

# CRISIS IN MYANMAR: INTERNATIONAL ACCOUNTABILITY MECHANISMS



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The current crisis in Myanmar indicates widespread abuses and violations of international humanitarian law and human rights law committed by the Myanmar military in Rakhine, Kachin and Shan States as well as in other ethnic areas throughout Myanmar. This has been confirmed with the report of the UN-mandated Fact-Finding Mission which concluded that the human rights violations committed in these areas “amount to the gravest crimes under international law.”<sup>1</sup> The report recommends that the Commander-in-chief of the Myanmar Military, Min Aung Hlaing, and five other top generals be investigated and prosecuted for the crimes of genocide in Rakhine State and crimes against humanity and war crimes in Rakhine, Shan, and Kachin States. In September 2018, the Pre-Trial Chamber of the International Criminal Court (ICC) ruled that it may exercise jurisdiction for the crime against humanity of ‘deportation’ in the context of the forced displacement of over 800,000 Rohingya from Myanmar to Bangladesh.<sup>2</sup>

This document sets out the various accountability mechanisms that are possible to address the situation in Myanmar. It begins with an overview of the evidence that has been collected via the UN, through mechanisms that are mandated to provide recommendations regarding future accountability processes. It continues by introducing the international mechanisms most likely to be applied to hold war criminals to account, either in the short or long-term. It is hoped this brief will be to provide a user-friendly snapshot of the actions that have been taken and to give context and key take-aways for future possibilities.

Myanmar rights-based civil society has stated its support for accountability to be found through the **International Criminal Court (ICC)**.<sup>3</sup> Since the ICC has found that it has jurisdiction over the crime of

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<sup>1</sup> “Myanmar: Tatamdaw Leaders must be investigated for genocide, crimes against humanity, war crimes – UN Report,” *Office of the United Nations High Commissioner for Human Rights*, 27 August, 2018.

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23475&LangID=E>

<sup>2</sup> Toby Sterling, “International Criminal Court says it has jurisdiction over alleged crimes against Rohingya,” *Reuters*, 6 September, 2018. <https://www.reuters.com/article/us-myanmar-rohingya-icc/international-criminal-court-says-it-has-jurisdiction-over-alleged-crimes-against-rohingya-idUSKCN1LM23H>

<sup>3</sup> See “Joint Statement: The UN Must Establish a Mechanism Towards Accountability for Gross and Systematic Human Rights Violations in Myanmar,” *By Myanmar Civil Society Organizations*. 28 June, 2018. <https://progressivevoicemyanmar.org/wp-content/uploads/2018/06/HRC38-Myanmar-PR-28-6-2017.pdf> “Rohingya Organizations Worldwide Call for Accountability for Genocide and Crimes Against Humanity in Myanmar,” *By 26 Rohingya Organizations*. 19 July, 2018. <https://progressivevoicemyanmar.org/2018/07/19/rohingya-organizations-worldwide-call-for-accountability-for-genocide-and-crimes-against-humanity-in-myanmar/> and “UN Security Council Members Must Refer Burma to the International Criminal Court,” *By Karen Communities Worldwide*. 30 July, 2018. <https://progressivevoicemyanmar.org/2018/07/30/un-security-council-members-must-refer-burma-to-the-international-criminal-court/>

“deportation” of the Rohingya from Rakhine State to Bangladesh, it is imperative that victims’ groups and International Non-Government Organizations (INGO) engage actively with the ICC to ensure evidence is properly collected and provided. In the short term, it is likewise important that victims and human rights groups on the ground in the camps in Bangladesh collect, preserve and codify evidence in compliance with international standards.<sup>4</sup>

### **Evidence Collection and Accountability Mechanisms**

There are a number of international efforts to collect evidence of war crimes and other international crimes perpetrated in Myanmar. The scale and scope of the crimes necessitates that some form of criminal accountability be pursued. Below is an examination of the mandate, pros and cons of the various data collection and international accountability mechanisms that exist, or might exist with the necessary political will, including: the UN mandated Independent international Fact-Finding Mission (FFM); International, Impartial, and Independent Mechanism; Special Rapporteur Yanghee Lee’s proposed Accountability Mechanism for Myanmar; International Criminal Court (ICC); *Ad hoc International Tribunal*; application of Universal Jurisdiction; and International Court of Justice (ICJ).

#### **(i) *Independent International Fact Finding Mission (FFM)***

The UN Human Rights Council’s (HRC) FFM is designed to establish the facts and circumstances of recent human rights violations by military and security forces in Myanmar, in particular in Rakhine, Kachin and Shan States since 2011. The purpose of the FFM is to ensure there is accountability in the future, by taking stock of the events, witness testimonies and observations of the alleged crimes to clarify facts for HRC and policymakers. The FFM does not have any judicial or prosecutorial power but allows the information that is gathered to be used in future accountability mechanism. Established on 24 March 2017 with the adoption of the resolution A/HRC/RES/34/22,5 the FFM is mandated to:

- **Establish facts** of violations of human rights and international humanitarian law;
- **Assessing facts and attribute responsibility** for human rights violations;
- **Issue recommendations** that will ensure full accountability for perpetrators.

The FFM’s leadership is comprised of Chair Mr. Marzuki Darusman (Indonesia), Ms. Radhika Coomaraswamy (Sri Lanka), and Mr. Christopher Dominic Sidoti (Australia). The FFM visited Bangladesh, Indonesia Malaysia, Thailand and the UK, but Myanmar did not grant them entry into the country. These efforts have resulted in over 875 in-depth interviews, as well as analysis of satellite imagery, photographs and video footage of events.

The FFM released their report summary on August 27, 2018, and concluded that five top generals, as well as the Commander-in-chief, Min Aung Hlaing, must be investigated and prosecuted for genocide in

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<sup>4</sup> “Basic Investigative Standards for First Responders to International Crimes,” By *Global Rights Compliance*. July 2016. <http://www.globalrightscompliance.com/uploads/a6dc7697658cbdfbce35ebfed31f5508.pdf>

<sup>5</sup> Resolution Adopted by the Human Rights Council on 24 March, 2017, *UN Human Rights Council*, 3 April, 2017. <http://undocs.org/A/HRC/res/34/22>

Rakhine State, and crimes against humanity and war crimes in Rakhine, Shan, and Kachin States.<sup>6</sup> The report finds genocidal intent in the actions of the Myanmar military, stating, “Factors pointing at such intent include the broader oppressive context and hate rhetoric; specific utterances of commanders and direct perpetrators; exclusionary policies, including to alter the demographic composition of Rakhine State; the level of organization indicating a plan for destruction; and the extreme scale and brutality of the violence.”<sup>7</sup> The report recommends that the UN Security Council (UNSC) refer these top generals to the ICC for prosecution or that an ad hoc tribunal is established to pursue accountability. They note how accountability must come internationally due to the failure of domestic mechanisms such as the recently established ‘Commission of Enquiry.’ In the interim period, the report calls for “an independent, impartial mechanism to collect, consolidate, preserve and analyse evidence of violations.”<sup>8</sup> Other recommendations include a global arms embargo on Myanmar, and to impose targeted sanction on individuals responsible for these crimes.

Initially designed to last one year, the FFM’s mandate was extended for an additional six months ([A/HRC/36/L.31/Rev.1](#)) and will submit its final, full report to the Council at its 39th session in September, 2018 and later to the UN General Assembly at its 73rd session. It is unclear whether the FFM’s mandate will be extended beyond that.

(ii) ***International, Impartial and Independent Mechanism (IIIM)***

On 5 December 2017, the outgoing High Commissioner for Human Rights Zeid Ra’ad Al Hussein, urged the Human Rights Council to recommend to the UN General Assembly for the establish an impartial and independent mechanism, to follow on from and complement the work of the FFM. This has been reiterated by the new High Commissioner for Human Rights, Michelle Bachelet, in her maiden speech at the UN Human Rights Council in September 2018.<sup>9</sup>

The IIIM model was established in response to the crisis in Syria. The purpose is to collect and consolidate evidence of the most serious war crimes and crimes against humanity committed on Syrian territory since the 2011. In this instance the mechanism was established because no formal venue exists where war crimes can be tried. Like in Myanmar, Syria is not party to the Rome statute and a veto-wielding permanent member of the UN Security Council obstructed a referral of the situation to the ICC. The IIIM was thus established to facilitate evidence collection and case-creation, for the eventual day when a venue would be created.

The IIIM would not be a venue to prosecute war criminals, but it would gather the evidence and **create cases** that would allow others to do so. Its mandate would be to prepare for and assist in a potential investigation and prosecution of persons responsible for the most serious violations of international law in Myanmar.

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<sup>6</sup> “Myanmar: Tatamdaw Leaders must be investigated for genocide, crimes against humanity, war crimes – UN Report,” *Office of the United Nations High Commissioner for Human Rights*, 27 August, 2018.

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23475&LangID=E>

<sup>7</sup> “The Report of the International Fact-Finding Mission on Myanmar, A/HRC/39/64 (Advance Unedited Version),” *UN Human Rights Council*, 24 August, 2017.

<https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/ReportoftheMyanmarFFM.aspx>

<sup>8</sup> *Ibid.*

<sup>9</sup> Stephanie Nebehay, “U.N.’s Bachelet presses for new body on crimes against Myanmar Rohingya,” *Reuters*, 10 September, 2018. <https://www.reuters.com/article/us-myanmar-rohingya-un/uns-bachelet-presses-for-new-body-on-crimes-against-myanmar-rohingya-idUSKCN1LQ00B>

Unlike the ICC or a tribunal, an IIIM-type mechanism lacks prosecutorial powers and would not have a mandate to try perpetrators. Instead, it would work closely with UN agencies, Member States, and Myanmar human rights monitoring groups and NGOs to assemble data into trial-ready cases for future prosecutions in other fora. This means that while the IIIM would take us one step closer to justice, it would not be a source for delivering such justice. In Syria's case, the IIIM was established through the UN General Assembly. It also possible, however, that an IIIM-type mechanism could be established through the Human Rights Council. Potentially, it might even be created via a Security Council resolution.

(iii) ***Special Rapporteur Yanghee Lee's Proposed Accountability for Mechanism***<sup>10</sup>

An 'IIIM-type' option was proposed by the Special Rapporteur Yanghee Lee at the 19<sup>th</sup> Meeting of the 37<sup>th</sup> session of the Human Rights Council.<sup>11</sup> This mechanism would be mandated to have three components making this option a more holistic approach to the IIIM:

- **Gather / consolidate evidence** of human rights & international humanitarian law violations;
- **Build trial-ready cases** consistent with international criminal law standards to be used in future prosecutions;
- **Develop a framework for victim support** and reconciliation.

(iv) ***International Criminal Court (ICC)***

The International Criminal Court (ICC) is the world's first permanent, autonomous international criminal court, formed under the Rome Statute, to prosecute individuals (not states) for the most serious international crimes. It can only try cases where it has jurisdiction both over the crime and the situation in question. In Myanmar's case, because Myanmar has not ratified the Rome statute, crimes committed on its territory do not automatically fall under the ICC's jurisdiction. For the ICC to try all international crimes in Myanmar, the situation in Myanmar would thus have to be referred to the ICC by the UN Security Council. However, another option is based on the Pre-Trial Chamber's recent decision that it has territorial jurisdiction over the crime against humanity of "deportation" because part of the crime took place in Bangladesh, which is a signatory to the ICC. These options are considered below.

(a) ***Security Council refers the situation in Myanmar to the ICC:***

A referral of the situation in Myanmar to the ICC would provide the most expansive means to ensure justice for victims of war crimes. If the situation were referred by the Security Council, the court would be mandated to:

- **Investigate crimes of genocide, crimes against humanity, war crimes** and (at some point in the future) the crime of aggression;

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<sup>10</sup> "Concept Note: Accountability Mechanism for Myanmar." *Special Rapporteur on the situation of human rights in Myanmar*. <https://www.ohchr.org/Documents/Countries/MM/ConceptNoteAccountabilityFramework.pdf>

<sup>11</sup> Ibid.

- **Prosecute individuals** believed to be responsible for those crimes;
- **Try alleged perpetrators** in The Hague, Netherlands.

Unfortunately, this option is highly unlikely. China has made clear it will veto any effort by the Security Council to refer the situation in Myanmar to the ICC. China's veto would effectively make a referral of the situation in Myanmar to the ICC impossible.

China is not, however, the only country that would likely thwart an ICC referral. There is growing international frustration with the ICC from permanent Security Council members, in particular the United States. The recent inclusion of the crime of "aggression" within the ICC's mandate (referring to acts such as the war in Iraq, when a person plans, initiates, or executes an act of aggression using state military force that violates the Charter of the United Nations) has angered traditional allies of the Court, such as France, and may – over time – result in lessening international support for the ICC (the United States has always been wary of the Court, and is not a signatory to the Rome Statute). However, at present, these states are not likely to work against an ICC referral of Myanmar. The main stumbling block to an ICC referral remains China's veto.

***(b) ICC Prosecutor obtains authorization to begin an investigation of the crime of "deportation"***

On 9 April 2018, the ICC Prosecutor Fatou Bensouda asked the ICC to rule on whether the court "can exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh."<sup>12</sup> This request is significant because unlike Myanmar, Bangladesh is a party to the Rome Statute and hence, the ICC could have territorial jurisdiction over this crime (under Article 19 (3)). The Pre-Trial Chamber ruled on 6 September, 2018 that the court may exercise jurisdiction for the crime of deportation.<sup>13</sup>

By ruling that they have jurisdiction under Article 19 (3), this move is unprecedented, and it offers a real window to hold perpetrators to account for the crime against humanity of deportation against the Rohingya. Based on this ruling, the ICC will now be able to take the following steps, assuming the other ordinary requirements are met at each step:

- **Investigate the crime of "deportation"** of the Rohingya from Myanmar to Bangladesh;
- **Prosecute individuals** believed to be responsible for the crime of deportation;
- **Try alleged perpetrators** responsible for the crime of deportation in the Netherlands.

The Prosecutor will now likely carry out a preliminary examination, and the Pre-Trial Chamber that ruled on jurisdiction has encouraged her to do so quickly. Thus, it is likely that she will soon apply for authorization to start a formal investigation, which if approved will allow investigators from the Office of the Prosecutor to conduct investigations and allow the Prosecutor to apply for arrest warrants and use other legal tools to collect evidence. In order for the request to open an investigation to be approved, the Prosecutor will need to answer the following questions:

<sup>12</sup> Application Under Regulation 46(3), *Office of the Prosecutor*, International Criminal Court. 9 April, 2018. [https://www.icc-cpi.int/CourtRecords/CR2018\\_02057.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF)

<sup>13</sup> "ICC Pre-Trial Chamber I rules that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh." *International Criminal Court*. 6 September, 2018. <https://www.icc-cpi.int/Pages/item.aspx?name=pr1403>

- Whether there has been a genuine attempt by the state concerned to bring perpetrators to justice. (This is known as “**complementarity**”)
- Whether the case is of sufficient **gravity** to merit the attention of the ICC
- Whether opening an investigation would serve the **interests of justice and the victims**.<sup>14</sup>

The crime of deportation is an underlying crime falling under the banner of ‘crimes against humanity’. Unlike forcible transfer, it refers specifically to matters in which a victim is forced to cross an international border – in this case, from Myanmar to Bangladesh. Given the very limited nature of the Prosecutor’s request, this option would have bearing only on the role of Myanmar’s armed forces in deporting the Rohingya into Bangladesh. It would not necessarily lead to the prosecution of other crimes against humanity or war crimes committed internally in Myanmar – such as murder, extermination, imprisonment, torture, rape of sexual violence, etc. However, in its decision on jurisdiction, the Pre-Trial Chamber noted that other crimes in addition to deportation, for instance the crimes against humanity of apartheid and persecution, may also come under the court’s jurisdiction if they meet the same conditions that gave the court jurisdiction over deportation – namely, that a sufficient part of the crime takes place in Bangladesh. In addition, evidence of other crimes such as torture, killings and sexual violence may be relevant in a case of deportation to demonstrate how the alleged perpetrators forced the Rohingya to leave Myanmar and enter Bangladesh.

The ICC accepting jurisdiction over the crime of deportation provides a major opportunity for human rights activists. But even this major step will not result in swift justice. Myanmar has already stated that it rejects the ruling and will not cooperate in any investigation, and would stifle access to its territory. It would also not be willing to extradite war criminals, which means the Court might be unlikely to prosecute any high-level decision-makers for the foreseeable future.

(v) ***Ad hoc International Tribunal***

Given the blockage around an ICC referral, an alternative option is the formation of an ad hoc tribunal. The most famous examples of ad hoc tribunals are the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) – both established prior to the ICC. A tribunal’s mandate would be to:

- **Investigate high-level political officials, military and paramilitary leaders** who bear the greatest responsibility for war crimes and crimes against humanity committed throughout the Myanmar conflict.
- **Prosecute individuals** for those crimes in an international tribunal;

Tribunals are temporary courts set up to prosecute crimes in a specific situation where grave breaches of international humanitarian and criminal law are alleged to have occurred. An international tribunal could be established through one of several means: a Security Council resolution; a request by the Myanmar authorities to establish such a tribunal under UN auspices delivered to the UN General Assembly; or potentially, a General Assembly resolution authorizing the formation of a tribunal. All three options are highly unlikely to materialize at this stage.

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<sup>14</sup> Rome Statute, Art. 53.

(vi) **Universal Jurisdiction**

Universal jurisdiction allows countries to claim criminal jurisdiction over an accused person regardless of where the alleged crime was committed or the accused's nationality. This means, for example, that country X could try a Myanmar official for war crimes, irrespective of whether that official had citizenship to country X or where the crime was committed. Several countries allow their own courts to try persons on the basis of universal jurisdiction. This includes Germany, Spain, Belgium, Canada and Finland. States that recognize universal jurisdiction often do so with the mandate to:

- **Investigate individuals** for their alleged involvement in genocide, crimes against humanity, extrajudicial executions, torture and forced disappearances;
- **Prosecute individuals** for those crimes in their own **national courts**;

States that apply universal jurisdiction most often do so when an alleged perpetrator travels on their territory. This means that the individuals tried using universal jurisdiction are often low-level and lack command responsibility (since high-level officials accused of war crimes rarely travel). There are some exceptions, however.

Police and prosecutors are generally reluctant to investigate or prosecute crimes based on universal jurisdiction and, in practice, in most instances they act only when it is clear that neither the territorial state or suspect's state is taking any action or effective action.<sup>15</sup> In June, for example, it was announced that Germany's chief federal prosecutor had issued an arrest warrant for Jamil Hassan, the head of Syrian Air Forces, on charges of implementing a campaign of murder and torture.<sup>16</sup> The warrant, which took years to develop and relentless advocacy by Syrian victims groups, applied to Hassan even though he was located in Syria at the time of the crime, and remains in Syria to date. Particularly in Europe, therefore, the focus of universal jurisdiction is thus an avenue worth advocating.

The principle of universal jurisdiction is based on the premise that states will act in corporation and mutual assistance. There is a duty in international law and within international treaties to extradite or try ("*aut dedere aut judicare*") international crimes, to mitigate impunity. The biggest roadblock for a state exercising universal jurisdiction is the enforcement of extradition of the suspects. On a practical level a state needs the defendant to be present in their jurisdiction and the cooperation of the state where the crimes were alleged in order to conduct a full and fair investigation and trial. This is reflective of the current status of the Jamil Hassan's situation, he remains in Syria and safe from prosecution but unable to travel safely due to an Interpol red notice.<sup>17</sup> Thus, there are political obstacles to seeking justice.

(vii) **International Court of Justice**

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<sup>15</sup> "Universal Jurisdiction: Strengthening this Essential Tool of International Justice," *Amnesty International*, October 2012 <https://www.amnesty.org/download/Documents/24000/ior530202012en.pdf>.

<sup>16</sup> Louisa Loveluck, "Germany seeks arrest of leading Syrian general on war crimes charges," *The Washington Post*, 8 June, 2018. [https://www.washingtonpost.com/world/germany-seeks-arrest-of-leading-syrian-general-on-war-crimes-charges/2018/06/08/2fa025d0-6b21-11e8-a335-c4503d041eaf\\_story.html?noredirect=on&utm\\_term=.54d09bf86355](https://www.washingtonpost.com/world/germany-seeks-arrest-of-leading-syrian-general-on-war-crimes-charges/2018/06/08/2fa025d0-6b21-11e8-a335-c4503d041eaf_story.html?noredirect=on&utm_term=.54d09bf86355)

<sup>17</sup> "Jamil Hassan and the Challenges of Universal Jurisdiction," *Syria Justice and Accountability Centre*, 15 June 2018. <https://syriaaccountability.org/updates/2018/06/15/jamil-hassan-and-the-challenges-of-universal-jurisdiction/>

The International Court of Justice (ICJ) is the principal judicial organ of the UN. Unlike other courts and tribunals, it issues opinions related to States – not individuals or organizations. The ICJ is mandated to:

- **settle legal disputes (contentious proceedings) between countries** that are members of the UN (in which case Myanmar must agree to participate);
- **issue advisory opinions** to authorized UN organs and specialized agencies (which would not be binding).

The ICJ is made up of a panel of 15 judges elected by the General Assembly and Security Council for nine-year terms. It is seated in the Peace Palace in The Hague.

Only States can bring contention cases to the ICJ. There are two ways a case against Myanmar could be brought to the ICJ: (i) more than 30 states ratify the necessary instruments to bring a “contentious proceeding”, or lawsuit, against Myanmar for violations of the laws of war; and (ii) the UN General Assembly, by majority vote, could request the Court to issue an advisory opinion on “any legal question” relating to Myanmar.

The ICJ’s contentious proceedings are binding but they can only be brought against states that agree to be bound by the Court’s decision. By contrast, advisory opinions are not binding. They are, however, symbolically influential and widely respected. They do not result in any individual being criminally prosecuted.

## Progressive Voice

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Progressive Voice is a participatory rights-based policy research and advocacy organization rooted in civil society, that maintains strong networks and relationships with grassroots organizations and community-based organizations throughout Myanmar. It acts as a bridge to the international community and international policymakers by amplifying voices from the ground, and advocating for a rights-based policy narrative.