

Rohingyas and the Quest for International Justice

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This is the third in a series of articles on the International Criminal Court (ICC). The Rome Statute creating the ICC entered into force on July 1, 2002 and the court is now in its 20th year. To mark the occasion, The Wire is publishing a series of articles evaluating its performance over the past two decades. See also: [Part 1 \(Afghanistan\)](#) | [Part 2 \(Powerful states staying above the law\)](#)

The situation faced by the Rohingya is once again in the spotlight with the Bangladesh government reportedly commencing the COVID vaccination drive for Rohingya refugees on one hand and the Indian government terming them “a threat to national security” on the other. Last month, the Human Rights Watch minced no words in asking the Indian government to release the detained asylum seekers.

The scale of atrocities perpetrated by Myanmar’s brutally oppressive military dictatorship on the Rohingya for decades is well known. The Rohingya were termed by the UN Secretary General as the most persecuted minority in the world. The long-standing discrimination against the Rohingya, in law and policy as well as in practice, including a denial of citizenship and violations of their civil, political, social, economic and cultural rights, has been detailed elsewhere.

Since the military crackdown in the Rakhine state of Myanmar in 2016 and 2017, the Rohingya have been subjected to brutal forms of violence, including torture, persecution, extra-judicial killings and deportation. A UN Fact finding mission further documented various forms of sexual and gender based violence and observed that Myanmar’s military was using the same to terrorise and punish ethnic minorities.

As stateless persons who have either fled from Myanmar or live in the country under heightened repression and with a subordinate status, there is little hope for Rohingya of seeking justice and accountability against the military officials, who have perpetrated heinous crimes, from the courts in Myanmar. It is in this context that international justice initiatives for the Rohingya people gain significance.

Three initiatives for international justice

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The Rohingya situation led to two international initiatives and one domestic initiative in 2019. On July 4, 2019, the erstwhile prosecutor of the International Criminal Court (ICC) – Fatou Bensouda – made a request to a pre-trial chamber of the ICC to authorise the commencement of an investigation into alleged crimes committed within the ICC’s jurisdiction.

The ICC was created in 1998 through the Rome Statute of the International Criminal Court, in order to prosecute individuals committing the most serious crimes under international law – war crimes, crimes against humanity, genocide and aggression.

In a separate initiative in November, 2019, the Gambia filed a petition in the International Court of Justice (ICJ) on behalf of the Organisation of Islamic Cooperation (OIC), alleging the commission of genocide by Myanmar’s military officials and seeking legal recourse for ending the genocide, punishing the perpetrators and preserving evidence of the same.



File Photo: Myanmar’s leader Aung San Suu Kyi speaks on the second day of hearings in a case filed by Gambia against Myanmar alleging genocide against the minority Muslim Rohingya population, at the International Court of Justice (ICJ) in The Hague, Netherlands December 11, 2019. Photo:

In the same month, a petition was filed in an Argentinian court by Tun Khin, president of the Burmese Rohingya Organisation UK (BROUK), alleging serious crimes including genocide and crimes against humanity against the Rohingya population. The petition invoked the responsibility of the Argentinian government to prosecute offenders under the Convention for the Prevention and Punishment of the Crime of Genocide.

On one hand, the three legal initiatives cumulatively indicate the resolve of the international community to deliver justice to the Rohingya victims and to ensure that the perpetrators are made accountable for the heinous crimes that they perpetrated. At the same time, it becomes important to examine the interplay between these three initiatives.

Invoking universal jurisdiction

Genocide has a specific definition under international law and its elements include a 'genocidal intent' (intent to destroy a national, ethnical, racial or religious group in whole or in part) combined with a 'genocidal act' (such as killing members of the group, causing them serious physical or mental harm or deliberately inflicting conditions of life calculated to bring about destruction of the group).

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The Genocide Convention imposes an obligation on all state parties to prevent and punish genocide and to enact a national legislation to give effect to the provisions of the convention. Additionally, member states are duty-bound to either prosecute individuals accused of genocide in their national courts or to send them to an international penal tribunal that has competent jurisdiction, irrespective of where or by which country's national the act of genocide was committed. In short, the universal jurisdiction contains an obligation to 'prosecute or extradite'.

Universal jurisdiction is not a new concept. In the 1930s, Raphael Lemkin – the scholar responsible for coining the term 'genocide' – added acts of barbarity, which were carried out on a group or collectively, to a pre-existing list of offences drawn up by European scholars such as Henri Donnedieu de Vabres and Vespasian Pilla. The offences on this list were considered 'crimes against the law of nations' and provided a humanitarian basis for universal jurisdiction, outside of the conventional rules of international law. This was on the basis that these are crimes that shock the collective conscience of the global community.

In 2020, there were 30 ongoing trials involving at least 144 suspects all over the world that invoked universal jurisdiction for a range of contexts, out of which 18 charges were for genocide, according to Universal Jurisdiction Annual Review 2021.

Argentina became a state party to the Genocide Convention in 1956 and is therefore bound by the obligations contained within it. The alleged crime of genocide has neither taken place on Argentinian territory nor, possibly, by Argentinian nationals. Yet its legal

obligations were invoked on the basis of universal jurisdiction.

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[Also read: Argentina Is Taking a Unique Route to Try Myanmar's Leaders for Crimes on Rohingya](#)

On May 29, 2020, in a significant development, a court in Buenos Aires (Federal Criminal Chamber No. 1) admitted a petition to investigate the role of Myanmar's leader Aung Sang Suu Kyi and other senior military and civilian leaders in the genocide against the Rohingya community. On July 12, 2021, the court dismissed the petition on the basis of an ongoing investigation by the ICC for the same. This was appealed against by the BROUK.

On the first date of appeal, – August 17, 2021 – [Rohingya women spoke remotely](#) to the Federal Criminal Appeals Court of Argentina from the Cox Bazar refugee camp in Bangladesh. They testified about the atrocities committed by Myanmar's military officials in the Rakhine state, which included brutal massacres, sexual violence against women and the burning of their houses.

On August 23, six Rohingya civil society groups in Cox Bazar submitted an [amicus curiae brief](#) (brief by friends of the court) in the appeal. Notable is the fact that the amici included women, men and *hijra* (transgender) victims of sexual violence. The appeal remains pending till date but a decision is expected shortly.

The decision will be significant in circumscribing the limits of universal jurisdiction in relation to the ICC. This legal initiative is historic in many ways, particularly in that the voices of Rohingya victims and their pursuit of justice that reached an Argentinian court through technological advancements

Seeking provisional measures at the International Court of Justice

In a parallel move, The Gambia filed a petition in the ICJ against the Myanmar government alleging the latter's failure to comply with and discharge its international legal obligations under the Genocide Convention. The ICJ has jurisdiction only over intergovernmental disputes in relation to UN treaties and other related binding legal documents. Myanmar has been a state party to the Genocide Convention since 1956, while the Gambia became a state party in 1978.

The Gambia's petition is a historic move as it is the first time that a country that was not involved in the alleged genocide in any way was bringing such a dispute before the ICJ. In 1993, Bosnia and Herzegovina had instituted proceedings against the Federal Republic of Yugoslavia in the ICJ, alleging violations of the Genocide Convention by the latter and requesting provisional measures by the ICJ. However, in that case, Bosnians were directly affected by the alleged crimes, which were being perpetrated throughout their territory.



Gambia's lawyer Andrew Loewenstein, testifying at the International Criminal Justice.

Both parties to the dispute made their oral submissions in the ICJ in December, 2019. The Myanmar government admitted that there may have been some war crimes that were committed, but not genocide and that the military action was solely aimed at containing social unrest in the Rakhine state of Myanmar. It said that an “independent” commission of inquiry had been instituted, which incidentally, released its findings of war crimes but no genocidal intent just prior to ICJ’s order, in an obvious attempt to thwart ICJ intervention.

Notably the commission dismissed all allegations of rape and gang rape by the security forces despite extensive documentation by the UN Independent International Fact-finding Mission on Myanmar and other human rights groups. The report of January, 2020 – an outcome of a government-appointed commission that lacked independence from it – has received scathing critiques.

On the contrary, the Gambia detailed the persecution, repression and discriminatory policies against the Rohingya and the genocidal acts perpetrated against them, which included mass and indiscriminate killings, torture, sexual and gender based violence and arson. Significantly, the opening statement made by the Gambian minister for justice in the ICJ requested the court to direct Myanmar to stop the “senseless killings”, “acts of barbarity and brutality that have shocked and continue to shock our collective conscience” and “to stop [the] genocide of its own people.”

On January 23, 2020, all 17 judges of the ICJ unanimously issued “provisional measures” directing Myanmar to prevent further human rights violations against the Rohingya population and to avoid the destruction of evidence related to the case. They relied upon a 2018 UN Report of the Independent International Fact-Finding Mission on Myanmar, which found that it had “reasonable grounds to conclude that serious crimes under

international law ha[d] been committed that warrant[ed] criminal investigation and prosecution”, including the crime of genocide, against the Rohingya community in Myanmar.

Significantly, the ICJ called upon the Myanmar government to report to it on the action taken in this regard, initially after four months and then every six months subsequent to that. The provisional measures ensure that Myanmar remains under the watchful eye of the ICJ. The case remains pending at the ICJ, with Myanmar objecting to the court’s jurisdiction, but the provisional measures issued remain in force.

The ICJ order for provisional measures is a partial but significant victory for those seeking justice for the Rohingya community. However, ensuring that the Myanmar government complies with and implements the measures at the ground level is crucial.

Investigation by the International Criminal Court

Simultaneously to these initiatives, the then-ICC prosecutor – Fatou Bensouda – requested the pre-trial chamber of the ICC for the authorisation to commence an investigation into the Myanmar situation and placed evidence before it which had been collected through a preliminary examination. It is significant that the pre-trial chamber received requests from thousands of alleged victims requesting an investigation by the ICC as they believed that only justice and accountability could ensure a termination and prevention of the cycle of violence and abuse.

On November 14, 2019, the pre-trial chamber delivered a decision authorising the prosecutor to do so. This was based on the chamber’s conclusion that there was reasonable basis to believe that crimes against humanity had been committed against the Rohingya people. This includes ICC crimes such as deportation (across the Myanmar-Bangladesh border), persecution on the combined grounds of ethnicity and religion and heinous forms of sexual and gender based violence. Given the scale of the forcible displacement of the Rohingya people, – with an estimated 600,000 to one million fleeing to Bangladesh – sufficient gravity of the crimes was illustrated for the ICC to investigate.

Interestingly, Myanmar is not a state party to the ICC but Bangladesh – its neighbour – ratified the ICC treaty in 2010. Under ordinary circumstances, the ICC would have no jurisdiction over the alleged crimes committed by Myanmar nationals on the Rohingyas within Myanmar. However, the pre-trial Chamber of the ICC authorised the commencement of investigation by the ICC prosecutor into the Myanmar situation if at least part of the criminal conduct has taken place in Bangladesh or any other state party to the ICC, or any other state willing to accept ICC’s jurisdiction.

[Also read: UNSC Drops Language on Opposing Islamic Emirate in Afghanistan, Singling Out Taliban on Terrorism](#)

Temporally, the jurisdiction of the ICC dates back to crimes committed after June 1, 2010, when the ICC treaty came into force for Bangladesh and covers present and future crimes as well, so long as they are sufficiently linked to the situation.

At present, investigation into the situation is ongoing, and the prosecutor is in the process of gathering the necessary evidence. Given that most of the heinous crimes have been committed within the territory of Myanmar and the Myanmar government's firm rejection of any genocidal intent, it remains to be seen if the ICC can prosecute and punish persons responsible for the alleged crimes against the Rohingya and surpass Myanmar's very probable non-cooperation with the court.

Since the victims have been forcibly displaced/deported and are living in Bangladesh, Thailand and other countries, challenges remain for the prosecutor's office in reaching out to them to gather evidence and record their testimonies.

Meanwhile, the National Unity Government (NUG) of Myanmar – a shadow government consisting of ousted parliamentarians, activists and civil society representatives of various minority ethnic groups – is reportedly considering granting jurisdiction to the ICC, under the guidance of several international legal experts.

In June 2021, reports indicated that NUG had gathered 400,000 pieces of evidence of atrocities committed by military officials which it plans to submit to the ICC. The NUG would be able to delegate jurisdiction to the ICC over crimes committed in Myanmar in two ways: either through a declaration under Article 12(3) of the ICC Treaty for the immediate context or by ratifying the ICC Treaty, which would make it a state party to the ICC. These processes can be undertaken simultaneously as well, though only after it is internationally recognised as the government of Myanmar.

A report titled *Ending Impunity in Myanmar*, released in August, 2021 by Fortify Rights, an independent human rights group, details how the NUG can end impunity and usher in justice and accountability through the ICC. Legal developments in this regard will be interesting to observe in the forthcoming months.

Principle of complementarity

There exists a correlation between the ICC's jurisdiction and universal jurisdiction that may potentially be exercised by Argentina. The Rome statute of the ICC makes a clear preference for domestic prosecutions through the principle of complementarity – that is, the ICC will investigate a situation and prosecute suspects for ICC crimes only if the concerned state is either unwilling or unable to do so.

The principle of complementarity balances state sovereignty with the need for a safety net when perpetrators of serious crimes under international law escape with impunity under domestic law, due to their official position, political clout, legal immunity or other factors.

Complementarity within the ICC system would lead to domestic prosecutions for ICC crimes, primarily in countries with links to the crimes – such as Myanmar and perhaps Bangladesh. In contrast, complementarity in the context of universal jurisdiction implies domestic investigations and prosecutions in any country willing to exercise universal jurisdiction – such as Argentina.

It will be interesting to observe whether, in the future, the investigation by the ICC prosecutor gives deference to the Argentinian investigation for the alleged commission of ICC crimes on the Rohingya people or takes precedence over it.

In pursuit of justice

The universal jurisdiction case in Argentina, the petition in the ICJ and the investigation by the ICC on the Myanmar situation are complementary and mutually reinforcing in nature, in the pursuit of justice. The first has the potential to prosecute suspects in domestic courts outside Myanmar in a direct exercise of universal jurisdiction. The ICJ holds the hope of acting as an oversight mechanism to compel Myanmar to respect and discharge its obligations under the Genocide Convention, to protect the vulnerable population and to prevent further violations.

The ICC may have the capability to prosecute and punish the top military and civilian leaders of Myanmar for ICC crimes, including but not limited to genocide, and particularly for the large scale sexual and gender based violence.

Needless to say, the road to justice is likely to be a long and arduous one for the Rohingya people, with a necessity to leverage and activate multiple options and avenues for justice and accountability, including but not limited to the ICC. However, it is clear that justice is a slow but sure way to break the cycle of violence by ending impunity.

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