



## Opportunities for Inclusive International Justice in Post-Coup Myanmar

*“To a large extent, we have arrived at this point due to the past failures of the international community to hold Myanmar’s military accountable for their crimes, especially the 2017 genocide of the Rohingya.”*

*Professor of International Relations Yossi Mekelberg, reflecting on the 2021 military coup*

On February 1, 2021, the Tatmadaw, Myanmar’s military, overthrew the democratically elected government in a coup d’état and announced that Myanmar would be controlled by the military junta.<sup>1</sup> As the Burmese people rose up against this undemocratic seizure of their country, the Tatmadaw unleashed a brutal and violent assault on the peaceful civilian protesters. The Tatmadaw’s violent assault on civilians has led to demands for accountability for the crimes being committed against the Burmese people.<sup>2</sup> BROUK stands in solidarity with its Burmese brothers and sisters in their call for justice and accountability.

However, for the Rohingya, the violent repression of human rights and criminal conduct of the Tatmadaw is not new. The Rohingya have suffered violence, repression and discrimination at the hands of the Tatmadaw for decades with little to no tangible protection or intervention from the international community, the Myanmar civilian government, or, unfortunately in many cases, their fellow Burmese. This culture of impunity contributed to the Tatmadaw’s 2017 genocidal clearance operations against the Rohingya, which represented a culmination of generations of escalating oppression against the Muslim minority.

It is critical, both in terms of restoring Myanmar on its path to democracy and in seeking justice and accountability for crimes committed by the Tatmadaw, that these efforts fully include the Rohingya. A return to democratic governance in Myanmar cannot be a return to the status quo of the

past. Indeed, it must be acknowledged that the previous democratically elected civilian government did not reform the discriminatory laws and policies that target the Rohingya or rein in the Tatmadaw’s violent repression of the Rohingya people.<sup>3</sup>

Despite the regrettable lack of solidarity in the past, there is cautious reason for optimism. Many Burmese, now finding themselves the target of the Tatmadaw’s brutal violence, are beginning to re-evaluate their positions on the treatment of the Rohingya.<sup>4</sup> Members of the government-in-exile, the National Unity Government (NUG), have also acknowledged the previous government’s failings with respect to the Rohingya, such as Susana Hla Hla Soe, the NUG’s Minister for Women, Youth, and Children’s Affairs.<sup>5</sup> Dr. Sasa, the NUG’s Minister of International Cooperation, recently declared:

*“Together we will deliver justice for our Rohingya brothers and sisters who have suffered so much for so long under these same military generals who have killed almost 300 unarmed civilians since 1 Feb. We will not rest until we bring these military generals into justices for the war crimes, atrocities and the crimes against humanity they have committed against the great and brave people of Myanmar.”<sup>6</sup>*

BROUK welcomes this declaration of solidarity and the call for justice and accountability for the Tatmadaw’s crimes against all of the people of Myanmar, including the Rohingya.

In that spirit, this brief analyses the following two questions:

- What are the opportunities and challenges for international justice for the crimes committed since the 1 February coup?

1 Republic of the Union of Myanmar Office of the Commander-in-Chief of Defence Services, Notification No. 1/2021, 1 February, 2021, available at: <https://www.myawady.net.mm/content/republic-union-myanmar-office-commander-chief-defence-services-notification-no-12021-5th>.

2 See e.g. UN News, “UN rights expert calls for ‘urgent and decisive’ action to support people of Myanmar”, 5 March 2021, available at: <https://news.un.org/en/story/2021/03/1086482>.

3 See BROUK, “Dereliction of Duty- International Inaction over Myanmar’s Noncompliance with ICJ Provisional Measures”, November 2020. Available at: <https://docs.google.com/viewerng/viewer?url=https://www.rohingyatoday.com/sites/default/files/2020-11/BROUK+Briefing+on+ICJ+case+Nov+2020+.pdf>

4 Radio Free Asia, “Junta Brutality Gives Myanmar’s Majority a Taste of Ethnic Minorities’ Plight”, 23 April 2021, available at: <https://www.rfa.org/english/news/myanmar/ethnic-minorities-plight-04232021173252.html>.

5 *Ibid.*, reporting that: “Susana Hla Hla Soe, minister for women, youth, and children’s affairs under the week-old National Unity Government (NUG) acknowledged failings by the civilian government under national leader Aung Sang Suu Kyi with ignoring human rights in ethnic minority areas, including the Rohingya Muslims. ‘I myself personally apologize for that,’ she said Thursday, adding that while she had been a member of parliament for five years she did not raise a voice for our brothers and sisters from the ethnic areas, including Rohingya brothers and sisters.”

6 Facebook post, 24 March 2021, available at: <https://www.facebook.com/DrSasa22222>.

- How can the international community and the NUG support the already ongoing international justice efforts related to crimes committed against the Rohingya?

First, this brief provides background on the military coup and subsequent developments in Myanmar. Second, the various international justice mechanisms, including the International Court of Justice (ICJ), the International Criminal Court (ICC), the Independent Investigative Mechanism for Myanmar (IIMM), and the possibility of a case under universal jurisdiction, are discussed in relation to the potential for justice for crimes committed in the context of the military coup and in relation to how the NUG and other States can support the ongoing international justice efforts for the Rohingya. The brief concludes with recommendations to the NUG, States, and United Nations' Security Council and General Assembly.

## The 1 February 2021 coup and subsequent developments

### *Myanmar's return to military dictatorship: 2011-2021*

Myanmar began to emerge from nearly a half century of military dictatorship in 2011. In the 2015 national elections, the then opposition party, the National League for Democracy (NLD), headed by Aung San Suu Kyi, won in a landslide and assumed power as de facto head of the civilian government in the newly created post of State Counselor. Government control, however, remained shared with the Tatmadaw based on provisions of the 2008 constitution. Expectations regarding Suu Kyi leading Myanmar into an era of respect for human rights and an end to the impunity enjoyed by the Tatmadaw were soon dashed by the Tatmadaw's genocidal campaign of 2016-2017 against the Rohingya, in which thousands were killed and close to 800,000 Rohingya fled to Bangladesh to escape the violence.<sup>7</sup> In response to the attacks, the United States imposed sanctions on Myanmar's military leaders, including Commander in Chief Min Aung Hlaing. Suu Kyi and NLD leadership defended the Tatmadaw's actions, denied that a genocide had taken place, and continued to propagate hate speech against the Rohingya. In the lead up to the 2020 elections, the Rohingya people were fully disenfranchised from voting or standing as candidates.<sup>8</sup>

7 Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar", A/HRC/39/CRP.2, 17 September 2018, paras 1174, 1275.

8 See Wai Wai Nu, TIME Magazine, "Myanmar Went To the Polls for the Second Time Since the End of Military Rule but the Election Was Not Free or Fair", 12 November 2020. Available at: <https://time.com/5910739/myanmar-election-rohingya/>. See also Human Rights Watch, "Myanmar: Election Fundamentally Flawed", 5 October 2020, available at: <https://www.hrw.org/news/2020/10/05/myanmar-election-fundamentally-flawed>.

9 Reuters, "Myanmar opposition demands vote re-run as Suu Kyi's NLD heads for victory", 11 November 2020, available at: <https://www.reuters.com/article/us-myanmar-election/myanmar-opposition-demands-vote-re-run-as-suu-kyis-nld-heads-for-victory-idUSKBN27R0UO>.

10 Radio Free Asia, "Myanmar Election Authority Rejects Military Claims of Election Fraud", 28 January 2021, available at: <https://www.rfa.org/english/news/myanmar/election-fraud-01282021184631.html>.

11 See e.g. Assistance Association for Political Prisoners (Burma), available at: <https://aappb.org/> (last accessed 8 May 2021).

12 The Irrawaddy, "Amid Coup, Myanmar's NLD Lawmakers Form Committee to Serve as Legitimate Parliament", 8 February 2021, available at: <https://www.irrawaddy.com/news/burma/amid-coup-myanmars-nld-lawmakers-form-committee-serve-legitimate-parliament.html>.

13 Reuters, "Opponents of Myanmar coup form unity government, aim for 'federal democracy'", 16 April 2021, available at: <https://www.reuters.com/world/asia-pacific/opponents-myanmar-coup-announce-unity-government-2021-04-16/>.

In the November 2020 national elections, the NLD again won a large majority of parliamentary seats while the Tatmadaw-aligned political party, the Union Solidarity and Development Party (USDP), faltered. Immediately following the election, the Tatmadaw and USDP responded by refusing to recognize the results based on what they alleged were election irregularities and fraud.<sup>9</sup> Over the next two months, the Tatmadaw and USDP raised their objections before Myanmar's Union Election Commission (UEC), which were dismissed in late January 2021 on the grounds that any errors were not of a scale to call into question the validity of the election results.<sup>10</sup>

On 1 February 2021, Myanmar's parliament was scheduled to be in session and confirm the 2020 election results. Instead, Ms Suu Kyi and other NLD leaders were arrested, the military announced a one-year state of emergency, replaced the civilian-led government with military officials, and handed control of the country to Senior General Min Aung Hlaing.

### *Responses to the military coup*

The Burmese people's rejection of the military coup was immediate and overwhelming. Peaceful protests and strikes were organized throughout the country. The Tatmadaw responded with coordinated, widespread and systematic military force against the peacefully protesting civilians. To date, Burmese activists have documented more than 700 killings of civilians, as well as numerous enforced disappearances, arbitrary detentions, acts of torture, and the destruction of property,<sup>11</sup> with the numbers increasing daily. Despite the Tatmadaw's violence, the Burmese people continue to persist in peacefully opposing the military takeover.

On 8 February 2021, a group of NLD parliamentarians elected in the 2020 elections formed the Committee Representing Pyidaungsu Hluttaw (CRPH), and called on the United Nations and other governments to engage them as the legitimate government of Myanmar.<sup>12</sup> On 16 April 2021, the CRPH announced the formation of the NUG, as well as a list of the officials who would fill government positions.<sup>13</sup> The NUG is comprised of NLD parliamentarians, anti-coup protest leaders, and representatives from ethnic minority groups. No Rohingya were included in the NUG.

Several international actors, including the United States, the European Union, the United Kingdom, and Canada, announced sanctions on Myanmar's military leaders in response to the coup.<sup>14</sup> However, while the internationally community as a whole has as a whole largely not recognized the junta as Myanmar's legitimate government, neither has it recognized the NUG. Media reports have suggested that some States are considering recognizing the NUG as Myanmar's legitimate government, however, as of writing, none have yet done so.<sup>15</sup>

Concerns have been raised regarding the inclusion of officials in the NUG who were complicit or supportive of the Tatmadaw's genocidal attacks on the Rohingya, the exclusion of Rohingya representation from the NUG, and the NUG's lack of public positions regarding how it will treat the Rohingya, including recognizing their identity and restoring their citizenship. For example, following a hearing of the United States House of Representatives' Committee on Foreign Affairs, Rep. Ted Lieu (CA-33) posted the following statements on Twitter:

"[The] UN found the prior government in Myanmar engaged in ethnic cleansing of the Rohingya with genocidal intent. Estimated over 25,000 dead & 18,000 women & girls were raped. The new National Unity Government does not include any Rohingya. We cannot support NUG until that is changed."

"The US should not support the National Unity Government in Burma unless it includes Rohingya representation. The prior government killed Rohingya with genocidal intent. @NUGMyanmar must commit to stopping the ethnic cleansing actions against Rohingya."<sup>16</sup>

## International Justice Mechanisms: Challenges and Opportunities

In its response to the protests against the military coup, the Tatmadaw has committed numerous atrocities against the people of Myanmar, including gross violations of human rights that could rise to the level of crimes against humanity. The people of Myanmar deserve justice and account-

ability for the violations and immense harm that has been inflicted on them. BROUK joins the NUG's call for international justice for these atrocities. However, BROUK is mindful that the previous democratically elected government, which comprises much of the NUG, did not cooperate with international justice efforts with respect to the 2016-2017 attacks against the Rohingya and, in most cases, actively opposed these efforts.

The next sections discuss the various potential avenues for justice for crimes committed post-coup and also address how the NUG can positively engage with the already ongoing international justice initiatives related to crimes committed against the Rohingya.

### *The International Court of Justice*

The ICJ is the principal judicial body of the United Nations and has jurisdiction over legal disputes between States.<sup>17</sup> Article 36 of the ICJ statute<sup>18</sup> sets out the grounds for the Court's jurisdiction.<sup>19</sup>

The alleged crimes since the coup have occurred (and are occurring) solely within the territory of Myanmar, meaning that no other State is currently involved and there is not a "dispute" between States for the ICJ to address. While Myanmar is a State Party to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),<sup>20</sup> this is not a potential avenue for the post-coup violence since violations are not judged to have reached the level of genocide.

There is still an important role for the NUG to play in the ongoing genocide case before the ICJ, which was brought to the Court on November 11, 2019 by The Gambia against Myanmar for violating its obligations under the Genocide Convention with respect to the Rohingya.<sup>21</sup>

As pointed out by other commentators, the ICJ Statute refers to States and not governments, meaning that it is not up to the Court to make decide whether the Tatmadaw or the NUG represents the legitimate government of Myanmar is.<sup>22</sup> In a situation where the government is contested, whether the ICJ will accept submissions filed by Myanmar's agent<sup>23</sup> on behalf of the military junta is not clear from the

14 Reuters, "Factbox: Sanctions imposed against Myanmar's generals since they seized power", 22 March 2021, available at: <https://www.reuters.com/article/us-myanmar-politics-sanctions-factbox/factbox-sanctions-imposed-against-myanmars-generals-since-they-seized-power-idUSKBN2BE2PY>.

15 See Radio Free Asia, "Myanmar's Parallel Government Gets Moral Support But No Political Recognition", 27 April 2021, available at: <https://www.rfa.org/english/news/myanmar/political-recognition-04272021171541.html>.

16 Twitter, 4 May 2021, available at: <https://twitter.com/tedlieu/status/1389664596009574403>; 5 May 2021, available at: <https://twitter.com/tedlieu/status/1390090205986578434>.

17 The ICJ also provides advisory opinions. See ICJ Handbook, 1976, updated December 2108, para. 6, providing that: "The Court also gives advisory opinions on legal questions referred to it by the General Assembly, the Security Council or by other UN organs and specialized agencies so authorised by the General Assembly (known as advisory jurisdiction; Article 96 of the UN Charter)." Available at: <https://www.icj-cij.org/public/files/publications/handbook-of-the-court-en.pdf>.

18 Available at: <https://www.icj-cij.org/en/statute>.

19 See ICJ Handbook, chapters II (optional clause), III (treaties), IV (special agreements).

20 UN General Assembly, Resolution 260/III, 9 December 1948, entered into force 12 January 1951, 78 U.N.T.S. 277.

21 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Application Instituting Proceedings and Request for Provisional Measures.

22 See Priya Pillai, "Myanmar Coup d'état – Implications for International Justice", 11 February 2021 (Pillai Article), available at: <http://opiniojuris.org/2021/02/11/myanmar-coup-detat-implications-for-international-justice/>.

23 Myanmar, as a State, is notified and communicates with the Court through its designated agent(s), as provided for in article 38 of the ICJ Rules. Available

Court's jurisprudence or legal texts. This unresolved issue significantly complicates the case against Myanmar before the ICJ, and it is at the time of writing unclear to what extent – if at all – the military junta will continue to engage with the case. This is a pressing situation, however, that also presents an opportunity for the NUG to show its commitments to international human rights standards and to ending discrimination against the Rohingya.

On January 23, 2020, the ICJ ordered four provisional measures in the case against Myanmar,<sup>24</sup> obliging Myanmar to: 1) take all measures within its power to prevent the commission of all acts of genocide; 2) ensure that the military, as well as any irregular armed groups, organizations or persons under its control, do not commit acts of genocide, and 3) prevent the destruction and ensure the preservation of evidence related to allegations of acts of genocide.<sup>25</sup> The Court further requires Myanmar to report on the actions it is taking to comply with the provisional measures, initially four months after it was issued and then every six months thereafter.<sup>26</sup> Myanmar's next report is due later this month, on 23 May 2021.

BROUK urges the NUG to consider designating its own agent in the case and filing, as the legitimate government of Myanmar, a progress report to the ICJ, while also requesting that the Court not accept submissions from the junta's designated agent in the case.

Since the issuance of the provisional measures order, BROUK, along with other organizations,<sup>27</sup> has consistently highlighted Myanmar's lack of compliance with the provisional measures. Since the order was issued in January 2020, violence and discrimination in the context of an ongoing genocide against the Rohingya has continued, while no concrete steps have been taken to repeal or reform discriminatory politics.<sup>28</sup> While Myanmar's reports have been filed confidentially and their exact content is therefore not known, the only measures that can be identified so far are three presidential directives issued in April 2020.<sup>29</sup> These directives are very generic and mainly merely repeat the

at: <https://www.icj-cij.org/en/rules>. The ICJ's Registry most recently sought and received the views of Myanmar through the receipt of a letter from its agent in May 2020. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of 18 May 2020, I.C.J. Reports 2020, p. 76. It is unknown whether Myanmar's agent is now affiliated with the NUG or whether the ICJ will continue to accept submissions from the previous agent.

24 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order.

25 Order, para. 86.

26 *Ibid.*

27 See e.g. Legal Brief, United States Holocaust Memorial Museum, "Practical Prevention: How the Genocide Convention's Obligation to Prevent Applies to Myanmar, Report #2: The Denial of the Right to Citizenship and the Right to Participate in Public Affairs", October 2020, available at: [https://www.ushmm.org/m/pdfs/Practical\\_Prevention\\_Report\\_2.pdf](https://www.ushmm.org/m/pdfs/Practical_Prevention_Report_2.pdf); Press Release, International Commission of Jurists, "Myanmar: Government Must Do Far More to Comply with International Court Justice's Order on Protection of Rohingya Population", 22 May 2020, available at: <https://www.icj.org/myanmar-government-must-do-far-more-to-comply-with-international-court-justices-order-on-protection-of-rohingya-population/>; Global Justice Center, "Q&A: The Gambia v Myanmar", May 2020, available at: <https://www.globaljusticecenter.net/blog/19-publications/1258-updated-q-a-the-gambia-v-myanmar-rohingya-genocide-at-the-international-court-of-justice-2>.

28 Media Release, Burmese Rohingya Organization UK, "Rohingya genocide continues unabated as Myanmar ignores the 'World Court's' provisional measures", 25 May 2020. Available at: <https://www.rohingyapost.com/rohingya-genocide-continues-unabated-as-myanmar-ignores-the-world-courts-provisional-measures/>.

29 Republic of the Union of Myanmar, Office of the President, Directive No.1/2020, 8 April 2020 (instructing all entities and persons under its control not to commit acts of genocide and to report any credible information in this regard to the office of the Presidency); Directive No.2/2020, 8 April 2020 (dealing with the preservation of evidence); Directive No. 3/2020, "Prevention of incitement to hatred and violence (or) Prevention of proliferation of hate speech", 20 April 2020.

30 Order, para. 73.

31 Detailed findings of the Independent International Fact-Finding Mission on Myanmar", A/HRC/42/CRP.5, September 2019 (FFM September 2109 Report), paras 2-9.

32 Media Release, The European Rohingya Council, "JOINT LETTER TO ICJ: MYANMAR'S OBLIGATION TO COMPLY WITH THE PROVISIONAL MEASURES", 19 June 2020 (ERC Joint Letter). Available at: <https://www.theerc.eu/joint-letter-to-icj-myanmars-obligation-to-comply-with-the-provisional-measures/>

language of the Genocide Convention itself. They do not represent, as requested by the Court, "concrete measures aimed specifically at recognizing and ensuring the right of the Rohingya to exist as a protected group under the Genocide Convention."<sup>30</sup>

The United Nations' Independent International Fact-Finding Mission on Myanmar (FFM) found that the failure to reform the structural discrimination against the Rohingya in Myanmar's laws, policies and practices, including severe movement restrictions, were factors that led it to conclude that "there is a serious risk genocidal actions may occur or recur."<sup>31</sup>

In its report to the ICJ, the NUG should therefore set out the concrete measures it intends to undertake to mitigate these systemic genocide risk factors and to ameliorate the deplorable living conditions under which the Rohingya currently suffer, in particular in relation to the NUG's stated intention to establish a new constitution and system of federal government.

BROUK, as well as the European Rohingya Council (representing 30 Rohingya advocacy groups), has also requested that the Court make Myanmar's reports publicly available.<sup>32</sup> These requests have not received a response. As such, the NUG is strongly encouraged to make its report to the ICJ publicly available. In so doing, the NUG will demonstrate not only to the Burmese people, including the Rohingya, but also the international community, that it is committed to upholding its international obligations and responsibilities as the government of Myanmar.

Other States, including The Gambia, should support the NUG's submission to the ICJ as the legitimate government of Myanmar.

Should the ICJ not accept a submission by the NUG, BROUK strongly encourages the NUG to publicly commit, once democracy has been restored, to comply fully with the ICJ's provisional measures order, to set out in writing and

make publicly available the measures that it will undertake to comply with the Court's order, and to consult with Rohingya groups on what concrete measures are needed.

Regarding the overall case, on 20 January 2021, Myanmar filed preliminary objections to the jurisdiction of the Court and the admissibility of The Gambia's application.<sup>33</sup> As pointed out by other commentators,<sup>34</sup> one of the risks post-coup is that the military junta will stop participating in the ICJ proceedings and could refuse to respect or implement the Court's judgment in the case. Assuming the ICJ rules against Myanmar's preliminary objections, the NUG should publicly commit to respecting the ICJ's decision on the merits and to implementing any orders directed at it, including with respect to reparations. The NUG should also publicly commit to assisting the Court in securing evidence and witnesses, if requested to do so by the Court.

### ***The International Criminal Court***

The ICC handles cases involving individual criminal liability, meaning that it investigates and criminally prosecutes individuals for the commission of war crimes, crimes against humanity, genocide and the crime of aggression. The ICC does not investigate States, nor does it have competence to decide matters of state responsibility. Currently, the ICC Prosecutor has been authorized by the Court to carry out an investigation, pursuant to article 15 of the Statute, of the Myanmar/Bangladesh situation in relation to crimes that occurred, at least partly, on the territory of Bangladesh against the Rohingya, including forcible deportation, persecution and other inhumane acts relating to the waves of violence in 2016 and 2017.<sup>35</sup> Because Myanmar is not a State Party to the Rome Statute, the ICC's governing treaty, the Court's jurisdiction under article 15 is limited to potential crimes that have occurred on the territory of a State Party, in this case Bangladesh. This means that many of the crimes committed against the Rohingya within Myanmar are outside of the Court's jurisdiction and cannot be included in the Prosecutor's investigation.

Unlike the ICJ, the ICC presents several potential avenues for international justice for crimes committed following the 2021 military coup. Several human rights organisations and officials, including the Tom Andrews, the UN Special Rapporteur on the situation of human rights in Myanmar, have stated that the Tatamadaw violence since the coup meets the threshold of crimes against humanity, in that the

<sup>33</sup> On 20 January 2021, Myanmar filed preliminary objections to the jurisdiction of the Court and the admissibility of The Gambia's application. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order, 28 January 2021, p. 2. Available at: <https://www.icj-cij.org/public/files/case-related/178/178-20210128-ORD-01-00-EN.pdf>.

<sup>34</sup> See Pillai Article.

<sup>35</sup> "Request for authorisation of an investigation pursuant to article 15"; 4 July 2019, ICC-01/19-7 04-07-2019; Pre-Trial Chamber III, "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, ICC-01/19-27 (Decision Authorizing an Investigation).

<sup>36</sup> See Pre-Trial Chamber I, *the Prosecutor v. Callixte Mbarushimana*, "Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana", 28 September 2010, ICC-01/04-01/10-1, paras 5-7.

<sup>37</sup> Decision Authorizing an Investigation, paras 71-92.

<sup>38</sup> See e.g. The situation in Central African Republic related to the violence in 2002-2003 (CAR I), available at: <https://www.icc-cpi.int/car>; and the second situation related to renewed violence starting in 2012 (CAR II), available at: <https://www.icc-cpi.int/carII>.

<sup>39</sup> See Al Jazeera, "Myanmar rejects ICC probe into alleged crimes against Rohingya", 15 November 2019, available at: <https://www.aljazeera.com/news/2019/11/15/myanmar-rejects-icc-probe-into-alleged-crimes-against-rohingya>.

violence constitutes a "widespread or systematic" attack against a civilian population.

It is critical that, in exploring avenues for justice at the ICC, the NUG and, potentially, the United Nations also press for justice for the crimes committed against the Rohingya. These various options are discussed in the following section.

### **1. An investigation under article 15 of the Rome Statute**

Articles 13 (c) and 15 of the Rome Statute permit the Prosecutor to open an investigation proprio motu, i.e. on his or her own initiative, on the basis of information received regarding crimes within the jurisdiction of the Court.

With respect to potential crimes committed in the context of the coup, the ICC's jurisprudence defining the scope of a "situation" does not appear to permit these crimes to be considered within the current investigation. While the perpetrator (the Tatamadaw) is the same, potential crimes must be "sufficiently linked" to the original crisis or conflict that sets the parameters for the "situation".<sup>36</sup> The current situation under investigation at the ICC relates to crimes arising out of "two waves of violence" in 2016 and 2017 committed against the "Rohingya civilian population".<sup>37</sup> The post-coup violence occurred in the context of a different "crisis" or "event" and would not appear to fall within the situation that the ICC is currently investigating.

While the Prosecutor may request authorization to open a separate investigation in relation to a second situation in Myanmar,<sup>38</sup> the same jurisdictional limits (namely that the potential crimes must have been committed by a national of a State Party or on the territory of a State Party) that limit the investigation of crimes committed against the Rohingya would still apply, thereby excluding crimes committed solely on the territory of Myanmar.

While an article 15 investigation may not be a viable avenue for justice for crimes committed in the context of the coup, the NUG is strongly encouraged to take a different approach to the Prosecutor's current investigation from that of the previous government. Following the opening of the investigation, the Myanmar civilian government refused to recognize the ICC's authority and to cooperate with the Prosecutor's office, including by granting access to investigators to Rakhine state.<sup>39</sup> For the NUG to be seen as a truly

inclusive and representative government of the people of Myanmar, it must commit to a new approach towards the ICC. The NUG should publicly commit to cooperate with the ICC Prosecutor in her investigation of potential crimes committed in relation to the 2016-2017 attacks on the Rohingya, including by complying with any arrest warrants issued by the Court, granting investigators access to its territory and complying with requests for cooperation issued under article 87 of the Rome Statute.

## **2. A referral by a State Party pursuant to article 14 of the Rome Statute or an article 12 (3) declaration**

The ICC may also exercise its jurisdiction when it receives a referral of a situation from a State Party pursuant to article 14 of the Rome Statute. Under article 12 (3) of the Statute, a non-State Party may accept the jurisdiction of the Court with respect to specific alleged crimes. An article 12 (3) declaration obligates the non-State Party to cooperate with the Court.

These two jurisdictional bases raise the preliminary question of whether the NUG could ratify the Rome Statute and make a “self-referral”, a situation that has already occurred at the Court<sup>40</sup> where a State Party refers a situation on its own territory to the ICC, or alternatively lodge an article 12 (3) declaration with respect to crimes committed in Myanmar. The jurisprudence of the ICC suggests that it could not. In a different context, the ICC Prosecutor has previously found that determinations of whether a contested entity qualifies as a “State” for purposes of acceding to the Rome Statute under article 21 (1) or filing an article 12 (3) declaration rests “the relevant bodies at the United Nations or the Assembly of States Parties”, and not with the Prosecutor’s office.<sup>41</sup> This reasoning would presumably also be applied with respect to a dispute regarding which entity is the legitimate government of a State. Absent international recognition, in particular from the United Nations General Assembly, the ICC does not have the unilateral authority to recognize contested governments as legitimate for purposes of bringing that State under the jurisdiction of the ICC.

However, this does not mean that the NUG should do nothing. Rather, the NUG should already publicly declare its intention, once democracy has been restored, to seek justice and accountability for the crimes committed by the Tatmadaw at the ICC by acceding to the Rome Stat-

ute or by filing an article 12 (3) declaration.<sup>42</sup> By so doing, the NUG would send a powerful message to the people of Myanmar that the era of impunity is over. This message, however, must be for all of the people Myanmar, without exception. This means that any eventual referral or article 12 (3) declaration must not be limited to only the crimes occurring in the context of the military coup, but must also include the past crimes committed against the Rohingya and other ethnic minority groups, in particular those crimes committed fully within Myanmar’s territory and which are currently outside the article 15 investigation.

## **3. A referral by the Security Council acting under Chapter VII of the UN Charter**

The final avenue for justice and accountability would be for the UN Security Council to refer the situation in Myanmar to the ICC under article 13 (b) of the Statute. To date, the UN Security Council has referred two situations to the ICC, Darfur and Libya.<sup>43</sup>

It is for the Security Council to determine the temporal scope of the referral to the Court. Accordingly, it is important that any Security Council referral not be limited to only the post-coup violence. In this regard, BROUK joins the call by Tom Andrews for the UN Security Council to make “a referral to the International Criminal Court to investigate and prosecute atrocities committed since the coup on 1 February and those committed against ethnic groups in years prior” (emphasis added).<sup>44</sup> BROUK encourages the NUG to join this call for justice and publicly support a Security Council referral to the ICC of crimes committed since the military coup and those committed in the past, including notably against the Rohingya. A referral of this type would permit those crimes committed against the Rohingya within Myanmar that are currently outside the reach of the Court’s jurisdiction to be investigated and prosecuted.

The United Nations Security Council has recognized in numerous resolutions that serious and gross breaches of international human rights and humanitarian law constitute threats to international peace and security.<sup>45</sup> Following the February 2021 coup, The UN Security Council has met three times in closed session to discuss the situation in Myanmar.<sup>46</sup> On April 9, 2021, at the initiative of the United Kingdom, the Security Council held an Arria-formula

40 See *Infra*. fn. li.

41 Office of the Prosecutor, “Situation in Palestine”, 3 April 2012. Available at: <https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>

42 U Aung Myo Min, the NUG’s Minister of Human Rights, stated in an interview on 5 May 2021 that his Ministry “will be recording the crimes to file complaints at the International Criminal Court (ICC) and other courts”, but did not indicate under which provision of the Rome Statute such action was contemplated. The Irrawaddy, “Prosecutions Being Prepared for Myanmar Military: NUG Human Rights Minister”, available at: <https://www.irrawaddy.com/news/burma/prosecutions-prepared-myanmar-military-nug-human-rights-minister.html>.

43 Resolution, UN Security Council, S/RES/1593, 31 March 2005, available at: [https://undocs.org/S/RES/1593\(2005\)](https://undocs.org/S/RES/1593(2005)); Resolution, UN Security Council, S/RES/1970, 26 February 2011 (reissued for technical reasons on 10 March 2011), available at: [https://undocs.org/S/RES/1970\(2011\)](https://undocs.org/S/RES/1970(2011)).

44 Press Release, OHCHR, “Myanmar: UN human rights expert issues report and urges decisive, unified action to put an end to brutality”, 4 March 2021, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26845&LangID=E>.

45 See United Nations Office on Genocide Prevention and the Responsibility to Protect, “Atrocity Crimes- Prevention”, available at: <https://www.un.org/en/genocideprevention/prevention.shtml>.

46 Security Council Report, “Myanmar: Arria-formula Meeting”, 8 April 2021. Available at: <https://www.securitycouncilreport.org/whatsinblue/2021/04/myanmar-arria-formula-meeting-2.php>.

meeting on Myanmar.<sup>47</sup> Despite these activities, the likelihood of a referral to the ICC, given the veto power of China and Russia, is low. In this situation, UN member states, international organizations, and the NUG should also lobby the UN Security Council to create an ad hoc tribunal that could prosecute these crimes. This option is discussed below in the section addressing the IIMM.

### **Final comment in relation to the ICC as an international justice avenue**

The ICC Prosecutor is duty bound to investigate all sides to a conflict. In this regard, a “situation” cannot be limited to the actions of only one side.<sup>48</sup> This applies regardless of whether the ICC’s jurisdiction is triggered by a State Party referral, an article 12 (3) declaration, or a Security Council referral. It is therefore critical that all ethnic armed groups in Myanmar comply with the laws of armed conflict and international humanitarian law and that there be a recognition that accountability for prior crimes committed by these groups would be a part of any ICC investigation. As the NUG engages with these armed groups and considers allying with them, it should remind them of their obligation to conduct themselves in accordance with international law.

### ***The Independent Investigative Mechanism for Myanmar***

The IIMM’s mandate from the United Nations Human Rights Council is to collect and analyze evidence of “the most serious international crimes and violations of international law committed in Myanmar since 2011” and to build case files to facilitate criminal proceedings in national, regional or international courts.<sup>49</sup> The FFM has turned over all of its materials related to crimes committed against the Rohingya and other ethnic minority groups to the IIMM.<sup>50</sup>

On 17 March 2021, the IIMM announced that it was “closely following events since the Tatmadaw’s seizure of power in February 2021 and collecting evidence regarding arbitrary arrests, torture, enforced disappearances and the use of force, including lethal force, against those peacefully opposing the coup.”<sup>51</sup> On 9 April 2021, Dr. Sasa announced that he had met with the head of the IIMM to discuss “the

modalities of dialogue and co-operation” between the NUG and the IIMM.<sup>52</sup> BROUK applauds the IIMM’s willingness to work with the NUG in this regard.

However, absent in any public statements is reference to cooperating with the IIMM in regards to justice for the Rohingya. The NUG and IIMM should include the Rohingya in any further discussions on the “modalities of dialogue and co-operation”. The NUG should also publicly commit to ensuring access to its territory to IIMM investigators, cooperating with document and witness access requests, and ensuring the protection and safety of any Rohingya individuals or groups that engage with the IIMM.

Second, it is recalled that the IIMM is mandated to compile case files to facilitate criminal proceedings. The IIMM is not mandated to conduct trials or bring prosecutions against potential perpetrators itself. With respect to domestic prosecutions in Myanmar, the FFM concluded in its final report of September 2019 that the government had, through numerous actions, demonstrated “its unwillingness to pursue accountability at the domestic level.”<sup>53</sup> The NUG should chart a new course and engage with the IIMM regarding the reforms and domestic structural changes needed to pursue justice domestically,<sup>54</sup> particularly as it relates to the development of a new national constitution.

However, the deficit of trust, as well as issues related to domestic capacity, may make international courts a more appropriate forum for the immediate future. In this respect, it should be highlighted that, in its final report, the FFM “strongly encourage[d] the [UN Security] Council to adopt a resolution, under Chapter VII, to create an ad hoc international criminal tribunal without delay.”<sup>55</sup> Given the current jurisdictional limitations facing the ICC with respect to Myanmar, as well as the political difficulties in getting a referral to the ICC through the Security Council, a UN created ad hoc tribunal may offer the best hope for realizing the long delayed hopes for justice and accountability of the Burmese people. Any such tribunal must be authorized to address all of the crimes committed by the Tatmadaw, including those committed against the Rohingya.

UN Member States, international organizations, and the NUG should lobby the UN Security Council to continue to monitor the situation in Myanmar and, based on the in-

47 *Ibid.*

48 See Statement, ICC, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at a press conference in Uganda: justice will ultimately be dispensed for LRA crimes”, 27 February 2015, in which the Prosecutor noted that “[o]n the 16th of December 2003 and in the exercise of its sovereign right under the Statute, the Government of Uganda referred the situation in Northern Uganda to the Office of the Prosecutor of the ICC. The referral letter cited LRA and called for its members who had committed crimes in Northern Uganda to be brought to justice. The Office of the Prosecutor made it clear to the Government that all sides involved in the conflict in the North would be investigated and the evidence alone would determine which individuals would ultimately be charged, irrespective of status or affiliation.” [Emphasis added.] Available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-27-02-2015-ug>.

49 HRC, Resolution 39/2, adopted 27 September 2018. See also General Assembly, Resolution 73/264, 22 December 2018.

50 See FFM September 2019 Report, paras 14-17.

51 “IIMM: Recipients of illegal orders should contact us”, available at: <https://iimm.un.org/iimm-recipients-of-illegal-orders-should-contact-us/>.

52 Facebook, <https://www.facebook.com/DrSasa2222/photos/a.140520717538794/292756138981917/>, 9 April 2021 at 9.57.

53 FFM September 2019 Report, para. 95.

54 See UN Human Rights Council, “Compilation of all recommendations made by the Independent International Fact-Finding Mission on Myanmar, to the Government of Myanmar, armed organizations, the UN Security Council, Member States, UN agencies, the business community and others”, A/HRC/42/CRP.6, 16 September 2019, paras 19, 21-22 (FFM Recommendations). Available at: [https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A\\_HRC\\_42\\_CRP.6.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.6.pdf).

55 FFM September 2019 Report, para. 106.

formation already known, to create an ad hoc international criminal tribunal with jurisdiction to investigate and prosecute both crimes committed in the context of the 2021 coup and prior crimes committed against all ethnic groups in Burma, including the Rohingya.

## **Universal Jurisdiction**

Universal jurisdiction is a form of criminal jurisdiction that permits national courts to investigate and prosecute a person suspected of committing certain crimes anywhere in the world regardless of whether the victim or accused is a national of that State or in the absence of any links to the State where the court is located.<sup>56</sup> Typically, crimes prosecuted under universal jurisdiction relate to prohibitions and obligations that have an erga omnes character, meaning that they are owed to the international community as a whole, or jus cogens status, which are norms that cannot be derogated from by any state. These crimes are sometimes referred to as “the most serious crimes of concern to the international community as a whole” and include genocide, torture, crimes against humanity, and war crimes.

The crimes committed by the Tatmadaw against the anti-coup protesters arguably amount to crimes against humanity, given their widespread and systematic nature. As such, another potential avenue for justice would be to bring a universal jurisdiction case against members of the Tatmadaw in a country that provides for such investigations and prosecutions. One of the advantages of using universal jurisdiction is that these cases may proceed more quickly than cases at the international level, particularly if, for example, an ad hoc tribunal would need to first be set up. An example of this is Germany’s recent conviction of a Syrian national for crimes against humanity (crimes committed in Syria against Syrian nationals who were not located in Germany.) This prosecution was possible because the German legal framework enshrines the principle of universal jurisdiction.<sup>57</sup>

On 13 November 2019, BROUK filed a criminal complaint against Myanmar’s military and civilian leadership for the Rohingya genocide before the Federal Court in Buenos Aires, Argentina.<sup>58</sup> Argentina’s national legal framework provides for universal jurisdictions cases. In addition, the FFM has consistently recommended that UN Member States bring universal jurisdiction cases in their domestic courts “to investigate and prosecute alleged perpetrators of serious crimes under international law committed in

Myanmar”.<sup>59</sup>

With respect to this case or any other universal jurisdiction case, the NUG should declare its willingness to extradite alleged perpetrators if required by any foreign State, regardless of the existence of an extradition treaty, as long as thorough, effective, prompt, impartial, independent and transparent investigations and prosecutions are not possible in Myanmar. Second, article 445 of the 2008 constitution provides immunity to members of Burma’s previous junta members.<sup>60</sup> It is recalled that the previous civilian government attempted to revoke article 445, but the amendment failed to pass.<sup>61</sup> Therefore, the NUG should make a public formal statement that article 445 of the 2008 Myanmar constitution is inapplicable in any instance, as it is contrary to international human rights law and international criminal law.

Other States are encouraged to follow the FFM’s recommendation and bring universal jurisdiction cases in their domestic courts in relation to the crimes committed post-coup and in relation to crimes committed against the Rohingya and other ethnic and religious minority groups in Myanmar.

## **Conclusion**

The international community must not permit the Tatmadaw to reinstate a military dictatorship in Myanmar. The Burmese people have made undeniably clear their wish for Myanmar to return to the path of democracy and the immense sacrifices that they have made since 1 February 2021, in the face of extraordinary brutality and violence, demands the unqualified support of the international community. However, no democracy can be said to truly exist when it rests on a foundation of discrimination and exclusion. Democracy is more than civilian rule. It must be representative of all of the people. Reinstalling the civilian government, while important, will not address the underlying non-democratic foundational issues facing Myanmar. Neither the Tatmadaw nor the NLD has governed Myanmar in accordance with democratic standards and principles. To support the Burmese people, as opposed to those who only claim the power vested in the people, the international community must insist that the NUG commit to transparent and meaningful reforms and make a clean break from the destructive policies and positions of the past.

56 Amnesty International, “Universal Jurisdiction: Questions and Answers”, 2001, available at: <https://www.amnesty.org/download/Documents/128000/ior530202001en.pdf>.

57 Report, Hogan Lovells LLC, “German court exercises universal jurisdiction: Implications for corporate criminal liability under international law”, 26 February 2021, available at: <https://www.jdsupra.com/legalnews/german-court-exercises-universal-1752951/>.

58 “Argentinean Courts Urged To Prosecute Senior Myanmar Military And Government Officials For The Rohingya Genocide”, 13 November 2019, available at: <https://www.brouk.org.uk/argentinean-courts-urged-to-prosecute-senior-myanmar-military-and-government-officials-for-the-rohingya-genocide/>. See also OpinioJuris, Tun Khin, “Universal Jurisdiction, the International Criminal Court, and the Rohingya Genocide”, 23 October 2020, available at: <http://opiniojuris.org/2020/10/23/universal-jurisdiction-the-international-criminal-court-and-the-rohingya-genocide/>.

59 FFM Recommendations, para. 102.

60 See US Congressional Research Service, “Burma’s Military Blocks Constitutional Amendments”, 30 March 2020.

61 *Ibid.* See also Sam Yaming Aung, The Irrawaddy, “The Untouchable Articles in Myanmar’s Constitution”, 23 March 2020, available at: <https://www.irrawaddy.com/specials/untouchable-articles-myanmars-constitution.html>.

In this same sense, the Tatmadaw must be held accountable for the atrocities it has committed with impunity. However, accountability and justice cannot be limited to only the atrocities that occurred post-military coup. It must also include justice and accountability for the Rohingya and other ethnic and religious groups who have suffered under violent oppression for generations. In engaging with international justice efforts, the NUG has a unique opportunity not only to hold the Tatmadaw to account for the crimes it has committed post-coup, but also to demonstrate to the international community that it is committed to seeking justice for the Rohingya and other ethnic and religious minorities as well. In so doing, the NUG can gain much needed international credibility and confidence that it is truly representative government of all of the people of Myanmar and is committed to charting a new course for its Rohingya citizens, one that is premised on justice, fairness, and equality under the law.

## Recommendations

### The National Unity Government should

- Recognize the Rohingya's identity, provide for the restoration of full citizenship to them, and commit to government reforms that remove discriminatory laws and policies targeting the Rohingya.
- Include Rohingya representation in the NUG's composition.
- Publicly commit to the non-applicability of article 445 of the 2008 constitution in all instances.
- Remind all ethnic armed groups in Myanmar with whom it engages of their obligation to conduct themselves in accordance with international law.

With respect to the ICJ genocide case:

- Designate an agent and file a progress report in relation to the ICJ's provisional measures order that is publicly available and contains concrete measures to ensure that the rights of the Rohingya under the Genocide Convention are respected;
- If it is decided not to file submissions before the ICJ, publicly commit to complying fully with the ICJ's provisional measures order, to set out in writing and make publicly available, the measures that it will undertake to comply with the Court's order, and to consult with Rohingya advocacy groups on what concrete measures are needed;
- Publicly commit to respecting the ICJ's decision on the merits and to implementing any orders directed at it, including with respect to reparations;
- Publicly commit to assisting the Court in securing evidence and witnesses, if requested to do so by the Court.

With respect to the ICC:

- Publicly commit to cooperating with the ICC Prosecutor in his investigation of potential crimes committed in relation to the 2016-2017 attacks on the Rohingya people, including by complying with any arrest warrants, granting investigators access to its territory and complying with requests for cooperation issued under article 87 of the Rome Statute;
- Publicly announce its intention to ratify the Rome Statute and refer the situation of crimes committed following the military coup and past crimes committed against ethnic minority groups, including the Rohingya;
- Support a UN Security Council referral of the situation in Myanmar to the ICC that includes past crimes committed against the Rohingya and other ethnic and religious minority groups.

With respect to the IIMM:

- Continue to document post-coup violence and cooperate with the IIMM in this regard;
- Include crimes committed against the Rohingya in any further discussions on the "modalities of dialogue and co-operation" and cooperate with the IIMM in its investigations in this regard;
- Publicly commit to ensuring access to Myanmar territory to IIMM investigators, cooperating with document and witness access requests, and ensuring the protection and safety of any Rohingya individuals or groups that engage with the IIMM;
- Engage with the IIMM regarding the reforms and domestic structural changes needed to pursue justice domestically, particularly as it relates to the development of a new national constitution;
- If the UN Security Council does not issue a referral to the ICC, publicly support the creation of an ad hoc tribunal to prosecute the cases identified by the IIMM.

With respect to universal jurisdiction:

- Publicly declare its willingness to extradite alleged perpetrators if required by any foreign State, regardless of the existence of an extradition treaty, as long as thorough, effective, prompt, impartial, independent and transparent investigations and prosecutions are not possible in Myanmar.

### States should

- Recognize the NUG as the legitimate government of Myanmar once it includes Rohingya representation, has publicly clarified its position in relation to justice and accountability for the 2017 genocidal attack and subsequent expulsion, and has publicly committed to government reforms that remove discriminatory laws

and policies targeting the Rohingya and to restoring the Rohingya's citizenship rights.

- Support the NUG should it decide to file a submission before the ICJ and encourage the NUG to include the concrete measures it will take to comply with the Court's provisional measures order, including measures to mitigate the systemic genocidal risk factors present in Myanmar with regard to the Rohingya.
- Support The Gambia in its case at the ICJ, including by intervening in the case or offering other forms of assistance to The Gambia.
- Encourage the NUG to cooperate with all international justice efforts and provide financial and technical resources to do so.
- Support a UN Security Council referral of the situation in Myanmar to the International Criminal Court or support the creation of an ad hoc international tribunal.
- Bring universal jurisdiction cases in their domestic courts in relation to the crimes committed post-coup and in relation to crimes committed against the Rohingya and other ethnic and religious minority groups in Myanmar.

### **The United Nations Security Council should**

- Continue to closely monitor the situation in Myanmar.
- Refer the situation in Myanmar to the ICC or create an ad hoc international criminal tribunal under Chapter VII of the UN Charter that includes within its temporal jurisdiction past crimes committed against ethnic and religious minority groups, including the Rohingya.

### **The United Nations General Assembly should**

- Recognize the NUG as the legitimate government of Myanmar once it includes Rohingya representation, has publicly clarified its position in relation to justice and accountability for the 2017 genocidal expulsion and attack, and has publicly committed to government reforms that remove discriminatory laws and policies targeting the Rohingya and to restoring the Rohingya's citizenship rights.

## **About Burmese Rohingya Organisation of the UK**

The Burmese Rohingya Organisation of the UK (BROUK) is headquartered in London and was founded in 2005. The organisation works to highlight the plight of the Rohingya internationally and to support the Rohingya community through a number of initiatives, including by promoting and carrying out research activities on relevant topics, monitoring the human rights situation in Myanmar through an extensive network of contacts, and highlighting ongoing violations against Rohingya through international media and high-level advocacy.

BROUK provides a vital voice for the Rohingya people through its work with the community inside Myanmar, as well as the wider diaspora. The organisation is furthermore committed to training the next generation of Rohingya activists through interaction and capacity building with Rohingya youth groups. BROUK works to ensure justice for the ongoing genocide against the Rohingya people in Myanmar by advocating for international accountability. In November 2019, BROUK filed a petition in Argentina for a universal jurisdiction case against Myanmar military and civilian leadership for crimes against humanity and genocide against the Rohingya. This is the first universal jurisdiction case regarding the Rohingya genocide anywhere in the world.

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