* at 94.

<sup>156</sup> RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE U.S. § 411.

violence can be fit into the investigation's scope through passive personality, given the victims currently residing as refugees in Cox's Bazar have such a strong connection to Bangladesh.

Relatedly, the concept of effects jurisdiction allows a state to claim jurisdiction over conduct occurring outside its territory that has a substantial effect within its territory. No element of the crime needs to take place within the state's territory for effects jurisdiction to exist, as long as there is a substantial effect in the state invoking jurisdiction.<sup>157</sup> The ICC Prosecutor intentionally chose to focus on concepts of territoriality in her request to the Court for a ruling on jurisdiction, avoiding reliance on the effects doctrine.<sup>158</sup> However, the ICC has implied its support for the effects principle. Though not explicitly relying on the effects doctrine in its decision granting jurisdiction over the Myanmar investigation, the Court referred to the case of *United States v. Aluminum Company of America*, in which a U.S. Appellate Court first enunciated the effects doctrine.<sup>159</sup> The Court "implied that even if the elements of the crime were not present in [Bangladesh's] territory, the effects of the crime of deportation did manifest in Bangladesh ... [allowing] the Court to conclude that it has jurisdiction over the dispute."<sup>160</sup> This support for the effects doctrine can be extrapolated to argue in favor of including crimes that occurred entirely or almost entirely in Myanmar within the scope of the investigation.

Finally, the objective territoriality principle allows states to exercise jurisdiction over conduct that commences or occurs outside of the state if that conduct is completed, or if a constituent element takes place, within the state.<sup>161</sup> The concept of objective territoriality has long been accepted by the ICC.<sup>162</sup> The Court has explicitly supported the notion that crimes with an element occurring in Bangladesh fall under its jurisdiction, even if the rest of the crime occurred in Myanmar. This is the principle that allows for the inclusion of sexual and gender-based violence crimes as an element of the crimes of deportation and persecution. To that end, when examining sexual and gender-based violence as a standalone crime, it is useful to recognize that even where the conduct occurred in Myanmar, there are still nascent links to Bangladesh. The full impacts of sexual and gender-based violence crimes often do not appear until months later. For example, Doctors Without Borders has recorded hundreds of cases of pregnancies in Bangladesh's refugee camps resulting from rapes perpetrated during the waves of clearance operations.<sup>163</sup> Though future defense counsel may argue that

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<sup>157</sup> *Id.* at § 409.

<sup>158</sup> Request for Ruling on Jurisdiction, *supra* note 80, at ¶ 31.

<sup>159</sup> Pre-Trial Chamber III Decision, *supra* note 40, at n.98.

<sup>160</sup> Nigam, *supra* note 120; *See also* Pre-Trial Chamber III Decision, *supra* note 40, at ¶ 58 ("under customary international law, States are free to assert territorial criminal jurisdiction, even if part of the criminal conduct takes place outside its territory, as long as there is a link with their territory.... States have a relatively wide margin of discretion to define the nature of this link.").

<sup>161</sup> RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 408.

<sup>162</sup> The Case of the Republic of Korea involved the cross-border firing of torpedoes from North Korea (a non-State Party) to South Korea (a State Party). The ICC Office of the Prosecutor relied on the doctrine of objective territoriality in establishing that the Court had jurisdiction because the crime was completed on the territory of a State Party. ICC Office of the Prosecutor, Situation in the Republic of Korea: Article 5 Report, ¶¶ 38–39 (June 2014), available at <https://www.icc-cpi.int/iccdocs/otp/sas-kor-article-5-public-report-eng-05jun2014.pdf>.

<sup>163</sup> Susannah Savage, "'A lot of shame': Rohingya camps brace for wave of babies conceived in rape," WASH. POST (May 22, 2018), [https://www.washingtonpost.com/world/asia\\_pacific/a-lot-of-shame-rohingya-](https://www.washingtonpost.com/world/asia_pacific/a-lot-of-shame-rohingya-)

these are attenuated links to Bangladesh, the Court's decision refers to a "relatively wide margin of discretion to define the nature of this link," indicating that even a weaker link to Bangladesh may be acceptable.<sup>164</sup>

Ultimately, the Rohingya investigation involves groundbreaking uses of ICC jurisdiction that require the Court's acceptance of creative interpretation, such as jurisdictional principles like the passive personality principle, the concept of effects jurisdiction, and/or the objective territoriality principle. The Court must undertake such a progressive evolution of their precedent to meet its goals of promoting accountability and an end to impunity. However, even if the ICC accepts this expanded jurisdictional scope, the challenges to accountability do not end there. The next section will identify additional barriers that the ICC will face in attempting to bring perpetrators of crimes against the Rohingya to justice.

#### IV. ADDITIONAL CHALLENGES ON THE PATH TO JUSTICE

##### A. *Unique Challenge of Investigating and Prosecuting Gender-Based Violence*

Investigators and prosecutors of international atrocity crimes face evidence-gathering challenges such as the reliability of witness testimony, quality of evidence, loss of evidence over the significant time required to try a case, security of personnel, and access to the territory where the crimes were committed.<sup>165</sup> But sexual and gender-based violence crimes present significant and unique additional challenges. Sexual violence crimes are unique in that they carry a danger of reporting and a societal stigma for the victim that is not present in most other wartime offenses. Rohingya women who have been raped face rejection by their families and communities and may even fear being subjected to additional sexual violence.<sup>166</sup> This stigma creates different types of barriers for victims seeking justice. Victims may be less likely to report or testify about what has happened to them for fear of "outing" themselves as victims and being forced to face the shame of their community.<sup>167</sup> And even if an investigation leads to a conviction for perpetrators, justice may still be elusive for victims: Testifying witnesses may face retaliation, and judicial accountability alone does not alter communities' mindsets or eliminate pervasive stigma.

There are also challenges linking sexual violence to high-level commanders. The jurisprudence of tribunals like the ICTR showed a reluctance to use vicarious liability to hold high-level officials accountable for wartime rape committed by their forces, despite successfully finding officials responsible for murders committed by

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[camps-brace-for-wave-of-babies-conceived-in-rape/2018/05/21/8bf9be3c-45b4-11e8-b2dc-b0a403e4720a\\_story.html](https://www.washingtonpost.com/news/energy-environment/wp/2018/05/21/camps-brace-for-wave-of-babies-conceived-in-rape/2018/05/21/8bf9be3c-45b4-11e8-b2dc-b0a403e4720a_story.html).

<sup>164</sup> Pre-Trial Chamber III Decision, *supra* note 40, at ¶ 58 ("[U]nder customary international law, States are free to assert territorial criminal jurisdiction, even if part of the criminal conduct takes place outside its territory, as long as there is a link with their territory...States have a relatively wide margin of discretion to define the nature of this link."), and at ¶ 61 ("...provided that part of the *actus reus* takes place within the territory of a State Party, the Court may thus exercise territorial jurisdiction within the limits prescribed by customary international law.").

<sup>165</sup> Christian de Vos, *Investigating from Afar: The ICC's Evidence Problem*, 26 LEIDEN J. OF INT'L L. 1009, 1009 (2013).

<sup>166</sup> U.N. Human Rights Council, *supra* note 13, at ¶ 438.

<sup>167</sup> Peggy Kuo, *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 CASE W. RESV. J. OF INT'L L. 305, 316 (2002).

their troops based on virtually the same evidence.<sup>168</sup> The Rome Statute now includes two groups of criminal responsibility: Individual responsibility under Article 25 and superior or command responsibility under Article 28, which provides that commanders be criminally liable for crimes committed by forces under their “effective command and control.”<sup>169</sup> Though some sexual and gender-based violence was committed by commanders and other high officials, the majority was carried out by lower-level soldiers, so the latter provision would be the best avenue for holding high-level commanders liable for sexual violence. But despite this provision, courts can be reluctant to hold commanders responsible for sexual violence, reasoning that while lower-level soldiers would not kill without explicit orders from their commander, they would choose to rape women *en masse* on their own.<sup>170</sup> There is also a notable dearth of convictions of superior officers who raped victims themselves.<sup>171</sup> This creates problematic precedent. It is crucial to hold both lower-level and superior officers accountable for wartime sexual violence to avoid supporting the notion that rape is an incidental byproduct of war and to avoid sending the message that soldiers can rape and sexually abuse with impunity. Cases like *Akayesu* and *Gacumbitsi* have set the precedent that rape itself can be a grave crime.<sup>172</sup> As the nature of conflict evolves, courts must use robust investigations and creative legal theories to prosecute high-level complex cases with perpetrators remote from the crime scene.<sup>173</sup>

#### B. *Uncertain Prospects of Myanmar’s Cooperation with Indictment*

Throughout the course of the investigation, the Office of the Prosecutor will be collecting necessary evidence about the crimes against the Rohingya from a variety of reliable, independent, impartial, and objective sources, such as the Independent International Fact-Finding Mission on Myanmar and its successor, the Independent Investigative Mechanism for Myanmar. If there is sufficient evidence to establish that specific individuals bear criminal responsibility, then the Prosecutor will request Judges from Pre-Trial Chamber III to issue summonses to appear or warrants of arrest.<sup>174</sup> If the investigation goes so far, this process will present another significant barrier to the execution of justice. The ICC relies on the cooperation of States Parties for the successful investigation, arrest, and prosecution of defendants.<sup>175</sup> The unique makeup and groundbreaking use of jurisdiction in the present case may make it extremely difficult for summonses or arrest warrants of high-level perpetrators to be executed.

<sup>168</sup> Lupig, *supra* note 99, at 19.

<sup>169</sup> Rome Statute arts. 25, 28.

<sup>170</sup> Catherine MacKinnon, *The ICTR’s Legacy on Sexual Violence*, 14 NEW ENG. J. INT’L & COMP. L. 211, 214–15 (2008) (citing Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-T, Dissenting Opinion of Judge Ramaroson, 69-78 (Dec. 1, 2003) for support).

<sup>171</sup> Kelly Dawn Askin, *Gender Crimes Jurisprudence in the ICTR: Positive Developments*, 3 J. INT’L CRIM. JUST. 1007, 1008 (2005) (“[M]any indictments fail to bring rape charges, primarily because there has been very little genuine and rigorous investigation of the crime by the Prosecutor’s office. This has resulted in rape acquittals, dropped charges and other missed opportunities and debacles.”).

<sup>172</sup> See *supra* note 100.

<sup>173</sup> Anne-Marie de Brouwer, *The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes*, 48 CORNELL INT’L L. J. 639, 662 (2015) (referencing the need to prosecute complex cases on the basis of *respondeat superior* and joint criminal enterprise).

<sup>174</sup> Press Release, *supra* note 45.

<sup>175</sup> Rome Statute arts. 86-102.



The ICC will be investigating and prosecuting offenders using the link to the State Party of Bangladesh, but all the perpetrators who would be on trial reside in Myanmar. Not only is Myanmar not a State Party and thus has no obligation to assist the ICC in extraditing individuals for prosecution, but it has also been previously uncooperative with international justice efforts and its recent coup make its future engagement with the ICC uncertain.

In the past, Myanmar has repeatedly refused to cooperate with international investigations or to acknowledge its culpability in the severe and systematic persecution of the Rohingya. In April 2018, when the ICC was considering initial questions of the Court's jurisdiction over the matter, the government of Myanmar signaled its disapproval of such an exercise of jurisdiction, stressing that "Myanmar is not a party to the Rome Statute" and "[t]he proposed claim for extension of jurisdiction [...] exceed[s] the well enshrined principle that the ICC is a body which operates on behalf of, and with the consent of States Parties."<sup>176</sup> Myanmar's previous de facto leader Aung San Suu Kyi urged the ICJ to drop their genocide case against Myanmar, calling the allegations "incomplete and misleading."<sup>177</sup> Myanmar's internal investigation of abuses against the Rohingya proved to be nontransparent, denying the military's widespread use of sexual violence, finding no evidence of genocidal intent, and failing to hold senior military officials responsible.<sup>178</sup>

The ongoing unrest in Myanmar makes Myanmar's future cooperation with international justice efforts uncertain. In 2011, the military junta that had ruled the country for decades was dissolved and replaced with a civilian transitional government and later a democratically elected government, raising hopes for a stable and democratic future for the nation.<sup>179</sup> But in February 2021, the Tatmadaw staged a military coup and retook control of the country. The junta charged the de facto civilian leader Aung San Suu Kyi with various crimes and placed her and other government officials and activists under house arrest.<sup>180</sup> The ensuing protests and retaliatory government strikes led to the deaths of over 1,600 people and the arrest of over 12,000, as of March 11, 2022.<sup>181</sup> Eventually, the ousted politicians and activists formed a parallel government called the National Unity Government ("NUG"), which declared war on the junta, leading to widespread fighting throughout the country.<sup>182</sup> Because of this increasing instability and the enduring discrimination and violence against the Rohingya, domestic justice efforts for the Rohingya remain unlikely.

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<sup>176</sup> Pre-Trial Chamber I Decision, *supra* note 82, at ¶ 35.

<sup>177</sup> Reedy Brody, *Aung San Suu Kyi Denies Burmese Genocide of Rohingya at The Hague*, HUM. RTS. WATCH (Dec. 17, 2019), <https://www.hrw.org/news/2019/12/17/aung-san-suu-kyi-denies-burmese-genocide-rohingya-hague>.

<sup>178</sup> *Myanmar: Government Rohingya Report Falls Short*, HUM. RTS. WATCH (Jan. 22, 2020), <https://www.hrw.org/news/2020/01/22/myanmar-government-rohingya-report-falls-short>.

<sup>179</sup> Lindsay Maizland, *Myanmar's Troubled History: Coups, Military Rule, and Ethnic Conflict*, COUNCIL ON FOREIGN RELS. (Jan. 31, 2022), [https://www.cfr.org/backgrounders/myanmar-history-coup-military-rule-ethnic-conflict-rohingya?gclid=CjwKCAjwzruGBhBAEiwAUqMR8Lj2Ihgg9mlFs1i30qAYGQdtS9snnUVXuYXPqc\\_hWaWO\\_88obPb\\_kNxoCs8oQAvD\\_BwE](https://www.cfr.org/backgrounders/myanmar-history-coup-military-rule-ethnic-conflict-rohingya?gclid=CjwKCAjwzruGBhBAEiwAUqMR8Lj2Ihgg9mlFs1i30qAYGQdtS9snnUVXuYXPqc_hWaWO_88obPb_kNxoCs8oQAvD_BwE).

<sup>180</sup> *Id.*

<sup>181</sup> *Daily Briefing in Relation to the Military Coup*, ASSISTANCE ASS'N FOR POL. PRISONERS (Mar. 11, 2022), <https://aappb.org/?p=20551>.

<sup>182</sup> Maizland, *supra* note 179.

However, there is some hope for cooperation with international efforts under an NUG-led government. In August 2021, the NUG filed a declaration with the ICC accepting the court's jurisdiction with respect to all international crimes committed in Myanmar since 2002.<sup>183</sup> This was done under Article 12(3) of the Rome Statute, which permits non-States Parties to accept the jurisdiction of the Court by declaration.<sup>184</sup> This is a significant shift in policy for Myanmar, likely driven largely by NUG's desire to hold the military junta accountable, and would mean that the ICC could investigate crimes committed solely in Myanmar. At time of writing, it is up to the international community to decide whether to accept this declaration and "thereby implicitly accept the NUG as Myanmar's legitimate government and international voice rather than the military junta."<sup>185</sup>

Given the ongoing instability and violence throughout Myanmar, the future of this declaration remains uncertain, as does the practical reality of cooperating with ICC investigations and prosecutions. The ICC has previously dealt with non-cooperative States and has mechanisms to attempt to induce compliance, but the reality is that it is nearly impossible to effectively prosecute a case without cooperation.<sup>186</sup> In the absence of Myanmar's cooperation, creative strategies would be necessary for successful prosecution. For example, the international community can place pressure on Myanmar to comply. Another option that may be possible in the future is to proceed with the trials *in absentia*. The ICC currently does not allow *in absentia* proceedings, which have been viewed as prohibited under the Rome Statute.<sup>187</sup> However, the 2020 decision in *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* could open the door to future *in absentia* trials. The Court found that the Rome Statute, together with general principles of law, permits the Court to hold the trial of an accused who is *willfully* absent.<sup>188</sup> This precedent could be used in the future to justify proceeding with *in absentia* trials of perpetrators from Myanmar who intentionally choose not to participate.

### C. Need for Long-Term Restorative Justice

<sup>183</sup> Adam Simpson, *Myanmar's exile government signs up to ICC prosecutions*, EAST ASIA FORUM (Sept. 17, 2021), <https://www.eastasiaforum.org/2021/09/17/myanmars-exile-government-signs-up-to-icc-prosecutions/>; National Unity Government Myanmar (@NUGMyanmar), Twitter (Aug. 20, 2021, 11:22 A.M.), <https://twitter.com/NUGMyanmar/status/1428739347717648389>.

<sup>184</sup> See FORTIFY RTS., ENDING IMPUNITY IN MYANMAR (Aug. 2021), <https://www.fortifyrights.org/downloads/Ending%20Impunity%20in%20Myanmar%20-%20Fortify%20Rights%20-%20August%202021.pdf> (analyzing the legal basis of NUG's Art. 12(3) submission).

<sup>185</sup> Simpson, *supra* note 183.

<sup>186</sup> In 2019, the ICC found that Jordan had failed to comply with its obligation to arrest Omar Al-Bashir and surrender him to the ICC. Because Al-Bashir is at large at time of writing, the case remains in the Pre-Trial stage. Press Release, ICC, Al-Bashir Case: ICC Appeals Chamber confirms Jordan's non-cooperation but reverses the decision referring it to the ASP and UNSC, ICC-CPI-20190506-PR1452 (May 6, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1452>; see also *Al Bashir Case*, INT'L. CRIM. CT., <https://www.icc-cpi.int/darfur/albashir>.

<sup>187</sup> Rome Statute art. 63 ("The accused shall be present during the trial.").

<sup>188</sup> Caleb Wheeler, *The ICC Appeals Chamber Signals a Possible Change in Approach to the Permissibility of Trials in Absentia*, EJIL: TALK! (July 3, 2020), <https://www.ejiltalk.org/the-icc-appeals-chamber-signals-a-possible-change-in-approach-to-the-permissibility-of-trials-in-absentia/>.

Even if the above limitations are overcome and the ICC is able to convict or imprison one or more high-level perpetrators, the work does not end there. The ICC may impact the priorities of the international community, but it alone cannot amend Myanmar's Constitution and discriminatory laws, repatriate the hundreds of thousands of Rohingya living in refugee camps in Bangladesh, reconcile divided communities, or change the hearts and minds that fuel the cycle of discrimination. For many Rohingya, "justice means going home as soon as possible. It means being given rights and citizenship in Myanmar. It means security, and the ability to call [themselves] 'Rohingya.'"<sup>189</sup> The ICC investigation alone is insufficient for bringing about enduring justice. The investigation will take a long time; even if it leads to the opening of cases against perpetrators, additional barriers will continue to block comprehensive justice, including and in particular for victims of sexual and gender-based violence, who often face stigma when returning to their home communities. One must also remember that the Rohingya are not the only ethnic minority group suffering in Myanmar. Despite evidence of brutal crimes by the Tatmadaw against the Karen, Shan, Mon, and Kachin groups, avenues for justice for non-Rohingya ethnic minority groups are nonexistent due to the strict jurisdictional limitations and strategic choices surrounding current justice efforts.<sup>190</sup>

International efforts through institutions like the ICC must be supplemented by regional and national reconciliation and transitional justice work. Tribunals can operate for decades without being able to address the full scope of war crimes committed. For example, after 25 years in operation, the ICTY, the most prolific of the international tribunals, had issued 161 indictments, leaving behind thousands more victims and unfinished investigations.<sup>191</sup> Additionally, the accountability made possible by tribunals is not the same as reconciliation. International legal institutions like the ICC are often far removed from—and inaccessible to—the communities in which justice is sorely needed. Indictments alone do not change harmful societal policies and mindsets. Even in the ICTY's last year of operation, after 25 years and 161 indictments, the minister of education in Republika Srpska in Bosnia and Herzegovina banned references to the Srebrenica genocide in schoolbooks, and a nationalistic singer performed a concert sponsored by a political organization that honored individuals who had been convicted for war crimes and crimes against humanity by the ICTY.<sup>192</sup> Even if the jurisdictional scope of the ICC investigation can be expanded to cover more of the atrocities committed against the Rohingya, it will never be able to comprehensively cover all the perpetrators and the huge magnitude of crimes committed. This makes local and regional transitional justice strategies imperative.

## CONCLUSION

The ICC investigation presents a hope of some justice for the Rohingya victims and survivors of horrific trauma. Yet on its face, the scope of the investigation is frustratingly limited. It is insufficient and unsatisfactory for perpetrators to be held

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<sup>189</sup> Southwick, *supra* note 47.

<sup>190</sup> Grant Shubin, *Implications of the Myanmar ICJ and ICC Cases for Non-Rohingya Minorities*, JUST SEC. (July 31, 2020), <https://www.justsecurity.org/71546/implications-of-the-myanmar-icj-and-icc-cases-for-non-rohingya-minorities/>.

<sup>191</sup> COUNCIL ON FOREIGN RELS., *supra* note 105.

<sup>192</sup> *Id.*

accountable solely for lesser and non-violent crimes like deportation. True justice and closure for victims requires holding perpetrators accountable for the full scope of crimes committed, particularly for the often minimized sexual and gender-based violence crimes. Though crimes involving sexual and gender-based violence occurred in Myanmar, they must be incorporated into the scope of the ICC investigation. This Note has argued that sexual and gender-based violence crimes can be addressed either as elements of crimes against humanity or as independent crimes. The latter requires a more creative interpretive leap, but both are consistent with Court precedent and with the ICC's goals of combatting impunity and ensuring accountability for the worst international crimes.

The road ahead to justice is a long one with numerous obstacles. Even if the investigation's scope is expanded, there will be challenges in attempting to successfully prosecute perpetrators. It is also crucial to acknowledge that attempts to seek justice and accountability through avenues like the ICC are mere supplements—perhaps even preconditions—for the democratic transition and restorative justice needed for long-term stability. Even so, this ICC investigation presents opportunities for groundbreaking legal interpretation. The precedent set by the Court here will have far-reaching implications, both for the hundreds of thousands of Rohingya victims and for victims of future conflicts with cross-border dimensions in a globalized world. It is imperative that the Court engage in progressive decision-making that recognizes the suffering of victims and upholds its commitment to human rights and accountability.