

**TYPE: RESEARCH ARTICLE**

# Crime of Genocide in The Viewpoint of International Criminal Law

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Mangku, D. G. S., & Yulianti, N. P. R. (2022). Legal Protection of Children in Armed Conflict in the View of International Humanitarian Law. *IJCLS (Indonesian Journal of Criminal Law Studies)*, 7(1), 17-38

**History of Article**

Received: 8 March 2022

Revised: 18 May 2022

Accepted: 26 May 2022

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*IJCLS (Indonesian Journal of Criminal Law Studies)* published by Faculty of Law, Universitas Negeri Semarang, Indonesia. Published biannually every May and November.

**ABSTRACT**

Genocide is one of the crimes that are included in gross violations of Human Rights (Human Rights) where this crime is related to ethnic cleansing which is also included in crimes against various political groups because it is difficult to identify which causes an international problem in a country. The crime of genocide in international criminal law is an extraordinary crime and is a prohibited act which was later included in the 1948 Genocide Convention, the statutes of the International Criminal Tribunals for the Former Yugoslavia (ICTY), the statutes of the International Criminal Tribunals for the Rwanda (ICTR) and the 1998 Rome statute.

**KEYWORDS**

*Genocide, International Criminal Law*

## 1 INTRODUCTION

A crime committed by assault on another person in the form of ethnic or cultural strife is often referred to as a human crime under international law that leads to the

act of mass murder of the torture of human limbs. In this case the dispute will increase and lead to a more aggressive act and the person who does this will increasingly do it out of bounds even including on heavy performances. This class of severe actions or actions is a massive disbursement to a particular ethnicity that increases the number of victims and material or immaterial losses. This is called a crime of genocide (Mangku, 2012).

The crime of genocide is related to ethnic or cultural extermination and also includes crimes against political groups because such groups are difficult to identify that will cause international problems within a country (Itasari, 2015). The definition of genocide in the 1948 Constitution is interpreted as an act with the intention of destroying or destroying all or part of a group of nations, tastes, ethnic or religious the notion of genocide is then contained in the International Criminal Court (ICC) and Law No. 25 of 2000 concerning the Human Rights Court (Mangku, 2021).

The crime of genocide is often associated with crimes against humans but when viewed in depth the crime of genocide is different from the crime against humans (Mangku, 2013), where the crime of genocide is directed at groups such as nations, races, ethnicities or religions while the crimes against humans are aimed at citizens and civilians. Then this crime of genocide can eliminate some or all of it while crimes against humans are not specific or conditions in that regard (Utama et al., 2021).

## 2 METHOD

In discussing this issue, the author uses the method of normative juridical approach by reviewing, testing and reviewing aspects of law (Itasari, 2020), especially criminal law related to international criminal law and to see how the legal principles and synchronization of applicable laws to the resolution of disputes of genocide crimes (Daniati et al., 2021). Considering this research is normative legal research, the data used is secondary data in the field of law, namely the type of data obtained from library research (Purwanto & Mangku, 2016), primary legal materials (laws and regulations governing the crime of genocide) and from other data (articles, internet, print media, papers, journals, and so on) related to the title of the study (Mangku & Itasari, 2015).

## 3 RESULT AND DISCUSSION

### A. Crimes of Genocide Reviewed in International Law

The word genocide is familiar to be known until now. Genocide itself is one of the crimes included in international crimes. The meaning of genocide is one of

the acts intended to destroy, in whole or in part, a national, ethnic, racial or religious group. Until now the crime of genocide still occurs and this makes it an interest for me to write the beginning of genocide until the actions of the United Nations (UN) to prevent the crime of genocide reviewed from the Convention On The Prevention and Punishment Of The Crime Of Genocide 1948 (hereinafter referred to as the Genocide Convention) with a case study of Rohingya - Myanmar. Mass murder is an ancient phenomenon (Mantovani, 2003).

However, the term "genocide" was first coined by Raphael Lemkin in 1944 and referred to as a legal term in the United Nations Convention on the Prevention and Punishment of the Crime of Genocide in 1948. Mass murder is an ancient phenomenon. However, the term "genocide" was first coined by Raphael Lemkin in 1944 and referred to as a legal term in the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Dörmann, 2003).

Elements of genocide include:

- a. By killing a certain group;
- b. Inflicting suffering on members of the group both physically and mentally;
- c. Presenting a situation that has the aim of destroying a particular group in real terms either in part or in whole;
- d. Imposed in various ways with the aim of warding off the birth of a particular group;
- e. Forcible transfer from one group to another by force against children.

Genocide is an act of international crimes that are included in 4 (four) international crimes, namely genocide, crimes against humanity, war crimes, and crimes of aggression. The Genocide Arrangements have been set forth in: the Charter of the Nurnberg International Military Court, the 1948 Genocide Convention, the ICTY Statute, the ICTR Statute, the Rome Statute of 1998 on the International Criminal Court, and the National Law Regulation of the 1948 Genocide Convention, the core of the genocide arrangements expressly regulated to include :l The suppression of genocide as an international crime This affirmation is explicitly contained in Article II of the Convention, To suggest that genocide, whether committed in times of war or peace, is a crime governed by international law and states are obliged to prevent and punish the perpetrators (Fournet & Pegorier, 2010).

1. Definition of genocide

The definition of genocide is accumulated in Article II of the Convention.

2. The expansion of the deeds that can be punished; In addition to genocide, the Convention also declares acts that can be punished, namely: (a) the association

- to commit genocide; (b) incitement to carry out genocide either directly or in general; (c) attempts to commit genocide; (d) participation in genocide.
3. Criminal responsibility individually criminal responsibility is both carried out individually means the desired principle that the perpetrator of international crimes account for his criminal responsibility individually, both his status and position regardless of government. That is, the status of the person as a public official or ruler, can not be peddled defending to avoid criminal responsibility. This principle can be seen in the Charter of the Nurnberg International Military Court reaffirmed in Article IV of the Convention.
  4. The obligation to make national laws governing the genocide of the 1948 Genocide Convention is a convention that carries out very much depending on the countries to which it is. This Convention requires that states that are members of the Convention to make national laws and regulations in order to establish the implementation of the provisions of the Convention on a national scope, especially genocide.
  5. The Forum and jurisdiction, the convention affirms: "that a court that has jurisdiction to try the perpetrators of genocide is the competent court of the state in which genocide took place. But the convention also opens up opportunities for international courts to implement jurisdictions on the basis of the consent of states parties to the genocide convention."
  6. The affirmation that genocide is not a political crime;" Article VII of the Convention contains provisions affirming that genocide is not categorized as a political crime, especially in the context of extradition.ini to be important, because in the realm of international law concerning extradition there is known to be a principle that a political criminal cannot be extradited (no extradition of political offenders).
  7. The affirmation that genocide is not a political crime; "Article VII of the Convention contains provisions affirming that genocide is not categorized as a political crime, especially in the context of extradition.ini becomes important, because in the realm of international law concerning extradition there is a principle that a perpetrator of political crimes cannot be extradited (non-extradition of political offenders).
  8. Possible involvement of the United Nations in prevention and enforcement; Article VIII provides that a state may request that competent UN organs take action in accordance with the Charter of the United Nations within the framework of the prevention and suppression of genocide. Although not explicitly stated, this article is actually an entry point for the UN Security

Council to play an active role in the prevention and suppression of genocide. This provision can be attributed to Chapter VII of the UN Charter which opens up opportunities for Security Council intervention when it is judged that there are conditions that endanger world peace and security.

In the Indonesian National Law Regulation, the Law of the Republic of Indonesia Number 26 of 2000 concerning the Human Rights Court in Article 7 states, the Crime of Genocide is a grave violation of human rights. Based on the article has also explained the elements of acts categorized as genocide crimes (Lemkin, 1947).

In the discussion of this crime of genocide in International Law using the theory of human rights and the theory of state responsibility because genocide is a gross human rights violation in which states must be responsible for protecting their countries from such crimes (Hiéramente, 2011) :

1. Human Rights Theory: Human rights are a responsibility that has been handed over from the state in the form of protecting every human right by prioritizing equality before law and justice. According to Satjipto Raharjo, legal protection is a protection to human rights that have been harmed by others and that protection is left to the community in order to feel all the rights that have been granted by the law. This relationship is strongly related to human dignity and dignity based on the provisions of a country's law. So it can be concluded that legal protection is an absolute right that every human being has and as an obligation for the government to fulfill it (Steiger, 2014).
2. Theory of State Responsibility: International law on state responsibility is international law based on customary international law. The responsibility of the State has the right and obligation to protect every citizen who is outside the territory of his country. Universally, the responsibility of this state arises when a state carries out matters such as reneging on international treaties, violating the sovereignty of another state's territory, damaging the property or territory of another state, committing violence by using weapons against another state, harming the diplomatic representatives of other countries, or making mistakes in treating foreign nationals. With regard to human rights violations, state responsibility is essentially realized in the form of conducting legal prosecutions against perpetrators (bringing to justice the perpetrators) and providing compensation or compensation to victims of human rights violations. Accountability for the actions of the individual regardless of the position and position of the individual. The principle of state responsibility and the principle of individual criminal responsibility are now recognized

principles in international law (Scheffer, 2001).

Another important element to this perception is that the use of genocide is often used to force a military intervention. As Akhavan asks, “is it better to not call a genocide ‘genocide’ and do nothing, or is it better to call a genocide ‘genocide’ and still do nothing” (3). The failure of the international community to intervene during the months of genocide in Rwanda in 1994 brought this idea into international consciousness (Kirsch & Holmes, 1999). With the failure of the international community, the United Nations, and the Clinton administration, a second legally defined genocide occurred, sending images of mass casualties streaming into the media and everyone’s consciousness: The Rwandan Genocide.

After the slogan “never again” was adopted through the resurrection of Holocaust memory, Rwanda became a glaring example that military intervention is expected upon the use of the term genocide. In the book *Shake Hands with the Devil: the failure of humanity in Rwanda*, General Roméo Dallaire discusses the failure of international aid and response in Rwanda while he was stationed as the Force Commander of the United Nations Assistance Mission for Rwanda (Yulianti & Mangku, 2019). During his peacekeeping mission, he acted as the ears on the ground during the one hundred days of genocide that led to the death of eight hundred thousand Tutsis (Dallaire). Requesting five thousand troops for his mission and multiple requests for additional supplies during the conflict, his pleas went unheard (Dallaire). As Warren Christopher, President Clinton’s secretary of state said, “‘if there’s any particular magic in calling it a genocide, I have no hesitancy in saying that’” (Kost, 2001). Underlying this statement is the assumption that genocide is a trigger term, requiring military intervention. Had Rwanda been accepted as genocide in April 1994 at the outbreak of violence, it could be argued that aid and military intervention would not have been withheld due to the moral obligation of intervention associated with genocide. Following this line of thinking, genocide has become a trigger word that seeks to mobilize political, military, and humanitarian responses (Sanjaya et al., 2020).

The creation of the term genocide was written as a way to expand the still growing body of international law. As Raphael Lemkin noted in his studies of barbarism and vandalism, what genocide aims to protect was not covered by other laws and easily could go unpunished simply due to linguistic gaps in law. The overwhelming strength of this doctrine through its international acceptance, “mean[s] that what originated in ‘general principles’ ought now to be considered a part of customary law” (Schabas, 2008). Assuring the acceptance of this doctrine, the International Criminal Court adopted the convention into the Rome Statute as



written by the UN delegates in 10 1948. While the definition remains constant, case law provides adequate evidence of the development of a hierarchy of crimes amongst international criminal law through its application.

Although this hierarchy in international criminal law is contemporary and apparent in today's international and domestic tribunals, the ICTY and ICTR established genocide to be of greater importance than other international crimes. These two tribunals enacted the deepest of universal moral wrongs with the ICTR explicitly classifying genocide as "the crime of crimes" above crimes against humanity and war crimes. Contemporary national tribunals like that of Cambodia and Argentina increasingly emphasize the growing primacy of genocide to gain justice for victims. Analyzing the creation of genocide as an international crime and its use in case law, the primacy of genocide can be seen developing since its creation (Mangku et al., 2021).

Analyzing genocide through case law, genocide's primacy in international law significantly impacts the experiences of victims, witnesses, and defendants in trial. Looking primarily at the ICTY and ICTR, the primacy of genocide heightens the rights and protections of victims and witnesses, and adversely negates the rights and presumed innocence of defendants. This research suggests that genocide has gained primacy within international law and therefore asks us to further research and question the impact of genocide's primacy over other crimes, particularly crimes against humanity.

Drawing from the literature review, the argument made is that genocide has gained primacy within international criminal law in both international and national tribunals. Genocide has gained primacy since its creation, and with the rise of Holocaust memory in the 60s and 70s, the crime rose to be the height of criminal activity in international law. As society has incrementally increased its perception of genocide's value and importance, this is also present and visible in international and national tribunals. By determining if a genocide conviction impacts court case proceedings and final judgments, genocide's primacy can be documented in international law cases and case law (Badar, 2008).

Using both a statistical analysis as well as qualitative methods, this research makes the case that tribunals are impacted by genocide charges. Furthermore, the argument is made that the perception that prosecuting genocide must be harsher than prosecuting other charges is no longer a perception, but a reality that is imbedded within genocide trial proceedings and sentence durations given at the final judgment. It is also maintained that the three main actors in tribunals are impacted by genocide's primacy: witnesses, victims, and defendants. Particularly,

genocide has primacy amongst civil society, which is visible in the cases of both Cambodia and Argentina's national tribunals. Civil society, in these cases, seeks genocide convictions in order to regain agency after prosecution and have their suffering valued by international tribunals and the international community (Van der Wilt, 2006).

Rather than simply a misunderstanding of genocide or a perception amongst the average person, it is argued that genocide has legal primacy in today's world. Stemming from a historical overview of the creation of genocide, the crime has gained primacy to the extent that it is prosecuted more harshly and with more importance. Studying the development of how genocide is perceived is essential to understanding how international tribunals, especially genocide tribunals function. It is equally important to understanding genocide on a broader scheme - understanding where its origins are, where it legally stands today, and how it is perceived and used by civil society around the world (Kleffner, 2003).

## **B. How to Resolve Disputes Against The Crime of Genocide By International Law**

Method of Resolving Cases in the Scope of International Law In this case there are two methods of settlement:

1. A peaceful settlement is when the disputing parties agree to a friendly settlement. The handling of this case is conducted internally by the state responsible for the dispute and is controlled by the United Nations.
2. Solution by force or violence, is when the way out is taken by using force. This settlement solution is done if a peaceful settlement cannot be done so it needs forced or violent efforts with the path of the International Criminal Court.

Cases of Genocide Against ethnic Rohingya in western Myanmar Myanmar located in the Southeast Asian region, historically named after Burma, especially in the Arakan Region is objectively only answered by historians. The amount of controversy caused and distortion due to the influence of strong group interests. Human rights violations that occurred a few months ago related to Burma became a trending topic where acts of discrimination against ethnic Muslim minorities known as Ethnic Rohingya From there then the name of illegal immigrants pinned on the Rohingya ethnicity as a result of the war of independence and the disaster of the typhoons of 1978 and 1991, some think the Rohingya ethnics want to strengthen their citizenship status as indigenous ethnicities. The largest tribes include Burma, Chin, Kachin, Arakan, Shan, Kayah, Mon, and Karen where



academics and the government determine there are 135 tribes in Burma, but there is no data that describes minority tribes related to territorial boundaries and lineages, while the percentage of ethnic population data in Burma, as follows:

- a. Ethnic Burmese as many as 50 million people or 50-70% make up the majority.
- b. Shan ethnicity 9%.
- c. Karen ethnicity 7%.
- d. As well as Mon, Arakan, Chinn, Kachinn, Karenn, Rohingnya.

Kayann, Chinese, Indian, Danuu, Akhaa, Kokang, Lahuu, Nagaa, Palaung have similarities also in terms of the language, religion and ethnicity of Bengalis who settled in the Chitagong region, many claim that Bengali Muslims located in Arakan settled in the 19th century Pao, Tavoyann, and Waa about 5%.

The Rohingnya ethnic group living in western Myanmar is precisely in the Arakan region are Muslims. The United Nations explains that many of its Rohings accept violence and discrimination, including the world's persecuted minorities, and that many of these have moved to safer places such as neighboring Bangladesh and Thai Myanmar. There are several reactions arising from the Rohingnya ethnicity of staying in Myanmar or becoming a refugee in a safer area, as it is also known that this crime of genocide is a serious crime that is global because it also falls into the scope of the ICC where the crime of genocide threatens the existence of an ethnicity aimed at destroying ethnic, religious and racial in a particular group. What the Myanmar government has done to the Rohingnya is an act that violates human rights. In the end, members of the Rohingnya Group who tried to survive were subjected to inhumane treatment and continued to experience oppression and their dis recognition as residents of Myanmar, thus creating a major conflict in the country of Myanmar involving the Myanmar government with its Rohing ethnicity, this then earned the Rohingnya ethnic group stateless person status. This crime of genocide has actually been a long time coming beginning with the killing in 1938 by buddhists of the Rohingnya ethnic group, as well as the massive arrests in 1970 of the Rohingya, and the enactment of the citizenship law in 1982 structurally making The Rohingya ethnicity has become illegal. These discriminatory acts have been carried out by the Rohing ethnicity since 1938 which was in the killing of 30,000 ethnic Rohingnya on July 26. And it continued to repeat in 1942, 1968, 1992, and its peak in 2012, where the Myanmar government in 1982 inaugurated the Burma Citizenship Law that is discriminated against the Rohingnya ethnic group.

The legal use of the term genocide is very closely associated with the name Raphael Lemkin (1900 – 1959). In memory of the massacre of the Armenians during the First World War, which remained almost entirely devoid of legal consequences, and with the Nazi policies of exclusion and annihilation in mind, Lemkin called for the creation of an internationally recognized penal law, based on which the perpetrators of the crimes committed in the name of National Socialism throughout Europe could be called to account. In response to Winston Churchill's comment that the nature and scale of this crime, which was committed against sectors of the civil population in Germany and, in particular, in the occupied territories, made it a "crime without a name", Lemkin coined a term to describe it; in 1944, he created the term "genocide" from the Ancient Greek *genos* (i.e. race, nation, tribe) and Latin *caedere* (to kill). He understood the term as referring to "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objective of such a plan would be disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups and the destruction of the personal security, liberty, health, dignity and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group."

Lemkin's definition of genocide is both narrow and broad in its scope. Narrow because it stipulated that only the destruction of national groups qualified as genocide, and broad because it deemed not only the physical destruction, i.e. murder, of the members of a national group as genocide, but also all acts targeting the permanent destruction of the foundations of life and culture of such a group. With regard to the course of a genocide, Lemkin highlighted the fact that it consists of two phases, i.e. "[...] one, destruction of the national pattern of the oppressed group; the other, imposition of the national pattern of the oppressor".

Had Lemkin had his way, a crime of genocide would have had to be included in the Charter of the International Military Tribunal which, as part of the London Agreement of August 8, 1945, specified the offences under international law for the prosecution and punishment of Nazi war crimes. However, the Allies classified the exclusion and annihilation measures implemented by the Nazis under the "crimes against humanity", or more precisely under the crimes of "extermination" and "persecution on political, racial or religious grounds". Due to the accessoriness of the crimes against humanity in the London Agreement, the two were not classified

as separate offences but connected with the simultaneous perpetration of crimes of aggression or war crimes. Accessoriness was, however, eradicated in the Allied Control Council Act No 10 of December 20, 1945.

Due to the fact that, in the view of the then international community of States, the special nature of the crime of genocide necessitated specific legal measures that reflected the gravity and complexity of such acts, on December 11, 1946, the General Assembly of the United Nations (UN) commissioned the UN Economic and Social Council to develop a draft for a convention on the crime of genocide. Two years later, almost to the day, on December 9, 1948, the draft of a convention to be entitled "Convention on the Prevention and Punishment of the Crime of Genocide" was passed in the form of a resolution by the UN General Assembly with fifty-six votes in favor and none against. This meant that the offence was formulated for the first time in an instrument of international law.

Article I of the Convention clearly states: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish." According to Article II of the Convention, acts committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group" are punishable as genocide. Protection is provided primarily to the physical and social existence of such groups; also protected is the human dignity of the victims. Objectively, genocide involves the committing of one of the individual acts specified in (a) to (e) of Article II of the Convention, i.e.: "(a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group". The object of the crime is always the individual member of the group in question. In terms of its typical manifestation, however, the crime is usually carried out in the context of a systematic or large-scale attack on a group.

In addition to premeditation in relation to the individual acts comprising a crime of genocide, from a subjective perspective, all genocidal acts must also involve the intention to destroy completely or in part a national, ethnic, racial or religious group. Thus, it is not essential that the group or a part thereof be actually destroyed.

The acts punishable under the terms of the Convention are defined in Article III. First and, unsurprisingly, comes (a) "genocide" followed by "(b) conspiracy to commit genocide", (c) "direct and public incitement to commit genocide", (d)

“attempt to commit genocide” and, finally, (e) “complicity in genocide”.

Article IV of the Convention takes up a provision of the London Agreement by stipulating that: “Persons committing genocide or any other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” Article V requires the “Contracting Parties” to take legislative measures to guarantee the application of the Convention and, in particular, “to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.” The question of jurisdiction is clarified in Article VI, according to which suspects should either “be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal”, the jurisdiction of which is recognized by the Contracting Parties. Finally, Article IX contains a further important provision which states that: “Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”

The Convention on the Prevention and Punishment of the Crime of Genocide came into force in early 1951. However, it failed to develop any penal effect in the subsequent years as an international penal jurisdiction that could have dealt with possible crimes of genocide did not exist. Unsurprisingly, the States displayed no interest in pursuing allegations of the perpetration of genocide on their own territories or within their sphere of influence. This does not mean, however, that the Convention was without social or political effect. It provided a point of reference for the documentation of the gravity of State crimes against minorities.

In terms of penal law, the Convention began to gain in significance in the first half of the 1990s. In May 1993, the UN Security Council set up the International Criminal Tribunal for the Former Yugoslavia, and this was followed by the establishment of the International Criminal Tribunal for Rwanda in November 1994, also on the basis of a Security Council resolution. Genocide is defined in the statutes of both of these courts as a penal offence, the forms and characteristics of which are adopted word for word from Articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide.

The first conviction for a crime of genocide was handed down in September 1998. The judgment against Jean-Paul Akayesu, the former mayor of a small town in Rwanda, simultaneously constituted a major contribution to the development of genocide law. Contrary to the traditional minimizing of crimes of violence against

women, in this judgment, the International Criminal Tribunal for Rwanda stated that rape and other sexual atrocities can be genocidal acts because, even if they are not accompanied by the murder of the victim, they cause serious physical and psychological harm to the victim and are committed with the aim of preventing births.

The first genocide judgment of the International Criminal Tribunal for the Former Yugoslavia was passed in 2001. It concerned the Srebrenica Massacre of July 1995 and commented on the important point as to what should be understood by the important formulation “destruction in part” in relation to a protected group. Based on this, it may be concluded that an intention to commit genocide exists if a “significant part” of a group, to be determined qualitatively, is to be destroyed and this is related to the treatment intended for the rest of the group. According to the Tribunal: “The Bosnian Serb forces knew, by the time they decided to kill all of the military aged men, that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica.” (Scheffer, 2001). The crime of genocide is also included in the Rome Statute of the International Criminal Court that began its work on July 1, 2002. The wording of Article 6 of this Statute largely corresponds to that of Article II of the Convention on Genocide.

Although 140 States have ratified or joined the Convention on Genocide (status: July 2007) and the prohibition on the acts listed in Article 2 is recognized under customary international law and is, moreover, a peremptory norm (*ius cogens*), the clarification of all the provisions of the Convention did not remain uncontested. The fact most widely accepted by case law and scholarship is that not only individuals but also States can be responsible for crimes of genocide, as established by the International Criminal Court in February 2007 in the case involving the “Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)”. This arises necessarily from the obligation to prevent genocide laid down in the Convention and aimed at States and from the classification of genocide as “a crime under international law” in Article I of the Convention.

Irrespective of this, it is nevertheless the case in international law practice that the punishment of crimes of genocide is based not on the responsibility of the States, but on individual responsibility as established by international penal law. It is even claimed on occasion that an individual acting alone could commit genocide (Prosecutor v. Jelisić, Judgment, December 14, 1999, para. 100; confirmed by appeal judgment, July 5, 2001, para. 48). However the view that the perpetration of a crime

of genocide necessitates a State plan or corresponding policy has meanwhile become established. Accordingly, it is stated in the Elements of Crimes of the Rome Statute that genocidal acts “took place in the context of a manifest pattern of similar conduct directed against that group or was conducted that could itself effect such destruction” (Elements of Crimes, ICC-ASP/1/3, p. 108).

The narrowness of the groups protected by the law of genocide remains a topic that generates controversy and debate. The exclusion of political groups is disputed in particular, especially in view of the fact that these are included in part as protected objects under national penal laws that incorporate a genocidal offence. The attempt to increase the number of protected groups in general based on the criterion of “stable and permanent groups” (Prosecutor v. Akayesu, Judgment, 2 September 1998, paras. 428-429) has, however, proven unsuccessful. The list of the four protected groups adopted by the various statutes from Article II of the Genocide Convention continues to be adhered to although subjective social attributions on the part of the perpetrators or third parties are taken into account in addition to the objective determination of the group characteristics. The intention “to destroy, in whole or part” in relation to one of the groups remains decisive as a central characteristic of genocide, therefore genocide cannot be equated with ethnic cleansing (Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia and Herzegovina v. Serbia and Montenegro], February 26, 2007, para. 190).

Despite this clarification, the tendency persists to relax the boundaries between this crime and crime against humanity in both jurisprudence and case law, and even to unite both categories of crime under the general heading of crimes against humanity. Non-legal sociological definitions of genocide go even further in that they define genocide as “a form of violent social conflict, or war, between armed power organizations that aim to destroy civilian social groups and those groups and other actors who resist their destruction” (Shaw, 154). The often lamented “hierarchization of victims” as a result of the understanding of genocide as the “crime of all crimes” in conjunction with the narrow concept of genocide may counteract this, however it is doubted (Schabas in Hankel, 226) whether this and other definitions are legally manageable and do justice to the specific demerits of the crime of genocide.

In an effort to analyze the degree to which genocide’s primacy impacts court cases, this paper divides the argument into three distinct sections. The first section, or chapter two, addresses the immediate impact of a hierarchy of international crimes on defendants. This chapter delves into the complexities of the data analysis



collected from the ICTY and ICTR and the direct impacts on the criminal case process and verdict. When and how this assumption began to impact international criminal law and tribunals will also be addressed; analyzing the ICTY and ICTR allows for an inspection of how precedents for genocide convictions develop over time and how genocide's primacy embeds itself into the legal system. The third chapter switches focus to victims and witnesses and the impact this assumption has on their perception of justice. While the ICTY and ICTR will be addressed due to their ample literature and available resources on victim and witness protection protocol, national tribunals in Cambodia and Argentina will be analyzed in order to assess justice for witnesses and victims. Rather than a quantitative look at the legal system, this chapter will address the question of justice on a more personal level, asking whether it is easier as a victim or witness to gain justice through legal means if a conviction is for genocide versus crimes against humanity or war crimes.

The legal definition incorporated into the fabric of international law holds great importance as a living convention to inspire action and give hope to international law's enforcement. However, the portrayal of genocide as the ultimate crime has been adopted into the international community's perception of genocide through its use in ad hoc tribunals, specifically written into case law in the ICTR. The ICTY was the first international war crimes tribunal since the Nuremberg and Tokyo trials when genocide was not yet a crime. However, some of the post Nuremberg national trials of Nazis charged them with genocide the Convention entered into force. The ICTY was the first international tribunal with the jurisdiction to charge defendants with genocide (ICTY). As such, the ICTY was also one of the first to create case law regarding sentence durations, allowing for comparison of sentence durations based on crimes (Van Schaack, 2017).

However, the landmark case that established the hierarchical nature of crimes in international law was Prosecutor v. Kambanda (Case No. ICTR-97-23-S). The trial was the first to have a defendant plead guilty to genocide and defined genocide as the "crime of crimes" in its final statements, establishing genocide's primacy over other crimes in international criminal law (ICTR). As a result of this perceived hierarchy, cases in both the ICTY and ICTR reflect the impact of genocide's primacy. This perception of genocide has impacted the way international criminal tribunals sentence defendants based on the charge for which they are tried.

### **C. Dispute Resolution Efforts Between The Government of Myanmar and Its Ethnic Rohingya Are Viewed From the Perspective of International Criminal Law**

In general, there are two means of settlement of the first in litigation, namely

the settlement of cases through judicial channels or in front of judges and also the second with non-litigation means that are interpreted as out-of-court settlements using the help of mediators, this is an effort that can be used to resolve cases internationally faced by countries experiencing disputes. The resolution of the case with non-litigation channels is:

1. Negotiations, the most common settlement commonly used in society, are quite a lot of disputes that are resolved every day with the main reason procedure, namely that with this process, all relevant parties can conduct a supervisory of the process of resolving the dispute and all such settlements are based on the agreements of the parties to the dispute.
2. Mediation, the use of a third-party intermediary or a mediator. Such mediators can come from countries, international organizations such as the United Nations, politicians, jurists, and a scientist. The mediator is actively participated in the mediation process, usually a mediator with his authority as an impartial party seeking peace of all parties by providing advice to resolve the dispute.
3. Conciliation in a more formal dispute resolution procession. Conducted by third parties or also commissions deliberately formed by the parties to the dispute also referred to as conciliation commissions, which also have the function of establishing the terms of dispute resolution, whose decisions are not binding on both parties.

Crimes committed in the international sphere must be solved through the judiciary if peace cannot be solved. Crimes such as those contained in the ICC relating to international matters as a whole are punishable. Therefore the establishment of a permanent International Criminal Court is considered very important for the prosecution of international crimes in the future (Yanto, 2016). The arrangement of the International Criminal Court in the Rome Statute is contained in Article 125 paragraphs 2 and 3, Article 126 paragraph 1, Article 4 paragraph 1, Article 4 paragraph 2, Article 3 paragraph 2. The Rome Statute 1998 is the basis for the establishment of an International Criminal Court which aims to be able to provide a certainty for victims of serious international crimes, that the perpetrators of criminal acts cannot be separated from criminal responsibility for their actions. Dispute resolution efforts are a way of for a court in order to resolve a dispute in a country. In this process is an effort to resolve the dispute that occurred in the State of Myanmar between the government of Myanmar and ethnic Muslims Rohingya. In order to resolve the dispute between the Myanmar government and the Muslim Rohingya, in accordance with Article 33 of the UN Charter should first

use diplomacy, if it does not find a bright spot in this matter then it is only switched by using legal means through the judiciary. In Article 31 of the Charter of the United Nations is presented in two paragraphs namely; Paragraph (1): All parties concerned are included in a dispute which if it proceeds continuously may be fatal to peace and national security, first required to choose the resolution of disputes by means of negotiation, investigation, mediation, conciliation, arbitration, settlement of disputes by law through regional bodies or regulations, or by other peaceful means determined by both parties. Paragraph (2): Where necessary, the UN Security Council may request that all relevant parties be able to address the problem as above. The crimes of the Myanmar state against the Rohingya tribe are classified as genocide, because in accordance with the meaning of genocide Article 6 of the Rome Statute of genocide is a crime that aims to eliminate ethnicity, race, and religion either in part or in part. In response to the case in Myanmar involving the Rohingya Muslims, the United Nations has strongly admonished the Myanmar state to be able to immediately end the violence that has been going on for a very long time. But then this was not welcomed by the Myanmar government and until now there has been no effort in resolving the dispute.

In this dispute, processes outside the legal channels, such as mediation, conciliation, and negotiation have been used for dispute resolution efforts but have not found a bright spot in the dispute. If in using the out-of-court process has been used by the state in ending the dispute that occurred, but still has not found common ground, then in this case can be controlled by the UN Security Council for its settlement with the path of the International Criminal Court. Within the jurisdiction of the International Criminal Court there are 4 (four) jurisdictions, namely:

1. Material Jurisdiction: The international criminal court has the authority to prosecute crimes stipulated in the Statute of 1998, namely in Article 6 in article 8, among others, genocide, crimes against humanity, aggression, and war crimes. It has been linked to the ongoing case in Myanmar that the crime is genocide.
2. Personal Jurisdiction: In Article 25 the International Criminal Court only prosecutes individuals regardless of the social status of the individual, whether a state official or so on (Schaller et al., 2004). With regards to the case in Myanmar the responsible are individuals.
3. Territorial Jurisdiction: The International Criminal Court may prosecute cases that take place in the Participating States where a crime occurs or occurs. This is in accordance with Article 12 of the Rome Statute 1998.

4. Temporal Jurisdiction: In accordance with Articles 11 paragraphs (1) and (2) of the Rome Statute 1998, the International Criminal Court is only authorized to prosecute crimes that occurred after the entry into force of the International Criminal Court on 1 July 2002. 17 in connection with the case in Myanmar that the crime had already occurred after the International Criminal Court officially took effect.

Although Myanmar is not linked as a country that ratifies the International Criminal Court, that does not mean it is an excuse not to be judged by the International Criminal Court. Because almost the entire population of a state falls under the jurisdiction of the International Criminal Court under such conditions; the state in which the dispute occurred has ratified the Statute of the International Criminal Court. It already recognizes the jurisdiction of the International Criminal Court on an ad hoc basis (Werle & Jessberger, 2005). The UN Security Council submitted the dispute to the International Criminal Court, so the case could be tried using the International Criminal Court. Myanmar's crimes against the Rohingya tribe are classified as genocide, because in accordance with the definition of Article 6 of the Rome Statute of genocide is a crime aimed at eliminating ethnicity, race, and religion either in whole or in part (Kastner, 2012). In response to the case in Myanmar involving the Muslim Rohingya tribe, the United Nations has strongly admonished the Myanmar state to be able to immediately end the violence that has been going on for a very long time. But then this was not welcomed by the Myanmar government and until now there has been no effort in resolving the dispute (Cooper, 2008).

In this dispute, processes outside the legal channels, such as mediation, conciliation, and negotiation have been used for dispute resolution efforts but have not found a bright spot in the dispute. If in using the out-of-court process has been used by the state in ending the dispute that occurred, but still has not found common ground (Hankel, 2005), then in this case can be controlled even though Myanmar is not related as a country that ratifies the International Criminal Court, it does not mean it is an excuse not to be judged by the International Criminal Court. Because almost the entire population of a country is under the jurisdiction of the International Criminal Court under such conditions; The country in which the dispute occurred has ratified the Statute of the International Criminal Court. From the above exposure researchers can draw results related to efforts to resolve disputes of crimes of genocide reviewed from the perspective of international criminal law (Copelon, 2000).

Disputes that occur in Myanmar constitute an international crime of genocide, so the settlement efforts can be done in various ways in addition to international criminal law dispute resolution can also be carried out through out-of-court processes such as mediation and negotiation (Levene, 2005). But from the way of international criminal settlement of disputes, related to the dispute that occurs, the settlement can be handled by the International Criminal Court even though the disputed is not a state of the party but everyone is under the jurisdiction of the International Criminal Court (Schabas & Schabas, 2000). The entire population of a State is under the jurisdiction of the International Criminal Court because first, it ratifies the Statute of the International Criminal Court, second, it claims the jurisdiction of the International Criminal Court on an ad hoc basis, third, the UN Security Council declares this dispute to the International Criminal Court, so that this action can be judged using the International Criminal Court (Shaw, 2007).

#### **4 CONCLUSION**

The main cause of the crime of genocide is motivated by the struggle for rights of minority tribes and the existence of fanatical and racially charged religion shown in cultural discrimination so that the acts of this crime of genocide have been outlined in international law in the form of treaties and rulings of the International Court of Justice and also on the provisions of national law which includes the Basic Law, The Law, And the Presidential Decision and related to the resolution of the dispute that occurred, the researcher provided an analysis related to the resolution of disputes that occurred in Myanmar, the dispute can be resolved by means inside and outside the court. If outside the court the settlement of disputes can be done by means of mediation and negotiation, but if done in a court that in this case is an international court of justice then the dispute can be handled by the International Criminal Court. All citizens are under the jurisdiction of the International Criminal Court.

#### **5 DECLARATION OF CONFLICTION INTERESTS**

Authors declare that there is no conflicting interest in this research and publication.

#### **6 FUNDING INFORMATION**

None

#### **7 ACKNOWLEDGEMNT**

Authors express the thankfulness to Universitas Pendidikan Ganesha (UNDIKSHA), Faculty of Social Sciences and Law, and all parties involved on this publication. Also to the editorial team of IJCLS (Indonesian Journal of Criminal Law Studies) for their valuable comment.

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