



Civil Society and the IIMM in the Investigation and Prosecution of the Crimes Committed Against the Rohingya

RESEARCH ARTICLE

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ABSTRACT

This article assesses the role of civil society and the Independent Investigative Mechanism for Myanmar (IIMM) in individual accountability proceedings by foreign domestic courts for the crimes committed against the Rohingya in light of the obstacles faced by Myanmar courts, the International Criminal Court (ICC) and the United Nations Security Council (UNSC). Due to the inability of third States to investigate the crimes committed within Myanmar, they depend (almost) exclusively on civil society organisations' (CSO) documentation to assert their jurisdiction. The article argues that two factors necessitated the creation of the IIMM as a legal bridge between documentation and States' investigatory and prosecutorial duties: the concerns about the reliability of CSOs' documentation and the impediments in its direct admissibility in criminal trials. The combined initiatives of civil society and the Mechanism constitute an essential component of States' duty in fulfilling their obligations to investigate and prosecute the crimes against the Rohingya. Finally, the Mechanism sets a precedence where civil society could actively participate in the promotion of the interests of justice.

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I INTRODUCTION

'There were so many bodies and so much blood in the river, it looked like the river was bleeding', said an 18-year-old Rohingya woman from Buthidaung.¹ The Rohingya, a religious minority in Myanmar, have been persecuted by their State for almost four decades.² 2016 marked the escalation of violence in the country, which reached its peak in 2017 after the launch of a dissemination campaign by the State's military forces.³ In late August of that year, Myanmar's military launched a clearance operation against the Rohingya in northern Rakhine, killing many of them and leading more than 700.000 to flee,⁴ seeking refuge to the neighbouring State of Bangladesh.⁵

The United Nations Human Rights Council (UNHRC)⁶ and non-governmental organisations (NGOs) have condemned the attacks and published reports regarding the crimes systematically committed against the minority group, including unlawful killings, torture and other forms of ill treatment, forced disappearances and sexual and gender-based violence.⁷ The UN-appointed Fact Finding Mission (FFM) has classified the attacks as war crimes and crimes against humanity, additionally suggesting that the crimes amount to genocide.⁸ Finally, in September 2020, two soldiers who deserted Myanmar's army confessed on video that they followed commanding officers' instructions to launch attacks on and kill Rohingya, confirming existing reports.⁹

The allegations of war crimes, crimes against humanity and genocide require the investigation of these violations and the prosecution of those responsible.¹⁰ As this article argues in section III, domestic courts are unwilling and unable to conduct investigations into the allegations in compliance with Myanmar's international legal obligations. Furthermore, the article illustrates that the International Criminal Court (ICC) would only offer a partial solution to the issue of individual accountability for the crimes committed in Myanmar. The obstacles faced by these traditional judicial mechanisms, therefore, reinforce the need to resort to the principle of universality. Considering the lack of access to sites in Myanmar for the purpose of investigation, the utilisation of criminal files provided by the IIMM, mainly based on evidence collected by civil society, plays a significant role in permitting the exercise of jurisdiction by third States.

In light of the previous observations, the article assesses to what extent civil society organisations and the IIMM could assist in States' duties to investigate and prosecute genocide, crimes against humanity and war crimes. The article focuses exclusively on individual criminal accountability and, thus, while recognising the ongoing proceedings before the International Court of Justice (ICJ), including the order on provisional measures,¹¹ the ICJ case will not be analysed. The reasons for the selection of Myanmar as the case study are multifaceted.

Firstly, Myanmar presents one of the few examples where third actors investigated crimes such as those committed against the Rohingya, resulting from the inability of the State, the ICC and the United Nations Security Council (UNSC) to provide a solution. Moreover, Myanmar is a unique case because the crimes were committed exclusively by its nationals and specifically against the Rohingya, a stateless population. Hence, in contrast to other cases, such as Syria, third States can primarily exercise universal jurisdiction over the crimes, which is the focus of the research, since no alternative jurisdictional link applies based on grounds of passive and active personality. Finally, Myanmar, where the ICC has limited jurisdiction, presents the opportunity to examine the interplay among different actors in a serious crisis and whether such approaches can reinforce the accountability process.¹²

The article is structured as follows. Section II presents the international legal framework regulating States' obligations to investigate and prosecute as well as the binding norms for Myanmar. The following part, section III, assesses the possibility for Myanmar, the ICC and the UNSC to address the crimes against the Rohingya. In section IV, the article evaluates the role of CSOs' documentation in the investigation of genocide, crimes against humanity and war crimes and suggests how their contribution could be further enhanced. Section V emphasises the necessity of the creation and mandate of the IIMM and examines to what extent it could bridge the legal gap between CSOs' documentation and States' investigations and prosecutions. The section continues with an assessment of the Mechanism and suggestions for its improvement. The final section summarises the analysis, providing its conclusions.

II OBLIGATIONS TO INVESTIGATE AND PROSECUTE

The discovery of crimes against humanity, war crimes and genocide raise States' obligations to investigate and prosecute those responsible. This section presents the binding norms for Myanmar. The section also analyses the obligations of third States in the cases of such crimes.

A MYANMAR'S OBLIGATIONS

So far, Myanmar has not enacted legislation proscribing genocide.¹³ Its Penal Code lacks the defining elements of genocide and does not contain any other crimes that could amount to the underlying acts of genocide. As a consequence, Myanmar criminal law also lacks penalties for persons guilty of committing genocide. The Penal Code criminalises certain acts that could amount to crimes against humanity and war crimes, such as murder, torture and rape.¹⁴ However, as the code dates back to 1891, several provisions are too narrow and do not correspond to international norms.

Despite the lack of effective domestic provisions covering the crimes committed against the Rohingya, a number of international legal sources crystallise the obligations to investigate and prosecute individuals responsible for the commission of genocide, crimes against humanity and war crimes. As stipulated in article 6 of the Genocide Convention, persons charged with genocide or other acts related to genocide shall be tried before competent penal tribunals.¹⁴ The ICJ, in its advisory opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, established that the principles underlying the convention are universal in character, which include the obligation to prosecute and try those responsible for such acts.¹⁵ According to the ICJ, these obligations are binding upon States, even those without conventional obligations, hence recognising their customary international law character.¹⁶ Myanmar has ratified the Genocide Convention and is bound by its provisions, including those stipulating the need for accountability.¹⁷ Consequently, Myanmar is obligated under the Genocide Convention to investigate and prosecute those responsible for the crimes against the Rohingya. However, Myanmar has expressed reservations regarding articles VII and VIII.¹⁸ Considering the role of Myanmar's officials in the perpetration of the genocide against the Rohingya and the State's unwillingness and inability to punish those responsible, Myanmar's reservation would go against the object and purpose of the Convention. In accordance with ICJ's Advisory Opinion, reservations could be permissible insofar as they do not go against the *raison d'être* of the Convention.¹⁹ A lack of alternative methods of accountability due to Myanmar's reservations would go against the object and purpose of the Convention, making the reservations null and void. However, the obligation to prosecute under article VII of the Genocide Convention is only limited to the State in the territory which the act was committed or to an international penal tribunal with jurisdiction over the matter.²⁰

Moreover, international humanitarian law includes obligations to investigate and prosecute suspected perpetrators of genocide, war crimes and crimes against humanity. Under international humanitarian law crystallised in the Geneva Conventions, States are obligated to either try or extradite those responsible for grave breaches.²¹ Myanmar is a party to all Four Geneva Conventions and is hence required to either ensure accountability of those suspected of committing such crimes against the religious minority or to extradite them to a competent State.²²

B THIRD STATES' OBLIGATIONS

International criminal law provisions, enshrined in the Rome Statute, require States to exercise their jurisdiction over genocide, war crimes and crimes against humanity.²³

Even though Myanmar is not bound by the provisions of the Rome Statute, the preambular mention to States' duties to exercise their criminal jurisdiction over those responsible for international crimes has been interpreted as a reference to universal jurisdiction.²⁴ Under this principle, every State can bring persons accused of international crimes to trial regardless of where the crime was committed or the nationalities of the perpetrator or victim.²⁵

As analysed, States are obligated to either try or extradite those responsible for grave breaches under the Geneva Conventions.²⁶ Thus, when atrocities have been committed and the State is unable to prosecute the perpetrators, the offenders must be extradited to States that are willing and able to do so. While not explicitly stated in the articles of the Four Geneva Conventions, these obligations have been interpreted as providing for universal jurisdiction.²⁷ Lastly, the UNSC and UNGA have adopted a number of resolutions providing clauses on the obligation to investigate war crimes and crimes against humanity and sanction the perpetrators.²⁸

In addition to obligations from international treaties, genocide can carry universal jurisdiction under customary international law. Following the adoption of the Genocide Convention, cases such as *Eichmann* and *Demjanjuk* have confirmed the applicability of universal jurisdiction over the crime of genocide.²⁹ As States have not protested against trials based on universal jurisdiction,³⁰ it can be argued that, next to States' practice, the *opinio juris* element of customary international law is also fulfilled. This argument can be further strengthened due to the *erga omnes* obligations concerning the prohibition of genocide.³¹ Finally, in *Pinochet*, Lord Millet supported that 'crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order'.³² Therefore, the large scale perpetration of genocide against the Rohingyas, which amounts to a violation of *jus cogens*,³³ would give rise to universal jurisdiction. Crimes against humanity are also subject to universal jurisdiction as expressed in the *Arrest Warrant* case's joint separate opinion of judges Higgins, Kooijmans and Buergenthal³⁴ and attested in the *Eichmann* and *Demjanjuk* cases.³⁵ Finally, under customary humanitarian law, applicable both in international and non-international armed conflicts, States are under the obligation to investigate war crimes over which they have jurisdiction and prosecute the suspects.³⁶

Lastly, under article 41 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, which codifies customary law norms, States shall cooperate to bring any serious breach of an obligation

arising under a peremptory norm of international law to an end through lawful means.³⁷ As analysed, genocide falls under this category and, hence, States could resort to the application of universal jurisdiction as an avenue to bring an end to the violation. A refusal of third States to investigate the crimes committed by Myanmar could implicitly mean a recognition of the wrongful act or assistance in maintaining it, constituting an international law violation by third States.³⁸

Considering the impediments in Myanmar, the ICC and the UNSC, as analysed in the following section, third States are accountable for the crimes against the Rohingya. Consequently, the main legal framework invoked to justify third States' duty to investigate and prosecute the perpetrators of the atrocities committed within Myanmar is customary law and the Geneva Conventions. In conclusion, foreign domestic courts should assert their jurisdiction over the crimes against the Rohingya minority in order to achieve accountability.

III THE STALEMATES IN DOMESTIC AND INTERNATIONAL INVESTIGATIONS AND PROSECUTIONS

This section examines the potential avenues of individual criminal accountability for the crimes committed against the Rohingya. It starts with an analysis of the limitations of the domestic legal system and proceeds with an examination of the extent the ICC could investigate the crimes and prosecute the perpetrators. Finally, the obstacles in the creation of an *ad hoc* court by the UNSC are briefly mentioned to give a fuller picture of the impediments in individual criminal accountability.

A INVESTIGATIONS AND PROSECUTIONS IN MYANMAR

Considering the extensive documentation of the commission of crimes against humanity and war crimes as well as allegations of genocide committed against the Rohingya by Myanmar officials, the State of Myanmar should investigate and, if appropriate, prosecute the accused.³⁹ However, domestic law in Myanmar does not include international crimes and no progress has been made in amending the law to include such crimes in the jurisdiction of its courts as a step towards accountability.⁴⁰ Additionally, it has been reported in numerous occasions that Myanmar's judiciary system lacks independency and impartiality.⁴¹ More precisely, impunity is enshrined in the 2008 Constitution which explicitly prohibits the prosecution of government and military officials for any act done while executing their duties.⁴² Although the clause appears to provide immunity for offences committed before March 2011, it could be interpreted as providing immunity for later offences.⁴³ Such restrictions suggest that the military is only accountable to itself

for all violations, including allegations of human rights violations.⁴⁴ The political influence of the military and the executive branch over the judiciary system further challenges the outcome of the latter's proceedings.⁴⁵ The lack of independence in the appointment of the judiciary signposts that crimes against minorities, in this case the Rohingya, will not be taken appropriately into account or investigated in line with the international obligations of Myanmar.⁴⁶

Another interrelated obstacle is the unwillingness of the State to conduct independent investigations.⁴⁷ This is primarily attested by Myanmar's reluctance to accept the FFM outcome report.⁴⁸ Moreover, the UN High Commissioner for Human Rights has criticised the State's judiciary for the impunity of the perpetrators of crimes committed against the Rohingya minority.⁴⁹ Despite requests from the Special Rapporteur of UNHRC concerning the investigation of violations of human rights and the distribution of justice in Myanmar,⁵⁰ the government has not taken any adequate steps to combat impunity thus far.⁵¹

The court-martial for the 2018 killings of Rohingya in Inn Din, along with the conviction and the sentencing of members of the military, could be seen as an expression of will for accountability.⁵² Nevertheless, a follow-up on the official conviction and sentencing of members of the military involved in the Inn Din killings in 2018 to 10 years imprisonment reaffirms the reluctance to conduct impartial investigations into the crimes against the religious minority.⁵³ Despite their conviction, the members of the military were released early and their actions were labelled as a response to alleged terrorist attacks by the Rohingya. Similarly, the transparency and impartiality of the proceedings for the incident against the Rohingya in Gu Dar Pyin cannot be verified, as the information about the perpetrators and the crimes committed have not been made publically available.⁵⁴

The creation of an Independent Commission of Enquiry (ICOE) by the government of Myanmar, mandated to investigate the allegations of human rights violations committed in Rakhine since the end of August 2017, could be interpreted as a positive step towards accountability.⁵⁵ Nonetheless, the UN High Commissioner for Human Rights has characterised the Commission's actions as insufficient.⁵⁶ The ICOE has been criticised due to its lack of independency and opaque methodology as well as the limited scope of its mandate, which only covers incidents which occurred in Rakhine for 12 days and excludes crimes committed elsewhere in Myanmar.⁵⁷ The independence of the findings of ICOE's final report are also questionable.⁵⁸ The findings acknowledge that members of Myanmar's security forces committed war crimes and serious human rights violations against Muslims in northern Rakhine, however, they dismiss the accusations of rape and genocide⁵⁹ in contradiction to numerous international reports.⁶⁰

Lastly, the significance of the government's directives to preserve evidence and property in northern Rakhine in April 2020⁶¹ is doubtful, considering its leading role in the 2017 reconstruction of several destroyed Rohingya villages in the area.⁶² Overall, the insufficient actions of the Myanmar government and its general stance towards the Rohingya suggest that the State will not undertake effective measures to improve their situation in the near future. Thus, the question is whether the ICC could intervene and assume the role of an impartial investigator.

B ICC JURISDICTION OVER THE CRIMES

As stipulated under paragraph 10 of the Preamble and article 1 of the Rome Statute, the principle of complementarity guides the work of the ICC.⁶³ In other words, the Court mainly functions under negative complementarity, according to which national criminal jurisdictions shall be the primary way of ensuring accountability in case of serious crimes. The ICC shall only intervene when domestic courts are unable or unwilling to investigate and prosecute serious crimes committed in their territory or by their nationals which violate international law.

The Court can exercise its jurisdiction over crimes committed in the territory of a State party to the Rome Statute or by a national of a State party.⁶⁴ Myanmar is not a party to the Rome Statute which would automatically enable the Court to exercise its jurisdiction over the alleged crimes.⁶⁵ As the crimes against the Rohingya minority were committed by Myanmar nationals, more precisely members of the State's armed forces, the Court cannot exercise its jurisdiction over the crimes. An alternative solution to fulfil the precondition to the exercise of jurisdiction is the issuance of a declaration by a State with the Registrar, in which the concerned State accepts the ICC's jurisdiction over a specific crime and agrees to cooperate with the Court in its procedures.⁶⁶ Myanmar has expressed neither the will to become a member of the Rome Statute nor the intent to issue a declaration accepting the retroactive application of the Statute during the period in question; both would enable the investigation of the allegations and the prosecution of the suspects. The reluctance of the State to acknowledge the findings of the FFM and the commission of the crimes listed in its report suggests that Myanmar will not accept the ICC's jurisdiction over the Rohingya situation, at least not in the near future.

Article 13 of the Rome Statute lists the jurisdictional triggers for the ICC, namely State party, UNSC referral and *proprio motu* investigation.⁶⁷ Under article 14 of the Rome Statute, a State party may refer a situation in which crimes within the jurisdiction of the Court have been committed to the Prosecutor and request the Prosecutor to investigate the situation.⁶⁸ Since the preconditions for the exercise of ICC's jurisdiction are not fulfilled, a State party referral is not feasible for the case of Myanmar.

Alternatively, the UNSC, acting under Chapter VII of the UN Charter, can adopt a resolution referring alleged atrocities committed in any country to the ICC.⁶⁹ For the referral to be permitted, the decision must be made by affirmative vote of nine members, including the concurring votes of the Council's Permanent Members.⁷⁰ The UNSC already did so in the case of Darfur, Sudan⁷¹ and Libya.⁷² However, this triggering process does not seem to be an option for Myanmar. China and potentially Russia, two Permanent Members of the Security Council, do not stand in favour of such a decision. China has been unwilling to accept a briefing concerning the human rights situation in Myanmar,⁷³ expressing its support for the domestic settlement of the Rohingya situation.⁷⁴ Additionally, Russia exhibited opposition to the practices of the ICC in many instances, underlining its preference for domestic proceedings, which implies a possibility of veto in support of China.⁷⁵ The politicised nature of the Court emerges as a corollary of the impediments faced in the UNSC referral attempt for the crimes committed in Myanmar, in contrast to the case of Libya, for instance, where the Security Council referred the situation to the ICC days after the initiation of the hostilities.⁷⁶

The main concern raised from the obstacles faced in Myanmar is that the political instrumentalisation of criminal law could result in limited or no prosecutions of the perpetrators of the crimes, which would sustain the impunity in the country. In an effort to find a solution to the issue and ensure that perpetrators are held accountable to some extent, the ICC Prosecutor, Fatou Bensouda, initiated a preliminary examination after a decision of the Pre-Trial Chamber confirming the Court's jurisdiction in September 2018.⁷⁷ The Prosecutor initiated a preliminary examination over the alleged crime of the deportation of Rohingya from Myanmar to Bangladesh, pursuant to article 12(2)(a) of the Rome Statute.⁷⁸ The decision on jurisdiction over the crime was based on the assessment that when at least one element of a crime is committed on the territory of a State party to the Statute, or when a crime is completed on the territory of a State party, then the alleged crime falls within the scope of the Court's jurisdiction under article 12(2)(a).⁷⁹

The initiative of the Prosecutor generated mixed reactions among members of the international community. Some experts argue that this decision is an innovation, underlining the powers of international criminal justice and the determination to prevent perpetrators of grave crimes from going unpunished.⁸⁰ The Prosecutor's initiative is a novelty in the criminal justice system and could enable action against high-level officials in Myanmar who might otherwise benefit from impunity. Conversely, part of the doctrine argues that the Court has expanded the scope of its territorial jurisdiction through the Pre-Trial Chamber's decision without properly taking into account the fact that

Member States to the Statute might not be in favour of an expansive interpretation of its provisions.⁸¹ Despite the different positions on the potential expansion of the Court's mandate, it is noteworthy that it allows the investigation of at least some crimes.

Nonetheless, the potential positive impact of ICC's investigation on the crime of deportation and the procedures it could prompt provide a limited solution. The Court can only exercise its jurisdiction over specific crimes which were executed or partly committed on the territory of Bangladesh.⁸² However, the majority of crimes were committed on the territory of Myanmar, which include allegations of genocide, sexual and gender-based violence and torture, as well as other crimes against humanity and war crimes.⁸³

Finally, even in the scenario that the ICC prosecutes the perpetrators of the crimes committed within Myanmar's territory, the potential of success is limited. More specifically, as Guilfoyle observed, a successful outcome is doubtful without the cooperation of the State where the crimes took place.⁸⁴ The case of Al-Bashir, who remained free for more than nine years after his arrest warrant, provides an example in support of the argument.⁸⁵ Myanmar has already rejected the decision of the Pre-Trial Chamber and has declined to cooperate with the Court,⁸⁶ which challenges the prospects of success of future prosecutions.

C ESTABLISHMENT OF AN AD HOC COURT

The likelihood that an *ad hoc* court will be established is small. According to article 29 of the UN Charter, the UNSC may establish subsidiary organs to assist in the performance of its functions.⁸⁷ This provision can be invoked to create *ad hoc* courts with compulsory jurisdiction upon States. However, invoking article 29 would require the affirmative vote of nine members, including the concurring votes of the UNSC's Permanent Members,⁸⁸ and, therefore, this scenario faces the same obstacles as with the case of an ICC referral. Hence, the prospects of investigations and prosecutions for the crimes against the Rohingya in the near future through the examined legal avenues are considerably limited.

IV CIVIL SOCIETY DOCUMENTATION OF GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES

The section presents the role of CSOs in the documentation of the crimes against the minority in light of the hindrances faced by domestic courts in Myanmar, the ICC and the UNSC to investigate and prosecute those responsible. The analysis illustrates both the significance of civil society documentation and some key concerns regarding the information collected.

A SIGNIFICANCE OF CSO DOCUMENTATION

For the purposes of the following analysis, Civil Society Organisations (CSOs) are defined according to the UN Office of the High Commissioner of Human Rights' definition and include:

'Individuals and groups who voluntarily engage in forms of public participation and actions around shared interests, purposes or values that are compatible with the goals of the UN: the maintenance of peace and security, the realization of development, and the promotion and respect of human rights. These include human rights defenders and NGOs, victims associations, Unions and community-based groups'.

Due to the limited prospects of investigations and prosecutions for the crimes against the Rohingya in the near future and to ensure that perpetrators, which include high-level military officials, will be tried before competent courts, civil society in Myanmar undertook the documentation of the violations.⁸⁹ The broad documentation by local and international CSOs increased the pressure on the State of Myanmar to investigate the crimes and indict those responsible.⁹⁰ Moreover, it raised awareness of the situation in third States and international actors and triggered the procedures to circumvent any impediments that would sustain a climate of impunity.⁹¹

CSOs' access to the field from the outbreak of the conflict provides an advantage compared to investigative mechanisms, which are not granted access to sites.⁹² Civil society can collect evidence not only of a testimonial nature but also from personal documentation through video and audio tapes of the hostilities which would otherwise not be an option during investigation procedures.⁹³ Especially in cases such as Myanmar, where investigations into serious crimes are not conducted by the concerned State within its own territory, field guidance and access to such material is essential.

The significance of CSOs' documentation is also exemplified by their direct access to victims and witnesses following the commission of crimes. In this case, many Rohingya fled Myanmar in attempts to survive.⁹⁴ Despite the danger of further losses of life in Myanmar, Rohingya are susceptible to trafficking during their stay in Bangladesh,⁹⁵ which could have crucial impact on the outcome of investigations into the crimes. The passage of time can negatively affect documentation efforts, as it might be challenging to locate and ensure the cooperation of key victims and witnesses and, hence, to acquire sufficient evidentiary material that would facilitate the accountability processes.

Furthermore, documenting crimes from an early stage of the crisis is crucial due to the high possibilities of evidence destruction which could obstruct the justice

process.⁹⁶ Indeed, the UN Special Rapporteur on the situation of human rights in Myanmar has underlined that the lapse of time will negatively affect the evidence collection.⁹⁷ This is a worrying issue as the Myanmar government has been reconstructing destroyed Rohingya villages in northern Rakhine and relocating other parts of the population there to eliminate all evidence of the atrocities before investigatory mechanisms can access the areas to collect evidence of the crimes.⁹⁸

Similarly, concerns regarding the impartiality of domestic investigations into the allegations of crimes against the Rohingya⁹⁹ render the collection of evidentiary material by civil society essential for justice procedures. For instance, human rights NGOs, which are generally considered independent entities, can substantially strengthen the value of evidentiary material.¹⁰⁰ Evidence provided by NGOs might be more difficult to challenge, especially in cases where material has been collected by multiple organisations. Local civil society can also introduce cultural considerations in the evidentiary material.¹⁰¹ Local CSOs have a better understanding of the culture and the interplay between different groups within a country. Utilising this knowledge can provide a more complete perspective on the root causes of the crimes, the reasoning of the perpetrators and the possible role of commanders.¹⁰²

CSOs can detect patterns of violence relevant to their respective mandates, therefore potentially enabling additional investigations and prosecutions.¹⁰³ The ICC or a single State do not have the capacities to prosecute all crimes which are committed,¹⁰⁴ potentially leaving an accountability gap. By indicating additional patterns of violence, civil society documentation could contribute to the creation of criminal files so other competent courts can assert jurisdiction. In case different competent jurisdictions undertake actions, this could multiply the indictments issued and reduce impunity.

B CONCERNs REGARDING CSOS' DOCUMENTATION

Even though civil society documentation in cases of crimes such as genocide and crimes against humanity is crucial, there are some concerns which may limit the relevance of this information. The first methodological concern is the inability of CSOs to access all relevant information regarding the crime committed. More specifically, as CSOs do not have investigatory powers, they cannot access key information.¹⁰⁵ This can include access to all sites and testimonies both from victims and perpetrators. As a result, the information provided by CSOs might be insufficient to make an informed legal finding for the purposes of criminal accountability proceedings.

Related methodological concerns are the lack of knowledge of legal requirements and the level of detail of the information collected. Relating back to the case

study of this article, Numerous NGOs in the Asia-Pacific region have expressed a lack of knowledge on the specificities of criminal law and have requested guidance on the gravity threshold of crimes and the evidentiary standards under international criminal law.¹⁰⁶ Less detailed documentation that lacks strong linkages and modes of liability might not be used if submitted as evidence in criminal procedures, simply prolonging the assessment procedure for information of no substantial value.¹⁰⁷ A partial solution could be the adoption of clear guidelines concerning criminal inquiries by NGOs and individuals willing to undertake documentation for the purposes of future submission to criminal procedures. In this direction, WITNESS produced a field guide to explain basic concepts about law and evidence for cases of video filming.¹⁰⁸

Additionally, considering that civil society aims to promote specific interests, the partiality of the information provided could come under scrutiny.¹⁰⁹ For instance, human rights organisations involved in the documentation and collection of information might have a political agenda which could affect their perception of how events unfolded or the presentation of their findings.¹¹⁰ Similarly, evidence collected by individuals, victims or witnesses could be biased, emphasising more on incriminatory information and potentially excluding exculpatory evidence.¹¹¹ This could affect the fairness of criminal proceedings due to the inequality of arms towards the defendants.

The possibility of assessing the authenticity and credibility of CSOs' documentation is also a central concern in criminal proceedings. In the case of Myanmar, the reliance on open source evidence, including evidence collected by individuals and shared in social media platforms, requires particular attention as technological advancements allow individuals to interfere with and manipulate this information.¹¹² The potential inability of CSOs to access sites and evaluate the credibility of the information collected could cause doubts about its reliability; this may subsequently exclude the evidence from criminal proceedings.

Finally, related to the previous concerns, civil society documentation is not directly admissible in courts. Due to the significance of this form of documentation, national authorities could introduce provisions in their penal systems which recognise documentation by civil society as a basis for the initiation of their investigatory and prosecutorial processes. This way, States would increase the amount of evidence collected by their criminal authorities and strengthen the fulfilment of their duties to investigate and prosecute.

The unwillingness of Myanmar to allow international presence on the ground greatly affects third States' duties to investigate and prosecute those responsible for the crimes against the Rohingya. When evidentiary material cannot be attained otherwise, it can lead to the (almost

exclusive) dependency of third States' investigations on civil society documentation. In this sense, such material plays a key role in the promotion of accountability for crimes amounting to genocide, crimes against humanity and war crimes.¹¹³ Nevertheless, since the obligation to investigate is binding towards States and the primary role of CSOs is not the investigation of serious human rights violations, their capabilities are limited. The lack of criminal elements in CSOs' documentation, their inability to create criminal files directly admissible to courts and concerns regarding the reliability of the information collected create a gap between CSOs' documentation and States' duty to investigate.

V THE IIMM: A LEGAL BRIDGE BETWEEN CIVIL SOCIETY DOCUMENTATION AND STATES' OBLIGATIONS

The need of alternative ways of ensuring accountability are reinforced by the obstacles in the accountability process for the case of the Rohingya through domestic courts, the ICC and the UNSC, in conjunction with broad documentation of the crimes by the FFM¹¹⁴ and NGOs, such as the PILPG.^{115,116} To ascertain the admissibility of the evidentiary material in competent courts and to facilitate criminal proceedings, the UNHRC adopted a resolution that created the Independent Investigative Mechanism for Myanmar (IIMM).¹¹⁷

Resolution 39/2 created an ongoing independent mechanism for Myanmar with the aim to:

'collect, consolidate, preserve and analyze evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011, and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law'.¹¹⁸

A ASSESSING THE NECESSITY OF THE IIMM

An initial concern regarding the IIMM is whether its creation was an unnecessary addition due to documentation by different stakeholders in the area.¹¹⁹ Besides local and international human rights organisations and civil society monitoring the situation and reporting on the violations, the UNHRC established the FFM to document the crimes committed in Myanmar, particularly in Rakhine.¹²⁰ The answer to the question might not be straightforward, but it becomes clearer after a closer look at the Mechanism's mandate. The Mechanism shall collect existing

documentation for the creation of files to be used in future criminal proceedings,¹²¹ which expands on the FFM's mandate to ensure that criminal proceedings are realistic in the future. Consequently, although the IIMM's mandate might be overlapping to some extent with that of the FFM, the Mechanism has a fundamentally different aim to fulfil, directly linked with criminal processes.

An interrelated issue is whether the multiplicity of mechanisms of criminal justice does not have an added value but rather sustains the fragility of the system. Indeed, on the one hand, the establishment of the IIMM brings forward the limitations of the current international criminal system, in particular the dependence of the initiation of accountability proceedings on political support.¹²² On the other hand, the initiative demonstrates the persistence of international community to ensure accountability for the crimes committed by Myanmar officials and to end impunity.¹²³ Considering the lack of alternative solutions, the creation of the IIMM is justified and necessary due to its unique purpose in coordinating the different initiatives of actors currently operating in the area in order to promote future accountability.

Finally, concerns about the reliability of CSOs' information, which is among the main sources of evidence about the crimes committed against the Rohingya, necessitated the creation of the IIMM. More precisely, despite the importance of civil society documentation, its admissibility as evidence to international criminal proceedings is not guaranteed because of a lack of emphasis on the necessary constituent elements of criminal files and reliability concerns. In this respect, the IIMM's role in assessing the reliability and probative value of the evidence to identify gaps and collect additional information¹²⁴ is key in ensuring the admissibility of CSOs' documentation to criminal proceedings.

B TEMPORAL AND GEOGRAPHICAL SCOPE OF THE IIMM'S MANDATE

As stipulated in the terms of reference of the IIMM, the Mechanism shall collect evidence concerning the most serious violations of international law committed in Myanmar.¹²⁵ The reference to universal jurisdiction in conjunction with a broad mandate could multiply the available judicial channels and, consequently, the delivery of further indictments. While the ICC or an individual State lack the capacity to prosecute all crimes committed, the availability of multiple adjudicatory avenues could ensure more indictments and, therefore, a reduction of the existing accountability gap. Indeed, parallel activities of different criminal jurisdictions, as it might become the case regarding universal jurisdiction in Argentina and potentially of the ICC, could ensure more prosecutions over different crimes and contribute to the restriction of impunity of the perpetrators.¹²⁶

Conversely, a broad mandate covering all serious crimes under international law might raise feasibility

questions due to the overwhelming volume of documentation.¹²⁷ In a similar case of the International Impartial Investigative Mechanism (IIMM), tasked with assisting in the investigation and prosecution of those most responsible for the crimes committed in Syria,¹²⁸ an equally wide mandate has resulted in the submission of extensive documentation to the IIMM which might significantly delay the initiation of criminal proceedings due to processing time. Indeed, in its report to the UNGA, this was among the main concerns raised by the IIMM.¹²⁹ The reference to this concern does not aim to suggest the limitation of the mandate of the IIMM, but rather to serve as a point of deliberation for the organisations submitting evidentiary material. On the contrary, a limitation of the mandate, although limiting the volume of documentation, might result in an accountability gap.¹³⁰

C OPERATION OF IIMM

The IIMM will mainly base the collection of its evidence on material from the FFM and CSOs.¹³¹ Albeit the cooperation with the FFM, a mission also created by the UNHRC, is evident, the cooperation with CSOs deserves further analysis. Civil society documentation of genocide, crimes against humanity and war crimes committed against the Rohingya can provide crucial evidence to the Mechanism which might otherwise be lost or destroyed. Moreover, local CSOs can provide assistance to the IIMM in identifying recurring patterns of violence and selecting cases. Lastly, the Mechanism could consult local civil society to identify the crimes for which accountability would be a priority for the victims. For instance, as sexual and gender-based violence is among the main forms of violence against the Rohingya,¹³² CSOs could advise the IIMM whether prosecuting such cases would be beneficial for the victims or whether it would result in their stigmatisation due to the religious nature of the minority.

Albeit crucial, the IIMM's collaboration with CSOs might entail challenges. The first is that civil society, and in particular human rights organisations, do not traditionally work in the criminal justice field. As a consequence, organisations might not be willing to cooperate with the Mechanism as the creation of criminal files could require the reversal of anonymity afforded in their reports which protects their sources. A solution could be offered by the creation of a protocol of collaboration between the IIMM and NGOs that sets out specific principles, including witness and victim protection.¹³³

Moreover, as illustrated in the previous section, CSOs often pursue political agendas which might affect their findings.¹³⁴ This could result in the CSOs sharing a biased narrative to the IIMM about the crimes committed. Although the IIMM should still consider cooperating with organisations pursuing a certain agenda, the work of the Mechanism should ensure its independence and the impartiality of the criminal files created. In this sense, while the Mechanism can collaborate with CSOs,

the creation of criminal files should be done by the IIMM after a thorough examination of the documentation provided. The preparation and signature of a protocol of collaboration between organisations providing documentation and the IIMM could clarify the role of each party and instruct CSOs about the information to be submitted to the Mechanism.

Finally, in this case, several human rights organisations as well as news organisations have documented the situation, resulting in the duplication of a significant amount of information and gaps in the narrative of the events that took place.¹³⁵ By collecting and storing documentation by several CSOs, the IIMM could ensure the collation of evidence from all different sources to provide a comprehensive picture of the commission of crimes. Furthermore, the Mechanism could serve as a bridge between diverse CSOs operating in the same area, coordinating the different initiatives and providing support to avoid the duplication of information.

The information collected by the IIMM can range from testimonies to documentary evidence.¹³⁶ More precisely, interviews and the direct contact with victims and witnesses shall be utilised either as evidence or as supplementary means in cases where the evidence provided is incomplete.¹³⁷ The reliance on interviews as a means to ensure the reliability of the information collected, as well as its use as evidence *per se*, increases the risk of biases. The IIMM currently does not have access to sites in Myanmar¹³⁸ which could affect the findings of the Mechanism and their ability to make an informed legal finding. More specifically, a limited access to sites and (potentially to) interviewees within Myanmar could result in the creation of a narrative which does not fully reflect the complexities of the situation. As a result, interviewees should be carefully selected to secure accurate legal findings.

Moreover, the utilisation of interviews with victims and witnesses as evidence would require obtaining the informed and valid consent of the interviewees. Ascertaining such consent might be difficult when the details about the court proceedings, including the potential defendants, are not available. The Mechanism will, hence, need to ensure reliable contact details for victims and witnesses; this would facilitate obtaining consent before the initiation of accountability proceedings.¹³⁹

Interviews with victims and witnesses also entail dangers of retaliation by the alleged perpetrators. In addition to the collaboration with CSOs in the area of witness protection, the IIMM should ensure the protection of the interviewees it directly contacts to limit the possibility of reprisals. Lastly, multiple interviews of victims by CSOs and the IIMM could result in the re-traumatisation of victims. The Mechanism should be aware of this risk and ensure the minimisation of interviews and the provision of psychosocial support.¹⁴⁰

The collection of documentary evidence is also a puzzling process. For instance, a challenge identified for the IIIM in Syria was handling the voluminous amount of documentation.¹⁴¹ In the case of Myanmar, a number of actors have documented the crimes committed against the Rohingya, while as mentioned in its latest report, the IIMM gathers material from open sources, including social media.¹⁴² This could result in similar issues of excessive information flow as in the case of the IIIM. Accordingly, the IIMM must be sufficiently staffed to be able to process the overwhelming amount of information.

Additionally, as analysed, the reliability of CSOs' documentation is not ensured, particularly due to the prominent role of open source documentation. For example, evidence collected by individuals on their devices and then uploaded on social media or applications created by NGOs can pose challenges to traditional legal actors, such as judges and lawyers, due to evidentiary biases related to the selective nature of the documentation.¹⁴³ Similarly, the emergence of digital information which is publicly available, as in the case of evidence collected by individuals and shared on social media platforms, presents increased risks of falsification.¹⁴⁴ The IIMM, tasked with processing and analysing digital information and staffed with experts on new technologies, could substantively contribute to overcoming such concerns and assist courts in initiating criminal proceedings that rely on this form of evidence.¹⁴⁵

Finally, although CSOs' documentation of crimes has a significant value, it often lacks both the *mens rea* and modes of linkage or individual criminal liability which could otherwise make it directly admissible to criminal courts and tribunals. By discovering key evidence which CSOs might not have access to, including potential access to perpetrators, the IIMM can provide a precise analysis of the crimes committed in accordance with international criminal standards. More specifically, the Mechanism could develop a theory of responsibility, connect specific crimes to specific perpetrators and establish the intent of the perpetrators.¹⁴⁶ The emphasis of the IIMM on the creation of criminal files explicitly identifying these constituent elements is an innovative aspect that could ensure the use of evidence collected by third actors in future criminal proceedings.

Access to territory through the cooperation of the State could considerably enhance the findings of the Mechanism.¹⁴⁷ By ensuring access to territory, the IIMM could have a more facile and more direct access to victims, witnesses and perpetrators, as well as original evidentiary material to ensure broader documentation and to assess the credibility of its sources. The FFM has been allowed to enter Myanmar to document the violations;¹⁴⁸ thus, the IIMM should negotiate a similar arrangement with the government. As stipulated under paragraph 23(b) of its founding resolution, the Mechanism shall have the capacity to document and verify the validity of the

information submitted to it through field engagement.¹⁴⁹ This could be translated as permitting the Mechanism to enter Myanmar territory and could serve as a basis in relevant negotiations for the granting of access.

However, a contrasting argument to the access to territory is the nature of the Mechanism. The quasi-prosecutorial nature of IIMM,¹⁵⁰ through the gathering of files for criminal prosecutions, could raise questions regarding the implications of gaining of access. As the IIMM has a more expanded mandate compared to the previous FFM, access to Myanmar territory might increase its powers. Therefore, before seeking admission to sites, the IIMM should carefully consider the implications of such a decision.

Overall, the IIMM's collection of evidentiary material from a multiplicity of actors and the emphasis on linkages and modes of liability constitute an essential part of criminal proceedings. Through its emphasis on these integral elements, the IIMM acknowledges the role of third actors' documentation and directly links them with accountability proceedings. Especially in cases such as Myanmar, where international access to the sites is denied, the documentation by civil society and the creation of criminal files by the Mechanism form an essential component of the investigatory process.

The resolution establishing the Mechanism specifically calls for the initiation of criminal justice processes through either an ICC referral or other criminal courts and tribunals to which the IIMM's files will be submitted.¹⁵¹ The significance of the reference to other criminal courts or tribunals is evident: it legitimises the exercise of universal jurisdiction by third States.¹⁵² The explicit reference to accountability by means of universal jurisdiction by third States also suggests that those efforts cannot be easily challenged as violations of the principle of sovereignty, thus encouraging States to prosecute perpetrators.¹⁵³ If the IIMM leads to successful prosecutions, it could result in a shift in the involvement of third actors in documentation during ongoing crises and the general recognition of their role in investigations and prosecutions¹⁵⁴ without exclusive dependence on domestic courts and the ICC.

The application of universal jurisdiction can provide a solution to the stalemates in accountability until the initiation of further proceedings either by the ICC or by Myanmar courts. However, the exercise of universal jurisdiction also faces obstacles. More specifically, both the exercise of conditional universal jurisdiction and absolute universal jurisdiction have certain limitations.

Conditional universal jurisdiction requires having custody of the accused as a prerequisite for prosecution.¹⁵⁵ Opportunities for the exercise of this version of universality include the case of the two Tatmadaw soldiers who confessed to killing dozens of Rohingya and are currently in the Netherlands.¹⁵⁶ The creation of criminal files by the IIMM could ensure that

in similar cases, States' prosecutorial authorities would possess sufficient material to investigate and prosecute suspected perpetrators in their territories. Nonetheless, this could lead to limited prosecutions and could only offer a partial solution to the accountability gap.

Absolute universal jurisdiction, according to which suspected perpetrators can be prosecuted regardless of the place of the commission of the crime and the nationality of the victim and the perpetrator,¹⁵⁷ could also be asserted over the crimes against the Rohingya for the prosecution of suspected perpetrators by third States. An example includes the complaint before Argentinian courts.¹⁵⁸ Through the support of the IIMM's investigations, States could overcome stalemates usually encountered, for instance, related to acquiring evidence for crimes to which they have no link.

Concerns about the rights of the accused could prevent States from initiating trials *in absentia*. Moreover, many legal systems do not permit trials *in absentia* and, hence, the presence of the accused would still be required for the initiation of trial proceedings.¹⁵⁹ In such case, if the accused never enters or is not extradited to the prosecuting country, authorities would end up investigating cases for which nothing could ultimately be done. In this respect, the IIMM could bridge different accountability initiatives and share the criminal files with the States in which suspects are apprehended. Consequently, the possibility of asserting universal jurisdiction over the crimes committed against the Rohingya could offer a limited solution to impunity.

D THE IIMM AS A LEGAL BRIDGE

Civil society documentation of genocide, crimes against humanity and war crimes is crucial. Their access to the field, victims and witnesses ensures the availability and sufficiency of evidence which might otherwise be lost or destroyed over the years and can reinforce the initiation of investigations and prosecutions. The inability of third States to conduct investigations into the crimes in Myanmar results in the almost exclusive dependence on CSOs' documentation, rendering it an important component of their duty to investigate and prosecute. Despite the significance of civil society's documentation, the evidence collected might not be reliable or fulfil international criminal law standards and, as a consequence, it might not be used in criminal proceedings.

This consideration, in conjunction with the stalemates in the accountability process for the crimes against the Rohingya, led to the creation of an Investigative Mechanism by the UNHRC. The Mechanism will create criminal files based, among other forms of evidence, on CSOs' documentation. In this process, the IIMM can coordinate the various civil society initiatives in the area, combine the findings of diverse civil society initiatives and

create stronger evidence of the commission of genocide, crimes against humanity and war crimes.

Through the collection of civil society documentation and its use in criminal files, the IIMM forms a legal bridge between CSOs' documentation and investigative and prosecutorial processes. Even though the focus of the article is on international criminal proceedings before domestic courts, the work of the Mechanism can serve as a legal bridge also between CSOs and the ICC or other future accountability forums. Lastly, by connecting CSOs' documentation and accountability proceedings, the Mechanism could lead to a predictable international criminal justice system which operates from the occurrence of international crimes until the cessation of the unlawful acts and the accountability of perpetrators.

The mechanism is an innovative solution to overcome the political stalemates faced. The creation of trial-ready case files by the IIMM can lay a foundation for accountability, substantively assisting competent jurisdictions to process the overwhelming amount of documentation which could otherwise require years to commence due to capacity limitations, and to fulfil their investigatory and prosecutorial duties. Notwithstanding the initial reasons that resulted in this innovative solution, the role of the examined stakeholders should be recognised as they could link processes from the occurrence of the violations until their seizure and the initiation of accountability proceedings, domestically or internationally.

VI CONCLUSION

The article has shown that, in light of the obstacles faced in the individual accountability proceedings by Myanmar, the ICC and the UNSC, the need for foreign domestic prosecutions for the crimes committed against the Rohingya religious minority increases. However, the inability of third States to investigate the crimes committed in Myanmar's territory results in their (almost) exclusive dependency on documentation collected by CSOs. Civil society documentation is crucial so that third States can assert their jurisdiction over the crimes against Rohingya. The concerns regarding CSOs' documentation and the impediments in its direct admissibility into criminal trials necessitated the creation of the IIMM as a legal bridge between documentation and States' investigatory and prosecutorial duties. The combined initiatives of civil society and the IIMM form an essential component of the duty to investigate and prosecute, reinforcing the fulfilment of States' obligations. Finally, the Mechanism sets a precedence where civil society located at the field could actively participate in the promotion of the interests of justice.

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COMPETING INTERESTS

The author has no competing interests to declare.

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