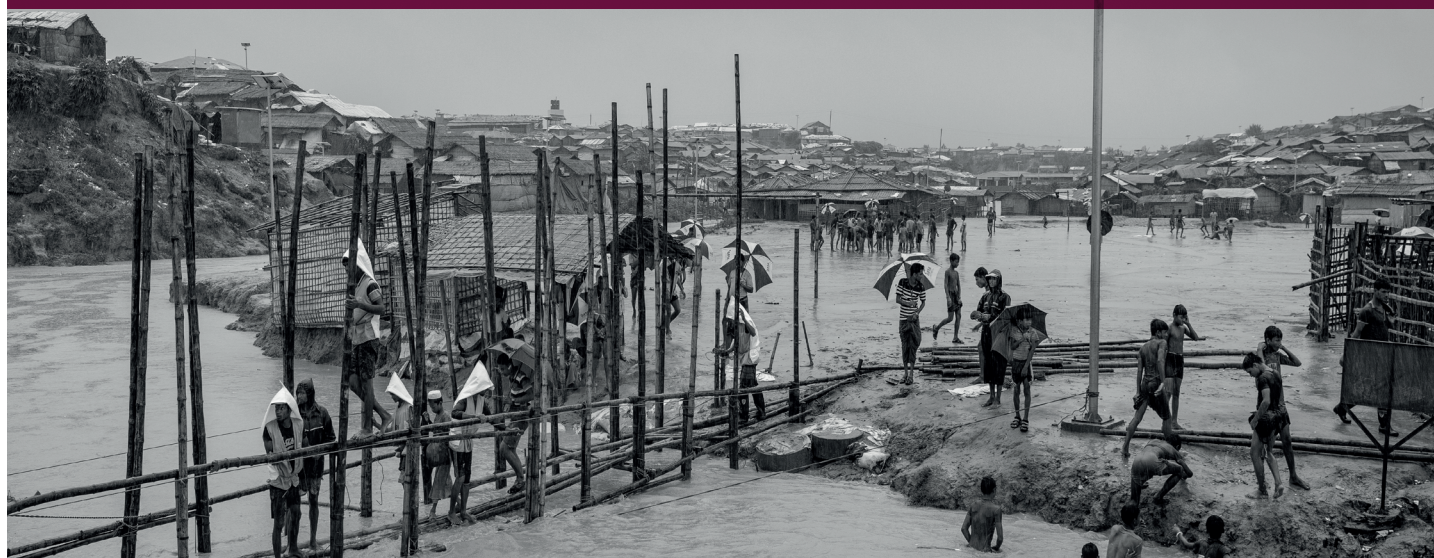


INTERNATIONAL RESPONSES TO THE ROHINGYA CRISIS IN MYANMAR

FROM POLITICAL INACTION TO GROWING LEGAL PRESSURE

Katja Creutz



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- In December 2019, Myanmar defended itself before the International Court of Justice against genocide charges for the atrocities committed in 2016–2017 against the Rohingya Muslims.
- The Rohingya crisis has driven several hundreds of thousands of the Rohingya as refugees into neighbouring Bangladesh with an unsettled future. In addition, questions of perpetrator accountability remain open.
- The UN Human Rights Council created a fact-finding mission and an international investigative mechanism for the purpose of bringing the individuals responsible to justice.
- With Western states generally condemning Myanmar's actions, China's influence in and over Myanmar has intensified, as the country has blocked robust action before the UN Security Council, leading to charges of political inaction.
- There is growing legal pressure against Myanmar at the national and international level, forcing it to respond. While accountability proceedings are important, problems may emerge when several courts deal with the same situation. Their capacity to provide immediate relief in relation to the crisis is also small.



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INTRODUCTION

In December 2019, Nobel Peace Prize laureate Aung San Suu Kyi stood before the International Court of Justice (ICJ, World Court) in The Hague denying the harsh interstate genocide charges against her country, Myanmar (previously known as Burma). Around the same time, the International Criminal Court (ICC) announced its investigation into the responsibility of Myanmar's top leaders for international crimes. Prior to this, a lawsuit had already been filed against the leadership of Myanmar based on universal jurisdiction in Argentinian courts. As a result of these legal actions, the atrocities committed against the Rohingya Muslims by Myanmar in 2016–2017 have finally caught the institutional attention of the international community, despite the inability of the UN Security Council (SC) to firmly address the situation.

This Briefing Paper explores the current international institutional responses to the atrocities committed against the Rohingya. It aims to provide a comprehensive overview of the different political and legal actions taken, as well as to evaluate potential outcomes. It will be argued that the recourse to international courts has enabled the adoption of concrete measures forcing Myanmar to respond – a process that would not have occurred otherwise. The importance of this course of action is further highlighted by the inability of the Security Council to act on the Rohingya crisis. In this paper, the conflict will firstly be contextualized, after which the diversity in the responses from the UN will be discussed – particularly the lack of Security Council targeted measures. From the political situation, the paper will turn to the legal responses, exploring the potential ramifications of two separate major courts handling the Myanmar case.

THE ROHINGYA CRISIS AMID A STALLED PEACE PROCESS

The Rohingya community – an ethnic, religious and linguistic minority of Myanmar – has lived in the area of the Myanmar state for centuries as descendants of

Persian or Arab traders. This Muslim population of approximately 1.1 million has been consistently persecuted, and the Rohingya are considered illegal immigrants in the predominantly Buddhist Myanmar. Effectively a stateless people, they suffer, among other things, from denial of citizenship, systematic discrimination, and restrictions on their freedom of movement.

Myanmar has a long history of fighting diverse ethnic-religious groups and their armed divisions, one of which is the Rohingya and its Arakan Rohingya Salvation Army. However, a decisive step towards ending decades of internal conflict was taken with the conclusion of the National Ceasefire Agreement in 2015, which set in place a complex peace process involving numerous national and international actors. The peace process aims to convince all ethnic armed groups to abandon separatism in favour of a united, federal and democratic state with the ultimate goal of concluding a peace agreement to that effect. When Aung San Suu Kyi as leader of the National League for Democracy came to power in early 2016, she inherited the peace process, vowing to make it her government's priority. Thus far, the peace process has not managed to secure the acceptance of all ethnic armed groups. Violence has escalated and the destiny of the peace process appears uncertain. While Myanmar's heartland enjoys improved living conditions and stability, the borderlands still witness fighting and instability.¹

One area outside the borderlands, which threatens the capital Naypyidaw's goal of securing peace in Myanmar, is Rakhine State, home to the Rohingya. In October 2016, violence erupted in Rakhine, with the killing of nine police officers by Rohingya rebels. The upsurge was disproportionately quashed by the Myanmar military, the Tatmadaw, leaving people dead and tens of thousands fleeing into neighbouring Bangladesh. Despite decades of tension, such violence was unheard of, resulting in allegations from officials at the UN Refugee Agency in Bangladesh of ethnic cleansing being conducted on the part of Myanmar officials. Reports described violations such as rape, arson, torture

1 Lex Rieff, 'Peace and War in Myanmar', 6 December 2019, www.brookings.edu/blog/order-from-chaos/2019/12/06/peace-and-war-in-myanmar/ (accessed 3 April 2020).

and extrajudicial killings, indicators that should have alerted the international community to genocide despite claims by Myanmar's government that they were defending the country's unity and sovereignty against Muslim terrorists. A further round of violence erupted in August 2017, which led to almost 7,000 Rohingya being killed, and half of the population fleeing to Bangladesh. The Rohingya in Bangladesh now form one of the largest refugee sites in the world.

Despite international expectations that State Counsellor Aung San Suu Kyi would side with the affected Rohingya community, she has done less than expected to address the situation. In 2016, an Advisory Commission on Rakhine State was established under the chairship of former UN Secretary-General Kofi Annan, mandated to look into how to best secure the economic and social well-being of all ethnic communities residing there. The final report, which was released in August 2017, called, among other things, for an improvement in the rights of the Rohingya community. Continued clashes between Rohingya rebel groups and the military nonetheless derailed any recommended improvement to the status of the Rohingya. Counsellor Aung San Suu Kyi has no powers to control the military, in whose hands the leadership ultimately rests. A confrontation by 'the Lady' with the military concerning the Rohingya would not only risk her electoral popularity, but could also lead to disruptions in the domestic politics.

A DIVIDED UN AND SECURITY COUNCIL INACTION

When reports about widespread human rights violations against the Rohingya started to emerge, the UN human rights machinery undertook decisive actions to investigate and address the situation. Alongside its Special Rapporteur on the human rights situation in Myanmar, it created in March 2017 an Independent International Fact-Finding Mission for Myanmar (IIFFM) led by Marzuki Darusman. In September the following year, the IIFFM issued a 441-page report on abuses against the Rohingya and other ethnic communities in three states in Myanmar.²

The report found that systematic human rights violations had been committed by Myanmar's security apparatus, and by the military in particular. It named a number of high-ranking military officials in

connection with the demands for accountability, including the commander-in-chief, Min Aung Hlaing. It was stated that the perpetrators should be brought before the courts to be held criminally accountable – either before an ad hoc international criminal tribunal or by referral to the ICC. In response to this, the UN Human Rights Council (HRC) decided in September 2018 to establish an Independent Investigative Mechanism for Myanmar (IIMM), whose purpose is to collect, maintain and analyze evidence about the atrocities committed against the Rohingya. The aim is to continue the work of the IFFM and obtain documentation from individuals, groups and organizations that can later be used for the purposes of accountability. It is noteworthy, however, that the IIMM works with higher standards of proof than the fact-finding mission did. In order to build criminal cases, the proof must be 'beyond reasonable doubt'.³

In contrast to the firm actions of the HRC, the reports on crimes against humanity and ethnic cleansing by various UN human rights bodies have failed to trigger robust Security Council action. Until the violent developments against the Rohingya in 2016, the Security Council had only discussed Myanmar incidentally. The 2017 exodus of Rohingya to Bangladesh changed the landscape to such an extent that Secretary-General António Guterres urged the SC to press Myanmar on its human rights situation – but even then the Council was slow to react. It took the Council two weeks to arrange a meeting on the situation and no resolution was agreed upon. Some momentum for action emerged in connection with the Security Council's visit to Bangladesh and Myanmar in April–May 2018, however. The Council members urged Myanmar to allow access for UN agencies, and called for an independent investigation into the alleged human rights violations, and the implementation of Myanmar's own Advisory Commission report. A similar push for action took place in September 2018 when the IIFFM issued its condemnatory report alleging that war crimes, crimes against humanity, and even genocide had been committed. Along with the report's recommendations to the Security Council on addressing accountability through international criminal justice, it also urged the SC to adopt targeted sanctions against the accused individuals, and to impose an arms embargo upon Myanmar.

² 'Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar', UN Doc. A/HRC/39/CRP.2, 17 September 2018.

³ UN, Independent Investigative Mechanism for Myanmar, Factsheet, www.ohchr.org/Documents/HRBodies/HRCouncil/IIMM/Factsheet_EN.pdf (accessed 7 April 2020).

However, the SC members have not been able to agree upon an outcome, as China and Russia have blocked all draft resolutions mentioning accountability or the threat of sanctions. Myanmar duly represents yet another case in which these two countries reject international interventions to hold perpetrators criminally accountable in line with their general resistance towards international criminal justice. This is also reflected in the Council's approach to the measures taken by the UN's own human rights machinery, which has been cautious. For example, briefings by the HRC have been subject to procedural votes by China and Russia in order to stymie them. In 2019, efforts to address Myanmar's acts against the Rohingya lagged even further. The so-called Rosenthal Report, which investigated the UN's response to the Myanmar situation, found that the UN's response was fragmented and torn between 'supporting the peace and political processes, while at the same time condemning serious human rights violations'.⁴ The restraints of the Security Council duly often leave the UN impotent when it comes to acting upon serious human rights violations, with no progress in this particular matter in sight.

CONCERTED LEGAL ACTIONS INITIATED

Despite the bleak response by the UN Security Council, mid-November 2019 proved that the international community had not forgotten about the atrocities committed against the Rohingya. Within one week, three separate, but serious legal actions were taken. Two international courts in The Hague, namely the ICJ and the ICC, started handling cases against Myanmar. A complaint concerning alleged international crimes was also made before Argentinian courts. Taken as a whole, these three cases indicate that judicial pressure against Myanmar is intensifying. Even though the outcomes of the distinct proceedings will be uncertain for some time to come, the wheels of international justice are turning as a result of what seems to be coordinated efforts to press Myanmar.

The Gambia's case in the ICJ

The Gambia, an African country located over 10,000 km away from Myanmar and the Rohingya, has proved indispensable in the Rohingya's fight against impunity. On 11 November 2019, The Gambia instituted proceedings against Myanmar before the ICJ. It accused Myanmar of breaching the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), to which both the applicant and respondent are parties. The Gambia blamed Myanmar for both its failure to prevent genocide and its perpetration of the same crime. The application also contained a request for protection of the Rohingya while the Court ponders the merits of the case. Although not officially a party to the dispute in question, the Organization for Islamic Cooperation (OIC) supported The Gambia in the application.

The ICJ, which is the primary judicial organ of the UN, only handles interstate disputes and is able to make findings on state-level responsibility. Its jurisdiction is consensual, and in this particular case, the competence of the Court is grounded in both state parties' acceptance of jurisdiction beforehand via the 1948 Genocide Convention. The Court has handled two cases to date relating to genocide charges in the former Yugoslavia, one by Bosnia and Herzegovina against Serbia, and the other by Croatia against the same respondent.

The Gambia initiated the case as a state party to the Genocide Convention although it had itself suffered no material injury. It also referred to the fact that the obligation to prevent and punish genocide is owed to the international community as a whole – grounds for litigation not commonly accepted by the ICJ. However, the Court's decision on provisional measures of 23 January 2020 demonstrated that it is taking the case seriously. It found that The Gambia has *prima facie* standing to pursue the case. It also found the Rohingya in Myanmar to be seriously exposed to attacks, and ordered provisional measures to be taken. It required Myanmar to prevent the killing or serious harming of any member of the Rohingya, to prevent the intentional infliction of life conditions that are aimed at destroying the Rohingya community in part or in whole, and to guarantee that its armed forces or any irregular forces under its control will not commit any genocidal acts. It also obliged Myanmar to prevent the destruction of evidence, and to report to the Court biannually on how it has implemented these measures.

⁴ Gert Rosenthal, 'A Brief and Independent Inquiry into the Involvement of the United Nations in Myanmar from 2010 to 2018', 29 May 2019, www.un.org/sites/www.un.org/files/atoms/files/Myanmar%20Report%20-%20May%202019.pdf, p. 15.



In December 2019, State Counsellor of Myanmar Aung San Suu Kyi, and next to her, Minister of Justice of The Gambia Abubacarr Tambadou participated in the public hearings of the Rohingya genocide case at the International Court of Justice (ICJ) in The Hague.
Source: UN Photo/ICJ-CIJ/Frank van Beek.

The World Court's decision on the provisional measures was generally regarded as a victory for The Gambia, although the Court did not approve all of the applicant's requests. Despite this initial success, no swift decisions on the merits of the case should be expected as proceedings before the ICJ usually take many years. For example, it took 14 years before the final judgement on the *Bosnian Genocide Case* between Bosnia and Herzegovina and Serbia was delivered. The Court's decision on the provisional measures, however, legally mandates Myanmar to report on adopted measures by 23 May 2020 and hence constitutes a powerful signal and follow-up to the situation.

The Argentinian court case

Two days after The Gambia's application for the institution of proceedings before the ICJ, another legal move was made, this time partly by the Rohingya community itself. The Burmese Rohingya Organisation in the United Kingdom (BROUK), together with Latin American human rights groups, filed an application in the federal court of Buenos Aires, Argentina on 13

November 2019.⁵ The criminal complaint called for responsibility to be taken by both military and civilian leaders, including Aung San Suu Kyi, because serious crimes against the minority group had been committed between 2012 and 2018.

It is not unheard of for national courts to handle cases involving serious violations of international law that were committed elsewhere. The doctrine of universal jurisdiction allows individual states to prosecute perpetrators of international crimes irrespective of place, since the crimes are so horrific that they concern the international community as a whole. In this case, Argentine courts were chosen because of the country's explicit approval of the principle of universal jurisdiction. Latin American courts have also been used before to pursue cases against rulers, for instance against Francisco Franco of Spain. The BROUK was also assisted by the former UN Special Rapporteur on Myanmar, Tomás Ojea Quintana, who happens to be an Argentine national himself. No decision as to the approval of the complaint has been made as yet.

⁵ See <https://burmacampaign.org.uk/media/Complaint-File.pdf> (accessed 19 March 2020).

The International Criminal Court

In July 2019, Prosecutor Bensouda of the International Criminal Court requested authorization for the opening of an investigation into the situation in Bangladesh/Myanmar. This request, and its subsequent approval by the Pre-Trial Chamber III on 14 November 2019, was made possible due to Bangladesh's ratification of the ICC Statute in 2010. The fact that Myanmar is not a party to the Statute does not preclude investigation, as it suffices that 'at least part of the [criminal] conduct' occurred on the territory of a state party.⁶ However, the events that occurred in the territory of Myanmar fall outside the Court's jurisdiction.

According to the Chamber approving the investigation, there were reasonable grounds to believe that cross-border deportation and persecution had taken place, acts which form a possible basis for alleged crimes against humanity. The decision was further motivated by the numerous communications that Rohingya victims had directed to the ICC. These views highlighted the need for accountability and justice in order for the abuses to finally come to an end. The next phase for the Court is to gather evidence, a difficult and time-consuming process. Its success is dependent on the cooperation of Bangladesh, as it seems unlikely that Myanmar would voluntarily cooperate with the ICC. To date, Myanmar has rejected the ICC investigation, arguing that it will secure justice by national means.

IMPLICATIONS OF THE RECOURSE TO JUSTICE

The three separate legal actions send a strong signal about the reprehensibility of Myanmar's actions against the Rohingya. They bear testament to the inability of the Security Council to take action in response to the Rohingya crisis, and show a blunt disregard for China's influence in the region. The legal actions also reveal the importance of small states and brave individuals, such as The Gambian Justice Minister, in the fight against impunity.

When several international institutions deal with the same situation, the reactions are often assumed to be complementary. However, this may not always be the case. While the political and legal responses can be mutually supportive, they can also clash. For example,

the legal proceedings before international courts have not rendered the Security Council irrelevant. It could still decide to adopt targeted measures against the accused individuals or decide to place an arms embargo on Myanmar. Any such measures would certainly provide swifter actions than those offered by legal institutions. It could also decide to aid the investigations of the ICC by referring the situation to the Court, thereby broadening the scope of the ICC investigation to the territory of Myanmar. Such a decision would also force Myanmar to cooperate with the ICC. At the same time, the Security Council has the power to defer an ICC investigation for a period of 12 months, should it choose to do so, by adopting a resolution to that effect under Chapter VII to protect international peace and security. Hence, it could block the ICC investigations for the sake of the peace process, for example.

But as the SC seems more or less unable to address the Rohingya situation, the potential for institutional competition seems greater concerning the proceedings in the ICJ and the ICC. It is commonly held that the actions of international criminal tribunals and the ICJ are complementary. The ICJ has itself stated that ascertaining the responsibility of states and the criminal responsibility of individuals separately is a prevalent feature of international law. However, problems may arise with multiple cases involving the same events and accused.⁷

The ICJ has no investigators that can collect, preserve or analyze evidence pertaining to the alleged genocide – unlike the ICC. In its previous genocide cases, the ICJ has therefore mainly relied on the investigations conducted by and evidence presented at international criminal trials, as well as their preceding findings. In the case against Myanmar, such evidence is not present. Hence, the ICJ currently seems to be relying on the investigation reports by the UN Fact-Finding Mission. But questions remain about the adequacy of these reports as a basis for responsibility before the ICJ. Whether the World Court will rely on the IIMM documents is also unclear at this stage.

The concurrent cases before the ICJ and the ICC also open the door for differing opinions about whether responsibility should rest with the state or the culpable individuals – or both. It is often claimed that the correct avenue for justice is not interstate proceedings with respect to serious violations of human rights, but

⁶ ICC-01/19, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (14 November 2019), para. 61.

⁷ Mia Swart, 'Will Cases Brought Against Myanmar Deliver Justice to Rohingya?', 19 November 2019, *Al Jazeera*, www.aljazeera.com/news/2019/11/cases-brought-myanmar-deliver-justice-rohingya-191117174800430.html (accessed 7 April 2020).

that individual criminal responsibility should be the focus. Such a view was presented, for example, by two judges in the interstate proceedings before the ICJ in the *Bosnian Genocide Case* in 2007. Moreover, the recommendations of the 2018 IFFM report focused on holding individuals accountable, and the IIMM was created with penal proceedings in mind.

Ultimately, proving genocide – whether at the state or the individual level – is difficult because of the requirement of genocidal intent. In previous cases, the ICJ has found state responsibility to exist where there have been earlier findings of individual criminal responsibility.⁸ This high dependency of state responsibility upon individual culpability poses risks. There is a danger that neither of the courts will affirm the relevant charges, which will benefit Myanmar in the end. It would also be compromising, should the international courts reach opposite conclusions.

CONCLUSIONS

The fact that two separate proceedings have been initiated before the ICJ and the ICC shows that decisive action on the atrocities committed against the Rohingya has finally been taken. What is blatant

concerning Myanmar's situation is the inability of the Security Council to achieve a common stance on the issue. This is a further case that reveals the paralysis of the Security Council in situations where China's and Russia's interests are affected. The Rohingya crisis has driven Myanmar closer to China, which has been able to deepen its influence in the country.

While tackling the issue of accountability is important – a fact that has also been highlighted in Security Council deliberations – it still represents a stumbling block for Russia and China. What is more, accountability is still to some extent juxtaposed with peace as the case of Myanmar demonstrates, not only in the views of different states but also within the UN. But there are also practical detriments to accountability and international trials: their protraction is still an obstacle to finding near-future solutions to the Rohingya in exile. The Security Council would possess the tools for more robust and swift action, which could persuade Myanmar to consider creating safe living conditions for all ethnic communities. Meanwhile, we have to trust the provisional measures issued by the ICJ to protect Rohingya from further violence. After all, even Naypyidaw may be sensitive to criticism from international courts at a time when the country is seeking to open up.

⁸ Beatrice I. Bonafè, 'Reassessing Dual Responsibility for International Crimes', *Sequência (Florianópolis)* No. 43, May/August 2016.