



Settlement of the "Cleaning Operation" Case of the Rohingya Ethnic in Myanmar Based on International Law

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Abstract

The Independent International Fact-Finding Mission on Myanmar (IIFMM) released a report on August 27, 2018, documenting over 10,000 deaths and the displacement of more than 725,000 Rohingyas to Bangladesh due to "clearance operations" conducted by the Myanmar Military. These actions constitute severe violations of international human rights law, potentially amounting to crimes against humanity, for which perpetrators could face prosecution at the International Criminal Court (ICC). However, Myanmar's non-ratification of the Rome Statute presents a significant obstacle to effective enforcement. Therefore, a more robust approach is necessary to address the plight of the Rohingya ethnic group affected by these operations. This study adopts a normative research methodology employing both statutory analysis and case study approaches. The Tatmadaw's culpability in committing acts of genocide against the Rohingya ethnic group has been established. To address this, three key mechanisms are proposed: the application of the Responsibility to Protect (R2P) principle, the involvement of international governmental organizations (IGOs), and the pursuit of justice through ICC proceedings. Urgent action is required to ensure accountability for those responsible for genocide, particularly high-ranking Tatmadaw officials, thereby preventing impunity from perpetuating.

Keywords: Rohingya, Tatmadaw, Genocide, International Criminal Court (ICC).

A. INTRODUCTION

In March 2017, the UN (United Nations) Human Rights Council established a Fact-Finding Mission to determine the facts and circumstances of alleged human rights violations by the military and security forces, as well as violations that occurred in Myanmar (Brooten, 2015). The fact-finding mission is called The Independent International Fact-Finding Mission on Myanmar (hereinafter abbreviated as IIFFMM) which is chaired by the former Attorney General of the Republic of Indonesia, Marzuki Darusman (OHCHR, 2018). On 27 August 2018 IIFFMM published its report on atrocities in Myanmar. According to this report, there were at least ten thousand (10,000) victims who died in "clearance operations" (the authors interpret it as "clearing operations") which began on 25 August 2017 (The Independent International Fact-Finding Mission on Myanmar, 2018, p. 8). Not just murder, but rape, sexual slavery, sexual violence, kidnapping, burning of buildings, violence against children, and other atrocities were also carried out during the "cleaning operation" (Ochab, 2018). For the victims, it was the last day on earth, as if the whole world had collapsed and the day of judgment (doomsday) had come.

As a result of this "clearance operation", nearly 725,000 Rohingya ethnic people fled to Bangladesh (The Independent International Fact-Finding Mission on Myanmar, 2018, p. 9). Avoiding massacres and fleeing and seeking asylum does not necessarily make them safe and secure. They still have to face challenges to survive longer. Without shelter, food, water, or even family, they walked for days or even weeks, through forests and over mountains. Many died on the road, due to injuries sustained, lack of food, or drowned while crossing rivers. Not only that, Tatmadaw soldiers (Myanmar Armed Forces) also attacked Rohingya while traveling or at border crossings. Landmines were also planted

by the Tatmadaw to prevent Rohingya from returning to their hometowns (International Campaign to Ban Landmines & Cluster Munition Coalition (ICBL-CMC), 2018, pp. 8–11).

The persecution efforts experienced by the Rohingya ethnic group have allegedly been going on for a long time. However, the Myanmar government denies accusations that the government took part in the massacre of the Rohingya ethnic group. The commission formed by the Myanmar government stated that it had found no evidence to suggest genocide against the Rohingya minority group ("Myanmar Commission Denies There Was 'Genocide' Against Rohingya Muslims," 2017). Zaw Htay (Senior Myanmar government spokesman) said the IIFFMM report was flawed because investigators had not visited the affected areas in the north of the country. The Myanmar government does not agree and does not accept any resolutions made by the UN Human Rights Council, but strangely it is the Myanmar government itself that refuses their access ("Myanmar Rejects UN Investigators' Report on Rohingya Genocide Because It Didn't Let Them into Country," 2018). This is not the only time the government has refused to be involved in the case of the massacre of the Rohingya ethnic group. Commissions formed by the Myanmar government always reported that there is no ethnic cleansing of the Rohingya. The fact-finding commission formed by Myanmar even seemed to blame the Rohingya themselves for the events they experienced (Republic of the Union of Myanmar, 2013). The Myanmar government (the Department of Public Relations and Psychological Warfare of the Myanmar Military) even published a 117 page book entitled Myanmar Politics and the Tatmadaw: Part 1 which contains the history of the Rohingya ethnic group in Myanmar, which according to the Jawa Pos newspaper is an attempt to change

history by "antagonizing" the ethnic group. Rohingya (Making New History, Turning the Rohingya into a Corner, 2018).

Regardless of the statement from the UN or the Myanmar government regarding the person responsible for the case, the facts show that there have been human rights violations against the Rohingya ethnic group. Judging from the consequences, the events that happen to the Rohingya can be categorized as "atrocities" or serious human rights violations (BAN, 2014). The perpetrators of these crimes can be tried by the International Criminal Court (ICC) as a manifestation of the promulgation of the Rome Statute of the International Criminal Court 1998 (hereinafter referred to as the Rome Statute). However, unfortunately, until now Myanmar has not ratified the Rome Statute, which means that Myanmar cannot simply be processed by the ICC (International Criminal Court, 2021). Even though Myanmar is a country that has not ratified (a non-party country) to the Rome Statute, this does not mean that Myanmar will enjoy impunity (cannot be punished) (The International Criminal Court, 1998).

With regard to justice for non-party countries to the Rome Statute, it can be analyzed based on territorial jurisdiction as stated in Article 12 in conjunction with Article 13 of the Rome Statute. Article 12 paragraph 3 concerning Preconditions for the implementation of jurisdiction (the authority to adjudicate), explains that non-party countries whose citizens act as victims or perpetrators can still be bound by the ICC's jurisdiction if they declare that their country accepts the implementation of the ICC's jurisdiction and submit it to the registrar for follow-up. Furthermore, Article 13 regarding the exercise of jurisdiction, in letter (b) also explicitly explains that even if the State does not ratify the Rome Statute, the ICC can still try it if a situation (case) is forwarded to the Office of Prosecutor (hereinafter referred to as the ICC Prosecutor) by the UN Security

Council (DK) acting based on Chapter VII of the UN Charter. So it can be concluded that the ICC can exercise its jurisdiction over non-party countries, so theoretically no party will enjoy impunity.

Unfortunately, the process of handing over a situation by the UN Security Council to the ICC Prosecutor must go through several steps that are full of political nuances. The initial step must be an investigation process, either through the mechanism of implementing Responsibility To Protect (R2P), an investigation from the UN Human Rights Council, or the results of the United Nations General Assembly, which is also very political in its implementation. After receiving the results of these initial steps, the UN Security Council must meet first to determine whether the case is a threat to world peace or not, then a decision is taken in the form of a resolution. For this reason, more efficient and effective solutions are needed to resolve cases of cleansing operations against the Rohingya ethnic group.

Based on this background, the authors intended to explain whether there have been legal incidents that refer to serious human rights violations in Myanmar. As well as to explain what the international community can do to overcome the problem of "clearance operations" experienced by the Rohingya ethnic group based on international law.

The authors used juridical-normative research methods with a statutory approach and a case approach in preparing this work. The legal approach is carried out by examining laws or regulations that relate to legal issues. In this case, does international law regulate the issue of the massacre of the Rohingya ethnic group, and what is the coherence of international law in responding to this case? The laws used include the Burma Citizenship Law of 1982, Charter of The United Nations and Statue of The International Court of Justice, PCNICC/1999/L.5/Rev.1/Add.2 - Annex III Elements of Crimes 1999,

PCNICC/2000/1/Add.2 - Part II Finalized draft text of the Elements of Crimes 2000, and Rome Statute of the International Criminal Court 1998. The case approach relates to cases relating to research legal issues that have become court decisions. With a case approach, the authors want to explain how (international) courts have decided on previous cases similar to the Rohingya, as well as its application in the Rohingya case.

B. RESULT AND DISCUSSION

Categories of Legal Events Experienced by the Rohingya Ethnicity

The Rome Statute provides that all elements of a crime must be fully consistent and proven for the jurisdiction of the ICC to apply. Each element of the crime must explain what must be proven, but not add to the difficulty for the ICC Prosecutor to prove guilt beyond reasonable doubt in accordance with the requirements of a fair trial (Amnesty International, 1999). Referring to the ICC's jurisdiction to prosecute serious human rights crimes as regulated in Articles 5-8 of the Rome Statute along with the elements of crimes set out in the Annex to the Rome Statute (additional rules which are inseparable from the Rome Statute), basically the "clearing operation" incident fulfills several elements contained in crimes of genocide, crimes against humanity, and war crimes (International Fact-Finding Mission on Myanmar, 2018).

However, to prove it, every element and element in the crime must be fulfilled. In the crime of genocide experienced by the Rohingya ethnic group, all the elements and elements of the crime of deliberately eliminating a particular group have been fulfilled. These elements include killing, causing serious physical and mental injury, intentionally causing living conditions calculated to bring about physical destruction, imposing measures intended to prevent birth, and forcibly removing children.

Crimes against humanity are essentially the same as genocide. The difference between the two is the intention to exterminate a particular group, so that every crime of genocide must contain crimes against humanity. In the case of "clearance operations" its elements and elements also fulfill crimes against humanity, such as murder, extermination, rape, torture and all other inhumane acts committed as part of the spread or systematic attacks directed against the Rohingya ethnic group.

Meanwhile, regarding war crimes, the IIFFMM assumes that there have been non-international war crimes between the Rohingya ethnic group, in this case the Arakan Rohingya Salvation Army (ARSA) and anti-Rohingya groups which are allegedly sponsored by the Tatmadaw and the Myanmar government. However, this assumption is difficult to prove, because the Myanmar government has not been legally proven to have funded militant groups to fight.

Armed with a comparison of the elements and elements of the crime contained in the "clearing operation" case, it can be concluded that the crime of genocide is a legal event that best meets the requirements of the provisions of the Rome Statute and the Annex to the Rome Statute.

Implementation Principle of Responsibility to Protect

Conflict in Myanmar is nothing new considering that conflict tendencies have been fostered since Myanmar became independent. Likewise, the history of persecution experienced by the Rohingya ethnic group has also occurred since the military junta came to power. The Myanmar government's efforts to resolve the conflict also seem to be "stepchildren" of the Rohingya ethnic group. For example, in 2012 President Thein Sein responded that the persecution experienced by the Rohingya ethnic group was not the government's responsibility. Thein Sein considers

the Rohingya ethnic group to be an illegal ethnic group who came to Myanmar, and the solution given is to place the Rohingya ethnic group in refugee camps provided by the United Nations High Commissioner for Refugees (UNHCR) or send them to countries that are willing to accept them (Oishi, 2020).

Efforts to resolve the conflict experienced by the Rohingya Ethnic in Myanmar have been going on for a long time. One of the efforts being urged by the world community is the implementation of the R2P principle or responsibility to protect. R2P is a norm or principle that explains that every country is obliged to protect its citizens from serious human rights crimes. However, if the country is deemed to have failed to protect it, the international community can take responsibility through the UN (United Nations General Assembly, 2015). Implementation of R2P through the UN in the case of the humanitarian crisis in Rakhine by providing humanitarian assistance and searching for evidence of human rights violations in Rakhine. The UN, through the UN Human Rights Council, then sent Yanghee Lee Special Rapporteur on the situation of human rights in Myanmar and then formed the IIFFMM whose main objective was to investigate and seek information and facts related to human rights violations in Rakhine related to this "Cleaning Operation" case (United Nations General Assembly, 2012). So it can be concluded that the sovereignty of a country is not absolute if serious human rights crimes occur within it.

However, in practice, the Myanmar Military refuses to implement the R2P principle because it considers the principle to be only a proposed doctrine, not a legal norm that must be obeyed. Myanmar also considers that the R2P concept cannot be attached to the Myanmar state for the events that happen to the Rohingya ethnic group. This is based on the citizenship status of the Rohingya ethnic group, which is not a

resident recognized by Myanmar. So the international community cannot interfere with Myanmar's sovereignty in this case (Nishikawa, 2020).

The R2P concept itself focuses on the state's responsibility for its citizens and inherently its counterpart is about citizenship. How can a country be forced to protect citizens who are not citizens of that country? Yukiko Nishikawa (a professor at Nagoya University) explained that R2P cannot help the Rohingya or other groups whose citizenship is at issue/lost (Stateless People), even though allowing stateless people to suffer is morally unacceptable. In the worst case scenario, R2P can provide an opportunity for the government to refuse responsibility for protecting certain groups because they are considered outsiders/not citizens of their country. R2P can result in unintended consequences for people suffering in countries that question people's citizenship status, such as the citizenship of the Rohingya in Myanmar (Nishikawa, 2019).

The root of the problem of Myanmar's relinquishment in implementing the R2P Principle is the intervention of the Tatmadaw which has long wanted to get rid of the Rohingya ethnic group. However, not only in the case of the Rohingya ethnic group, the Tatmadaw also often commits serious human rights crimes in order to remain in control of Myanmar and avoid pressure from the international community. Even though Myanmar is a democratic country, in reality the military has always controlled the country. When the government wants to change Myanmar into a more democratic country and prioritize human rights, the military can carry out a military coup at any time. This can happen because Myanmar's Constitution stipulates that if a situation occurs that threatens state security, the military can take over the country until state stability returns (Baharis, 2021).

The most recent case that caught the world's attention regarding the Tatmadaw's refusal to implement the R2P principle was when Myanmar was controlled by a military junta since there was a coup on February 1 2021. The crisis started because of a coup over the election results in November last year (2020). In this election, Aung San Suu Kyi, leader of the National League for Democracy (NLD) party, won 83% of the seats to form the government (Adams, 2021). However, the Tatmadaw annulled the results because they considered that there had been fraud in the general election. Suu Kyi, President Win Myint, and other politicians who were loyal to Suu Kyi were then unilaterally detained by the military and then took over the interim government until the re-election was held (Nunley, 2021). As a result of the coup, the people of Myanmar finally demonstrated to demand that the Tatmadaw restore the legitimate government. However, the Tatmadaw responded to the demonstration repressively and seemed to be frontal in dispersing the mass action (Sicca, 2021). Until this research was written, at least 1,281 people had died and at least 10,000 others had been detained for no apparent reason by the Tatmadaw (Iyabu, 2021).

UN envoy to Myanmar, Christine Schraner Burgener called on the UN Security Council to take collective action, warning that a “bloodbath” was imminent in Myanmar. The UN also called on all its employees in Myanmar to leave the country temporarily (UN Geneva, 2021). Increasing violence against civilians and ethnic militias shows that the Tatmadaw is increasingly losing control of the country and is plunging Myanmar into the abyss of a failed state (Welle (DW), 2021).

However, this does not mean that implementing R2P cannot be implemented, it just means that Myanmar's intervention in implementing R2P is less effective. Moreover, carrying out military intervention in implementing the Responsibility to React element will be considered a crime of aggression by Myanmar. So it can be concluded that as long as the Tatmadaw is still in power in Myanmar, human rights violations in Myanmar will continue to occur. As long as the Tatmadaw does not want to improve and reduce its power, the R2P principle will never be implemented in Myanmar. Because basically R2P focuses on the state's own awareness in protecting its citizens from serious human rights crimes.

The Role of IGOs in Resolving the Myanmar Conflict

International Governmental Organizations (IGO) are organizations consisting of two or more countries that have the same vision and mission. The role of IGOs is of course very important in resolving conflicts on an international scale. Apart from the UN, organizations such as ASEAN as a regional entity that houses countries in Southeast Asia, including Myanmar, also have an important role in maintaining regional peace and stability in the Southeast Asia region (The ASEAN Declaration, 1967). The Organization of Islamic Cooperation (OIC) is also involved in efforts to resolve the conflict in Myanmar. The OIC itself is an international organization consisting of Islamic countries and majority Muslims.

a. Association of Southeast Asian Nations (ASEAN)

Since the Rohingya Ethnic conflict in Myanmar, ASEAN has made many efforts to ensure that the conflict ends quickly. One of the efforts made was by holding the ASEAN Inter Parliamentary Myanmar Caucus (AIPMC), which then formed a special commission to handle the Myanmar issue. At a meeting in Bali, AIPMC called on

Myanmar President Thein Sein to continue his duties in advancing the democratization process and upholding human rights in Myanmar (Triono, 2014). However, AIPMC has not produced much results in handling cases in Myanmar.

A new problem emerged when the principle of non-interference was put into practice to resolve the conflict in Myanmar, namely placing the principle of solidarity as mere rhetoric. Other ASEAN member countries cannot interfere in the affairs of Myanmar and the Rohingya, even though basically ASEAN can act based on the R2P principle. This can be seen from the decision of ASEAN member countries regarding the "cleaning operation" experienced by the Rohingya ethnic group (Wisnu, 2017). Of the 10 ASEAN members, only Indonesia and Malaysia expect ASEAN to be involved in this case in accordance with UN instructions for ASEAN to apply the R2P principle to Myanmar. Meanwhile, Brunei Darussalam and the Philippines abstained, and 5 other countries refused to intervene in the Rohingya case because they adhere to the principle of non-interference (Albayumi, 2018).

Although the first paragraph of the opening of the Bangkok Declaration suggests that there is a spirit of solidarity between members, in reality this principle experiences ups and downs. The new principle of solidarity reappears explicitly in the ASEAN Charter, which further emphasizes that developing a common position must be based on unity and solidarity. Solidarity is an action based on reciprocity and mutualism, where the closer the subjects are, the more intense the reciprocal and mutually beneficial relationship between them will be (Arundhati, 2016). In ASEAN there is a tendency that the higher the level of nationalism in a country, the greater the sense of solidarity at the national level, and the weakening of the sense of solidarity at the international level (in this case ASEAN) (Arundhati, 2016).

Regarding the military junta issue, ASEAN is more inclined to protect its own country's political interests than to jointly resolve the Rohingya ethnic problem. Thailand, for example, until now has had a similar fate to Myanmar, which is still "controlled" by the kingdom and its military, so if it intervenes in the Rohingya ethnic issue, it is feared that it will backfire on the country. Likewise, other member countries appear to be careful in determining their stance regarding human rights violations or the implementation of R2P. This can be seen from the results of the ASEAN Summit which were not firm in stopping the Myanmar military junta, starting from the 32nd Summit (Fitriyanti, 2018) to the 2021 ASEAN Summit which was held in Jakarta on March 24 2021 (Kusumo, 2021).

It can be concluded that the sense of national solidarity of the Myanmar people to get rid of the Rohingya ethnic group is very high and when passing through Myanmar territory, this feeling is transformed into the principle of non-interference. So the sense of solidarity between ASEAN members to resolve this case is becoming increasingly thin, and in the end the emphasis is on the principle of non-interference rather than a sense of solidarity to resolve the Rohingya problem with other ASEAN members. Even though the UN has given a mandate to apply the R2P principle to regional entities because it understands their respective regions better, as long as ASEAN does not improve its concept of non-interference and solidarity principles, it will be difficult to resolve cases of gross human rights violations in the ASEAN region.

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a. Organization of Islamic Cooperation (OKI)

As an international organization that oversees Muslims, the OIC has a moral responsibility to help the Rohingya ethnic group escape the persecution they are experiencing. One of the efforts made by the OIC was to visit Myanmar to conduct an investigation and create a Memorandum of Cooperation (MoC) on 5-15 September 2012. The investigation was carried out by the OIC Contact Group on Myanmar to look at the factual situation that occurred in Rakhine State, Myanmar (Türbedar, 2019). The results of the MoC agreement are: OIC support for Myanmar to increase tolerance

between communities; Myanmar stops acts of persecution against the Rohingya Ethnic; OIC together with PMI and Red Crescent provided assistance to rebuild at least 4000 destroyed Rohingya houses; and finally the establishment of the OIC Humanitarian Office in Myanmar.

However, in its implementation, only the first agreement was implemented with the formation of the Buddhist-Muslim Interfaith Group. The second agreement was not implemented by Myanmar because many Rohingya were still being tortured, both by other ethnic groups and by the Myanmar government's own policies. Meanwhile, in the third agreement, UNHCR discovered the fact when visiting Rakhine State that the Myanmar government had not delivered the aid on target. Only 945 houses were built, and ironically only a few Rohingya received this assistance, even though the main victims in the horizontal conflict were Rohingya. Lastly, the construction of the OIC humanitarian office was rejected by the Buddhist community. They assume that the OIC will only spread Islam in the state of Arakan and only provide assistance to the Rohingya ethnic group (Juniar, 2014).

The OIC's latest effort is to provide support to Gambia as an OIC delegate to submit cases of persecution experienced by the Rohingya ethnic group to the International Court of Justice (ICJ) in November 2019. Gambia submitted a case for alleged violations of the UN Genocide Convention experienced by the Rohingya ethnic group. However, during the trial, Myanmar raised an objection, because it considered that Gambia did not have the legal standing to represent the Rohingya ethnic group in the case (Myanmar Rohingya, 2020). Only member states can file cases at the ICJ and not any international organizations. However, the ICJ is of the opinion that Gambia has filed the Case in its own name and efforts to seek support from other countries or

international organizations do not hinder Gambia's Legal Standing (individual position) in filing the Case (Khaliq, 2021). Until now the trial is still continuing so the case has not yet received a decision by the ICJ (International Court of Justice, 2021).

However, the OIC as a cooperative organization does not have much authority to intervene in resolving the Rohingya case. The OIC can only help in terms of humanitarian assistance and recommendations in resolving cases of "cleaning operations" so it can take a direct part in it.

Enforcement of "Cleaning Operation" Cases Through the ICC Judicial Service

Many efforts have been made to resolve the case of the Rohingya ethnic group, but until now the issue of genocide has never come to light. The Rohingya are still neglected without citizenship, without a place to live, without even certainty of survival. Until now, Rohingya can only depend on the assistance of humanitarian agencies. There needs to be a more firm and concrete solution to resolve the genocide case experienced by the Rohingya ethnic group. One of the efforts regulated in international law is the trial of the perpetrators of genocide and efforts to repatriate the Rohingya ethnic group to their homeland through trials at the ICC.

The problem that has arisen regarding this judiciary is the status of Myanmar which has not ratified the Rome Statute so that it has become a non-party to the ICC. In the end, the Myanmar government used this reason to reject the jurisdiction of the ICC (Aydin, 2019). However, the ICC can basically still exercise jurisdiction to try even if a country has not ratified the Rome Statute. This mechanism is regulated in territorial jurisdiction as stated in Article 12 in conjunction with Article 13 of the Rome Statute. There are at least 3 mechanisms that can be used to adjudicate Rohingya cases, consisting of:

Submission of cases from the affected party countries; Myanmar declares to accept jurisdiction of the ICC; and Submission of cases by the UNSC to the ICC.

The submission of cases from the party state where the crime occurred can be seen in Article 12 paragraph (2) of the Rome Statute. The country where a case can be processed is if it is the country in the region where the act occurred or if it occurred on board a ship/aircraft, then the country registered on the ship/aircraft can still be tried at the ICC. In the case of the Rohingya ethnic group, the country of Bangladesh is the site of some of the crimes committed by the Tatmadaw, namely crimes against humanity as regulated in Article 7 of the Rome Statute. Bangladesh itself is one of the 123 countries that ratified the Rome Statute, so it has become a party to the ICC and can accept jurisdiction to try the ICC. Articles that can be used to ensnare perpetrators of crimes against the Rohingya ethnic group based on the situation in Bangladesh can be seen from 3 aspects, namely: deportation, persecution and other inhumane acts.

1. Deportation or forced transfer of residents is regulated in Article 7(1)(d) of the Rome Statute, and according to the Annex to the Rome Statute the important point of deportation is “crossing territorial borders”. When the massacre of the Rohingya occurred, the place where the forced population transfer occurred was in Myanmar, but the destination for the deportation of more than 725,000 people was Bangladesh. Before the "clearance operation" occurred, Bangladesh was the closest place for the Rohingya to escape from Tatmadaw atrocities. Even refugees seeking asylum in Bangladesh have reached 1.2 million (Habib, Jubb, Ahmad, Rahman, & Pallard, 2018, Chapter 2), of course causing losses for Bangladesh.

2. The persecution (Article 7 paragraph (1) letter h of the Rome Statute) experienced by the Rohingya ethnic group was not only carried out when they were in their hometown. Atrocities committed by the Tatmadaw also occurred throughout the journey of their expulsion, ranging from being shot, raped, to being killed along the road if found by the Tatmadaw and even crossing the Myanmar-Bangladesh territorial border.
3. According to the authors, Article 7 paragraph (1) letter k of the Rome Statute regarding other inhumane acts is the most flexible article to be used as a deterrent for all other acts that are not regulated in the Annex to the Rome Statute regarding crimes against humanity. One thing that can be used is when the Tatmadaw plants land mines along the Bangladesh-Myanmar border to prevent the Rohingya from returning to their villages. Of course, this could result in serious injury if exposed to Rohingya ethnic groups who want to return to Myanmar, and even result in death. Even though it was planted in Myanmar territory, and can be used as an alibi for Myanmar so that it is not subject to provisions regarding crimes against humanity (because the place where the land mine was planted was not in Bangladesh), it should be remembered that the element of "serious mental injury" also includes the element of "fear of violence.... abuse of power, or by taking advantage of a coercive environment" as regulated in the Annex to the Rome Statute. So simply by causing very severe psychological fear, it can be included in the elements of crimes against humanity.

The weakness in this mechanism is that not all crimes can be fulfilled due to regional limitations in enforcement. For example, the crime of genocide and its elements and

articles cannot be proven because genocide only occurred in Myanmar. So what is feared is that the punishment that the perpetrators will receive will not be as severe as if they are proven to have committed genocide. Apart from that, there will be many perpetrators who will not be arrested because they escape the trap of the articles they are charged with Myanmar Declaration Against ICC Jurisdiction.

Article 12 paragraph (3) of the Rome Statute explains that a non-party state can declare that its state submits to and accepts the jurisdiction to try the ICC in connection with a disputed crime to the ICC Registrar. Of course, this will be a little difficult considering that the Tatmadaw which controls Myanmar is very uncooperative in efforts to resolve the crimes of genocide experienced by the Rohingya ethnic group. Considering that Myanmar refuses to accept the jurisdiction of the ICC because it is not a party to the Rome Statute / a non-party country.

In July 2019, the ICC prosecutor also requested proprio motu (the authority to initiate investigations into crimes under the ICC's jurisdiction) to conduct a preliminary investigation (International Criminal Court, 2019a). However, Myanmar again refused to carry out an investigation because they had already conducted an independent investigation and found no crimes against the Rohingya ethnic group and denied all accusations against the Myanmar government of committing genocide (Reuters, 2017). According to the Tatmadaw, until now they are still carrying out investigations and trials to punish the perpetrators suspected of carrying out the murder of the Rohingya ethnic group who the Tatmadaw suspects of carrying out attacks on police posts in Rakhine state (refusing to admit that there was a "clearing operation"). So the ICC cannot interfere considering that the ICC's jurisdiction is only a complementary court and cannot interfere with the national court once it has been handled.

However, the judge still granted the ICC Prosecutor's request to carry out *proprio motu* because he considered the ICC Prosecutor's legal basis acceptable (International Criminal Court, 2019b). Even though Myanmar states that it is making efforts to resolve the conflict related to the Rohingya, the ICC can still carry out investigations on the basis of Article 53(1)(b) which states that a case can be accepted if the exceptions contained in Article 17 of the Rome Statute are met. Article 17 itself contains the "issue of admissibility of the case", where if it is related to the case of the Rohingya ethnic group, there will be 2 articles that are fulfilled, namely Article 17 paragraph (1) letters a and b which contain the issues regarding unable and unwilling.

Article 17 paragraph (1) letter a states that a situation (case) cannot be accepted if the country concerned is conducting an investigation or prosecution unless the country concerned is not really serious or unable to carry out the investigation or prosecution. This article is relevant to apply to the Tatmadaw because until now investigations and prosecutions have not been carried out seriously. Recently, the Tatmadaw admitted for the first time that there was a "possibility" of wider violations by its forces regarding the "clearance operations" experienced by the Rohingya ethnic group in Rakhine. Several perpetrators have also been arrested but the judiciary is not very transparent. However, the Tatmadaw still denies that it has carried out genocide against the Rohingya ethnic group, and that operations targeting Rohingya terrorists are legal to carry out (Dikarma, 2020). Of course, this can harm the rights of the Rohingya ethnic group to seek justice, because the cases being investigated and prosecuted do not match the facts they have experienced.

Meanwhile, Article 17(1) (b) explains that a situation (case) cannot be accepted if the country concerned has carried out an investigation and decided not to prosecute

unless the decision is made because the country is unable and unwilling. This matter has been explained many times by previous authors, that the Myanmar party (Tatmadaw) has carried out an investigation and found no genocide. Even Myanmar has created two fact-finding commissions but the findings are nothing about the crimes of genocide experienced by the Rohingya ethnic group. As for the prosecution, only Tatmadaw "subordinates" were tried and the charges against them were limited to "contributing to and participating in the killings" which resulted in the deaths of 10 Rohingya people ("Myanmar soldiers jailed for killing Rohingya Muslims," 2018).

Facts like these should be able to make Myanmar improve and be serious about taking part in creating lasting peace. Basically, Suu Kyi's government has been cooperative regarding the enforcement of the Rohingya case. It can be seen that Suu Kyi took a direct part in solving this problem, such as directly appointing the late Kofi Annan to lead the fact-finding mission in Myanmar. However, this attitude gives the impression of ambiguity and just seeking to be safe. Because in its implementation, Suu Kyi often ignores the fate of the Rohingya and prioritizes her political interests so as not to lose the votes of the Burmese majority and the trust of the Tatmadaw. UN special rapporteur on human rights for Myanmar Yanghee Lee said that Suu Kyi was in a difficult position but still criticized her for not condemning the violence experienced by the Rohingya ethnic group (United Nations General Assembly, 2012).

The Tatmadaw is again the root of the problems in Myanmar. Marzuki Darusman (chairman of IIFFMM) even emphasized in his latest report that "Peace will not be achieved as long as the Tatmadaw is still above the law". Marzuki also added that the Tatmadaw Commander-in-Chief, Min Aung Hlaing and all his staff who fostered this military dynasty must be replaced immediately (The Independent International Fact-

Finding Mission on Myanmar, 2019). Restructuring of state institutions, especially the Tatmadaw, must be carried out immediately so that democratic civil government can be realized. If the Tatmadaw is no longer in power, it is not impossible that Myanmar will declare itself to be subject to the jurisdiction of the ICC. In this way, justice to resolve the case of genocide against the Rohingya ethnic group will be carried out.

The final mechanism that the authors offers is to utilize Chapter VII of the UN Charter where the UNSC can take necessary actions if violations are found that threaten world peace. The ICC itself provides space for the UNSC to delegate a situation (case) to the ICC based on the provisions of Article 13 paragraph (b) of the Rome Statute. However, the problem is that the UNSC in transferring cases to the ICC has to go through a long process. Before making a resolution regarding the delegation of power to the ICC, the UNSC must first go through an investigation process, either through the mechanism of implementing R2P, investigations from the UN Human Rights Council, or the results of the UN General Assembly. After obtaining the results of the investigation and sufficient evidence to bring the suspects to justice at the ICC, the UN Security Council had to issue a resolution which was also full of political overtones.

In the case of the Rohingya ethnic group, for example, at least the UN Security Council has issued 2 resolutions, but both failed to be implemented. To be accepted, a resolution must reach 9 of the 15 UNSC members. However, with the existence of veto rights for permanent member countries (China, Russia, Britain, the US and France), a resolution will automatically not be possible. Likewise in the case of the Rohingya ethnic group, as long as there is a veto right mechanism, genocide cases will not be submitted to the ICC. This can happen because of the special relationship between

Myanmar and China and Russia as veto rights holders. So every time the UN Security Council makes a resolution that will harm Myanmar, China and Russia will be ready to cancel it.

Regarding China's closeness to Myanmar, according to Yun Sun (Co-Director at the Stimson Center), China's interests will be threatened if their projects in natural resources, mining and energy companies are subject to sanctions. For this reason, China has always opposed imposing sanctions on Myanmar, even though it has to use its veto right (Sun, 2021). China and Myanmar have many economic agreements, one of the mega projects is to channel natural gas from Rakhine state to China. Of course, the Rohingya case will hamper Chinese business if the region has to be disturbed again.

Meanwhile, for Russia, defense relations between the countries have grown in recent years. Russia provides Myanmar with military training and university scholarships, as well as selling weapons to a military blacklisted by several Western countries over accusations of atrocities against civilians. Russia even became at least 16% of the source of weapons obtained by Myanmar from 2014-2019 (Staff, 2021).

As long as this political practice continues to be carried out above humanity, so long will the fate of the Rohingya be neglected. Lowering one's ego and having the courage to put aside one's interests in order to create peace is an absolute step in creating lasting peace. Of course this will be difficult to do, but if it can be done then the ICC as a permanent court established to try criminals against humanity will be able to carry out its duties more easily. Because the law is enforced not for those who have interests, but for those who seek justice.

And finally, hopefully more and more good people will help the Rohingya ethnic group. Whether in the form of assistance with money, food, shelter, or sincere prayers,

so that their suffering can end soon. Because direct assistance is also very necessary at this time, so that their needs can be met before their justice will be fulfilled later.

C. CONCLUSION

Based on the results of the analysis, it can be concluded that the crime of genocide is the legal event that best meets the requirements to be used as material jurisdiction for the ICC to adjudicate cases of "clearance operations" if seen based on the analysis of the elements and articles of the Rome Statute and the Annex to the Rome Statute. Efforts that can be implemented to resolve cases of "cleaning operations" based on international law can be carried out using 3 methods. The first is the application of the R2P principle where Myanmar is obliged to protect its citizens from serious human rights crimes, and if it is unable to do so, the international community such as the UN can take over this obligation. Second is the role of IGO (ASEAN and OIC) in resolving the Myanmar conflict, through diplomatic efforts carried out by ASEAN and ICJ judicial efforts by the OIC. The third is the enforcement of "clearing operation" cases through the ICC judiciary, with a mechanism for handing over cases by Bangladesh, Myanmar's declaration of ICC jurisdiction, as well as handing over cases by the UN Security Council. However, all these efforts must be accompanied by each party (especially the Tatmadaw as well as China and Russia) to be serious in efforts to enforce this case.

Based on this conclusion, the suggestions given are: first, the UN must immediately create a more efficient mechanism to prevent and take action against countries that commit genocide. Second, the Myanmar government must immediately restructure state institutions, especially the Tatmadaw, so that a democratic Myanmar civil government that upholds human rights can be realized. Apart from that, the

perpetrators of genocide, especially high-ranking Tatmadaw officials, must be immediately tried so that immunity does not continue to occur. Third, China and Russia should prioritize humanity and lasting peace rather than their diplomatic and business interests. So as not to always veto UNSC decisions in an effort to uphold justice for those who seek justice. Lastly, civil society throughout the world and Indonesia in particular, must continue to help the Rohingya ethnic group in living their lives. Assistance can be in the form of goods and money which can be channeled through NGOs or other forms of moral support so that their suffering can be reduced. Because every human being has an obligation to help other human beings, it is not enough to wait for formal efforts from the international community. It doesn't matter what your religion, ethnicity, or other identity is, as long as you are human, do humanitarian things.

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