

USALI Perspectives

Myanmar and the Myriad Efforts Towards International Justice

All avenues to ensure accountability and redress must be explored

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Myanmar is in a state of crisis. The coup orchestrated by its military in February 2021 has resulted in gross violations of international human rights and humanitarian law. According to the UN Office of the High Commissioner on Human Rights [reporting](#) to the Human Rights Council in September 2022, 2,316 civilians have been killed in Myanmar and more than 15,000 individuals have been arrested, with over 12,000 still in detention. The country is in the grip of a growing humanitarian crisis due to denial of access to aid by the authorities.

The same military regime that is carrying out these atrocities today was implicated in previous atrocities in Myanmar against many ethnic minorities, including the Rohingya. In 2017, nearly a million Rohingya – a minority persecuted for decades – were forced to flee military “clearance operations,” a euphemism for mass killings, rape, and the burning of entire villages in Rakhine state.

It is in this context that legal proceedings commenced before two international courts prior to the 2021

coup: one before the International Court of Justice (ICJ) and the other before the International Criminal Court (ICC). In addition, supporters of the Rohingya abroad began efforts to initiate legal proceedings in various countries' domestic courts based on the principle of universal jurisdiction. One such case is making its way through the courts in Argentina, and cases are being attempted in Indonesia and Turkey.

At the ICJ, cases relate to the responsibility of a state. The Gambia instituted proceedings against Myanmar in November 2019 on behalf of the Rohingya. In its [Application of the Convention on the Prevention and Punishment of the Crime of Genocide \(The Gambia v. Myanmar\)](#), The Gambia argued that as a state party to the Genocide Convention, and in the interests of humanity, it had an interest in ensuring compliance with the provisions of the treaty. The Gambia asked for particular provisional measures, or interim measures of protection, at the time of filing the application. The ICJ issued its [order on provisional measures](#) in January 2020, ordering that Myanmar comply with its obligations under the Genocide Convention and report to the court at regular intervals regarding its compliance with the order. These reports, however, are not made public by the court.

In the latest development, on July 22, 2022, the ICJ issued its [judgment on preliminary objections](#), in which it

overruled Myanmar's arguments and affirmed jurisdiction over the case, thereby moving to the merits phase. This is a significant step that ensures the substantive arguments – Myanmar's violation of the Genocide Convention – will be addressed by the court. The last significant case at the ICJ based on the Genocide Convention was [Bosnia and Herzegovina v. Serbia and Montenegro](#), which took 14 years to reach final judgment, and resulted ultimately in a holding of responsibility for the failure to prevent and punish genocide, but not for the commission of genocide. More recently, [Ukraine has initiated proceedings](#) at the ICJ against Russia based on this convention.

International legal proceedings before the ICC relate to individual criminal responsibility. In July 2019, the prosecutor of the ICC [requested](#) authorization to open an investigation into possible crimes against Rohingya that caused them to flee into neighboring Bangladesh. The prosecutor argued that the court has jurisdiction even though Myanmar is not a state party to the ICC because Bangladesh, which is an ICC state party, received the Rohingya onto its territory. The pretrial chamber [accepted the argument](#) in November 2019, giving the prosecutor authorization to proceed with the investigation. The prosecutor's office is now conducting its investigation, and a recent [statement](#) by the prosecutor upon a visit to Cox's Bazaar, site of a massive refugee camp for the Rohingya, indicates some

progress. However, it is only when warrants are issued and made public that the scope of the investigation and the case the prosecution is making will become clear.

What complicates the situation is that while many of the survivors are in refugee camps, both evidence and perpetrators remain in Myanmar. The scope of this investigation is somewhat limited due to the territorial component, requiring skill and creativity on the part of the prosecutor. At the same time, there are continued efforts for a full referral of the situation in Myanmar by the UN Security Council to the ICC, which would allow the prosecutor to pursue a more comprehensive case. Recently, the US and the UK have expressed [their support](#) for this proposition. However, due to the reality of Security Council dynamics, with Russia and China supporting the Myanmar military and wielding a veto, this may prove impossible.

In addition to these efforts at the international courts, efforts are also underway to use the principle of universal jurisdiction to initiate proceedings in domestic courts to ensure accountability. In Argentina, a Rohingya civil society organization has campaigned to initiate [legal proceedings](#) against the Myanmar military. Argentina has a history and familiarity

with legal proceedings based on universal jurisdiction, including cases occurring in Spain under General Franco's regime. The Rohingya case is also being supported by an Argentinian lawyer who was previously a UN special rapporteur on human rights in Myanmar. Rohingya women survivors recently testified before the Argentina court from the refugee camps. Other efforts to initiate proceedings based on universal jurisdiction are underway in Turkey and Indonesia.

Another part of this accountability matrix includes the UN Human Rights Council-mandated [Independent Investigative Mechanism for Myanmar](#). The mechanism has been established to consolidate, preserve, and analyze evidence of the most serious international crimes in Myanmar since 2011, and to prepare files for future cases in national or international courts.

In short, multiple legal efforts are being made to hold Myanmar accountable for its treatment of the Rohingya. None are a panacea for the significant human rights challenges posed by Myanmar's military rule. All avenues to ensure accountability and redress must be explored as long as the domestic legal system in Myanmar will not yield the desired results.



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