



INTERNATIONAL LAW BLOG

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Myanmar and the ICC: The Current Situation and What Can Be Done?

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Introduction

The Prosecutors of the International Criminal Court (ICC) recently started an investigation regarding the alleged atrocities committed against the Rohingya refugee population, primarily regarding the deportation of around 600,000 - 1,000,000 refugees from Myanmar to Bangladesh. On the 14th of November, 2019, the judges of the ICC authorized the investigation, which was to be conducted regarding any crimes committed on or after the 1st of June, 2010, when Bangladesh joined the ICC. An additional question relate to jurisdiction arose seeing as a number of the committed acts of violence occurred on the Bangladesh border and Myanmar is not a part of the ICC as they have not ratified the Rome Statute.

The investigation by the ICC

Myanmar, on the 15th of November, 2019, rejected the investigation that was started against them by the ICC for alleged crimes against the Rohingya. They further [stated](#) that their own committees would investigate the matter if it would be needed. However, the National Unity Government of the Republic of the Union of Myanmar (NUG), has [accepted](#) the jurisdiction of the ICC. The declaration of the same was submitted under article 12(3) under the Rome statute. The submission of this decleration threatened, the impunity held by the military officials who have undertaken the crimes. This does not mean that they have become a state actor, merely that they have given jurisdiction to the ICC to investigate the crime. Hence, the success of the same will [remain uncertain](#) until Myanmar becomes a state actor under the Rome Statute. Moreover, this declaration will [start a discourse](#) in the international community over which is the legitimate government of Myanmar; whether it is the Myanmar Junta or the NUG, which is seen as the government of the people.

Bringing the case to the International Court of Justice

Gambia acting as a proxy for the Organisation of Islamic Cooperation (OIC) instituted a case in the International Court of Justice (ICJ) against Myanmar on the 11th of November, 2019, for violations against the Genocide Convention of the United Nations (UN) for crimes against the Rohingya people in the Rakhine State, which in the words of Myanmar Government were clearance operations. Myanmar is a party to the Genocide Convention which makes the question of [jurisdiction simplified](#) under Article IX of the same. Myanmar argued Gambia was not affected by the crimes, there wasn't any dispute with Gambia, and reservation regarding Article VIII of the Convention for the lack of jurisdiction held by the ICJ. However, ICJ refuted most of the arguments and [went forward](#) with proceedings.

ICJ ordered Myanmar in January 2020 to prevent the genocide from happening against the Rohingya. The Government was against the ruling proclaiming the information brought by the ICJ, not portraying the actual situation in the country. Their line of reasoning was that there was no genocide, but war crimes occurred, which were being investigated under their own criminal system. The former de facto leader of Myanmar [argued](#) it was an internal armed conflict initiated by the Rohingya military. The Junta currently is also breaking the provisions ordered by the ICJ against them for protection of the Rohingya with [restricting their right of freedom](#).

Loopholes to prosecution

These crimes cannot be prosecuted in Myanmar for many reasons. First, that Myanmar did not have a domestic law against genocide to file crime done against the Rohingya. Hence, a new law on genocide has been made by the military after the ICJ requirements. However, the law has been made by the military for its benefit and [can't be seen by many stakeholders](#) as a law for enforcing a judgement or proper investigation for the alleged crimes by the military. Additionally, the judiciary is seen as partial. The judiciary being influenced by the military, and impunity for officers for acts done while doing their duty is given in the 2008 Constitution creates problems for any fair trial to be created in the domestic area. The Government has created the Independent Commission of Enquiry (ICOE) to investigate these crimes, but it is [argued to be insufficient](#) by the UN Commissioner for Human Rights.

Argentina's Federal Court is [also investigating](#) the alleged crimes perpetrated by Myanmar against the Rohingya people under universal jurisdiction; which covers grave crimes that can be tried anywhere as they aren't specific to any one country. The case was created after the request of BROUK, whose President, Tun Khin, gave testimony in the court on the 16th of December, 2021, [highlighting the crimes of the military](#), his own experience and examples of grave crimes done against the Rohingya.

When the NLD, which was backed by the military, became the Government in 2016, it posted ex-military officers on senior positions. The Chief Justice of Myanmar was not changed after the party came into power and [kept](#) the ex-general Htun Htun Oo in the position. He sent a memo to the members of the judiciary instructing them to not welcome any correspondence by the ICC or the Argentina's Federal Court. As the judiciary is highly influenced by the military, the memo [may have been](#) ordered by top military officials in the Junta. The Independent International Fact-Finding Mission on Myanmar had [released](#) its findings in 2018 wherein they stated that the military of Myanmar exhibits great control over its subordinates which makes the officials at the top be liable for the acts by their subordinates because of the hierarchical nature of command. Moreover, the military has never been held accountable and promotes perpetrators because there is no responsibility. The current move can be seen as a way to maintain this impunity against their crimes, who are being investigated by the international courts with the senior general Min Aung Hlaing being accused in most reports and testimonies. Myanmar can take inspiration from the case of *Nicaragua v. USA* in the ICJ wherein the US disputed the jurisdiction of the court in the case even when it was pronounced against it. Moreover, as the ICC doesn't have any means of enforcing their decision, it is unlikely that the military would comply with them until there is an issue of jurisdiction. The judgement can be enforced in the UNSC but as 2 veto holders, China and Russia, are allies of Myanmar military, this position would also be not possible.

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