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Disentangling Law and Religion in the Rohingya Case at the International Criminal Court

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ABSTRACT



The Rohingya are one of the most persecuted minorities in the world. Military campaigns conducted by Myanmar against the Rohingya have led to numerous deaths, widespread cases of sexual violence, the destruction of hundreds of villages, and the deportation of more than 700,000 people to Bangladesh. These events have triggered proceedings at the International Criminal Court (ICC). The ICC has arguably failed to address the religious dimensions of crimes and facts in some of its previous jurisprudence appropriately. The entanglement of law and religion at the ICC may lead to an impoverished ratio decidendi and disregard for the victims' claims. We hence argue that, by disentangling law and religion in the proceedings related to the Rohingya, the ICC may be able to enhance the consideration of both elements. This approach should result in (1) appropriate fact-finding related to the Rohingya's identity on ethnic and religious grounds as well as religious dimensions of mass atrocities; (2) attribution of criminal responsibility for serious violations of human rights, including rights related to the Rohingya's religious identity, which constitute international crimes; and (3) reparations for victims to redress harm inflicted on them.

KEYWORDS

Myanmar; Rohingya; International Criminal Court; religious persecution; international criminal law; human rights; freedom of religion; law and religion

Introduction

The Rohingya are one of the most persecuted minorities in the world.¹ Military campaigns conducted by Myanmar against the Rohingya since 2017 have led to more than 10,000 deaths, widespread cases of sexual violence, the destruction of nearly 400 villages, and the deportation of over 700,000 people to Bangladesh.² These events have triggered

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¹Human Rights Council Opens Special Session on the Situation of Human Rights of the Rohingya and Other Minorities in Rakhine State in Myanmar' (OHCHR, 5 December 2017) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22491> accessed 3 March 2021.

²*Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (Request for Authorisation of an Investigation Pursuant to Article 15) ICC-01/19-7 (ICC [Office of the Prosecutor], 4 July 2019) para 204. (In subsequent citations, 'Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar' will be abbreviated to 'Bangladesh/Myanmar Situation').*

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proceedings at the International Criminal Court (ICC)³ and the International Court of Justice (ICJ).⁴ The proceedings are multifaceted, and there are numerous reasons for the vulnerable situation of the Rohingya in Myanmar, including, among others, colonialism, economic deprivation, statelessness, and living under an oppressive military regime. Since other authors have explored those issues,⁵ we focus on a matter that has been overlooked: the Rohingya's religious affiliation in relation to the ICC legal proceedings.

The ICC Prosecutor requested to open an investigation concerning alleged crimes against the Rohingya within the ICC's jurisdiction on 4 July 2019. ICC Pre-Trial Chamber III authorised the investigation a few months later.⁶ The Chamber also received views from or on behalf of alleged victims.⁷ The Prosecutor's investigation focuses on the alleged crimes against humanity of deportation and persecution (ICC Statute, Article 7 (1)(d) and (h) respectively), as well as other crimes within the ICC's jurisdiction committed against the Rohingya or others in Rakhine state (Myanmar).⁸ The Prosecutor alleges that the criminal acts in Myanmar (a non-state party to the ICC Statute) forced the Rohingya to cross the border into Bangladesh (a state party to the ICC Statute), thereby completing the crime against humanity of deportation in the territory of Bangladesh.⁹

In addition to being an ethnic minority in Myanmar – where most Rohingya people used to reside – the vast majority of Rohingya are Muslims, a religious minority in the country. Consequently, the Rohingya have been persecuted due to both their ethnicity and their religion. The intersectionality of grounds on which the Rohingya are persecuted is, therefore, evident.¹⁰ This intersectionality creates the potential for two different outcomes. On the one hand, the Court could conflate and amalgamate the religious and ethnic grounds at the expense of proper consideration of each ground. On the other hand, the Court could consider these grounds separately, highlighting their uniqueness and thus bringing separate claims based on each specific ground. These distinct interpretations are noticeable in the definition of the Rohingya within UN bodies. For example, while the international website of the United Nations High Commissioner for Refugees (UNHCR) defines the Rohingya as '... a stateless Muslim minority in Myanmar', the UNHCR national website for the United States describes them as '... a stateless, mostly Muslim minority who have traditionally lived in Myanmar'.¹¹

³Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar. Investigation' (ICC 01/19) <www.icc-cpi.int/bangladesh-myanmar> accessed 3 March 2021.

⁴*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* Request for the Indication of Provisional Measures, Order (ICJ, 23 January 2020).

⁵See e.g. Azeem Ibrahim, *The Rohingyas: Inside Myanmar's Hidden Genocide* (Hurst 2016); Francis Wade, *Myanmar's Enemy Within: Buddhist Violence and the Making of a Muslim 'Other'* (Zed Books 2017); and Kriangsak Kittichaisaree, *The Rohingya, Justice and International Law* (Routledge 2021).

⁶*Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (Authorisation of Investigation)* ICC-01/19-27 (ICC [PTC-III], 14 November 2019).

⁷*Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (Representations of Victims from Tula Toli)* ICC-01/19-19 (ICC [PTC-III], 23 October 2019).

⁸*Bangladesh/Myanmar Situation (Request for Authorisation of an Investigation)* (n 2) paras 72–222.

⁹*Bangladesh/Myanmar Situation (Authorisation of Investigation)* (n 6) para 53.

¹⁰For further discussion regarding intersectionality involving religious aspects see David Keane, 'Addressing the Aggravated Meeting Points of Race and Religion' (2006) 6 *University of Maryland Law Journal of Race, Religion, Gender and Class* 367; and Nazila Ghanea, 'Intersectionality and the Spectrum of Racist Hate Speech: Proposals to the UN Committee on the Elimination of Racial Discrimination' (2013) 35 *Human Rights Quarterly* 935.

¹¹Compare respectively 'Rohingya Emergency' (UNHCR, 2020) <www.unhcr.org/rohingya-emergency.html> accessed 3 March 2021; with 'Rohingya Refugee Crisis' (UN Refugees, 2020) <www.unrefugees.org/emergencies/rohingya/> accessed 3 March 2021 (emphasis added).

We contend that the distinct characterisation of the Rohingya people – either as a Muslim ethno-religious group or as an ethnic group whose members are mostly Muslim – is highly relevant in the present case, particularly for the victims. If the Rohingya are characterised as an ethno-religious group, this may lead courts to overlook nuances in the religious dimensions of the identity of victimised individuals.¹² Conversely, characterising the Rohingya as an ethnic group whose members suffered persecution by virtue of their ethnicity *and* their religious beliefs, namely the second approach mentioned above, favours the disentangling of law, religion, and other crucial identity elements, such as ethnicity. We argue that the latter approach is the most suitable to take victims' complaints seriously, leading to appropriate fact-finding, attribution of responsibilities, and reparations. Moreover, should these distinctions be enforced in the case discussed, it could provide a critical precedent in similar judicial cases dealing with complex issues of law and religion.

This article therefore aims to answer the following question: to what extent can the ICC effectively address interrelated issues of law and religion regarding the attacks against the Rohingya? It does this through seven sections. First, a brief contextual analysis of the vulnerable position of the Rohingya in Myanmar. Second, a general overview of ethnicity-related and religion-related legal findings in the ICC Rohingya case. Third, an examination of the ICC's potential contributions to the process of identifying the Rohingya as an ethnic *and* religious group. Fourth, the article discusses aspects of the relationship between law and religion at the ICC. Fifth, it presents an analysis of the role of religion in the Rohingya case at the ICC. This analysis is germane not only to the Rohingya case but to other international judicial cases dealing with the persecution of groups, which may amount to war crimes, crimes against humanity, or even genocide. Sixth, we explore the role that the ICC, within the limits of its mandate, can play in determining gross violations of human rights that include rights related to the Rohingya people's religious identity, particularly freedom of religion or belief (FoRB). This section connects individual criminal liability for crimes against humanity of persecution on ethnic and religious grounds with the ICC's potential indirect adjudicatory role concerning those rights violations within its mandate. Seventh, questions concerning ICC reparations for victims to redress the harm inflicted on the Rohingya are scrutinised, paying attention to reparation modalities that may be suitable to redress harm resulting from international crimes that also constitute serious violations of human rights, including FoRB.

1. Brief Contextual Analysis of the Vulnerable Situation of the Rohingya in Myanmar

Myanmar, formerly known as Burma, became independent from Great Britain in 1948. In the same year, Burma cast the first vote in favour of adopting the Universal Declaration of Human Rights.¹³ In 1962, the Myanmar military – also known as the Tatmadaw – took over the government through a coup, allegedly to protect the country's territorial integrity in the face of protest from various ethnic groups.¹⁴ Unsurprisingly, the

¹²See also paper by Carola Lingaas in this special issue.

¹³UNGA, '183rd Plenary Meeting' (10 December 1948) [Voting of the Draft Universal Declaration of Human Rights] p 933.

¹⁴UN Human Rights Council, 'Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar' (17 September 2018) A/HRC/39/CRP.2 [IIFMM Report], para 71.

Tatmadaw forcefully suppressed ethnic insurgencies and restricted several fundamental rights, resulting in further dissatisfaction with the government, protests, and attempts to re-democratise the state.¹⁵ A decisive moment in which the military experienced a temporary loss of power and legitimacy came in 2007–2008 with the Saffron Revolution, a series of protests for political reform led by Buddhist monks.¹⁶ As they play a central role in Myanmar society,¹⁷ the monks' support for the protests was vital to a *de jure* democratic transition and a new, yet deeply problematic constitution.¹⁸ In 2021, the quasi-democratic status thus created was destabilised when the Myanmar military took over the government in another coup, explicitly placing the country under the control of the Tatmadaw commander-in-chief, General Min Aung Hlaing.¹⁹

According to the 2014 census, Myanmar had approximately 50 million inhabitants, one million of whom were Rohingya.²⁰ Myanmar is a diverse country with 135 officially recognised ethnic groups, yet the Rohingya are not recognised as such and are often referred to as Bengalis.²¹ The country's largest ethnic group is the Bamar or Burmese (68%), followed by the Shan (9%), the Karen (7%), and the Rakhine (4%).²² Since the Rohingya ethnicity is not recognised by Myanmar, they were not explicitly listed in the 2014 census, though it is suggested that they were categorised as 'non-enumerated'.²³

As for religious affiliation, Buddhists are the largest religious group in Myanmar (87.9%), followed by Christians (6.2%), Muslims (4.3%), and Hindus (0.5%).²⁴ These statistics do not reflect the complexity of the religious landscape in Myanmar, however, as some ethnic groups have a religious composition substantially different from the national one. For instance, in Chin state, 85% of the population is Christian.²⁵ Since the Rohingya were not properly consulted in the 2014 census, we have only estimations about their religious affiliation. Still, it is clear that the vast majority of Rohingya are Muslim, although some self-identify as belonging to other religions, for example, Hinduism and Christianity.²⁶

¹⁵Ibid. paras 72–73. See further Yoshihiro Nakanishi, *Strong Soldiers, Failed Revolution: The State and Military in Burma, 1962–1988* (NUS Press 2013).

¹⁶See Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Myanmar' (7 December 2007).

¹⁷'Beyond A Spiritual Calling: The Saffron Revolution' (2007) 61 *Journal of International Affairs* 235, 235–36.

¹⁸IIFMM Report (n 14) paras 74–79.

¹⁹See further UN, 'Myanmar Coup: UN Expert Calls for Strong International Response Including Sanctions and Arms Embargo' (OHCHR, 1 February 2021) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26706> accessed 3 March 2021.

²⁰*The 2014 Myanmar Population and Housing Census. The Union Report: Religion* (Myanmar Ministry of Labour, Immigration and Population, 2016) 3.

²¹IIFMM Report (n 14) paras 477 and 481.

²²'The World Factbook: Burma' (CIA, 6 October 2020) <<https://www.cia.gov/the-world-factbook/countries/burma/>> accessed 3 March 2021. See further, Martin Smith, *Burma (Myanmar): The Time for Change* (Minority Rights Group, 2002) 15–20; and Violet Cho, 'Ethnicity and Identity' in Adam Simpson, Nicholas Farrelly and Ian Holliday (eds), *Routledge Handbook of Contemporary Myanmar* (Routledge 2017) 43–51.

²³*The 2014 Myanmar Census* (n 20) 3–4; See also, Jane Ferguson, 'Who's Counting? Ethnicity, Belonging, and the National Census in Burma/Myanmar' (2015) 171 *Bijdragen tot de Taal-, Land- en Volkenkunde* 1, 20–22. See also IIFMM Report (n 14) para 406, footnote 905.

²⁴*The 2014 Myanmar Census* (n 20) 4.

²⁵Ibid. 3.

²⁶Respectively, Nicolas Haque, 'Rohingya Hindus Now Face Uncertainty in Myanmar' (*Al Jazeera*, 21 September 2017) <www.aljazeera.com/videos/2017/09/21/rohingya-hindus-now-face-uncertainty-in-myanmar/> accessed 3 March 2021; and Shafiur Rahman, 'Christian Rohingya Experience Persecution in the Camps' (*Medium*, 4 February 2020) <<https://medium.com/kutupalong/christian-rohingya-experience-persecution-in-the-camps-3cb65736dd16>> accessed 3 March 2021.

Historically, the Rohingya have lived – or used to live – in Rakhine state. Rakhine is one of the poorest states in Myanmar, having ‘... the highest unemployment rate in the country, and the lowest access to clean water and sanitation’.²⁷ Yet it is a key geopolitical location for Myanmar and Chinese economic interests, as it could provide a gateway for China to the Indian Ocean.²⁸ This factor has not benefited the Rohingya, and years of economic deprivation and ethnic isolation contributed to the formation of the Arakan Rohingya Salvation Army (ARSA), an ethnic armed group that has clashed with the military on several occasions.²⁹ ARSA is not the only ethnic armed group in Myanmar; conflicts involving other ethnic groups have also taken place in Myanmar.³⁰

Rakhine state shares a border with Bangladesh, where the majority of the population is ethnically Bengali and Muslim.³¹ For this reason, many in Myanmar have labelled the Rohingya as ‘illegal’ Bengali immigrants.³² As General Min Aung Hlaing, *de facto* leader of Myanmar since the 2021 coup, has put it:

... we openly declare that ‘absolutely, our country has no Rohingya race’ ... ‘those Bengali are not Myanmar ethnics ... Therefore, the Tatmadaw needs to take security measures for local people’ and ‘Bengali are not ethnic of Myanmar. Rohingya is not included on the list of Myanmar’s ethnics ... The Tatmadaw on its part will give priority to safeguarding the security and interest of the ethnics while protecting the citizens residing in Myanmar’.³³

The lack of recognition of the Rohingya by the state means that they are not considered citizens of Myanmar, rendering them stateless and thus leaving them in an even more vulnerable situation. For example, the Constitution of Myanmar enshrines in Article 3 that ‘The State is where multi-National races collectively reside’.³⁴ Yet the Rohingya are not considered a *national race*. The protection of constitutional rights is also reserved only for citizens of Myanmar. Consequently, the Rohingya are deprived of their fundamental rights in the country – such as the rights to equality, liberty, justice, FoRB, and private property.³⁵

Moreover, by creating a narrative of othering – that is, singling out the Rohingya as a foreign ethnic group with a different religious affiliation – the state has portrayed the Rohingya as a national threat. They have consequently become an easy target of attacks, and have endured successive waves of violence throughout history, the most recently in 2017.³⁶ Accordingly, several NGOs have alerted the risks of continuous violence against the Rohingya.³⁷

²⁷IIFMM Report (n 14) paras 405–407.

²⁸Sun Yun, ‘On the Yunnan-Rakhine Corridor’ (*Policy Brief Series no 109, TOAEP, 2020*) <www.toaep.org/pbs-pdf/109-sun-yun/> accessed 3 March 2021.

²⁹IIFMM Report (n 14) paras 55–59 and 408.

³⁰For further information, see Martin Smith, *Burma: Insurgency and the Politics of Ethnicity* (2nd updated edn, Zen Books 1999) XIV–XIX, 88–101, 322–54; Ardeth Maung Thawngmung and Mike Furnari, ‘Anti-State Armed Groups in Myanmar: Origins, Evolution and Implications’ in Benjamin Schreer and Andrew TH Tan (eds), *Terrorism and Insurgency in Asia: A Contemporary Examination of Terrorist and Separatist Movements* (Routledge 2019) 133–46.

³¹‘The World Factbook: Bangladesh’ (CIA, 6 October 2020) <www.cia.gov/the-world-factbook/countries/bangladesh/> accessed 3 March 2021.

³²IIFMM Report (n 14) paras 469–88.

³³*Ibid.* para 1330.

³⁴‘Constitution of the Republic of the Union of Myanmar’ (29 May 2008) art 3.

³⁵*Ibid.* arts 21(a), 34, and 37(c). See also *ibid.* ch VIII.

³⁶See further Jacques Leider, ‘Mass Departures in the Rakhine-Bangladesh Borderlands’ (*Policy Brief Series no 111, TOAEP, 2020*) <www.toaep.org/pbs-pdf/111-leider/> accessed 3 March 2021.

³⁷See ‘Joint Letter to UNSG on Rosenthal Report’ (*International Commission of Jurists* 3 September 2019) <www.icj.org/wp-content/uploads/2019/09/Myanmar-Letter-UNSG-Rosenthal-Advocacy-open-letters-2019-ENG.pdf> accessed 3

Therefore, while most Rohingya belong to a different religion than most inhabitants of Myanmar, the causes of their vulnerability are multifaceted. These causes combine a problematic imperial legacy concerning ethnicity, outdated laws, and intersectional discrimination on grounds of ethnicity, religion, and perceived foreign nationality.³⁸ The idea reinforced by state officials that ‘... there are no Rohingya in Myanmar’³⁹ also evidences the denial of the Rohingya’s right to self-identification.⁴⁰ We propose that the ICC should consider all these elements; however, as our main goal with this article is to disentangle law and religion, we will focus largely on the religious dimensions of the Rohingya case before the ICC.

2. The Rohingya Case at the ICC: General Remarks on Ethnicity and Religion

Subject to further examination in the rest of the article, this section briefly summarises what the Prosecutor argued and Pre-Trial Chamber III said about the ethnicity-related and religion-related aspects of the Rohingya case. The Prosecutor first argued that the Rohingya constitute an ethnic minority group that predominantly has Muslim faith,⁴¹ namely the Rohingya group ‘... may be characterised potentially in ethnic and/or religious terms’.⁴²

When legally characterising the crimes, the Prosecutor *inter alia* argued that ‘[t]he available information provides a reasonable basis to believe that the crime against humanity of persecution, based on ethnic and/or religious grounds under article 7 (1)(h) ... was committed’.⁴³ While the Prosecutor invoked diverse examples of attacks based on the ethnic dimension of the Rohingya’s identity,⁴⁴ the Prosecutor also referred to several instances that indicate religious attacks against the Rohingya.⁴⁵ Usually, the Prosecutor invoked these examples together or within the same sections of her investigation request when presenting the ethnic and religious elements that underlie and/or constitute the crimes allegedly committed against the Rohingya.

Concerning the findings of Pre-Trial Chamber III on the ethnicity and religious aspects of the Rohingya case, three elements should be stated here. First, although the Chamber employed the term ‘Rohingya’ to refer to the alleged victims, it highlighted that the term ‘... does not imply endorsement of any particular historical narrative or political claim, or recognition of a specific group for purposes outside of the present decision’.⁴⁶ Second, the Chamber considered and referred to the Prosecutor’s supporting materials, such as reports from NGOs and international organisations,

March 2021; Penny Green, Thomas MacManus, and Alicia de la Cour Venning, *Genocide Achieved, Genocide Continues: Myanmar’s Annihilation of the Rohingya* (International State Crime Initiative 2018); and ‘We Will Destroy Everything’: Military Responsibility for Crimes against Humanity in Rakhine State, Myanmar (Amnesty International 2018).

³⁸See *Identity Crisis: Ethnicity and Conflict in Myanmar* (International Crisis Group 2020) 4–8.

³⁹IIFMM Report (n 14) para 460; and Verena Hölzl, ‘Identity and Belonging in a Card: How Tattered Rohingya IDs Trace a Trail toward Statelessness’ (*The New Humanitarian*, 1 March 2018) <www.thenewhumanitarian.org/feature/2018/03/01/identity-and-belonging-card-how-tattered-rohingya-ids-trace-trail-toward> accessed 3 March 2021.

⁴⁰IIFMM Report (n 14) para 1330.

⁴¹*Bangladesh/Myanmar Situation (Request for Authorisation of an Investigation)* (n 2) para 38.

⁴²*Ibid.* para 174.

⁴³*Ibid.* para 172.

⁴⁴See e.g. *ibid.* paras 65, 177, 194, 282.

⁴⁵See e.g. *ibid.* paras 98, 101, 179–80.

⁴⁶*Bangladesh/Myanmar Situation (Authorisation of Investigation)* (n 6) para 17.

and to the Prosecutor's arguments, in which the Rohingya were overall characterised as an ethnic group that is predominantly Muslim.⁴⁷ Third, the Chamber found that the Prosecutor could reasonably believe that the targeting of the Rohingya may have been due to ethnic and/or religious grounds.⁴⁸ Thus, the Chamber accepted the existence of

... a reasonable basis to believe that since at least 9 October 2016, members of the Tatmadaw, jointly with other security forces and with some participation of local civilians, may have committed coercive acts that could qualify as the crimes against humanity of deportation (article 7(1)(d) of the Statute) and *persecution on grounds of ethnicity and/or religion* (article 7(1)(h) of the Statute) against the Rohingya population.⁴⁹

Comparatively speaking, in the other international case concerning the Rohingya, at the ICJ, the court's provisional measures order did not specifically categorise them.⁵⁰ Instead, the definition of the Rohingya was preliminarily left open: '... the Rohingya in Myanmar appear to constitute a protected group within ... the Genocide Convention'.⁵¹ This reflects the fact that the ICJ case is at an early stage – just like the ICC's Rohingya case.

3. Towards a Judicial Definition of the Rohingya as an Ethnic and/or Religious Group at the ICC

ICC Pre-Trial Chamber III, in its decision authorising an investigation into alleged crimes against the Rohingya, acknowledged that the term Rohingya is contested, yet the ICC Prosecutor used this term in her request because that is how the victims self-identified.⁵² More specifically, however, there is a lack of uniformity in relation to the defining characteristics of the group, namely the Rohingya as an ethno-religious minority or as an ethnic minority whose members are mostly Muslim.⁵³ Inevitably, these descriptions also appear in the ICC proceedings concerning the Rohingya. Pre-Trial Chamber III explains that several organisations have informed that '... persons who identify themselves as Rohingya reportedly claim that the term denotes an ethno-religious group'.⁵⁴ Later in the decision, however, the Chamber acknowledges ethnicity and religion separately, noting that all victims insisted the alleged crimes '... were committed on grounds of their ethnicity *and* religion, namely Rohingya *and* Muslims'.⁵⁵

Accordingly, the first approach toward a judicial definition of the Rohingya could be to define them as an 'ethno-religious group'. This term is a relatively recent creation. Yang and Ebaugh explain that early sociologists such as Durkheim and Weber recognised the interrelation of religion and ethnicity but treated them as separate subjects.⁵⁶ Starting in the 1970s, however, historians and sociologists began using the term 'ethno-religious

⁴⁷Ibid. paras 64–66, 69.

⁴⁸Ibid. para 109.

⁴⁹Ibid. para 110 (emphasis added).

⁵⁰See *The Gambia v Myanmar (Order)* (n 4).

⁵¹Ibid. para 52.

⁵²*Bangladesh/Myanmar Situation (Authorisation of Investigation)* (n 6) paras 13–14.

⁵³See 'Rohingya Emergency' and 'Rohingya Refugee Crisis' (n 11).

⁵⁴*Bangladesh/Myanmar Situation (Authorisation of Investigation)* (n 6) para 15.

⁵⁵Ibid. para 33 (emphasis added).

⁵⁶Fenggang Yang and Helen Rose Ebaugh, 'Religion and Ethnicity among New Immigrants: The Impact of Majority/Minority Status in Home and Host Countries' (2001) 40 *Journal for the Scientific Study of Religion* 367, 368.

group' to emphasise the interconnection and 'indistinguishable oneness' of ethnicity and religion.⁵⁷ The Committee on the Elimination of Racial Discrimination (CERD) has also adopted this term in its General Recommendation no. 35, stating that:

In the light of the principle of intersectionality ... the Committee's attention has also been engaged by hate speech targeting persons belonging to certain ethnic groups who profess or practice a religion different from the majority, including expressions of Islamophobia, anti-Semitism and other similar manifestations of hatred against ethno-religious groups, as well as extreme manifestations of hatred such as incitement to genocide and to terrorism.⁵⁸

We regard the term 'ethno-religious' as exceedingly murky and problematic in legal cases, as it conflates two distinct elements to create an ill-defined new categorisation. We argue that in order to disentangle law and religion in litigation, every element of the legal process needs to be addressed independently, which is precisely what the victims have claimed in the Rohingya case. We endorse this approach for three main reasons.

First, Rohingya is not a religion; it is an ethnicity. Although ethnicity may include inter alia religious elements and/or religion and ethnicity may be interconnected, ethnicity and religion are overall recognised as different and autonomous grounds in international law, including international criminal law. For example, the UN Convention against Genocide (Article II), the ICC Statute (Articles 6 and 7(1)(h)), and the International Law Commission's Draft Articles on Crimes Against Humanity (Article 2(1)(h)) list 'religious' and 'ethnic' groups or grounds independently. None of these international instruments uses the term 'ethno-religious'. Moreover, international jurisprudence⁵⁹ and scholars⁶⁰ have generally examined religious and ethnic grounds autonomously rather than as a merged 'ethno-religious' grounds or group. In international criminal law (including ICC jurisprudence), an ethnic group is '... a group whose members share a common language or culture',⁶¹ namely cultural or linguistic groups within and/or outside a state.⁶² In turn, a religious group concerns persons sharing '... the same religion, denomination, or mode of worship',⁶³ including theistic, atheistic, and non-atheistic communities.⁶⁴ Besides these objective criteria, international law has also considered offenders' and victims' perceptions (subjective criteria).⁶⁵

It may seem obvious that the Rohingya is an ethnic group, but numerous references seem to imply that it is a religious or ethno-religious minority. The UNHCR's statement referring to the Rohingya as a 'stateless Muslim minority in Myanmar' and the Harvard University Religious Literacy Project's definition of the Rohingya as a 'Sunni Muslim

⁵⁷Ibid. 369.

⁵⁸CERD, 'General Recommendation No 35: Combating Racist Hate Speech' (26 September 2013) CERD/C/GC/35, para 6.

⁵⁹See e.g. *Prosecutor v Akayesu (Judgment)* ICTR-96-4-T (ICTR [TC-I], 2 September 1998) paras 513–15; *Prosecutor v Krstić (Judgment)* IT-98-33-T (ICTY [TC], 2 August 2001) paras 554–60; and *Prosecutor v Al Bashir (Decision on the Prosecution's Application for a Warrant of Arrest)* ICC-02/05-01/09-3 (ICC [PTC-I], 4 March 2009) paras 135–37.

⁶⁰See e.g. William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP 2016) 135–37.

⁶¹*Akayesu* (n 59) para 513; and *Bangladesh/Myanmar Situation (Authorisation of Investigation)* (n 6) para 103.

⁶²See Agnieszka Szpak, 'National, Ethnic, Racial, and Religious Groups Protected against Genocide in the Jurisprudence of the ad Hoc International Criminal Tribunals' (2012) 23 EJIL 159.

⁶³*Akayesu* (n 59) para 515; and *Bangladesh/Myanmar Situation (Authorisation of Investigation)* (n 6) para 103.

⁶⁴Szpak (n 62) 159.

⁶⁵Ibid. 162–63; and *Bangladesh/Myanmar Situation (Authorisation of Investigation)* (n 6) para 103.

ethnic minority in Myanmar' exemplify such conflation.⁶⁶ Although such linguistic nuances might appear trivial a priori, they have the potential to substantially impact some individuals. A hypothetical example might help to illustrate this point.

Suppose that the ICC's investigation in the *Bangladesh/Myanmar Situation* was restricted to the deportation and persecution of 'Rohingya Muslims' considered *solely* as a religious group. The vast majority of Rohingya consider themselves Muslims, and justice would be hopefully served to them. However, what about those Rohingya who are not Muslims? Would they receive international protection? Would they receive meaningful reparations or any reparations? Not necessarily. As mentioned above, in its 2014 census Myanmar found that approximately one million Rohingya (identified as 'non-enumerated') were living in the country.⁶⁷ If we hypothesise that 2.5% of the Rohingya do not identify themselves as Muslim, that would mean that about 25,000 people could have no redress despite being persecuted. Non-Muslim Rohingya could indeed argue that they are persecuted by association and/or perception. Yet, since it is known that not all Rohingya are Muslims, it would be regretful to mischaracterise them as such, especially as they may be more vulnerable because they are a minority within a minority.⁶⁸

Second, when ethnicity and religion are conflated, both characteristics are undermined. The main difference between ethnicity and religion is the element of choice. For example, FoRB as enshrined in the International Covenant on Civil and Political Rights (ICCPR) provides that 'No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice'.⁶⁹ Put simply, individuals have the right to choose their religion, but not necessarily their ethnicity.⁷⁰ Thus, automatically linking all Rohingya to a specific religion could risk undermining their freedom to choose a belief, which is a fundamental aspect of their identity. As Witte and Green have elegantly explained: '... connecting religion to race risks ontologizing it and naturalizing it in a way that eclipses or elides the nonfoundational and hermeneutical understandings of religion'.⁷¹ Consequently, although some authors disagree with a sharp distinction between ethnicity and religion,⁷² we favour Bielefeldt's view:

... on the phenomenological level there is a lot of overlap between religious, cultural or ethnic facets of identity ... On the conceptual level, however, we cannot give up basic differentiations without seriously endangering the essence of freedom of religion or belief.⁷³

Third, one of the principles of (international) criminal law is *nullum crimen sine lege stricta*, also called the principle of legality or certainty, which states that

⁶⁶Respectively, 'Rohingya Emergency' (n 11) and 'Religious Literacy Project. The Rohingya' (*Harvard Divinity School*) <<https://rpl.hds.harvard.edu/faq/rohingya>> accessed 3 March 2021.

⁶⁷*The 2014 Myanmar Census* (n 20) 3.

⁶⁸See e.g. Haque (n 26).

⁶⁹ICCPR, art 18(2).

⁷⁰Leonard Leo, Felice Gaer, and Elizabeth Cassidy, 'Protecting Religions from "Defamation": A Threat to Universal Human Rights Standards' (2011) 34 *Harvard Journal of Law & Public Policy* 769, 782.

⁷¹John Witte and Christian Green, 'Religious Freedom, Democracy, and International Human Rights' (2009) 23 *Emory International Law Review* 583, 607.

⁷²Patrick Thornberry, 'Forms of Hate Speech and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)' (Expert Seminar: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence, Geneva, October 2008) 21.

⁷³Heiner Bielefeldt, 'Freedom of Religion or Belief: A Human Right under Pressure' (2012) 1 *Oxford Journal of Law and Religion* 15, 31.

the ‘... definition of a crime shall be strictly construed’.⁷⁴ In the Rohingya case, the alleged crimes were motivated by virtue of the victims’ ethnicity *and* religion. These elements should therefore be analysed by the Court separately. Such precision is required mostly to bring effective justice to the victims, but also to safeguard the fairness of the trial. An illustrative example in this regard is the case of *Cyprus v Turkey* at the European Court of Human Rights (ECtHR). Among other issues, Cyprus alleged that the right of Greek Cypriots and Maronites to FoRB was violated by Turkey in northern Cyprus due to Turkey’s restrictions on access to places of worship.⁷⁵ The ECtHR found a violation of the FoRB of Greek Cypriots (Orthodox Christians), but it did not find a violation of the same right in relation to the Christian Maronite community, as it deemed that ‘... the evidence before it [was] insufficient to prove beyond reasonable doubt that members of this community were prejudiced to the same extent as the Greek-Cypriot population in the north in the exercise of their right to freedom of religion’.⁷⁶ Thus, by individualising the claims of different religious communities, the ECtHR delivered a fairer judgement to both states.

In the ICC proceedings concerning the Rohingya, the ICC Prosecutor seems to consider ethnicity and religion separately: as previously noted, in the Prosecutor’s request for authorisation of an investigation into crimes falling within the ICC’s jurisdiction, the Prosecutor established that the ‘... Rohingya are an ethnic minority group of predominantly Muslim faith’.⁷⁷ This stance is also confirmed by the victims’ emphasis in asserting that the violent acts perpetrated against them ‘... were committed on grounds of their ethnicity *and* religion, namely Rohingya *and* Muslims’.⁷⁸ These violent acts include, according to the Prosecutor, ‘... crimes against humanity of deportation (Article 7(1)(d) of the Statute), other inhumane acts (Article 7(1)(k) of the Statute), and persecution on grounds of ethnicity and/or religion (Article 7(1)(h) of the Statute)’.⁷⁹ With religion being considered separately from ethnicity, additional crimes may have also been explicitly listed. Yet the ICC has seemingly captured the vital distinction between ethnic and religious grounds in the present case, as Pre-Trial Chamber III highlighted that:

Based on objective considerations, an ethnic group may be defined as a group whose members share a common language and culture. A religious group may be defined as one ‘whose members share the same religion, denomination or mode of worship’. As regards the subjective criteria, the perception of the group by the perpetrator as well as the perception and self-identification of the victims may be considered.⁸⁰

4. Law and Religion at the ICC

International cases concerning law and religion are always contentious, and legal decisions regarding religion are often problematic, as discussed below. One of the

⁷⁴ICC Statute, art 22(2). See also Claus Kieß, ‘Nulla Poena Nullum Crimen Sine Lege’ *Max Planck Encyclopedia of Public International Law* (OUP 2010) para 31.

⁷⁵*Cyprus v Turkey (Merits)* 25781/94 (ECtHR, 10 May 2001) paras 241–42.

⁷⁶*Ibid.* paras 246–47.

⁷⁷*Bangladesh/Myanmar Situation (Request for Authorisation of an Investigation)* (n 2) para 38.

⁷⁸*Bangladesh/Myanmar Situation (Authorisation of Investigation)* (n 6) para 33 (emphasis added).

⁷⁹*Ibid.* para 95.

⁸⁰*Ibid.* para 103.

main reasons for this problematic relationship is the lack of clarity regarding the limitations of both law and religion. When their boundaries are not well-defined, the two concepts easily become entangled. We argue that clarity alone might not solve the problem of disentangling law and religion, but it could shed some light for future jurisprudence.

In judicial decisions concerning law and religion, international courts tend to circumvent matters related to FoRB because religious matters tend to be controversial.⁸¹ However, while religious beliefs are subjective and mostly outside the jurisdiction of secular courts, FoRB has objective parameters of protection. The courts' responses to this paradigm range from completely overlooking the religious dimension of certain cases to overstating the role of religion in other cases.⁸² Unfortunately, the approach of the ICC in cases concerning law and religion is rather inconsistent.

This issue was already present in the *Al-Mahdi* case, in which the ICC struggled to address its religious aspects, opting instead to focus on culture.⁸³ Arguably, the development of international law regarding the protection of buildings dedicated to religion in the twentieth century was flawed, prioritising the protection of cultural buildings over those dedicated to religion, as demonstrated elsewhere.⁸⁴ Most astonishing, however, was that the perpetrator (Al-Mahdi) admitted that the motivation for destroying certain Timbuktu buildings (mausoleums and a mosque) in Mali was because of their religious, not cultural, nature; yet the Court focused on the cultural nature of the buildings.⁸⁵ This approach led to judicial decisions in *Al-Mahdi* that were partially unsatisfactory or insufficient, particularly for the victims.

On the other hand, in the ongoing *Al-Hassan* case⁸⁶ the ICC has so far explicitly acknowledged and addressed the religious dimensions of the crimes perpetrated against the population. Within its limited mandate, the Court is thus more comprehensively and convincingly analysing the violations of the human rights of those who suffered persecution and which constitute international crimes (particularly crimes against humanity). Hence, the ICC's position on issues concerning law and religion remains unclear, but the Court appears to be moving in the right direction towards better protecting the human rights of victims. Furthermore, should the Court address issues regarding religion alone correctly, it could also provide a much-needed precedent in international law for cases in which people are persecuted solely because of their religion – not because of their connection to any other ground – such as the case of Christians in Syria, Muslims in India, or Bahá'ís in Yemen.

⁸¹Thiago Alves Pinto, 'An Empirical Investigation of the Use of Limitations to Freedom of Religion or Belief at the European Court of Human Rights' (2020) 15 *Religion & Human Rights* 96, 125. See further Christopher McCrudden, *Litigating Religions: An Essay on Human Rights, Courts, and Beliefs* (OUP 2018) 91–101.

⁸²Marie Juul Petersen and Katherine Marshall, *The International Promotion of Freedom of Religion or Belief* (The Danish Institute for Human Rights 2019) 14–16.

⁸³*Prosecutor v Al Mahdi (Judgement and Sentence)* ICC-01/12-01/15-171 (ICC [TC-VII], 27 September 2016).

⁸⁴Juan Pablo Pérez-León-Acevedo and Thiago Alves Pinto, 'Enforcing Freedom of Religion or Belief in Cases Involving Attacks against Buildings Dedicated to Religion: The *Al Mahdi* Case at the International Criminal Court' (2019) 37 *Berkeley Journal of International Law* 437, 441–54; see also Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (CUP 2015) 113; and Gregory Mose, 'The Destruction of Churches and Mosques in Bosnia-Herzegovina: Seeking a Rights-Based Approach to the Protection of Religious Cultural Property' (1996) 3 *Buffalo Journal of International Law* 180, 182–85.

⁸⁵See *Al Mahdi (Judgement and Sentence)* (n 83) paras 14, 41, 46.

⁸⁶*Prosecutor v Al Hassan* ICC-01/12-01/18-461-Corr-Red (ICC [PTC-I], 13 November 2019) para 683.

5. The Role of Religion in the Rohingya Case at the ICC

A powerful connection can be made between religion and international crimes such as genocide or crimes against humanity of persecution by designating adherents of the same religion as a specific protected group.⁸⁷ As Temoney has highlighted, perpetrators of such atrocities use religion as a group identifier in order to target a segment of a population, and they exploit religious language to re-imagine ‘... victims as actors in a sacred drama deserving of destruction that is often supported by textual exegesis and theological warrants’.⁸⁸ This has involved the potentiating element of religion as a manifestation of religious identity in which the victims are portrayed as distinctive and even demonised, while the perpetrators (including clerics and demagogues) regard themselves as a distinctive, chosen, or heavenly people.⁸⁹ As Johnston and Eastvold have correctly pointed out, even though religion may not be the only or root cause of an armed conflict or serious crisis, ‘... its implications for the issues of ultimate reality that influence people’s identity and behavior are significant and need to be addressed’.⁹⁰

As stated by scholars,⁹¹ by the UN Independent International Fact-Finding Mission on Myanmar (IIFMM),⁹² and by the ICC Prosecutor,⁹³ attacks against the Rohingya were preceded by and accompanied with inter alia religious manifestos by leading monks and other key players who demonised and vilified the Rohingya as a Muslim existential threat to Buddhists. This reflected and hardened the existence of anti-Muslim sentiment and Buddhist nationalist hate speech in Myanmar.⁹⁴ The ICC Prosecutor’s investigation includes alleged crimes against humanity of persecution on religious and/or ethnic grounds against the Rohingya, since there are reasonable grounds to believe that the victims were targeted because of their membership of the Rohingya group.⁹⁵ Attacks against mosques and madrassas, as well as discriminatory ethnic and religious slurs and statements, are evidence of such targeting.⁹⁶

The judicial definition of the nature (religious, ethnic, etc.) of a protected group takes place during the trial at the ICC based on the evidence presented. The ICC proceedings related to the Rohingya are still at an early stage (investigation). However, an examination of the ongoing characterisation of the Rohingya by the ICC is relevant for three reasons. First, this early characterisation may provide some insights into what may be expected in later judicial outcomes. Second, it is useful to examine how the ICC has considered the ethnic and religious dimensions in their ongoing characterisation of the Rohingya people. Third, it is relevant to consider the manner in which the ICC may potentially contribute towards the legitimisation of the self-identification of the Rohingya.

⁸⁷Kate Temoney, ‘Religion and Genocide Nexuses: Bosnia as Case Study’ (2017) 8 Religions 112, 113.

⁸⁸Ibid. 113.

⁸⁹Ibid. 114, 119, and 125.

⁹⁰See Douglas Johnston and Jonathan Eastvold, ‘History Unrequited: Religion as Provocateur and Peace Maker in the Bosnian Conflict’ in Harold Coward and Gordon Smith (eds), *Religion and Peace Building* (State University of New York Press 2004) 222.

⁹¹Beth Van-Schaack, ‘Determining the Commission of Genocide in Myanmar Legal and Policy Considerations’ (2019) 17 Journal of International Criminal Justice 285, 314.

⁹²IIFMM Report (n 14) para 696.

⁹³Bangladesh/Myanmar Situation (*Request for Authorisation of an Investigation*) (n 2) para 60.

⁹⁴Ibid.

⁹⁵Ibid. paras 173–80.

⁹⁶Ibid. paras 178–79.

This judicial contribution would be consistent with the practice of *inter alia* the UN General Assembly, which has not only employed the term ‘Rohingya’ in its resolutions, but has also called upon the Government of Myanmar to allow Rohingya self-identification.⁹⁷ Potential judicial efforts would arguably help address the denial of the Rohingya people’s identity as an ethnic group, which Myanmar has systematically enforced. For the victims it is vital to obtain an acknowledgement of the existence of the Rohingya as a recognised and recognisable group on the basis of their ethnicity, as well as followers of a religion distinct from that of the majority of the population in Myanmar, as the ICC noted.⁹⁸

As mentioned in Section 3, ICC Pre-Trial Chamber III quoted the ICC Prosecutor in order to note that the term ‘Rohingya’ is contested: while the ‘... Rohingya self-identify as a distinct ethnic group with their own language and culture, and claim a long-standing connection to Rakhine State’, Myanmar has continuously rejected this assertion by regarding them as ‘illegal immigrants’ from Bangladesh.⁹⁹ What stands out here is the lack of an explicit reference to the religious dimension of the Rohingya people’s identity in this specific claim from the Prosecutor quoted by the Chamber. Despite Myanmar’s contestation, the Chamber did note the Prosecutor’s consistent use of the term ‘Rohingya’.¹⁰⁰ The Chamber thus decided to employ the term Rohingya to refer to the alleged victims individually and collectively.¹⁰¹ As previously pointed out, however, the Chamber added that using the term Rohingya did not mean recognising a particular group for purposes beyond its decision,¹⁰² and remarked on the need for further analysis of the characterisation of the group in later ICC proceedings.¹⁰³ These caveats are understandable due to the early (investigation) phase of the ICC proceedings.

As for the ICC Prosecutor’s characterisation of the Rohingya people, the ethnic element of the Rohingya identity seems to have prevailed so far. The Prosecutor has also referred to the religious dimension of their identity, however. For example, while arguing that Myanmar has discriminated against this ethnic group for decades, the Prosecutor also refers to the use of hate speech by Buddhist nationalists against Muslims, in particular targeting the Rohingya.¹⁰⁴ In any event, the Prosecutor and ICC judges should, in later ICC proceedings, use a legal formula that consistently and comprehensively embodies the main features of the Rohingya identity. Otherwise, the ICC will inadvertently and paradoxically risk neglecting the fact that the Rohingya have also been persecuted by virtue of their religious beliefs, in this case, mostly Islam. To reiterate, alongside the ethnic dimension, the religious component is also critical for fully grasping the reasons behind the persecution of the Rohingya.

Pre-Trial Chamber III relied on the jurisprudence of the International Criminal Tribunal of Rwanda (ICTR) on genocide, and thus applied subjective and objective criteria to operationalise the definitions of an ethnic and religious group. As mentioned above, the Chamber objectively defined a religious group as ‘... one whose members

⁹⁷UNGA, ‘Situation of Human Rights in Myanmar’ (22 January 2019) A/RES/73/264.

⁹⁸*Bangladesh/Myanmar Situation (Authorisation of Investigation)* (n 6) para 33.

⁹⁹*Ibid.* para 13.

¹⁰⁰*Ibid.* para 14.

¹⁰¹*Ibid.* para 17.

¹⁰²*Ibid.*

¹⁰³*Ibid.*

¹⁰⁴*Bangladesh/Myanmar Situation (Request for Authorisation of an Investigation)* (n 2) paras 64–65.

share the same religion, denomination or mode of worship'.¹⁰⁵ For the subjective definition, the Chamber correctly remarked that the perpetrator's perceptions of the group and the victims' self-identification may be considered.¹⁰⁶

Importantly, the Chamber applied this hybrid approach to conclude that there are reasonable grounds to believe that Myanmar's armed/security forces and local civilians may have committed acts that could qualify as the crime against humanity of persecution against the Rohingya on ethnic and/or religious grounds.¹⁰⁷ Nevertheless, the Chamber reiterated '... the need to obtain further clarity on the contours of the group-identity in question as well as the basis of the alleged targeting'.¹⁰⁸

This judicial characterisation of the Rohingya people therefore has to take place in subsequent pre-trial and, especially, trial proceedings. Overall, the Chamber's stated conclusion is a positive step towards the ICC's judicial recognition of the Rohingya as victims of the crime against humanity of persecution on ethnic and/or religious grounds in prospective trial judgments. Related to this, the ICC should, later on in the proceedings, recognise the Rohingya as an ethnic group. It must also acknowledge the religious dimension of their identity, particularly the fact that they are mostly Muslims. Furthermore, the ICC should later find that the Rohingya were persecuted because of both their ethnicity and religion.

Although the ICC Prosecutor and Pre-Trial Chamber III seem to have generally focused on the ethnic dimension of the Rohingya's identity, there are several references and findings throughout the Chamber's decision that point to the religious characteristics of the Rohingya people. This is consistent with the Chamber's abovementioned conclusive finding. The Chamber invoked supporting material such as reports from the IFFMM, Amnesty International, Human Rights Watch, and Physicians for Human Rights in order to highlight or note *inter alia* the following points.

First, while almost 90% of Myanmar's population is Buddhist, the Rohingya are predominantly Muslim.¹⁰⁹ Second, in 2012 there were waves of violence in the Rakhine state involving confrontations between Buddhists and Muslim groups (most of them Rohingya), which resulted in the internal displacement of the latter group in Myanmar.¹¹⁰ Third, the violence in Rakhine was partly intercommunal and fuelled by increasing anti-Muslim sentiment disseminated by Buddhist groups and individuals who depicted the Rohingya and Muslims as a '... threat to race and religion'.¹¹¹ Fourth, restrictions imposed on the Rohingya and other Muslim groups were expanded since 2012, and these restrictions both disproportionately and discriminately targeted the Muslim communities.¹¹² Fifth, while most of the attacked villages were almost exclusively Rohingya, in villages with mixed ethnic populations the non-Rohingya population remained unharmed, and the attackers referred to victims in discriminatory and derogatory manners.¹¹³ Sixth, it has been claimed that Myanmar's authorities carried out mass arrests of Rohingya, allegedly targeting influential

¹⁰⁵ *Bangladesh/Myanmar Situation (Authorisation of Investigation)* (n 6) para 103.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.* paras 109–10.

¹⁰⁸ *Ibid.* para 109.

¹⁰⁹ *Ibid.* para 66.

¹¹⁰ *Ibid.* para 68.

¹¹¹ *Ibid.* para 69.

¹¹² *Ibid.* para 70.

¹¹³ *Ibid.* para 80.

community members such as religious leaders.¹¹⁴ Seventh, non-Rohingya civilians – such as Buddhist monks – may have participated in village raids organised during the clearance operations, taking on specific functions.¹¹⁵ Eighth, victims indicated that they self-identify as belonging to the same ethnic and religious group.¹¹⁶

We will now discuss how the ICC can address some of the examined issues in order to deliver proper justice for the Rohingya victims, particularly via the determination of serious violations of human rights (section 6) and reparations (section 7) within the ICC's mandate. Illustrative references to serious violations of FoRB are included to clearly show how the religious dimension of the victims' identity was targeted.

6. The Determination of Serious Violations of Human Rights of the Rohingya at the ICC

Academic literature on the Rohingya-related situation at the ICC has employed human rights language, including references to FoRB. In the context of ethnic and religious violence against the Rohingya, scholars have remarked on (1) the existence of serious violations of the Rohingya's fundamental rights such as the free exercise of their religion, as demonstrated by attacks on religious property and symbols,¹¹⁷ and (2) the (potential) trans-border enforcement of human rights via international criminal jurisdiction.¹¹⁸

Besides academic/theoretical considerations, there are legal grounds for the ICC (within its limited mandate) to engage more actively with legal matters concerning serious violations of the Rohingya's human rights. Although the ICC is not a human rights court, there are important arguments for its (increasing) engagement with international human rights law (IHRL).

First, as scholars have noted,¹¹⁹ key provisions of the ICC Statute arguably constitute human rights clauses adapted to international criminal proceedings. These clauses include norms on defence rights (e.g. Articles 55, 67) and victims' rights (e.g. Articles 68, 75). Moreover, ICC Statute norms on crimes against humanity (Article 7) and other atrocities criminalise serious violations of human rights.¹²⁰ Second, Article 21 (1)(b) ('Applicable law') states that the ICC shall apply as subsidiary legal sources, '... where appropriate, applicable treaties and the principles and rules of international law'. This includes IHRL sources such as international and regional human rights treaties. Thus, an important human rights clause is arguably contained in Article 21(1)(b). Third, Article 21(3) is a pivotal human rights clause because it binds the ICC as follows:

The application and interpretation of law pursuant to this Article must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as ... religion or belief, national, ethnic ... or other status.

¹¹⁴Ibid. para 87.

¹¹⁵Ibid. para 91.

¹¹⁶Ibid. para 109.

¹¹⁷Van-Schaack (n 91) 296 and 308; Gaston Blasi, 'Rohingya's Exodus Continues to Oblivion' (2020) 30 *Indiana International and Comparative Law Review* 163, 193.

¹¹⁸Caleb Wheeler, 'Human Rights Enforcement at the Borders-International Criminal Court Jurisdiction over the Rohingya Situation' (2019) 17 *Journal of International Criminal Justice* 609, 610, 628–30; Carlos Gomez, 'The International Criminal Court's Decision on the Rohingya Crisis: The Need for a Critical Redefinition of Trans-Border Jurisdiction to Address Human Rights' (2020) 50 *California Western International Law Journal* 177, 180.

¹¹⁹See e.g. Martin Scheinin, 'How and Why to Assess the Relevance of Human Rights Norms in "Other" International Courts' in Martin Scheinin (ed), *Human Rights Norms in 'Other' International Courts* (CUP 2019) 8, 11.

¹²⁰See e.g. *Prosecutor v Katanga and Ngudjolo-Chui* ICC-01/04-01/07-717 (ICC [PTC], 30 September 2008) para 448.

Academics have remarked on the ‘constitutional’ importance of this provision at the ICC.¹²¹ Finally, the ICC when interpreting provisions of its own instruments has used IHRL sources such as treaties, jurisprudence, and resolutions.¹²²

Nonetheless, the ICC’s engagement with IHRL must acknowledge that its own mandate and nature correspond to an international *criminal* tribunal rather than a human rights court. This means that the ICC determines individual criminal liability rather than state responsibility, has more demanding standards of evidence, orders reparations against convicted individuals rather than states, and so on. IHRL should thus not be automatically transplanted into the ICC. Instead, the ICC must adapt IHRL to the ICC’s specific context.¹²³

Yet the ICC’s practice arguably shows that it has not made use of the full potential of the abovementioned human rights clauses and IHRL. The completed *Al-Mahdi* case, concerning the destruction of historical and religious buildings (mausoleums and mosques) in Timbuktu, is such an example. In *Al-Mahdi*, the ICC largely focused on the victims’ right to cultural identity at the expense of further and much-needed analyses of serious violations of other human rights – notably FoRB – brought about by the destruction of religious buildings.¹²⁴ In its confirmation of charges decision in *Al-Hassam*, however, the ICC Pre-Trial Chamber did pay attention, inter alia, to violations of religious practices such as praying at the sites of mausoleums and tombs, ways of praying, and the manners in which religious holidays are celebrated within the confirmed charged of persecution on religious grounds as a crime against humanity.¹²⁵ Thus the ongoing investigation into abuses inflicted on the Rohingya and future prosecutions and trials constitute an excellent opportunity for the ICC to deepen its analysis of serious violations of human rights related to religious claims – such as FoRB and freedom of assembly – and indirectly adjudicate this type of atrocities within its mandate as an international criminal justice institution.

Pre-Trial Chamber III concluded that widespread and/or systematic serious abuses such as murder, torture, imprisonment, rape, and sexual violence against the Rohingya civilian population could qualify as crimes against humanity of deportation (ICC Statute, Article 7(1)(d)) and crimes against humanity of persecution on grounds of ethnicity and/or religion (ICC Statute, Article 7(1)(h)).¹²⁶ Victims asserted that the serious abuses endured were perpetrated with discriminatory intent on grounds of their ethnicity (as Rohingya) and religion (as Muslims).¹²⁷

As previously outlined, a compelling reason for the ICC to increasingly and comprehensively consider IHRL is that international crimes in general and crimes against humanity in particular constitute serious violations of human rights.¹²⁸ For example,

¹²¹See e.g. Schabas (n 60) 530.

¹²²See e.g. *Prosecutor v Lubanga (Order for Reparations)* ICC-01/04-01/06-3129-AnxA (ICC [Appeals Chamber], 3 March 2015).

¹²³See e.g. Alexandre Galand, ‘The Systemic Effect of International Human Rights Law on International Criminal Law’ in Martin Scheinin (ed), *Human Rights Norms in ‘Other’ International Courts* (CUP 2019) 130.

¹²⁴See Pérez-León-Acevedo and Alves Pinto (n 84).

¹²⁵*Al Hassan* (n 86) para 683.

¹²⁶*Bangladesh/Myanmar Situation (Authorisation of Investigation)* (n 6) paras 92, 110.

¹²⁷*Ibid.* para 33.

¹²⁸See Theodor Meron, ‘International Law in the Age of Human Rights-General Course on Public International Law’ (2003) 301 *Recueil Générale de Cours de la Académie de Droit International* 21, 165; Lyal Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (Martinus Nijhoff 1992) 157.

ICC Pre-Trial Chamber III referred to concerns expressed by the Rohingya in Bangladesh about their return to Myanmar as they manifested that such return is conditioned on *inter alia* respect for their religion.¹²⁹ The Chamber also noted that Rohingya victims mentioned incidents in which mosques were destroyed.¹³⁰

Indeed, human rights language is contained in the ICC Elements of the Crimes, which is applicable by the ICC under Article 21(1)(a) of the ICC Statute. The first element of the crime against humanity of persecution based on, *inter alia*, religious grounds is that ‘[t]he perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights’.¹³¹ Concerning the underlying acts of persecution as a crime against humanity, the *travaux préparatoires* of the ICC Statute and related academic commentaries have in fact referred to serious human rights violations such as bans on the practice of certain kinds of religious worship, the detention of representatives of a religious group, systematic destruction of religious monuments and buildings, harassment or harm on account of religious beliefs, and institutionalised discrimination on religious grounds which puts a part of the population at a serious disadvantage.¹³² Moreover, various national and international courts have found that acts against religious property can constitute the crime against humanity of persecution.¹³³

Within the limits of its mandate and nature as an international *criminal* tribunal, the ICC can arguably pay further attention to serious violations of the Rohingya’s human rights which underlie and constitute the crime against humanity of persecution against the Rohingya. This is relevant to the exercise or fulfilment of the ICC’s mandate in the Rohingya-related investigation and potential future ICC cases against specific individuals accused of atrocities against the Rohingya. Such a mandate includes the ICC’s task of determining individual criminal liability for the crime against humanity of persecution against the Rohingya by virtue of the religious affiliation of the vast majority of their members.

As ICC Pre-Trial Chamber III correctly remarks: ‘[n]ot every infringement of human rights amounts to persecution, but only a “severe deprivation” of a person’s “fundamental rights contrary to international law” and “[f]undamental rights may include a variety of rights, whether derogable or not’.¹³⁴ Thus it is not difficult to argue *prima facie* that most violations of FoRB of the Rohingya are constitutive of the crime against humanity of persecution on religious grounds due to the serious nature and/or scale of the said abuses. Remarkably, the Chamber falls short of explicitly including FoRB among the examples of fundamental rights listed in its investigation decision, despite the obvious relevance of this freedom to the plight of the Rohingya.¹³⁵

In the context of international crimes, close links between serious violations of FoRB and gross abuses of other human rights may be identified in the academic literature.¹³⁶

¹²⁹Bangladesh/Myanmar Situation (Authorisation of Investigation) (n 6) para 107.

¹³⁰*Ibid.* para 32.

¹³¹ICC, ‘Elements of Crimes’ (2 November 2000) art 7(1)(h)(1).

¹³²See Christopher Hall, Joseph Powderly, and Niamh Hayes, ‘Article 7. Crimes against Humanity: Persecution’ in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, CH Beck 2016) 219–23.

¹³³See e.g. *Attorney-General of the Government of Israel v Eichmann* (District Court (Israel), 12 December 1961) [1994] 36 IL Rep, para 457; *Prosecutor v Stakić (Judgment)* IT-97-24-T (ICTY [TC], 31 July 2003) paras 765–68.

¹³⁴Bangladesh/Myanmar Situation (Authorisation of Investigation) (n 6) para 101.

¹³⁵*Ibid.*

¹³⁶See David Llewellyn and Victor Condé, ‘Freedom of Religion or Belief under International Humanitarian Law and International Criminal Law’ (2004) 12 *Trinity Law Review* 39, 39–74; Kate Temoney, ‘The 1994 Rwandan Genocide: The

Those links can be arguably found in the ICC Prosecutor's submissions concerning the Rohingya. For example, Rohingya victims' right to physical and psychological integrity was grossly breached through sexual violence, rape, and torture perpetrated in mosques;¹³⁷ their right not to be subject to degrading or humiliating treatment was severely violated through attacks against external personal manifestations of religious affiliation;¹³⁸ and serious violations of their right to non-discrimination materialised via the use of derogatory speeches with religious references and the destruction of madrassas and mosques.¹³⁹

As commentators have pointed out, the emphasis of the IIFFMM, the UN Human Rights Council, and advocacy groups on individual criminal accountability for abuses against the Rohingya was expected because '... international criminal law has become the central or even dominant narrative of the international response to so many crises'.¹⁴⁰ Within its mandate limits, the ICC is thus a key component for a more effective international response to the serious violations of human rights suffered by the Rohingya, including those related to the exercise of religion of members of the Rohingya ethnicity. These gross abuses of human rights in turn constitute or underlie international crimes under the ICC's jurisdiction.

Yet the ICC is only one international mechanism. To avoid disappointment and frustration among the victims, expectations about what international courts can achieve should not be exaggerated.¹⁴¹ The international judicialisation of serious human rights violations, including FoRB, may nonetheless provide additional advantages. This is particularly pressing for the Rohingya because Asia, unlike other regions, has no human rights court.

Furthermore, diverse sources strongly indicate the extensive involvement of state actors in serious violations of the Rohingya's human rights. The ICC establishes individual criminal responsibility rather than international state responsibility. However, as Cançado Trindade has remarked, individual criminal responsibility for international crimes and international state responsibility for serious human rights violations are complementary categories.¹⁴² Article 25(4) of the ICC Statute actually establishes that ICC Statute provisions on individual criminal responsibility shall not affect international state responsibility.

The ongoing Rohingya-related international judicial proceedings at the ICC (and at the ICJ) may bring international pressure on Myanmar and, unlike UN General Assembly's Resolutions or IIFFMM's findings, judicial outcomes are legally binding notwithstanding their challenging subsequent implementation.¹⁴³ Indeed, scholars who

Religion/Genocide Nexus, Sexual Violence, and the Future of Genocide Studies' (2016) 10 *Genocide Studies and Prevention* 3, 3–24.

¹³⁷ *Bangladesh/Myanmar Situation (Request for Authorisation of an Investigation)* (n 2) paras 98 and 101.

¹³⁸ *Ibid.* para 179.

¹³⁹ *Ibid.* paras 107–11, 179.

¹⁴⁰ Michael Becker, 'The Situation of the Rohingya: Is There a Role for the International Court of Justice?' (*EJIL-TALK! Blog*, 14 November 2018) <www.ejiltalk.org/the-situation-of-the-rohingya-is-there-a-role-for-the-international-court-of-justice/> accessed 3 March 2021.

¹⁴¹ Priya Pillai, 'The International Court of Justice and the Rohingya: The Long Road Ahead for Accountability' (*Opinio Juris Blog*, 6 November 2019) <<https://opiniojuris.org/2019/11/06/the-international-court-of-justice-and-the-rohingya-the-long-road-ahead-for-accountability/>> accessed 3 March 2021.

¹⁴² See Antônio Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (vol II, Brill 2010) 367–74.

¹⁴³ See Pillai (n 141).

highlight the importance of the UN General Assembly's actions also acknowledge the need for international criminal adjudication of serious violations of human rights committed against the Rohingya.¹⁴⁴

Within the limitations of its mandate, the ICC can therefore analyse events that are clearly indicative of serious breaches of human rights by examining the crime against humanity of persecution on religious and ethnic grounds against the Rohingya. Based on the arguments explained previously, the ICC should increasingly use the robust practice of human rights courts and bodies concerning serious violations of human rights, but subject to its own mandate and nature: an adapted rather than mechanical use of IHRL. Thus, the ICC can, via a sort of indirect adjudication, give 'teeth' to IHRL on fundamental rights related, inter alia, to the religious identity of individuals.

7. ICC Reparations for Harm Resulting from Crimes that Constitute Serious Violations of the Rohingya's Human Rights

This section examines to what extent the ICC is a suitable forum at which Rohingya victims of gross violations of human rights, such as FoRB, that amount to the crime against humanity of persecution, can claim and obtain reparations for harm or damages inflicted on them. Under Article 75 of the ICC Statute, the Court can order reparations against the offender and in favour of victims only when the defendant is convicted. Since the Rohingya-related investigation is ongoing, no ICC cases against specific individuals accused of gross abuses against the Rohingya even exist yet. Moreover, ICC reparations only concern harm resulting from *sensu stricto* crimes under the ICC's jurisdiction rather than violations of human rights, since it is not a human rights court. However, this section discusses harm resulting from crimes under the ICC's jurisdiction that also constitute, inter alia, serious violations of human rights related to the religious persecution of members of the Rohingya. As examined, these gross breaches of human rights underlie crimes against humanity, and so the resulting harm can be redressed, potentially and at least indirectly, through the ICC's reparation system.

In their representations in the *Bangladesh/Myanmar Situation*, Rohingya victims have made it clear that they have suffered all types of harm, including physical and mental harm, as a result of the crimes committed against them, and they thus claim to meet the victim definition of ICC Rule of Procedure and Evidence 85(a).¹⁴⁵ This is necessary to receive ICC reparation awards. The ICC Prosecutor provided details on forms of reparable harm directly related to religious elements. Concerning mental and physical harm, the Prosecutor has alleged that the Tatmadaw soldiers rounded up women and girls and gang-raped them in mosques in front of the victims' relatives or the wider community, and victims were left conscious or unconscious with torn clothes or without clothes.¹⁴⁶ Men's beards were forcibly removed.¹⁴⁷ As for material harm/damages, the Prosecutor has maintained that Tatmadaw soldiers or other security forces, with the participation of non-Rohingya civilians, burned and destroyed religious schools (madrassas)

¹⁴⁴See e.g. Rebecca Barber, 'Accountability for Crimes against the Rohingya: Possibilities for the General Assembly Where the Security Council Fails' (2019) 17 *Journal of International Criminal Justice* 557, 557–84.

¹⁴⁵*Bangladesh/Myanmar Situation (Representations of Victims from Tula Toli)* (n 7) para 8.

¹⁴⁶*Bangladesh/Myanmar Situation (Request for Authorisation of an Investigation)* (n 2) paras 98 and 101.

¹⁴⁷*Ibid.* para 179.

and mosques during attacks on Rohingya villages.¹⁴⁸ Witnesses reported that these buildings were targeted on ethnic and religious grounds, evidenced by the perpetrators' use of derogatory expressions such as 'Muslim dogs' posing a 'threat'.¹⁴⁹ Material damages also included the destruction of religious clothing and symbols.¹⁵⁰

Under the ICC's law and practice, victims can obtain restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, which can be ordered against the convicted as collective or individual awards and may be implemented by the ICC Trust Fund for Victims (TFV).¹⁵¹ Indeed, Rohingya victims' representations have referred to the TFV.¹⁵² For reparation matters, such as what reparation modalities (restitution, compensation, rehabilitation, etc.) the Rohingya victims could and should obtain at the ICC, the UN Reparation Principles are particularly important.¹⁵³ Although this is a soft-law instrument, academics have recognised that the UN Reparation Principles reflect well-recognised standards on victims' right to reparations.¹⁵⁴ Like other international and regional courts, the ICC has actually invoked the UN Reparation Principles to interpret and apply normative reparation provisions of its instruments and, thus, construe its reparations jurisprudence.¹⁵⁵ Importantly, the ICC has also invoked regional human rights case law on reparations.¹⁵⁶

The nature and seriousness of the violations of the human rights of the Rohingya victims make it virtually impossible to re-establish their situation prior to the violations. By adapting and applying Principle 19 of the UN Reparation Principles, however, some restitution measures can be suitable. These measures may include respect for the FoRB of Rohingya victims in the form of restoring places of worship, returning religious property, and committing to protect the victims while they observe their religious rituals and worship.

Regional jurisprudence concerning reparations for violations of human rights in similar cases¹⁵⁷ and UN Reparation Principle 20 may guide the ICC to design and order compensatory awards for Rohingya victims in order to (partially) redress physical or mental harm, material damages, and moral damage inflicted on the Rohingya as a result of serious violations of their FoRB and other rights amid the group's ethnic and religious targeting. Although compensable damages may be difficult to calculate and financially implement at the ICC, victims do normally ask for some compensation.¹⁵⁸ Since UN Reparation Principles 11(b) and 15 refer to 'adequate' and 'effective'

¹⁴⁸Ibid. paras 107–11.

¹⁴⁹Ibid. paras 111, 179.

¹⁵⁰Ibid. para 179.

¹⁵¹ICC Statute, arts 75 and 79; ICC, 'Rules of Procedure and Evidence' (9 September 2002) 94–99; *Lubanga (Order for Reparations)* (n 122) paras 33–43.

¹⁵²*Bangladesh/Myanmar Situation (Representations of Victims from Tula Toli)* (n 7) para 25.

¹⁵³UNGA, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (21 March 2006) [UN Reparations Principles].

¹⁵⁴See e.g. Theo van-Bowen, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines' in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (2nd edn, Brill 2020) 15–37.

¹⁵⁵See e.g. *Lubanga (Order for Reparations)* (n 122) paras 13–16, 35–42.

¹⁵⁶Ibid. paras 40–42.

¹⁵⁷See e.g. *Cyprus v Turkey (Merits)* (n 75) paras 241–47; *Río Negro Massacres v Guatemala* (IAcTHR, 4 September 2012) Series C No 250, paras 151–65; *African Commission on Human and People's Rights v Kenya* 006/2012 (AcTHPR, 26 May 2017) paras 162–69.

¹⁵⁸See e.g. *Prosecutor v Katanga* ICC-01/04-01/07-3728-tENG (ICC [TC-II], 24 March 2017) para 301.

reparations, awards should combine material and symbolic elements. Alternatively, Rohingya victims of serious violations of human rights, including FoRB, may receive nominal compensatory sums.

In light of UN Reparation Principle 21, regional human rights jurisprudence,¹⁵⁹ and ICC case law,¹⁶⁰ provision of healthcare and various assistance services are rehabilitative measures that may help to redress physical and psychological harm experienced by Rohingya victims. This involves mental trauma and/or physical harm when they were targeted because of their ethnicity and religion as well as their gender, which included sexual violence perpetrated against women and girls in mosques.

Concerning symbolic measures, namely, satisfaction and guarantees of non-repetition, important measures exist that can redress religion-related dimensions of the harm inflicted on the Rohingya. Under the UN Reparation Principles 22(h) and 23(e), the case law of regional human rights bodies,¹⁶¹ and jurisprudence of the Extraordinary Chambers in the Courts of Cambodia,¹⁶² these symbolic measures may include unrestricted access to religious sites by community members, an accurate account of perpetrated violations of human rights in educational materials, promotion of collective memory, provision of education on human rights to all sectors, exhibitions to inform current and future generations of atrocities perpetrated, such as gross violations of FoRB, and the construction of a peace learning centre.

Regarding satisfaction specifically, in *Al-Mahdi* the TFV proposed the performance of sanctification ceremonies for destroyed mausoleums to restore their previous sacredness.¹⁶³ Similar ceremonies could be conducted in religious sites destroyed in the attacks against the Rohingya. Under UN Reparation Principle 22 and the case law of international courts,¹⁶⁴ satisfaction measures also include public apologies, commemorations, and tributes to victims. Public apologies from perpetrators and government officials of Myanmar to the Rohingya people, as well as commemorative ceremonies to honour the victims, could be highly symbolic and redress the religious-related dimensions of the harm inflicted.

UN Reparation Principle 23 lists several guarantees of non-repetition. Within these guarantees, measures such as institutional and legal reforms to prevent the recurrence of attacks against the Rohingya are fundamental to redress harm inflicted on victims as well as to eliminate, inter alia, religious discrimination and achieve national reconciliation.¹⁶⁵ Religious rhetoric has been used to discriminate against and persecute people of other faiths or no faith, resulting in international crimes; however, religion can also be a powerful instrument for fostering reconciliation.¹⁶⁶ Guarantees of non-repetition could

¹⁵⁹*Río Negro Massacres v Guatemala* (n 157) para 289; *Plan de Sánchez Massacre v Guatemala (Reparations)* (IACtHR, 19 November 2004) Series C No 116, paras 106–108.

¹⁶⁰*Lubanga (Order for Reparations)* (n 122) para 42.

¹⁶¹*Centre for Minority Rights in Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* 276/03 (ACHPR, 25 November 2009), operative para 1; *Plan de Sánchez Massacre v Guatemala (Reparations)* (n 159) para 104.

¹⁶²*Case 002/01*, Judgment (ECCC [TC], 7 August 2014) paras 1134–35, 1137.

¹⁶³*Prosecutor v Al Mahdi (Draft Implementation Plan for Reparations)* ICC-01/12-01/15-265-Corr-Red (ICC [TFV], 18 May 2018) paras 266–67.

¹⁶⁴See e.g. *Case 002/01* (n 162) paras 1151–64; *Plan de Sánchez Massacre v Guatemala (Reparations)* (n 159) paras 100–101, 117.

¹⁶⁵Blasi (n 117) 190.

¹⁶⁶Temoney, ‘Religion and Genocide Nexuses’ (n 87) 127; see also UN Office on Genocide Prevention and the Responsibility to Protect, ‘Plan of Action for Religious Leaders and Actors to Prevent and Counter Incitement to Violence’ (2017); and OHCHR, ‘Beirut Declaration on “Faith for Rights”’ (29 March 2017).

also involve civilian control of military and security forces, law reforms, national awareness campaigns against discrimination policies targeting the Rohingya, removal of officers involved in attacks against the Rohingya, and implementation of diverse accountability-related proceedings.¹⁶⁷ These measures could have significant reparative effects by preventing the future occurrence of serious violations of the human rights of the Rohingya.

To maximise the redress of harm related to or resulting from, *inter alia*, gross violations of human rights, including FoRB, the ICC should order individual and collective awards. However, since the ICC cannot order reparations against the state of Myanmar, reparation implementation will depend on international financial cooperation, especially if the convicted persons are indigent or have limited assets; and Myanmar's cooperation in implementing measures in which state involvement is required, particularly symbolic reparations.

Conclusion

Within its mandate limits, the ICC may contribute towards disentangling the relationship between law and religion in the Rohingya-related proceedings in the context of the ethnic and religious violence that has characterised and underlain serious violations of human rights and international crimes committed against the Rohingya. The ICC's impact may involve the following.

First, the ICC can and should legally recognise the Rohingya as an ethnic group and must acknowledge that their members were persecuted because of *both* their ethnicity and their religious belief (as a group consisting predominantly of Muslims). Thus, the ICC can address these key dimensions of the Rohingya's identity without ignoring or undermining either one (particularly the religious dimension), and without conflating these grounds. Second, the ICC can and should identify properly the ethnic and religious dimensions of the serious violations of human rights of the Rohingya, which underlie, prove, or intrinsically relate to the determination of individual criminal liability for international crimes under the ICC's jurisdiction. Subject to its nature and mandate as a *criminal* court, the ICC can and should increasingly make an adapted use of IHRL in, *inter alia*, the Rohingya case. Third, the ICC can and should identify harm that stems from crimes constitutive of serious violations of the Rohingya's human rights – including FoRB – and order suitable reparations modalities to redress such harm in light of international standards.

These measures would affirm the commitment of the Court to human rights and correctly address the views of the victims in relation to their ethnicity and religion. The Rohingya victims have endured enormous suffering and remain in a highly vulnerable situation. This is not solely a matter of academic debate; it requires the ICC to apply a victim-centred approach and listen attentively to the victims' claims. The time is ripe for the ICC to address their plight.

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¹⁶⁷Blasi (n 117) 191; UN Reparations Principles, Principle 23.

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