

# **A Perspective on Myanmar's Genocide & How to End It: Options at the International Criminal Court (ICC) and the International Court of Justice (ICJ)**

**Free Rohingya Coalition Expert Group**

**On**

**An Exploration of Peaceful Pathways to Hold Myanmar's Generals and the State of Myanmar Accountable for Institutionalized Persecution of Rohingyas since 1978<sup>1</sup>**

## **Introduction**

In December 2018, amidst official calls for the UN Security Council to refer Myanmar's crimes of persecution and genocide of Rohingya in Rakhine state and other crimes against humanity in Kachin and Shan states to the International Criminal Court, the United Nations mandated the establishment of an Independent Mechanism – with a budget allocation of US\$28 million -- to prepare files in order to facilitate fair and independent criminal proceedings in national, regional or international courts.

This unprecedented development, with the UN General Assembly approving investigation of criminal accountability of individual leaders of Myanmar for crimes against the Rohingya, was a result of the 444-page authoritative report of the International Independent Fact-Finding Mission (hereafter FFM) released to the UN Human Rights Council in Geneva on 18 September 2018. The FFM report found "overwhelming evidence" of genocide, war crimes, and crimes against humanity committed by Myanmar military leaders against the Rohingya ethnic and religious group. The crimes have been denied and tacitly condoned by Aung San Suu Kyi's civilian government.

In addition, periodic reports by the UN Special Rapporteur on the Human Rights Situation in Myanmar, Professor Yanghee Lee, and her predecessor Tomas Quintana Ojea of Argentina, contributed to the UN's decision. As late as 16 February 2019, at the launch of the Forsea.co (Forces of Renewal Southeast Asia) inaugurated by Prime Minister Tun Dr Mahathir at the pro-Publika in Kuala Lumpur (KL), the Chair of the FFM, Mr. Marzuki Darusman, former Attorney General and Commissioner of the National Human Rights Commission of Indonesia, repeated that Myanmar's persecution of the Rohingya amounts to the "mother of all crimes," namely genocide.

Against this backdrop and following the meetings between the new, democratic leadership in Putrajaya and Free Rohingya Coalition (FRC) representatives in February 2019, the FRC mobilized a group of leading scholars and practitioners in the field of international law.

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<sup>1</sup> For background on the history of Rohingya persecution by Myanmar, **see the attached note, "A Brief History of Rohingya Persecution by Myanmar as a UN Member State."**

In late March, a team of international law practitioners, genocide scholars, and leading Rohingya spokespersons travelled to KL to participate in a Symposium on the Myanmar genocide co-sponsored and co-organized by a diverse group of Malaysian and global civil society NGOs. The Symposium was held at the International Islamic University of Malaysia in KL on 26 March 2019. The Symposium was opened by Malaysian Foreign Minister Datuk Saifuddin.

The expert group presented balanced, nuanced and researched perspectives on global justice and accountability mechanisms such as the International Criminal Court (ICC) to pursue "*individual accountability*" for grave crimes in international criminal law including crimes against humanity, genocide, war crimes, and the crime of aggression, and the International Court of Justice ("the World Court"), the ultimate mechanism to peacefully resolve disputes between Member States of the United Nations.

At the time of writing, Malaysia's plans to accede to the ICC's Rome Statute are uncertain. On 5 April 2019, facing political opposition, Prime Minister Mahathir Mohamad announced that his government would have to withdraw from the treaty before Malaysia's accession to the Rome Statute enters into force on 1 June 2019.<sup>2</sup> Malaysia had deposited its instrument of accession to the Rome Statute at the United Nations Treaty Office on 4 March 2019.<sup>3</sup> Whether or not Malaysia becomes a State Party to the Rome Statute, Malaysia can support the work of the ICC in a number of ways, as discussed below and in the attached memorandum on the ICC.

### **Make-Up of the International Expert Group**

The international expert group (*hereinafter IEG*) is made up of the following scholars and practitioners of international law: the founding president of Genocide Watch and renowned genocide scholar and lawyer, George Mason University **Professor Gregory Stanton**, who was involved in setting up UN-sponsored international criminal tribunals such as the Khmer Rouge Tribunal and the Rwanda Tribunal; **Katherine Southwick**, international legal scholar and former legal staff in the Office of the Prosecutor in the Case against Milosevic at the International Criminal Tribunal on Yugoslavia (ICTY); **Khin Mai Aung**, UC Berkeley-trained Burmese American civil rights lawyer based in New York City; **Professor John Packer** who holds the Neuberger-Jesin Professorship in International Conflict Resolution in the Faculty of Law at the University of Ottawa (Canada) and former legal assistant to the first UN Special Rapporteur on the human rights situation in Myanmar (1992-93); **Doreen Chen**, international defense lawyer for one of the two senior Khmer Rouge leaders, Noun

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<sup>2</sup> "Malaysia Won't Join ICC Over Pressure from Muslim Opposition," WASHINGTON POST, 5 April 2019, [https://www.washingtonpost.com/world/asia\\_pacific/malaysia-wont-join-icc-over-pressure-from-muslim-opposition/2019/04/05/efd086ea-580d-11e9-aa83-504f086bf5d6\\_story.html?utm\\_term=.8a884aeb46f2](https://www.washingtonpost.com/world/asia_pacific/malaysia-wont-join-icc-over-pressure-from-muslim-opposition/2019/04/05/efd086ea-580d-11e9-aa83-504f086bf5d6_story.html?utm_term=.8a884aeb46f2).

<sup>3</sup> According to the ICC, "For a new State Party, the Statute enters into force on the first day of the month after the 60<sup>th</sup> day following the date of the deposit of its instrument of ratification, acceptance, approval or accession." International Criminal Court, *Understanding the International Criminal Court* 5, <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>.

Chea, at the Khmer Rouge Tribunal, and Lead Prosecutor at the Permanent Peoples' Tribunal on Myanmar held at the Faculty of Law of the Universiti Malaya (2017); and **Dr Maung Zarni**, Fellow with the (genocide) Documentation Center – Cambodia (DC-Cam) and the co-author of the 3-year study entitled “the Slow-Burning Genocide of Myanmar's Rohingyas” (Pacific Rim Law and Policy Journal, 2014). Doreen Chen was unable to travel from Paris to KL owing to her work schedule at the Khmer Rouge Tribunal, but she provided valuable input into the discussions and deliberations on the subject of comparative efficacy of existing global justice and international law institutions. The IEG was joined by two leading Rohingya representatives from the FRC, namely **Nay San Lwin**, founder and editor of Rohingya Today and **Tun Khin**, President of Burmese Rohingya Organization UK. In the weeks leading up to their participation at the symposium, the IEG held numerous deliberations to build a professional consensus as to the development of optimal strategic use of the world's foremost legal institutions, the ICC and the ICJ.

### **The International Expert Group's Analysis and Policy Recommendations**

The following is the group's consensus view, accompanied by concrete step-by-step recommendations for the new, democratic and transitional Malaysia, as an important UN Member State and ICC-signatory.

There are two possible legal pathways to pursue accountability for serious crimes against the Rohingya: the International Criminal Court (ICC) and the International Court of Justice (ICJ). While processes at these institutions run their courses, both institutions can help to sustain international attention on the suffering of the Rohingya. They can also strengthen political and economic pressure on the Myanmar government to cease its policies of persecution and violence and restore human rights to the Rohingya.

The group supports taking steps in relation to both institutions, with more resources and greater focus dedicated to bringing a case to the ICJ. An ICC prosecution, if successful, would result in the imprisonment of one or more individuals. Its impact on improving conditions for the Rohingya would be indirect at best. An action at the ICJ is more difficult for States to ignore, creating pressure for States to comply with the World Court's decisions. An ICJ action is more likely to be in line with Rohingya objectives to stop the violence, achieve the restoration of their human rights, and obtain reparations. While the ICC focuses on individual criminal responsibility, a UN Member State bringing an ICJ action for breach of the UN Genocide Convention would send a powerful message regarding *state responsibility* for serious crimes.

#### *International Criminal Court*

This section provides a brief overview of the ICC and the ICC Prosecutor's preliminary examination into the situation of Bangladesh/Myanmar. It then outlines a few ways in which Malaysia can support the ICC's work relating to crimes committed against the Rohingya, either as a State Party to the Rome Statute or as a supporter of the institution's mandate. As noted above, whether or not Malaysia will

join the ICC is currently unclear due to domestic political dynamics. **For more detail, please refer to the memorandum on the ICC appended to this document.**

#### ICC Overview: Functions and Jurisdiction:

Headquartered in the Hague, Netherlands, the ICC investigates and tries individuals charged with the most serious crimes of concern to the international community as listed under Rome Statute Article 5: genocide, war crimes, crimes against humanity, and the crime of aggression.<sup>4</sup> The ICC relies on the cooperation of States Parties to the Rome Statute to arrest alleged perpetrators and to enforce many of its decisions.

The ICC has jurisdiction over Article 5 crimes that were committed after the Rome Statute's entry into force on 1 July 2002. For States who join the ICC after this date, a State may make a declaration retroactively accepting the ICC's jurisdiction in a particular matter.<sup>5</sup> Malaysia's accession to the Rome Statute is due to enter into force on 1 June 2019, unless the government withdraws its instrument of accession before then. If Malaysia withdraws, Malaysia could still consider accepting the Court's jurisdiction under Rome Statute Article 12(3) with respect to crimes connected to Myanmar's treatment of Rohingya and which have legal elements that were committed on the territory of Malaysia.<sup>6</sup> Generally, the Court obtains territorial jurisdiction in situations where the alleged perpetrator is a national of a State Party or where elements of an alleged Article 5 crime was committed in the territory of a State Party.<sup>7</sup>

The Office of the Prosecutor (OTP), led by Ms. Fatou Bensouda, is the only entity that can investigate and bring charges against individuals at the Court. The Prosecutor may initiate an investigation "on the basis of crimes within the jurisdiction of the Court."<sup>8</sup> Under Article 14, a State Party may refer a situation requesting that the Prosecutor investigate crimes appearing to be within the Court's jurisdiction. The Security Council, acting under Chapter VII of the UN Charter, may also refer to the Prosecutor a situation in which one or more of such crimes under Article 5 appears to have been committed. Under a Security Council referral, the Prosecutor may investigate crimes allegedly committed within a non-State Party or by a national whose State is not Party to the Rome Statute. A Security Council referral is the only way by which the ICC could exercise jurisdiction over crimes committed within the territory of Myanmar, which is a non-State Party.

After nearly 17 years of operations, the ICC has seen 8 convictions and 3 acquittals. While the ICC has at least 123 States Parties, the ICC's relatively slow and uneven track record, along with high financial costs, have raised questions about the Court's

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<sup>4</sup> Rome Statute of the International Criminal Court, art. 5 [hereinafter Rome Statute].

<sup>5</sup> Ibid., art. 11(2); International Criminal Court, *Understanding the International Criminal Court* 5, <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>.

<sup>6</sup> Rome Statute, art. 12(3).

<sup>7</sup> Ibid., art. 12.

<sup>8</sup> Ibid., art. 15.

effectiveness. The ICC Prosecutor is thus likely to take a particularly cautious approach to opening and defining the scope of a criminal investigation.

#### ICC Prosecutor and the Situation of Bangladesh/Myanmar:

In late 2017, the ICC Prosecutor initiated a preliminary examination into the situation of the Rohingya. She requested that the Court clarify a purely legal question as to whether the Court “may exercise jurisdiction over allegations that members of the Rohingya people from Myanmar (a State not Party to the Statute) were deported to Bangladesh.”<sup>9</sup> In September 2018, the Court determined that it could exercise jurisdiction “if at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party.”<sup>10</sup> Accordingly, the Court concluded that “acts of deportation initiated in a State not Party to the Statute (through expulsion or other coercive acts) and completed in a State Party (by virtue of victims crossing the border to a State) fall within the parameters of article 12(2)(a) of the Statute.”<sup>11</sup>

The Chamber further asserted that this rationale may apply to other crimes within its jurisdiction, such as persecution.<sup>12</sup> The Court also identified unlawfully compelling victims to remain outside their own country as an “inhumane act” under article 7(1)(k), over which the Court could exercise jurisdiction because an element of the crime takes place on the territory of Bangladesh.<sup>13</sup> The Chamber thus further noted that “it falls within [the Prosecutor’s] prerogatives” to cite additional crimes consistent with the Court’s decision if or when she makes a request to open an investigation.<sup>14</sup>

During an investigation, the Prosecutor may apply to the Pre-Trial Chamber to issue an arrest warrant or summons to appear for suspected perpetrators (Art. 58). If the suspect is arrested or voluntarily appears, ICC proceedings can move forward to the subsequent stages of Pre-Trial, Trial, Appeals, and Enforcement of Sentence. Generally, the entire process of investigation and prosecution can take several years. In the absence of arrest, the process can stall indefinitely.

#### How Malaysia Can Support the ICC:

Malaysia could take several steps to support the ICC and its work relating to Bangladesh/Myanmar, whether or not Malaysia is a State Party to the Rome Statute. Given the political and resource constraints facing the ICC Prosecutor, the group suggests that Malaysia consider consulting informally with the Office of the

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<sup>9</sup> International Criminal Court, Pre-Trial Chamber I, No. ICC-RoC46(3)-01/18, “Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,’” para. 50, 6 September 2018.

<sup>10</sup> *Ibid.*, para. 64.

<sup>11</sup> *Ibid.*, para. 73.

<sup>12</sup> *Ibid.*, para. 75.

<sup>13</sup> *Ibid.*, paras. 77-78.

<sup>14</sup> *Ibid.*, para. 79.

Prosecutor on which steps would be helpful. Stretching the capacity of the ICC could be counterproductive for the institution and for prospects for justice for the Rohingya.

However, ICC engagement can be leveraged, regardless of the “success” of prosecutions, to sustain pressure on Myanmar leadership to resolve the underlying dynamics that led to mass violence and to provide the Rohingya and other minority groups full rights as citizens of Myanmar. ICC procedures are not necessarily ends in themselves, but rather should be utilized insofar as they support those larger goals of peace and human rights for minorities in Myanmar and ending impunity for political and military leaders who commit serious crimes. Stakeholders should be mindful that ICC processes do not divert attention from other necessary diplomatic efforts to apply political and economic pressure on Myanmar’s leadership and support tolerance and human rights within Myanmar’s civil society. If Malaysia becomes a State Party, the expert group favours the first four items below insofar as they would fulfil Malaysia’s obligations as a State Party and enhance Malaysia’s political capital as a supporter of international accountability while conserving resources for advocacy at the ICJ and other efforts.

If Malaysia does not become a State Party, Malaysia could still take some of these steps in modified form. Nothing precludes a non-signatory state from supporting the ICC in accordance with national law. For instance, under the Obama Administration, the United States, a non-signatory, was “prepared to support the court’s prosecutions and provide assistance in response to specific requests from the ICC prosecutor and other court officials, consistent with U.S. law, when it is in U.S. national interest to do so.”<sup>15</sup> Additionally, as noted above, if Malaysia becomes a non-signatory, Malaysia could still consider accepting the Court’s jurisdiction under Rome Statute Article 12(3) with respect to crimes connected to Myanmar’s treatment of Rohingya and which have legal elements that were committed on the territory of Malaysia.<sup>16</sup>

- **Actively Participate in the ICC’s Assembly of States Parties (ASP).**<sup>17</sup> If Malaysia becomes a State Party to the Rome Statute, Malaysia could use its representation at the ASP to help assure that the ICC Prosecutor has sufficient resources to carry out a thorough and efficient examination and subsequent investigation into the situation of Bangladesh/Myanmar. If, at some point, the Pre-Trial Chamber issues arrest warrants, Malaysia could deploy diplomatic efforts through the ASP to promote international cooperation in executing arrest warrants. If Malaysia does not formally join the ICC, Malaysia could attend the ASP as an observer, as the United States did during the Obama Administration, and channel diplomatic efforts to supporting the Prosecutor, to encouraging States to share evidence, and to executing arrest warrants, if the Pre-Trial Chamber issues warrants.

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<sup>15</sup> U.S. Department of State Website, “International Criminal Court,” <https://www.state.gov/j/gcj/icc/>.

<sup>16</sup> Rome Statute, art. 12(3).

<sup>17</sup> *Ibid.*, art. 112.

- **Harmonize National Laws in order to Fully Cooperate with and Assist the ICC.** Whether or not Malaysia becomes a State Party, consistent with Part IX of the Rome Statute, Malaysia could take steps to ensure that national law has procedures enabling cooperation with ICC requests. Such procedures could include, for instance, assuring that institutions are in place to collect and provide evidence in connection with elements of Article 5 crimes allegedly committed against Rohingya in Malaysia, and that enforcement bodies would be ready to execute arrest warrants in the event the Court issues them.
- **Taking cognizance of the Pre-Trial Chamber's September 2018 decision, send and publicly release a letter to the Office of the Prosecutor welcoming the opportunity to assist OTP** if it opens an investigation into the situation of Bangladesh/Myanmar. Malaysia could use this exchange as an opportunity to discuss informally other ways in which Malaysia can be helpful to OTP as it continues working on the Bangladesh/Myanmar situation.
- **Send a Letter Requesting the Security Council Refer the Situation of Myanmar to the ICC Prosecutor.** While permanent members Russia or China are widely expected to veto a referral, such a letter would send a strong signal against alleged perpetrators and further serve to complicate political engagement and economic investment in Myanmar while accountability for atrocities remains so limited. Such a request would echo the calls for Security Council referral made by the UN Human Rights Council's Independent International Fact-Finding Mission on Myanmar<sup>18</sup> and the Public Interest Law and Policy Group (PILPG).<sup>19</sup> To send a letter, Malaysia need not be a State Party to the Rome Statute, but could be acting in its capacity as a concerned UN Member State seeking to uphold the Responsibility to Protect.
- **Under Article 15, Provide Information to the ICC Prosecutor to Assist with OTP's Determination as to Whether to Open an Investigation.** In line with the Pre-Trial Chamber's September 2018 decision, Malaysia could send documentation and briefs to the Prosecutor of evidence concerning deportation from Myanmar to Malaysia. If Malaysia becomes a State Party, such evidence could expand the scope of charges the ICC Prosecutor could consider bringing in the course of an investigation. For the ICC to have jurisdiction over crimes committed before Malaysia's accession to the Rome Statute enters into force on 1 June 2019, Malaysia could make a declaration to the ICC Registrar under Article 12(3) accepting jurisdiction for crimes concerning Myanmar for the period before 1 June 2019. If Malaysia is not a State Party, such documentation could bolster the credibility of the Prosecutor's eventual charges of deportation from Myanmar to Bangladesh.

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<sup>18</sup> Human Rights Council, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2, para. 1652, 17 September 2019.

<sup>19</sup> Public International Law and Policy Group, *Documenting Atrocity Crimes Committed against the Rohingya in Myanmar's Rakhine State: Factual Findings and Legal Analysis*, December 2018, 90.

- **If Malaysia Does Formally Join the ICC, Make a State Party Referral to the ICC Prosecutor under Article 14.** Where documentation and briefs submitted under Article 15 function as suggestions to the Prosecutor, a State Party referral under Article 14 compels the Prosecutor to assess whether the information provided in the referral meets the statutory criteria as set out in Article 53(1) to open an investigation. If, therefore, Malaysia wanted the Prosecutor to examine deportation as a crime against humanity or other crimes with elements in Malaysia or in the territory of other States Parties, it could submit a referral to the Prosecutor. A referral could catalyse further political and public support for an investigation into crimes in Myanmar with international elements.<sup>20</sup> In making a referral, Malaysia should be prepared to provide adequate documentation and witness testimony to help simplify the ICC Prosecutor's examination.

*International Court of Justice:*

In addition to or as an alternative to taking steps to support the ICC's work on Bangladesh/Myanmar, Malaysia could bring an action before the International Court of Justice (ICJ or Court) under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention or Convention). Both Myanmar and Malaysia are among the 148 States Parties to the Genocide Convention.

As noted, the group favours bringing an action before the ICJ for several reasons. It will address, in a comprehensive manner, the institutional persecution of the Rohingya committed by the State of Myanmar and will offer the real prospect of vindication of the Rohingya, repair of damages suffered, and broadly address the material needs of the Rohingya as victims. While holding this unique potential, an ICJ action does not prejudice the prospect of eventual actions against individual perpetrators.

This recommendation to bring an ICJ action echoes the call of Nurul Islam, the Chairman of the advocacy group, Arakan Rohingya National Organisation (ARNO). On 30 November 2018 at the 11<sup>th</sup> UN Forum on Minority Issues in Geneva, Mr. Islam called upon the United Nations system to apply the Genocide Convention and hold the State of Myanmar to account before the ICJ. **Please see his statement appended to this document.**

The following sections provide a brief overview of the Genocide Convention and the steps involved in bringing an action under the Convention to the ICJ.

The Genocide Convention:

The object and purpose of the Convention is, first of all, to prevent genocide from occurring and, second, to ensure punishment of perpetrators in the case of

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<sup>20</sup> For an analysis of limitations and benefits of a State Party referral in the ICC's Venezuela situation, see Nicholas E. Ortiz, "Understanding the State Party Referral of the Situation in Venezuela," *EJIL: Talk!*, 1 November 2018, <https://www.ejiltalk.org/understanding-the-state-party-referral-of-the-situation-in-venezuela/>.



violations. The duties – to prevent and to punish – are held by States. The character of genocide is, ultimately, a matter of State conduct; the State alone has certain powers to prevent genocide and, in certain respects, to commit it in violation of international law. The State of Myanmar is responsible for the composite of laws, policies, programmes, institutions, and practices, which have combined to constitute a genocide against the Rohingya group in violation of the Genocide Convention.

As defined under Article II of the Convention,

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>21</sup>

Genocide is a peremptory norm (*jus cogens* or “compelling law”) of international law with the character *erga omnes* (“towards all”), meaning it concerns the community of States such that a State not directly affected may act. Irrespective of the *jus cogens* and *erga omnes* nature of genocide, Malaysia has standing as a State Party to the Convention and, arguably also, as being directly affected insofar as Malaysia has sustained specific damages as a result of hosting a large number of Rohingya refugees. Under the Convention, States Parties are obligated to enforce the Convention (Article V) and, under Article IX, disputes between States Parties relating to the Convention, “including those relating to the responsibility of a State for genocide or for any of the other acts enumerated under [A]rticle [3],<sup>22</sup> shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”<sup>23</sup>

Action at the ICJ:

Accordingly, as a State Party asserting violations by Myanmar, Malaysia should (or “shall” under Article IX) bring the dispute to the Court without delay.

Article IX Reservation. We note, however, that Malaysia entered a reservation to Article IX when it acceded to the Convention. Malaysia's reservation renders submission by Malaysia of disputes to the ICJ subject to the consent of Malaysia on a

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<sup>21</sup> Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1949, 78 U.N.T.S. 277.

<sup>22</sup> Article III provides that “the following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

<sup>23</sup> Emphasis added.

case-by-case basis. Myanmar has no similar reservation regarding Article IX jurisdiction. Generally, under the Court's rule of reciprocity, any reservation by one party to an ICJ dispute may also be invoked by the other party to the dispute. Therefore, Myanmar could conceivably invoke Malaysia's reservation on Article IX ICJ jurisdiction over this case to negate Myanmar's general acceptance of ICJ jurisdiction. Myanmar could also enter its own reservation to Article IX jurisdiction before the dispute is submitted to the ICJ.

To avoid this problem, before submitting a dispute with Myanmar to the ICJ, Malaysia could withdraw its reservation to Article IX jurisdiction by the ICJ specifically for disputes about the application of the Genocide Convention. One could, however, contest application of the rule of reciprocity here based on the view that the rule does not apply where consent to jurisdiction is based on a compromissory clause, such as in Article IX.<sup>24</sup> How the Court would rule on this procedural issue is uncertain given the lack of precedence on the matter. In short, Malaysia's withdrawal of the reservation would avoid this complication, but if Malaysia maintains its reservation, there is a good but uncertain chance that it could successfully contest an attempt by Myanmar to avoid jurisdiction by introducing its own reciprocal reservation.

Initiating an ICJ Action. Any State Party may initiate a case simply by submitting an application to the Court. Apart from the potential complication of Malaysia's current reservation under Article IX, there should be no bar to jurisdiction since both Myanmar and Malaysia are States Parties, the acts attributable to Myanmar fall within the material, geographical, and temporal scope of the Convention, and the Convention expressly stipulates the arguably mandatory referral of a dispute to the Court.

In order to initiate an action before the Court, Malaysia must establish that there is a dispute. That should manifest through a demarche or note verbale to Myanmar conveying Malaysia's position and seeking cessation of the violative acts together with due reparations, including to Malaysia with respect to specific damages.

Memorial, Joinder of Other States' Applications, Provisional Measures. Upon submission of Malaysia's substantive memorial, in which the State would make its case, Myanmar will be expected by the Court to respond and will be duty-bound to do so as a State Party to the Convention. **Appended to this document is a sample memorial**, drawing in part on the September 2018 report of the Independent International Fact-Finding Mission, which concluded, "on reasonable grounds, that the factors allowing the inference of genocidal intent are present."<sup>25</sup>

Other States may act in parallel to make applications invoking the *erga omnes* basis for action and/or their own specific damages (such as Bangladesh's enormous costs in hosting refugees). If the Court considers the matters to be substantially similar, the Court may join them.

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<sup>24</sup> Michael A. Becker, EJIL: Talk!, "The Situation of the Rohingya: Is There a Role for the International Court of Justice?" Nov. 14, 2018, <https://www.ejiltalk.org/the-situation-of-the-rohingya-is-there-a-role-for-the-international-court-of-justice/#more-16632>.

<sup>25</sup> Human Rights Council, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar HRC/39/CRP.2, para. 1441, 10-28 September 2018.

The memorial of the applicant (Malaysia and/or others) may address the full range of violations of the Convention, from failure to implement it *per se* (failure to respect principles of good faith or *pacta sunt servanda*, that “promises shall be kept”) through individual substantive provisions (such as acts of genocide, complicity, or others) and procedural obligations, such as failure to incorporate provisions within Myanmar's domestic law, as prescribed by Article V of the Convention. If the applicant were to assert this latter claim, then Malaysia should ensure that its domestic laws have incorporated the Genocide Convention's provisions, or at least initiate a domestic process toward that end, so as to avoid a counterclaim from Myanmar.

Given the nature of the violations and the claims, applicants (Malaysia and other States) may request the Court to issue **provisional measures**, which, in accordance with Article 41 of the ICJ Statute, “ought to be taken to preserve the respective rights of either party.”<sup>26</sup> Under Article 41(2), “Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.”<sup>27</sup>

Outcome. Unless the disputant States should reach a satisfying understanding, such as a scenario in which Myanmar changes its policies, laws, and practices, and repairs damage caused, the Court will ultimately render a binding judgment with the possibility of orders. Failure on the part of Myanmar to respect the Court's judgement and/or orders would constitute a subsequent violation of international law. In contentious cases, the applicant bears the costs of the proceedings.

The procedure before the Court will take some time – certainly months for preliminary elements and likely some years for a final judgement and possible orders to be delivered. In the mean time, the process will remain public and exposed to international scrutiny, including of the UN Security Council. Subjecting the matter to the consideration of the “World Court” for definitive application of the law would be a public process that would generate significant international attention amongst governments, business, and civil society. Whether or not the Court makes a legal determination of genocide is uncertain – despite the evidence and the strength of the FFM report – given the highly contextualized approach to these legal questions in international jurisprudence. Irrespective of the outcome, the process alone will likely have substantial effects.

### Conclusion

To summarize, the International Criminal Court and the International Court of Justice present two paths to accountability with respect to crimes committed against the Rohingya minority.

While being a State Party to the ICC's Rome Statute sends a clear message regarding a State's stance on ending impunity, a State need not be a State Party to support the work of the ICC. Malaysia could, for instance, accept jurisdiction under

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<sup>26</sup> United Nations, Statute of the International Court of Justice, art. 41(1), 18 April 1946.

<sup>27</sup> *Ibid.*, art. 41(2).

Article 12(3) with respect to the Prosecutor's potential investigation into crimes committed by Myanmar leaders against the Rohingya. Even if Malaysia does not make a declaration under Article 12(3), Malaysia could apply diplomatic resources to supporting the ICC by attending the ICC's Assembly of States Parties as an observer or by requesting that the Security Council refer the situation of Myanmar to the ICC Prosecutor. Malaysia could harmonize national laws to smooth potential cooperation with the ICC with respect to gathering evidence or executing arrest warrants, if warrants are eventually issued. Through a letter or public statement, Malaysia could welcome the opportunity to assist the Prosecutor if she attains authorization to pursue an investigation. Under Rome Statute Article 15, Malaysia could supply the Prosecutor with relevant information.

Through an ICJ action under the Genocide Convention, Malaysia could request that the World Court issue provisional measures to stop the violence and allow humanitarian access to vulnerable communities in Rakhine State. A binding judgement and possible orders could result in changes to Myanmar laws and policies that harm Rohingya and other ethnic minorities, as well as an award of damages to Malaysia for the costs of hosting thousands of Rohingya. Regardless of the outcome, an ICJ action could have significant effects on how the international community engages with Myanmar leaders. In pursuing an ICJ action, Malaysia should consider withdrawing its reservation under Article IX of the Convention or be prepared for a potential dispute as to whether the reciprocity rule applies. Malaysia should also attend to whether its domestic laws have incorporated the provisions of the Genocide Convention. If the laws have not, then a process to comply with Article V should be commenced.

In the short and long term, Malaysia's efforts to pursue accountability through the ICC and particularly through an ICJ action under the Genocide Convention would bolster Malaysia's standing as a regional leader on human rights and international law. Such efforts would also generate leverage and renew hope in finding solutions to the suffering of the Rohingya and other ethnic minorities in Myanmar.

The International Expert Group thanks the Malaysian Foreign Ministry for the opportunity to share this information and welcomes questions or requests for further assistance.