



## UNITED STATES COMMISSION *on* INTERNATIONAL RELIGIOUS FREEDOM

### FACTSHEET **BURMA**

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## The Path Towards Justice: Accountability for International Crimes Against the Rohingya of Burma

*By Kirsten Lavery, International Legal Specialist, and Harrison Akins, Policy Analyst*

On January 23, 2020, the International Court of Justice (ICJ) in The Hague announced provisional measures requiring that the Burmese government must “take all measures within its power” to ensure that the military and any irregular armed units “do not commit acts of genocide” against the Rohingya in Burma. This unanimous decision by the 17-judge panel was the first international court ruling against Burma and a key recognition of the ongoing vulnerability of the Rohingya to genocidal violence by the Burmese government and non-state actors. The ICJ case is being conducted at the same time as a universal jurisdiction case in Argentina and an International Criminal Court (ICC) investigation into Burmese officials’ actions against the Rohingya. Collectively, these efforts represent an unprecedented use of the international justice system to hold the Burmese government and government officials accountable for atrocities committed against the Rohingya.

Many Rohingya *victims* and *refugees* have emphasized the importance of justice and accountability for the horrors they have suffered. This factsheet provides an overview of the legal accountability processes for alleged international crimes—including genocide and crimes against humanity—committed against the Rohingya, the implications of these actions, and possible outcomes.

#### Background

The Rohingya are a Muslim-majority group defined by language and ethnicity, historically residing in the northern part of Burma’s western Rakhine State (known as Arakan prior to 1989), and comprising nearly 3 million people. Following independence from British colonial rule in 1948, the Burmese government increasingly consolidated a political identity based on the majority Buddhist faith and majority Bamar ethnic identity, especially after 1962, when the military junta came into power. The military government systematically persecuted the Rohingya, who are neither Buddhist nor Bamar, denying their identity and instead labeling them “illegal Bengali immigrants” whose presence was a legacy of British colonialism. The government subsequently excluded the Rohingya from Burmese citizenship through

the [1982 Citizenship Law](#) and conducted a series of military operations that pushed hundreds of thousands of Rohingya into Bangladesh.

As anti-Muslim [sentiment](#) and Buddhist nationalism blossomed alongside the democratization process that began in 2011, the Rohingya have continued to face intense persecution, including two campaigns of egregious violence conducted by both the Burmese military and non-state actors. In 2012, local political parties and Buddhist monks organized and incited mob attacks against Rohingya in Rakhine State. Human Rights Watch [reported](#) that government security forces “assisted the killings by disarming the Rohingya of their sticks and other rudimentary weapons they carried to defend themselves.” The 2012 [attacks](#) left nearly 200 dead. More than 140,000 Rohingya were forcibly displaced, including 75,000 Rohingya fleeing to Bangladesh. In the midst of the violence, then President Thein Sein [expressed](#) his desire to hand over responsibility for the entire ethnic group to the United Nations High Commissioner for Refugees (UNHCR) and “send the Rohingyas to any third country that will accept them.” The 2015 election of Aung San Suu Kyi’s National League for Democracy did little to alter the Burmese government’s stance in regard to the Rohingya. Suu Kyi and other senior government officials, especially military officers who hold significant political power under the [2008 Constitution](#), continued to push the narrative that the Rohingya are “illegal Bengali immigrants” and implement the same policies restricting the Rohingya from any citizenship rights, including religious freedom, access to education and health services, access to employment and, in some cases, even freedom of movement.

The second wave of anti-Rohingya violence began in August 2017. Using insurgent attacks as justification, the military launched widespread operations in the region that targeted Rohingya civilians. During these operations, the military forces [engaged in](#) indiscriminate extrajudicial killings of civilians; mass rape and other sexual violence; enforced disappearances; forced starvation; arbitrary detentions and arrests; and looting, burning, and property destruction, forcing over 700,000 Rohingya across the border into Bangladesh. Both prior to these operations and for Rohingya that stayed in Rakhine during these operations, government authorities and non-state actors also have shuttered and burned down mosques, prevented Rohingya Muslims from worshipping or attending madrassas, interfered with Islamic funeral rites, desecrated

and burned Qur’ans, and targeted imams for detention, torture, and killings. Social media, in particular Facebook, has been [used](#) extensively to spread hate speech against the Rohingya, as well as Muslim communities throughout Burma, and incite people to commit violence against them. By July 2019, approximately [910,000 Rohingya](#) had fled the violence in Rakhine State and settled in refugee camps in Cox’s Bazar, Bangladesh.

Approximately 120,000 internally displaced Rohingya remain confined to camps in Rakhine with severe limitations on their movement, little access to education or healthcare, lack of work, and inability to obtain ID cards. In July 2019, the government cut the Internet in areas of Rakhine and Chin states, with human rights groups [expressing](#) concern this would restrict humanitarian aid from reaching vulnerable populations and limit the ability to monitor military abuses. The Internet restrictions were lifted in September but [reimposed](#) in February 2020. Reports continued of the military indiscriminately killing civilians and destroying homes, mosques, and food stores. As a result, United Nations (UN) Special Rapporteur on Myanmar Yanghee Lee [concluded that](#) “it is not safe or sustainable for refugees to return.”

## Fact-Finding and Evidence Collection Bodies

The foundation for the legal proceedings, described in detail below, was laid through efforts to determine what took place in Rakhine State. Through these fact-finding efforts, information and evidence regarding alleged international crimes were collected and preserved.

*Fact Finding Mission (FFM):* In March 2017, the UN Human Rights Council [created](#) the [FFM](#) to establish the facts and circumstances of the alleged human rights violations by Burmese military and security forces, and abuses by other actors, since 2011. The FFM produced a series of reports, including its primary [report](#) released in September 2018 that found “reasonable grounds” to believe that security forces, particularly the military, had committed crimes against humanity, genocide, and war crimes against the Rohingya and other ethnic minorities. The FFM also found that the “factors allowing for inference of genocidal intent” were present. Additional reports were released on [sexual and gender-based violence](#) and the economic [interests](#) of the Burmese military. The FFM issued a [final report](#) when its mandate ended in September 2019.

*The Independent Investigative Mechanism for Myanmar (IIMM)*: The UN Human Rights Council *established* the *IIMM* in September 2018 to collect evidence of the most serious international crimes and violations of international law and prepare files for criminal prosecution. In building its case files, the IIMM uses evidence received from the FFM, along with other sources. As detailed in U.S. President Donald Trump's first *report* under the Elie Wiesel Genocide and Atrocities Prevention Act, the U.S. government provided "publicly available satellite imagery and pertinent information" to the IIMM. As an investigative mechanism, the IIMM cannot conduct its own prosecutions but may contribute to accountability efforts by sharing its files with national, regional, or international courts that are able and willing to conduct fair trials of individuals for crimes committed in Burma.

## Current Justice and Accountability Processes

Legal actions are now being pursued to achieve *accountability for the mass atrocity crimes* identified by the FFM and other fact-finding initiatives in three different forums: (1) *the International Court of Justice (ICJ)*, (2) *the International Criminal Court (ICC)*, and (3) the criminal courts in Argentina.

### (1) The ICJ Suit

*Background*: The UN Charter established the ICJ in 1945. As the judicial organ of the UN, it settles legal disputes between states and provides advisory opinions on legal matters referred to it by UN bodies. Although the ICJ does not conduct criminal investigations or prosecutions, Article IX of the UN Convention on the Prevention and Punishment of Genocide ("*Genocide Convention*") provides the ICJ with jurisdiction to decide disputes relating to the interpretation, application, or fulfillment of the Genocide Convention.

*The Gambia v. Myanmar*: On November 11, 2019, The Gambia *instituted proceedings* against Burma before the ICJ, alleging violations of the *Genocide Convention*. While the other 56 member countries of the Organization of Islamic Cooperation *supported* The Gambia's submission, it alone filed this legal case under Article 9 of the Genocide Convention, which allows any state party to bring a claim against another party that it believes is not upholding its obligations under the Convention. According to *news reports*, the genesis for The Gambia to file the case came from its Justice Minister Abubacarr Tambadou, who spent over a decade prosecuting cases in the wake of the 1994 genocide in Rwanda. When he visited Rohingya refugees

in Cox's Bazar, he noticed striking similarities to the atrocities in Rwanda and saw "genocide written all over [their] stories," compelling him to move forward with the suit.

Relying on the FFM's reports, The Gambia accused the state of Burma of violating the Genocide Convention by committing, failing to prevent, and failing to punish genocide. The suit also alleged that Burma failed to pass domestic legislation to enact the required provisions of the Genocide Convention. The Gambia requested relief, including the cessation of genocidal acts, prosecution of those responsible, and reparations for the victims.

The Gambia requested six provisional measures, which are similar to preliminary injunctions, to mitigate further harm during the pendency of the litigation. From December 10-12, 2019, the ICJ hosted *public hearings* to consider The Gambia's request for provisional measures, which require a showing that there is a reasonable basis for the claim. State Counsellor Aung San Suu Kyi appeared as the agent for Burma during these hearings. Among other legal arguments presented, she claimed that the necessary genocidal intent was not present within the Burmese government to bring a claim under the Genocide Convention.

On January 23, 2020, the ICJ found that The Gambia's claims were plausible and that "there is a real and imminent risk of irreparable prejudice to the rights of the Rohingya." Based on this, the ICJ unanimously *granted* four of the requested provisional measures. Specifically, Burma must:

- refrain from acts of genocide against the Rohingya;
- ensure that the military and other groups subject to its control refrain from genocide or related acts;
- prevent the destruction and ensure the preservation of evidence related to the alleged genocide; and
- submit a report in 4 months on the steps taken to implement the provisional measures and then submit a report every 6 months.

The ICJ found the other two requested measures—to not aggravate the dispute and to grant access to UN investigative mechanisms—to be unnecessary.

The Gambia's suit is the first time that a country without a direct connection to the crimes brought a case of alleged genocide to the ICJ based on its status as a signatory to the Genocide Convention. The ICJ found in its decision on provisional measures that all parties to the Genocide Convention have a "common interest" in preventing

genocide and ensuring accountability when genocidal acts occur. As a result, the ICJ *noted* that any signatory to the Genocide Convention, including The Gambia, can bring suit for failure to enforce the treaty's provisions. The ICJ also found that the Rohingya "appear to constitute a protected group within the meaning of Article II of the Genocide Convention." While this preliminary finding could change once the case proceeds on the merits, it is significant because Burma has refused even to recognize the Rohingya as a distinct minority group. For example, in State Counsellor Suu Kyi's speech defending Burma in the hearing on provisional measures at the ICJ, she *failed* to use the word "Rohingya" and only referenced Muslims in Rakhine State.

*Next Steps:* The decision on provisional measures was the first step in the ICJ's proceedings. The ICJ will *next* determine whether it has jurisdiction to proceed to a full hearing on the merits. If it finds that it does, it will then move forward with hearing the case. If the ICJ ultimately rules in The Gambia's favor, it would grant some of its requests of relief. The average duration of ICJ cases from initial filing to final decision is *4 years*, but some cases take significantly longer. For example, it was 14 years between the initiation and the final judgment in another Genocide Convention case, *Bosnia and Herzegovina v. Serbia and Montenegro*.

There are several challenges ahead. The ICJ case is focused on making a legal determination regarding state responsibility; it is not a criminal prosecution of officials within Burma. The goal is to ensure that the Burmese government honors its commitments under the Genocide Convention. Since the ICJ does not itself have investigatory power, it must rely on evidence gathered from other cases and investigations.

Concerns persist that violence directed at the Rohingya will continue during the duration of the suit. Notably, the Srebrenica genocide *occurred* after two ICJ provisional measures had been ordered in the *Bosnia and Herzegovina v. Serbia and Montenegro* case. Here, the ICJ's order issuing provisional measures is legally binding on Burma. In theory, the Burmese government must comply with it while the case is proceeding. However, in practice, the impact relies on political and other pressures being placed on the Burmese government, as the ICJ does not have any enforcement mechanisms.

Despite these challenges, Burma has accepted the authority of the ICJ and participated in the court proceedings. As it proceeds, the ICJ case provides an important opportunity for the international community to determine whether the violence and persecution of the Rohingya constitutes genocide.

## (2) The ICC Investigation

*Background:* The *Rome Statute*, signed by 120 states in 1998, established the *ICC* as a permanent court based in the Netherlands. The ICC can investigate and prosecute individuals for serious international crimes including genocide, crimes against humanity, and war crimes. Unless the UN Security Council refers a case to the Office of the Prosecutor, the ICC's jurisdiction only extends to crimes committed on the territory or by the nationals of states that have accepted its jurisdiction. The ICC's jurisdiction complements national jurisdiction, meaning the ICC can only take up cases where the states concerned, including those without a link to the crimes, are incapable of pursuing the perpetrators or unwilling to do so.

*Burma/Bangladesh Situation:* While Burma is not a signatory to the Rome Statute, Bangladesh ratified the Rome Statute in 2010. On November 14, 2019, the ICC *authorized* the Prosecutor to proceed with a limited investigation into crimes under ICC jurisdiction committed against Rohingya in Burma's Rakhine State, where at least one element occurred in the territory of Bangladesh or another party to the Rome Statute. This is the first time the ICC has found jurisdiction for cross-border acts based on one state having ratified the Rome Statute.

Although the Prosecutor may investigate additional crimes, the Court specifically found a reasonable basis to believe that since October 2016, the Burmese military, other security forces, and some local civilians have committed acts that qualify as crimes against humanity, including deportations and persecution of the Rohingya population, and fall under the ICC's jurisdiction. The investigation is limited temporarily to crimes that took place within the 2016 and 2017 "clearance operations," along with other crimes that are "sufficiently linked" to these events.

*Next Steps:* The Prosecutor will conduct an independent investigation and collect further evidence. Burma has not accepted the jurisdiction of the ICC and stated that it will not allow ICC investigators to enter the country, which may hamper the ability of the Prosecutor to collect the evidence needed to build criminal case(s).

If sufficient evidence is gathered to establish the criminal responsibility of any specific individual, the Prosecutor will request the Pre-Trial Chamber to issue a summons or [arrest warrant](#) to proceed with a trial. If a defendant is found guilty, the ICC can sentence the individual to prison and establish a reparations regime for victims.

Absent a full referral of the situation in Rakhine State to the ICC by the UN Security Council, which is [unlikely](#), the ICC's efforts will be limited to crimes where one element occurred in the territory of Bangladesh or another party to the Rome Statute. Additionally, given that the investigation is also limited to crimes allegedly committed since October 2016, the Prosecutor will not address the full scope of the crimes that have occurred against the Rohingya.

If the Argentine courts move forward with the universal jurisdiction case, discussed in the following paragraphs, it will be the [first time](#) that a universal jurisdiction case is occurring in parallel with an ICC investigation. As the ICC Prosecutor moves forward in the investigation and focuses on the specific perpetrators, a jurisdictional issue based on the principle of complementarity (as described above) may arise. However, because the Argentine complaint focuses on crimes that occurred in Burma and the ICC's investigation involves alleged crimes with a connection to Bangladesh, the two cases may both be able to proceed.

### (3) Universal Jurisdiction Case in Argentina

*Background:* Universal jurisdiction allows states to prosecute in their domestic courts serious international crimes committed by any person, anywhere in the world, based on the principle that such crimes harm the international community or international order. Many states maintain laws that empower their courts to exercise universal jurisdiction, particularly when the states with connections to the mass atrocity crimes are unwilling or unable to hold perpetrators accountable. Some treaties, such as the Genocide Convention, require states to implement legislation that provides for universal jurisdiction for specific international crimes.

*Argentine Case:* On November 13, a group of Rohingya and Latin American human rights groups [filed a criminal complaint](#) against a number of Burmese officials under Argentina's universal jurisdiction law, which gives Argentine courts jurisdiction over crimes in the ICC's Rome Statute. Like the ICC case, this case focuses on individual responsibility for the alleged crimes. Specifically, the case alleges genocide and crimes against

humanity committed by Burmese civilian and military officials, including State Counsellor Suu Kyi and Army Chief Min Aung Hlaing, relying on the findings of the FFM.

*Next Steps:* Now that the complaint is lodged, the Argentine court will [consult](#) a federal prosecutor to determine whether an investigation will proceed. Although Argentina has [prosecuted](#) cases under the principle of universal jurisdiction, it is difficult to predict whether the federal prosecutors will opt to proceed with the case. If the case moves forward, the court would then collect evidence, which can be [particularly difficult](#) in universal jurisdiction cases involving crimes committed in a foreign jurisdiction. The process of issuing arrest warrants to extradite defendants can also be an uphill battle.

## Conclusion

These cases represent a significant step forward in pursuing justice and holding accountable the Burmese government and individuals responsible for mass atrocities committed against the Rohingya.

The U.S. government should cooperate with and support efforts to collect, preserve, and analyze evidence of the international crimes committed against the Rohingya. In connection with broader U.S. actions to hold Burmese officials accountable for their crimes, including through the use of targeted sanctions, U.S. support for these legal processes would signal U.S. support for accountability and help to increase international pressure on the Burmese government to cooperate with these legal institutions, including complying with the provisional measures ordered by the ICJ.

The U.S. government should also refocus efforts to conclude definitively and publicly whether atrocities against the Rohingya meet the legal definition of crimes against humanity and/or genocide. Previous efforts, such as the U.S. Department of State's 2018 survey [Documentation of Atrocities in Northern Rakhine State](#), fell short of providing a legal determination and only described actions taken against the Rohingya as "ethnic cleansing," an act not recognized as a crime under international law. While the U.S. determination of genocide or crimes against humanity would not carry legal weight in the ongoing cases, this public declaration could be an instrument to leverage international pressure against the Burmese government and individuals responsible for these acts.



These investigations and cases face many challenges. The simultaneous pursuit of these cases increases the likelihood of achieving meaningful justice. Notably, the precedent set by these cases may also have a broader impact in helping victims of crimes against humanity or genocide in other contexts by defining a path towards justice.

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