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The Rohingyas' Plight: What Options Under International Law?

What role can the ICC and ICJ play in bringing justice for the Rohingyas' suffering?

By **Viren Mascarenhas**, **Brian Jacobi**, **Claire O'Connell**, and **Isabel San Martin**

January 15, 2019



A Rohingya refugee family walks back with relief material collected from aid agencies inside Balukhali refugee camp near Cox's Bazar, in Bangladesh (Nov. 17, 2018).

Credit: AP Photo/Dar Yasin

The plight of the Rohingya in Myanmar, hundreds of thousands of whom have fled to neighboring Bangladesh, has attracted widespread international attention. However, the United Nations Security Council (UNSC) has failed to take action, hindered by Russia's and China's use of their veto powers. The UNSC's inaction has not stopped other international actors from stepping up. Recently, the International Criminal Court's Pre-Trial Chamber gave the green light for further examination into the atrocities suffered by the Rohingya, affirming the ICC's plausible basis for jurisdiction despite Myanmar not being a party to the Rome statute. The ICC Prosecutor has launched a preliminary examination, and actively invited civil society and victims to participate in the process.

The United Nations Human Rights Council (HRC) has also taken action, commissioning an independent fact-finding investigation into the Rohingya crisis that recently issued a report describing atrocious crimes against the Rohingya committed by the Myanmar military. Following this, the HRC has authorized the

creation of an agency to collect and preserve evidence that could be used in future prosecutions.

The spotlight must remain on the plight of the victims. This article examines these developments and potential recourse for the Rohingya under international law.

The Rohingya are a *de facto* stateless people residing primarily in the Rakhine state of western Myanmar. For decades, the Rohingya have suffered from [systemic oppression](#), including restrictions on their movement, subsistence, development, and a denial of citizenship. Recently, however, violence against the Rohingya has escalated, as Myanmar's security forces [commenced](#) "clearance operations" throughout Rakhine state, which indiscriminately targeted and [terrorized](#) the entire Rohingya population in a "brutal and grossly disproportionate" manner. Myanmar's security forces [committed](#) "human rights violations on a colossal scale," including killing more than 10,000 civilians, the systematic and coordinated rape of women, and the destruction of entire villages. As a result, an estimated 727,000 Rohingya refugees fled from Myanmar into neighboring Bangladesh, putting the total Rohingya refugee population in Bangladesh at an estimated [921,000](#) as of September 2018.

International Response to the Rohingya Crisis

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In response to these atrocities, the UNSC has failed to adopt any resolutions on the Rohingya situation, hindered by China and Russia's partnership with Myanmar. The UNSC has visited Myanmar and Bangladesh, and issued a non-binding Presidential [Statement](#), routinely used in instances where a

permanent member has threatened to veto a resolution.

By contrast, the HRC has taken significant steps toward ensuring future accountability for the Rohingya, especially in the context of evidence preservation. In April 2017, the HRC adopted [Resolution 34/22](#), under which it established an independent international fact-finding mission on Myanmar. The mission's [report](#), which was published last September, provides gruesome accounts of murder, rape, and violence suffered by the Rohingya. The government of Myanmar has rejected the findings in the report categorically.

Following the report, China [held](#) an “informal meeting” with Myanmar and Bangladesh during the General Assembly sessions in New York, later informing the UNSC that “[a]n important three-point consensus” had been reached between the three countries, notably including Bangladesh's agreement to repatriate Rohingya refugees pursuant to further agreement regarding logistics between the States. However, Bangladesh recently [indicated](#) that no Rohingya is willing to voluntarily accept a repatriation offer, and several commentators have raised concerns that repatriation measures would violate fundamental international law principles, including the principle of non-refoulement. Nonetheless, in November 2018, Bangladesh and Myanmar [signed](#) an arrangement on the repatriation of Rohingya refugees back to Rakhine state. The repatriation arrangement is controversial at best, with the UN High Commissioner for Refugees (UNHCR) recently [stating](#) that it “does not believe current conditions in Rakhine state are conducive to the voluntary, safe, dignified, and sustainable return of refugees.” While discussions are ongoing regarding the UN's, and, in particular,

the UNHCR's engagement in the repatriation process, repatriation has not yet taken place.

Notwithstanding deadlock in the UNSC, the HRC has taken additional steps toward future accountability mechanisms. On September 27, 2018, the HRC adopted a [resolution](#) creating an agency that would prepare evidence of human rights abuses and international crimes in Myanmar for any future prosecution.

Bangladesh has led the regional response to the Rohingya crisis, [establishing](#) a national strategy involving the cooperation of 22 Bangladeshi ministries and entities as early as 2013. Bangladesh's most important contributions under that strategy are the provision of infrastructure, health, and water services to a number of large refugee camps, including the camp at Cox's Bazar, which, with an estimated 602,400 refugees, is the largest in the world.

More recently, Bangladesh, the UN, and national and international NGOs [launched](#) a Joint Response Plan (JRP), a humanitarian response plan aimed at housing, feeding, registering, and educating the Rohingya refugee population. The scope of the JRP is enormous, bringing together over [130 partners](#), including 12 UN agencies and 127 national and international NGOs.

Commencement of Preliminary Examination at the ICC

Given the UNSC's failure to address the situation in Myanmar, many have looked to the ICC as a potential avenue to address the atrocities suffered by the Rohingya people. However, as Myanmar is a non-signatory to the Rome Statute, the exercise of jurisdiction at the ICC is limited. While the UNSC has authority to direct the opening of an investigation concerning non-state parties, that is unlikely as China and Russia have

blocked even UNSC statements expressing concern.

On April 9, 2018, the Office of the Prosecutor [requested](#) that the Pre-Trial Chamber determine whether the ICC could exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh on the basis that an element of the crime takes place on the territory of a signatory to the Rome Statute, Bangladesh. On September 6, 2018, the ICC's Pre-Trial Chamber I issued a majority [decision](#) finding that the Court could exercise jurisdiction over the alleged deportation.

The Pre-Trial Chamber's decision delivers an important clarification regarding the jurisdictional scope of crimes falling under the Rome Statute, particularly the crime of deportation. Notably, the Pre-Trial Chamber [found](#) that the “inclusion of the inherently transboundary crime of deportation in the [Rome] Statute without limitation” evidenced that the Court could exercise jurisdiction should one element of the crime be committed on the territory of a state party. Importantly, however, the decision is not limited to the crime of deportation, as the Chamber further [“emphasize\[d\]](#) that the rationale of its determination as to the Court's jurisdiction in relation to the crime of deportation may apply to other crimes within the [Court's] jurisdiction” should at least one element of those crimes be committed on a state party's territory.

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Following this decision, the prosecutor opened a preliminary examination regarding the deportation of the Rohingya into Bangladesh, in addition to other potential crimes under Article 7 of the Statute. Prosecutor Bensouda

[stated](#) that she would examine “a number of alleged coercive acts” that led to the forced displacement of Rohingyas, “including deprivation of fundamental rights, killing, sexual violence, enforced disappearance, destruction and looting.” Her statement indicates that the underlying acts that led to the Rohingya population fleeing Myanmar will also be considered as a basis for opening an investigation, flagging a potentially expansive investigation. However, no statement from the ICC to date reflects a willingness to investigate allegations of genocide, by far the most egregious claims leveled against Myanmar.

Regional Responses to the ICC's Actions

With the announcement of formally opening a preliminary examination, the ICC Prosecutor appears to be entering “[Phase 2](#)” of a four-phase process used to determine if an investigation is warranted, including “taking into account the gravity of the crime, as well as the interests of victims” to determine whether there are “[substantial reasons](#)” to believe that an investigation “would not serve the interests of justice.” Phase 2 will thus focus on developing the factual record with an eye toward [ensuring](#) that all concerned parties “have had the opportunity to provide the information they consider appropriate.” To do so, the prosecutor will engage directly with relevant stakeholders, such as states, including Bangladesh, organs of the UN, and intergovernmental and non-governmental organizations.

Bangladesh has already actively participated in the proceedings before the ICC, seemingly supporting the prosecutor's actions despite not referring the situation to the Court itself. On May 7, 2018, the Pre-Trial Chamber [requested](#) Bangladesh to submit its written observations regarding the prosecutor's request as *amicus curiae* pursuant to rule 103(1) of the Rules of

Procedure and Evidence. Bangladesh [submitted](#) its views regarding the Rohingya crisis to the ICC confidentially, agreeing that the ICC had territorial jurisdiction for the crime of deportation. Myanmar was also requested to participate, but declined to do so, [stating](#) that it was “under no obligation to enter into litigation with the prosecutor,” arguing that the ruling “set[s] a dangerous precedent whereby future populist causes and complaints against non-state parties . . . may be litigated.”

In addition to Bangladesh’s participation, nonprofits and lawyers representing victims of the Rohingya crisis have also begun participating in proceedings. For example, Global Rights Compliance submitted written [observations](#) to the Pre-Trial Chamber in connection with their examination of the Prosecutor’s request, representing the interests of 400 women affected by the crisis. Furthermore, organizations such as Guernica 37 and a coalition of Bangladeshi nongovernmental representatives have also submitted an [amicus curiae](#) brief pursuant to Rule 103 of the Rules of Procedure and Evidence.

One of the most noteworthy features of the ICC is the increased role victims are envisioned to play at all stages of proceedings — including during the preliminary examination stage — should a victim’s personal interests be affected. For example, under [Article 15\(3\)](#) and [Rule 50\(1\)](#), victims have the right to make representations before a Pre-Trial Chamber in connection with a prosecutor’s request for authorization to open an investigation *proprio motu*. Additionally, given that the ICC has a [Trust Fund](#) specifically tasked with providing reparations to victims of atrocities related to court proceedings, the advancement of proceedings could lead to the forfeiture of

property or money of convicted individuals in addition to independent contributions to provide future reparations to victims.

The ICJ and the Genocide Convention

Despite the positive developments at the ICC, the question remains as to whether the prosecutor will investigate the crime of genocide. Nonetheless, a genocide case is still possible. Since Myanmar is a signatory to the Genocide Convention, any contracting party that has accepted the International Court of Justice's (ICJ) jurisdiction under Article IX could bring a [genocide claim](#) against Myanmar before the ICJ.

A genocide case before the ICJ would be important for three reasons. First, the ICC will focus on *individual* criminal responsibility, while the ICJ could seek legal [accountability at the state level](#). Doing so could force Myanmar to directly respond to the claims against it, which it has so far declined to do before the ICC. Second, the ICJ could issue [provisional measures](#) directing Bangladesh and Myanmar to postpone their agreement to repatriate the Rohingya. While Myanmar may not comply with those measures, Bangladesh, which has been cooperative with the ICC, may be more inclined to do so. Such relief would be vital for Rohingya refugees fearful of returning to Myanmar. Third, claims of genocide are by far the most serious allegations against Myanmar and simply cannot go unpunished, particularly in light of the inaction of the international community.

Conclusion

The ICC's opening of a preliminary examination is an important step toward justice for the Rohingya. Given the ICC's victim-oriented proceedings, there is significant space for victims and their legal representatives to participate fully in the

proceedings. That, combined with parallel genocide proceedings before the ICJ, could provide an effective path to fully addressing the crimes against the Rohingya.

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