

Ending Impunity in Myanmar

Can the **National Unity
Government** of Myanmar Delegate
Jurisdiction to the **International
Criminal Court**?

A Legal Analysis



August
2021

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Cover:

Myanmar Army troops on Armed Forces Day in Naypyidaw, March 27, 2007. This annual military parade commemorates Myanmar resistance to Japanese occupation in 1945. On Armed Forces Day 2021, the Myanmar Army and police killed more than 100 protesters and others with impunity.

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Several thousand troops march on Armed Forces Day in Naypyidaw. Myanmar has one of the largest standing armies in Southeast Asia with almost half a million soldiers.

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On February 1, 2021, the Myanmar military detained the state counsellor, president, and others, seizing power in an attempted coup d'état. Military generals pictured here on Armed Forces Day in Naypyidaw, 2007, from left to right: Lieutenant General Thein Sein (president from 2011 to 2016), Lt. Gen. Kyaw Win, Lt. Gen. Khin Maung Than, Lt. Gen. Maung Bo, Lt. Gen. Tin Aung Myint Oo, Lt. Gen. Tin Aye, Soe Thein (Navy), and Myat Hein (Air Force).

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Summary

The Myanmar military and police are responsible for mass-atrocity crimes—namely war crimes, crimes against humanity, and genocide—commissioned over several decades against the diverse people of Myanmar. To date, the architects and perpetrators of these crimes have enjoyed complete impunity. By delegating jurisdiction to the International Criminal Court (ICC) to investigate and prosecute atrocity crimes, the recently established National Unity Government (NUG) of Myanmar has an opportunity to reverse the culture of impunity and potentially prevent future atrocities in Myanmar.

This report finds that the NUG can grant jurisdiction to the ICC to address atrocity crimes perpetrated in Myanmar. The NUG can do this in two ways: First, by lodging what is known as an Article 12(3) declaration with the Court, and second, by formally acceding to the Rome Statute.

A declaration by the NUG under Article 12(3) of the Rome Statute could provide immediate jurisdiction to the Court to address specific atrocity crimes, including past crimes. Fortify Rights recommends that the NUG delegate jurisdiction to the ICC for any atrocity crimes that may have occurred since 2002—the date that the Rome Statute came into force—and future crimes.



Civilians in Je Gau Pa internally displaced persons camp in Kachin State, displaced by ongoing war, await blankets and supplies from local aid workers. Since June 2011, war in Kachin State displaced more than 100,000 ethnic-Kachin civilians. The Myanmar military is responsible for decades of wartime mass-atrocity crimes against Kachin people.

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Additionally, accession to the Rome Statute would entitle Myanmar to all the rights of a State Party to the Statute and enable it to provide the ICC with jurisdiction over future atrocity crimes.

The Rome Statute is a multilateral treaty that came into force in 2002, providing the legal framework to establish the ICC. Located in The Hague, the Netherlands, the ICC has the authority to investigate and prosecute mass-atrocity crimes as a “court of last resort.” Some 123 countries are States Parties to the Rome Statute of the ICC, meaning they have ratified or acceded to the Rome Statute.

By ratifying or acceding to the statute, states may delegate their jurisdiction to the ICC to prosecute individuals responsible for atrocity crimes committed on their territory or by their nationals. The court’s jurisdiction is relevant when the home state is unable or unwilling to adequately address such crimes. States may grant jurisdiction to the Court for atrocity crimes dating back to July 1, 2002 but not earlier. For states that have not delegated jurisdiction to the Court, the ICC can only consider atrocity crimes referred to the prosecutor of the ICC by the United Nations Security Council.

The Committee Representing Pyidaungsu Hluttaw (CRPH)—a committee of elected Myanmar parliamentarians that formed following the February 1 military coup *d’état*—established the NUG of Myanmar on April 16, 2021. The people of Myanmar overwhelmingly recognize the NUG as their legitimate, elected government, as do certain state and non-state actors internationally. As such, the NUG can exert authority to enter the country into binding treaties under international law.



◀ For decades, the Myanmar military and police have arbitrarily detained of human rights defenders and others, often subjecting them to torture. A former political prisoner in Mae Sot, Thailand demonstrates various "stress positions" inflicted on prisoners in Myanmar, including during interrogation.
©Nic Dunlop/
Panos, 2005

The Myanmar military overthrew the elected government of Myanmar in a *coup d'état* on February 1, 2021 and arrested senior civilian leaders and others. The people of Myanmar have protested the junta nationwide using various nonviolent tactics, including through street protests and a national Civil Disobedience Movement (CDM), which has involved untold numbers of government employees choosing not to report for work. The CDM has effectively brought the daily business of the government to a halt.

The Myanmar military and police responded to peaceful protesters and perceived opponents with deadly force, murdering and arresting civilians *en masse* in towns and cities throughout the country. The junta and its forces used forced labor, raided and destroyed property, blocked or restricted internet access, attacked health care workers and vehicles, and terrorized the general population. At the time of writing, the Myanmar military and police have killed more than 900 men, women, and children, and, by its own admission, the junta arrested and detained more than 9,000 people between February 1 and April 15, 2021 alone.

In decades past, the military perpetrated similar atrocities as those happening now throughout the country. The military's past atrocities primarily targeted communities in ethnic states, directly affecting millions of people. In recent decades, the military forcibly displaced millions of ethnic civilians, particularly along Myanmar's borders. It razed thousands of ethnic villages throughout the country and killed untold numbers of men, women, and children, including in multiple, well-documented massacres. It committed widespread and systematic rape and sexual violence against women and girls as well as men and boys. It committed these and other atrocities, including genocide, with impunity.

Well before the coup of 2021, Fortify Rights documented evidence of genocide against Rohingya as well as other war crimes and crimes against humanity against other ethnic nationalities, including the Kachin and Shan people. Since February 1, the military has launched offensives in ethnic regions, deploying heavy artillery and air strikes on civilian areas, particularly in Karen (also known as Kayin state) and Karenni (also known as Kayah) states, killing and injuring civilians and displacing more than an estimated 177,500 people between February and June 2021.



Myanmar authorities have subjected untold political prisoners to hard labor. Shackled prisoners are shown here doing hard labor in Tone Le Lone, Shan State, Myanmar.
©Nic Dunlop/
Panos, June 2005



An ethnic Pa-O woman farmer at a market in Shan State, 2005. Myanmar is one of the world's most diverse countries, with more than 100 distinct ethnic nationalities, all of whom have survived military rule and severe human rights violations.

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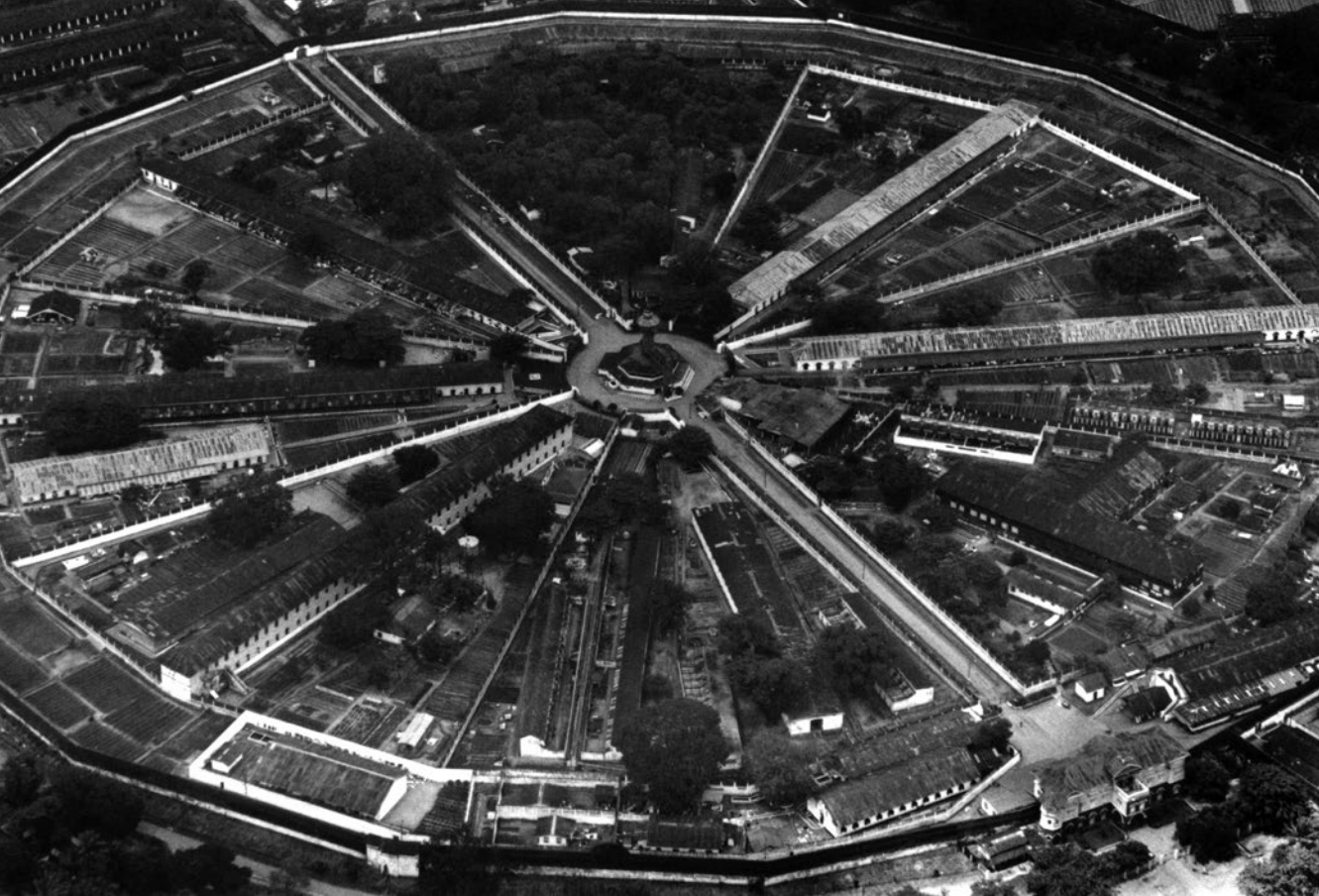
An ethnic-Karen woman from Karen State, Myanmar, in Mae La refugee camp on the Thailand-Myanmar border, 2005. Karen State is home to the world's longest-running civil war. The Myanmar military has razed thousands of Karen villages and committed atrocities against women, men, and children with impunity. At the time of writing, tens of thousands of Karen refugees—including Christians and Buddhists—still live in refugee camps in Thailand.
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A Rohingya woman refugee from Rakhine State, Myanmar, in Bangladesh, 2007. The Myanmar military has long persecuted and denied the existence of the Rohingya people, most of whom are Muslims. In 2017, in response to a Rohingya-militant-led assault that reportedly killed a dozen officials, the Myanmar Army killed, tortured, raped, and imprisoned Rohingya en masse, forcing more than 700,000 across the border to Bangladesh. Fortify Rights, a U.N. Fact-Finding Mission, and others found the military was responsible for the crime of genocide against Rohingya.
©Nic Dunlop/Panos, 2007



An ethnic-Thet woman in Mrauk-U, Rakhine State, Myanmar, 2006. Rakhine State, also known as Arakan State, has been the site of war crimes and crimes against humanity against Arakanese people—the largest ethnic group in the state, most of whom are Buddhist—as well as Rohingya Muslims, Kaman Muslims, and smaller tribes, such as the Daingnet and Thet, the latter of which are mostly Buddhist. ©Nic Dunlop/Panos, 2006



Lodging a declaration under Article 12(3) of the Rome Statute to grant immediate jurisdiction to the ICC followed by full accession to the Rome Statute would be an effective way for the NUG to demonstrate to the people of Myanmar and the international community that Myanmar is willing to advance internationally recognized accountability mechanisms. While these measures alone would not suffice to end and remedy all ongoing atrocities, they would bring the country closer to ending deadly cycles of impunity. Fortify Rights believes that accession to the Rome Statute would also likely have a preventative effect, requiring military leadership to consider in its decision-making calculus the possibility of prosecution by a neutral international court.

Chapter I of this report provides an analysis of the NUG's status under international law. To engage and enter binding international treaties, the NUG must be authorized as a representative of the sovereign government. Past practice suggests that governments with significant international recognition can represent and act on behalf of the state, even in situations where the government does not exercise effective control over the territory or people—such as in the situation of a *coup d'état*. Given that the NUG is largely recognized by the people of Myanmar as the democratically elected Government of Myanmar and has significant support from members of the international community, this chapter finds that the NUG has the authority to represent and act on behalf of Myanmar, including to engage on and enter international treaties.

Chapter II of this report explores the two non-exclusive options available to the NUG to grant jurisdiction to the ICC—by lodging a declaration under Article 12(3) of the Rome Statute and by acceding to the treaty. Both options would allow the Court to prosecute mass-atrocity crimes committed by the Myanmar security forces when

The notorious Insein Prison in Yangon, Myanmar, in 2006. Thousands of political prisoners have passed through its gates. The prison is known for its harsh conditions and routine use of torture and ill treatment. Since February 1, 2021, the military junta has imprisoned several thousand political prisoners, including State Counsellor Aung San Suu Kyi, Australian economist Sean Turnell, American journalist Danny Fenster, as well as thousands of human rights defenders, journalists, doctors and medics, artists, writers, and entertainers.

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Ethnic-Karenni soldiers at war with the Myanmar military move through the jungle in October 2006.

The Karenni National Progressive Party have been at war with the Myanmar military for decades, for ethnic rights and federal democracy. In 2021, following its attempted coup d'état, Myanmar military-led attacks displaced tens of thousands of civilians in Karenni State.

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certain conditions are met; however, accession would provide jurisdiction to the Court that would be difficult to revoke, strengthening accountability to address and potentially prevent atrocity crimes in the future.

The first section under Chapter II considers the option of immediately engaging the ICC through Article 12(3) of the Rome Statute. By lodging a declaration under Article 12(3), the NUG may delegate to the ICC its jurisdiction to prosecute atrocity crimes committed in Myanmar. To provide the Court with the widest possible jurisdiction—with an aim toward ending the military's impunity—the NUG could and should grant the Court jurisdiction over all past atrocities dating back to July 1, 2002 along with an indefinite duration to cover future crimes as well.

The second section under Chapter II explains how the NUG may become a State Party to the Rome Statute by depositing with the Secretary-General of the U.N. an “instrument of accession” to the treaty. Depositing and having the U.N. Secretary-General accept an instrument of accession is the only requirement for a country to become a State Party to the Rome Statute. If the instrument is accepted, Myanmar would most likely become a State Party to the Rome Statute with the ability to exercise full rights under the treaty.

In exploring the option of acceding to the Rome Statute, this report also discusses the high threshold required by the principles of international treaty law to challenge a successfully deposited instrument of accession. Procedurally, the Assembly of



States Parties to the Rome Statute—the management oversight and legislative body of the ICC—would likely be the body to consider any challenge to an accession to the Rome Statute. If a challenge arose, the Assembly may settle the dispute itself—possibly through a vote—or recommend another means to settle the dispute.

As explained in this report, only State Parties to the Rome Statute may challenge a validly deposited accession to the statute. Notably, states that may be predisposed to challenge the NUG’s ability to accede to the Rome Statute—such as China, the Russian Federation, and certain Southeast Asian governments—are not parties to the Rome Statute. Therefore, a successful challenge to the NUG’s accession to the Rome Statute is unlikely.

Bold, historic leadership is required to end the Myanmar military’s decades-long cycles of impunity, and it must come from multiple sources. Governments besides the NUG have a role to play. At a minimum, U.N. member states should acknowledge the NUG as the legitimate government of Myanmar and support its credentials at the U.N.



An amputee is fitted for a prosthetic in the Mae Tao Clinic in Thailand, near Myanmar’s eastern border, in June 2006. Myanmar is one of the world’s most landmined countries, and all parties to its many armed conflicts have used them. The Myanmar military has targeted civilians with landmines and used them to prevent civilians from returning to their villages. The military often uses people as human minesweepers as well—a war crime.

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Rohingya Muslim men pray at the Jama Mosque in Sittwe, Rakhine State, on the country’s western border. Myanmar authorities closed the mosque in 2012, when clashes between Buddhists and Muslims led to statewide, state-sanctioned attacks against Rohingya. The military, police, and extremists razed Rohingya villages, killing masses and eventually forcing residents into squalid internment camps. At the time of writing, the military continues to confine more than 120,000 mostly Rohingya to more than 20 internment camps in five townships. An estimated 500,000 other Rohingya are also at grave risk, denied citizenship, freedom of movement, and other human rights.

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*Ethnic-Karenni refugees
displaced by war attend a
Christian church service in
Ban Mai Nai Soi refugee camp
in Thailand, January 2007.
The Myanmar military has
forcibly displaced millions of
civilians in the country over
the years, threatening regional
peace and security.*

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Map of Myanmar



2002-2021

Chronology of Select Atrocities Committed with Impunity in Myanmar & Steps Toward International Accountability

- Atrocities
- International accountability
- Key political events

2002

July 1

The Rome Statute enters into force, creating the ICC, the world's first international court to investigate and prosecute individuals charged with the world's gravest crimes: genocide, war crimes, crimes against humanity, and later, the crime of aggression.

JUL

○ 2002 to 2004

The Myanmar military destroys, relocates, or forces the abandonment of more than 240 ethnic villages—mostly in Karen State and eastern Myanmar—displacing an estimated 160,000 persons in systematic attacks.

2004

○ 2004

At least 650,000 civilians are forcibly displaced to date in eastern Myanmar alone, due to armed conflict and Myanmar military attacks.

2005

○ 2005

As the result of armed conflict and military-led persecution, an estimated hundreds of thousands of refugees from Myanmar are in Thailand—mostly ethnic-Karen, Shan, and Karenni, along with smaller numbers of ethnic-Burman human rights defenders—an estimated 60,000 mostly ethnic-Chin refugees from Myanmar are in India, 150,000 mostly ethnic-Rohingya refugees are in Bangladesh, and 25,000 are in Malaysia.

October 21

Archbishop Desmond Tutu and former Czech President Vaclav Havel call on the U.N. Security Council to adopt a resolution for nonmilitary intervention in Myanmar in response to ongoing mass-atrocity crimes and impunity.

OCT

2008

○ May 29

Myanmar enacts a new constitution that gives the military a controlling stake in the country's governance—including 25 percent of seats in parliament, unelected, and control of key ministries—and guarantees impunity for crimes committed by the military.

MAY

2010

June 1

After acceding to the Rome Statute on March 23, 2010, Bangladesh becomes a State Party to the Statute.

JUN

August 19

The National League for Democracy (NLD)—Myanmar's main pro-democracy political party co-founded by Aung San Suu Kyi—boycotts the first general elections in Myanmar in more than a decade, noting the elections are neither free nor fair. The military-backed party installs former military general Thein Sein as President.

AUG

2011

June 9

Decades-long civil war resumes in Kachin State, ending a 17-year-long ceasefire between the Myanmar military and the Kachin Independence Army. The end of the ceasefire leads to war crimes, including killings, torture, and deprivations of aid, committed with impunity by the Myanmar military.

JUN

2012

April 1

The NLD participates in by-elections, winning a majority of contested seats.

APR

June and October

Clashes between Buddhists and Muslims in Rakhine State lead to coordinated, state-sanctioned attacks against the long-persecuted Rohingya Muslim population, displacing more than 140,000, and killing untold numbers with impunity. The military confines survivors to dozens of internment camps in five townships, where more than 120,000 remain at the time of writing.

JUN

OCT

2015

November 8

The NLD wins 886 of 1,150 contested seats in parliament in a nationwide general election. The government denies voting-age Rohingya the right to vote or run for office while also disenfranchising hundreds of thousands of other ethnic people.

NOV

2016

October 2016

Rohingya militants attack Myanmar police outposts in Maungdaw Township, Rakhine State, reportedly killing nine. The Myanmar military responds with brutal violence, killing scores, razing villages, raping women and girls, and forcibly displacing more than 90,000 civilians.

OCT

2017

March 24

The U.N. Human Rights Council passes a resolution establishing the Independent International Fact-Finding Mission (IFFM) on Myanmar to “establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, particularly in Rakhine State” as well as Kachin and Shan states. The Government of Myanmar immediately disassociates itself from the resolution and refuses to cooperate.

MAR

August 2017

Following another assault on Myanmar security posts by Rohingya militants, the Myanmar military wages a full-scale attack on Rohingya civilians, killing, raping, and torturing untold masses, razing more than 300 villages, and forcing more than 700,000 refugees to Bangladesh.

AUG

2018

April 9

The Office of the Prosecutor at the ICC requests a ruling from the Court for jurisdiction over the forcible deportation of the Rohingya from Myanmar to Bangladesh.

APR

2018

September 6

The ICC rules that the Court may exercise jurisdiction over the alleged crime of deportation of the Rohingya from Myanmar to Bangladesh.

SEP

September 18

The FFM releases its detailed findings in a 444-page report, finding that the Myanmar military is responsible for genocide of Rohingya and war crimes and crimes against humanity against Kachin and Shan civilians.

2019

November 13

Under the principle of universal jurisdiction, the Burmese Rohingya Organization U.K. and Latin American human rights groups file a petition in an Argentinian court to open a criminal investigation into Myanmar's atrocity crimes against the Rohingya.

NOV

November 11

The Gambia files a case against Myanmar at the International Court of Justice (ICJ) for violating the Genocide Convention concerning its treatment of the Rohingya in 2016 and 2017.

November 14

The Pre-Trial Chamber III of the ICC authorizes the Office of the Prosecutor to proceed with an investigation into forced deportation and other possible crimes against Rohingya in 2016 and 2017.

DEC

December 11

Myanmar State Counsellor Aung San Suu Kyi, representing Myanmar at the ICJ in The Hague, defends the military against allegations of genocide against Rohingya. She does not mention the Rohingya by name, keeping with the state practice of denying their existence.

2020

JAN

January 23

The ICJ unanimously indicates legally binding "provisional measures of protection" for Rohingya, requiring the Government of Myanmar to preserve evidence of genocide and to report to the Court every six months on its progress implementing the order, among other measures.

September 8

Two Myanmar Army soldiers who confessed to committing atrocities against Rohingya civilians are transferred from Bangladesh to the ICC in The Hague—becoming the first perpetrators from Myanmar to be in the hands of the ICC.

SEP

NOV

November 9

The NLD overwhelmingly wins reelection in Myanmar's second democratic election. During the election, the government denied voting-age Rohingya the right to vote or run for office.

2021

February 1

The Myanmar military overthrows the rightfully elected civilian government, imprisoning State Counsellor Aung San Suu Kyi, President Win Myint, and dozens of others in the early-morning hours.

FEB

February 9

As mass anti-junta protests spread throughout the country, Myanmar security forces fatally shoot in the head a 19-year-old woman in Naypyidaw. In the coming months, the military and police go on to kill more than 900 civilians, including scores of children, imprisoning several thousand others.

April 16

Elected officials, overthrown by the coup, form the National Unity Government (NUG) based on the mandate bestowed on it by the voters in the 2020 general election.

APR

June 28

NUG Minister of International Cooperation Dr. Sasa tells a news conference that his government is preparing to engage the ICC to prosecute Senior General Min Aung Hlaing and others at the ICC.

JUN



Background

On February 1, 2021, the Myanmar military arrested State Counsellor Aung San Suu Kyi, President Win Myint, and other senior officials and opinion leaders in an attempt to overthrow the elected government and exert control over all levers of state power.¹ The people of Myanmar recognized the military junta as an illegal regime and, beginning in early February, millions took to the streets or otherwise protested in nationwide peaceful demonstrations against the coup.²

On February 9, the Myanmar military and police began using live ammunition on peaceful protesters and passersby, killing more than 900 people from February 9 to the time of writing.³ The authorities also began a process of widespread and systematic imprisonment of protesters, critics, journalists, and others, arresting more than 9,900 people from February 1 to April 15, according to the junta's own admission.⁴

While these crimes shocked the world, Myanmar security forces have long perpetrated such crimes—including murder, torture, rape, and imprisonment, against ethnic minorities and others with impunity—and in many cases, with much less domestic and international outrage.⁵ Past military-led mass

1 U.N. Office of the High Commissioner for Human Rights (OHCHR), “Myanmar Coup: UN Expert Calls for Strong International Response Including Sanctions and Arms Embargo,” February 1, 2021, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26706&LangID=E>; Fortify Rights, “Myanmar: Release Government Officials and Human Rights Defenders Detained in Military Coup,” February 1, 2021, <https://www.fortifyrights.org/mya-inv-2021-02-01/>.

2 U.N. Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, Thomas H. Andrews, A/HRC/46/56, March 4, 2021, https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session46/Documents/A_HRC_46_56.pdf.

3 The Assistance Association for Political Prisoners (AAPP) has monitored arrests and detentions since February 1, 2021. See, <http://www.aappb.org>; See, also, OHCHR, “Myanmar: UN Expert Calls for Emergency Coalition to End Junta’s ‘Reign of Terror,’” July 7, 2021, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27282&LangID=E>.

4 State Administrative Council, “The Current Political Situation in Myanmar,” *unpublished*, April 24, 2021, on file with Fortify Rights, p. 60.

5 See, e.g., OHCHR, “Myanmar,” *website*, <https://www.ohchr.org/en/countries/asiaregion/pages/mmindex.aspx>. See also, Fortify Rights, *Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar*, February 25, 2014, https://fortifyrights.org/downloads/Policies_of_Persecution_Feb_25_Fortify_Rights.pdf; Fortify Rights, “I Thought They Would Kill Me”: *Ending Wartime Torture in Northern Myanmar*, June 9, 2014, https://fortifyrights.org/downloads/Fortify%20Rights_Myanmar_9_June_2014.pdf Fortify Rights and the Allard K. Lowenstein International Human Rights Clinic at Yale Law School, *Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar’s Rakhine State? A Legal Analysis*, October 29, 2015, https://fortifyrights.org/downloads/Yale_Persecution_

atrocities include crimes of genocide against ethnic-Rohingya Muslims and war crimes and crimes against humanity against ethnic-Chin, Kachin, Karen, Karenni, Mon, Rakhine (or Arakanese), Shan, and others.⁶

The ICC is the world's first and only permanent international court tasked with prosecuting individuals responsible for genocide, crimes against humanity, war crimes, and the crime of aggression.⁷ The statutory framework to establish the Court—the Rome Statute of the ICC—was developed and adopted in 1998 during a five-week U.N. diplomatic conference in Rome attended by delegates representing 160 countries.⁸ Sixty days after reaching the country ratification threshold of 60, the Rome Statute entered into force, and the Court became operational on July 1, 2002.⁹ The ICC now serves as a “court of last resort” to address the world's most serious crimes when national courts are unable or unwilling to do so.¹⁰

At the time of writing, 123 countries, including 19 countries in the Asia-Pacific region, have ratified or acceded to the Rome Statute.¹¹ As a party to the Rome Statute, a state may delegate their jurisdiction to the ICC to prosecute individuals responsible for atrocity crimes committed on their territory or by their nationals when the state's domestic justice system is unwilling or unable to address such crimes.

of_the_Rohingya_October_2015.pdf; Fortify Rights and United to End Genocide, *Supporting Human Rights in Myanmar: Why the U.S. Should Maintain Existing Sanctions Authority*, May 9, 2016, https://fortifyrights.org/downloads/Fortify_Rights_and_UEG_Supporting_Human_Rights_in_Myanmar_May%202016.pdf; Fortify Rights and The United States Holocaust Memorial Museum, “*They Tried to Kill Us All: Atrocity Crimes Against Rohingya Muslims in Rakhine State, Myanmar*,” November 15, 2017, https://www.fortifyrights.org/downloads/THEY_TRIED_TO_KILL_US_ALL_Atrocity_Crimes_against_Rohingya_Muslims_Nov_2017.pdf; Fortify Rights, “*They Block Everything: Avoidable Deprivations in Humanitarian Aid to Ethnic Civilians Displaced by War in Kachin State, Myanmar*,” August 30, 2018, https://www.fortifyrights.org/downloads/They_Block_Everything_EN_Fortify_Rights_August_2018.pdf; Fortify Rights, “*They Gave Them Long Swords: Preparations for Genocide and Crimes Against Humanity against Rohingya Muslims in Rakhine State, Myanmar*,” July 19, 2018, https://www.fortifyrights.org/downloads/Fortify_Rights_Long_Swords_July_2018.pdf; Fortify Rights, “*Tools of Genocide: National Verification Cards and the Denial of Citizenship of Rohingya Muslims in Myanmar*,” September 3, 2019, <https://www.fortifyrights.org/downloads/Tools%20of%20Genocide%20-%20Fortify%20Rights%20-%20September-03-2019-EN.pdf>; Fortify Rights, “*The Torture in My Mind: The Right to Mental Health for Rohingya Survivors of Genocide in Myanmar and Bangladesh*,” December 10, 2020, <https://www.fortifyrights.org/downloads/The%20Torture%20in%20My%20Mind%20-%20Fortify%20Rights%20-%20December-10-2020.pdf>; Fortify Rights, “*International Criminal Court: Prosecute and Offer Witness Protection to Myanmar Army Deserters*,” September 8, 2020, <https://www.fortifyrights.org/mya-inv-2020-09-08/>. See also, Hannah Beech, et al., “*Kill All You See: In a First, Myanmar Soldiers Tell of Rohingya Slaughter*,” *New York Times*, September 8, 2020, <https://www.nytimes.com/2020/09/08/world/asia/myanmar-rohingya-genocide.html>; Nahlah Ayyed, “*Once Foot Soldiers in Myanmar's Army, Now Potential Witnesses to Mass Atrocities*,” *Canadian Broadcasting Corporation (CBC)*, September 8, 2020, <https://www.cbc.ca/news/world/myanmar-soldiers-custody-hague-1.5715272>.

6 Ibid.

7 Upon coming into force, the International Criminal Court (ICC) was able to exercise jurisdiction over three distinct crimes: genocide, crimes against humanity, and war crimes. The Assembly of States Parties adopted an amendment to the Statute, establishing the crime of aggression on June 11, 2010 and activated the Court's jurisdiction over the crime, effective as of July 17, 2018. *Amendments to the Rome Statute of the International Criminal Court*, adopted June 11, 2010, C.N. 651.2010.TREATIES-8 (2013). See also, ICC, “*Assembly Activates Court's Jurisdiction Over Crime of Aggression*,” December 15, 2017, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1350>.

8 U.N., *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, A/CONF.183/13 (Vol. I), 2002, https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf. See also, U.N., “*UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court*,” July 20, 1998, <https://www.un.org/press/en/1998/19980720.l2889.html>.

9 Rome Statute of the International Criminal Court (Rome Statute), adopted July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9, (2002).

10 U.N., *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*.

11 This includes Palestine, who acceded to the Statute on January 2, 2015. U.N. Treaty Collection, “*Depositary: Status of Treaties*,” Chapter XVIII, 10. Rome Statute of the International Criminal Court,” *website*, July 27, 2021, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=en.

Myanmar is not among the countries that have ratified or acceded to the Rome Statute. By not being a State Party to the Rome Statute, the Court does not have jurisdiction to consider atrocity crimes committed by Myanmar state security forces. Despite this, in November 2019, the Court's Pre-Trial Chamber III authorized the prosecutor to proceed with an investigation into crimes perpetrated against Rohingya in Bangladesh and Myanmar.¹² Relying on Bangladesh's status as a State Party to the Rome Statute, the prosecutor requested jurisdiction from the Court, and was subsequently granted it, to investigate the crime against humanity of forced deportation of Rohingya to Bangladesh, stemming from military-led attacks against civilians in Rakhine State in 2016 and 2017.¹³

On September 8, 2020, two Myanmar Army soldiers were transferred from Bangladesh to the ICC in The Hague, becoming the first perpetrators from Myanmar to be in the hands of the Court.¹⁴ In confessions made prior to their transfer to the ICC and obtained by Fortify Rights, the soldiers provided the names and ranks of 19 Myanmar Army soldiers, including themselves, involved in perpetrating atrocity crimes against Rohingya in 2016 and 2017. Among those, they named six senior commanders, including a lieutenant colonel, a colonel, and three captains.¹⁵ Both men separately claimed to be acting on orders from senior commanders to "exterminate all [Rohingya]," to "shoot all that you see and that you hear," and to "kill all" Rohingya in specific areas.¹⁶

Other international accountability mechanisms also exist to investigate and collect evidence of recent atrocities committed in Myanmar. For example, on March 24, 2017, the U.N. Human Rights Council passed a resolution creating an Independent International Fact-Finding Mission (IFFM) "to establish the facts and circumstances of the alleged recent human rights violations by military and security forces . . . with a view to ensure full accountability for perpetrators and justice for victims."¹⁷ The IFFM subsequently produced several publications documenting the crime of genocide as well as war crimes and crimes against humanity perpetrated primarily by the Myanmar security forces.¹⁸ International advocacy by the human rights movement and principled U.N. member states in addition to the IFFM's reporting, in turn, led the Human Rights Council to create the Independent Investigative Mechanism for Myanmar (IIMM).¹⁹ The IIMM is mandated to "collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011."²⁰

¹² ICC, "ICC Judges Authorise Opening of an Investigation into the Situation in Bangladesh/Myanmar," November 14, 2019, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>.

¹³ *Ibid.*

¹⁴ See, Fortify Rights, "International Criminal Court: Prosecute and Offer Witness Protection to Myanmar Army Deserters." See also, Beech, *et al.*, " 'Kill All You See': In a First, Myanmar Soldiers Tell of Rohingya Slaughter," *New York Times*; Aye, "Once Foot Soldiers in Myanmar's Army, Now Potential Witnesses to Mass Atrocities," *CBC*.

¹⁵ Fortify Rights, "International Criminal Court: Prosecute and Offer Witness Protection to Myanmar Army Deserters."

¹⁶ *Ibid.*

¹⁷ U.N. Human Rights Council, *Situation of Human Rights in Myanmar*, A/HRC/RES/34/22, April 3, 2017, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/081/98/PDF/G1708198.pdf?OpenElement>. See also, Fortify Rights, "Myanmar: U.N. Orders Vital Inquiry into Severe Rights Violations," March 24, 2017, <https://www.fortifyrights.org/mya-inv-2017-03-24/>.

¹⁸ See, *e.g.*, U.N. Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, A/HRC/42/50, August, 8, 2019, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/236/74/PDF/G1923674.pdf?OpenElement>. See also, U.N. Human Rights Council, "Independent International Fact-Finding Mission on Myanmar," *website*, 2020, <https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx>.

¹⁹ U.N. Human Rights Council, *Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar*, A/HRC/RES/39/2, October 3, 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/293/69/PDF/G1829369.pdf?OpenElement>.

²⁰ *Ibid.*

Moreover, in November 2019, The Gambia filed suit against Myanmar at the International Court of Justice (ICJ)—also known as the World Court, which adjudicates disputes between States—in The Hague, alleging violations of the U.N. Convention on the Prevention and Punishment of the Crime of Genocide.²¹ The case is focused on genocidal crimes committed against Rohingya primarily in 2016 and 2017.²² In an historic decision on January 23, 2020, the ICJ indicated four “provisional measures of protection” to protect the rights of Rohingya in Myanmar.²³ In the first provisional measure, the Court held that Myanmar must take all measures within its power to prevent the commission of all acts of genocide, such as killing, causing serious mental or bodily harm, and other acts listed in the Convention.²⁴ The second provision held that the Government of Myanmar must ensure that the Myanmar military and all actors or groups operating under the military’s direction, influence, or control not commit genocide.²⁵ Third, Myanmar must additionally take effective measures to prevent the destruction and ensure the preservation of any evidence related to any acts of genocide.²⁶ Fourth and finally, the ICJ ordered Myanmar to submit a report four months after the order on all measures taken to give effect to the Court’s order and then every six months until a final decision on the case is rendered by the Court.²⁷

Prior to the February 1 *coup d’état*, Myanmar State Counsellor Aung San Suu Kyi represented Myanmar at the ICJ and, before the court, denied allegations of genocide against the Rohingya.²⁸

While the ICJ in The Hague handles disputes between states, the ICC in The Hague is a criminal court that focuses on prosecuting individuals involved in perpetrating atrocity crimes.²⁹ The ICC’s Office of the Prosecutor (OTP) investigates and prosecutes cases. Generally, cases arise before the Court in one of four ways:

21 *The Gambia v. Myanmar*, “Application Instituting Proceedings and Request for Provisional Measures,” 2019 I.C.J. 178, November 11, 2019, <https://www.icj-cij.org/public/files/case-related/178/178-20191111-APP-01-00-EN.pdf>; International Court of Justice (ICJ), “The Republic of The Gambia Institutes Proceedings Against the Republic of the Union of Myanmar and Asks the Court to Indicate Provisional Measures,” November 11, 2019, <https://www.icj-cij.org/public/files/case-related/178/178-20191111-PRE-01-00-EN.pdf>.

22 *Ibid.*

23 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, *Provisional Measures*, I.C.J. Reports 2020, January 23, 2020, <https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>; ICJ, “The Court Indicates Provisional Measures in Order to Preserve Certain Rights Claimed by The Gambia for the Protection of the Rohingya in Myanmar,” January 23, 2020, <https://www.icj-cij.org/public/files/case-related/178/178-20200123-PRE-01-00-EN.pdf>. See also, Fortify Rights, “Myanmar: Protect Rohingya, Comply with ICJ Provisional Measures,” January 23, 2020, <https://www.fortifyrights.org/mya-inv-2020-01-23/>; Fortify Rights, “Myanmar: Comply with World-Court Orders, End Ongoing Atrocities,” October 23, 2020, <https://www.fortifyrights.org/mya-inv-2020-10-23/>.

24 International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, *Request for the Indication of Provisional Measures, Order of 23 January 2020*, <https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>; See also, Fortify Rights, Myanmar: Protect Rohingya, Comply with ICJ Provisional Measures, news release, January 23, 2020, <https://www.fortifyrights.org/mya-inv-2020-01-23/>; Fortify Rights, “Myanmar: Comply with World-Court Orders, End Ongoing Atrocities,” news release, October 23, 2020, <https://www.fortifyrights.org/mya-inv-2020-10-23/>.

25 *Ibid.*

26 *Ibid.*

27 *Ibid.*

28 U.N., “Aung San Suu Kyi Defends Myanmar from Accusations of Genocide, at Top UN Court,” December 11, 2019, <https://news.un.org/en/story/2019/12/1053221>.

29 ICC, *Understanding the International Criminal Court*, undated, p. 4, <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>. See also, Fortify Rights, “What is International Accountability for Atrocity Crimes?,” film, October 23, 2020, <https://www.youtube.com/watch?v=FW2Q5MfvvTA&feature=youtu.be>.

1. A State Party to the Rome Statute requests the OTP to investigate a specific set of events;
2. The U.N. Security Council refers a situation to the Court;
3. A state that is not a party to the Rome Statute lodges an Article 12(3) declaration to accept jurisdiction of the ICC with respect to crimes committed in its territory or by one of its nationals and requests the OTP to investigate; or
4. The prosecutor decides to investigate a case on its own accord based on information received from credible sources.³⁰

All ICC cases begin with the OTP conducting an official “preliminary examination” where the OTP scrutinizes information received and assesses the appropriateness of the case for the ICC.³¹ Based on the results of the preliminary examination, the OTP will determine whether to proceed with a formal investigation.³² The OTP may proceed with a formal investigation following a preliminary examination unless the OTP opened the case on its own accord.³³ For cases initiated by the OTP, the OTP must submit to a Pre-Trial Chamber of the ICC a request for authorization to open an investigation.³⁴ The Court will then make a preliminary determination as to its jurisdiction over the situation and the admissibility of the case.³⁵

When proceeding with an investigation, the OTP relies on cooperation and assistance from the involved parties, including, where possible, the state on whose territory the alleged crimes were committed.³⁶

Depending on the manner in which the case arose, various parties can challenge the Court’s jurisdiction over the situation being investigated or the admissibility of the case before the Court at most stages during the investigation.³⁷ Similarly, the OTP can, itself, seek a ruling from a Pre-Trial Chamber of the Court confirming the jurisdiction and/or admissibility of a case at any time based on the information available at that time.³⁸ If an investigation proceeds to the point of an impending arrest, the Court will issue warrants and initiate criminal proceedings.³⁹

³⁰ ICC, *Understanding the International Criminal Court*, p. 17.

³¹ See generally, ICC, *Policy Paper on Preliminary Examinations*, November 2013, https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf; American Bar Association ICC Project, “How the ICC Works,” *website*, <https://how-the-icc-works.aba-icc.org/>. This scrutiny consists of four main phases of analysis, including: initial, jurisdictional, admissibility, and interest of justice assessments. Essentially, these phases require the Office of the Prosecutor to look at the available information and determine whether the case appears to satisfy core elements of situations that are typically viable for prosecution, ranging from a determination of whether the statutory criteria under the Rome Statute have been met to open an investigation to whether it would, in the OTP’s discretion, serve the best interests of justice to proceed further.

³² *Ibid.*

³³ *Ibid.*

³⁴ Rome Statute, Art. 15.

³⁵ *Ibid.*

³⁶ ICC, *Understanding the International Criminal Court*.

³⁷ See generally, Rome Statute, Arts. 13–19.

³⁸ *Ibid.*

³⁹ *Ibid.*

I. Does the National Unity Government Have Authority to Represent Myanmar?

Article 21 of the Universal Declaration of Human Rights states:

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.⁴⁰

Under international human rights law, the National Unity Government (NUG) of Myanmar has the authority of government to represent and act on behalf of Myanmar. The Committee Representing Pyidaungsu Hluttaw (CRPH)—a group of elected parliamentarians who escaped imprisonment by the Myanmar military during the February 1 *coup d'état*—established the NUG on April 16, 2021 to serve as the Government of Myanmar.⁴¹ Comprising democratically elected officials and other prominent appointees, the NUG includes 16 ministries led by 32 officials and four heads of government, including State Counsellor Aung San Suu Kyi and President Win Myint.⁴² The NUG is overwhelmingly accepted and recognized by the people of Myanmar as the democratically elected Government of Myanmar.⁴³

By contrast, the Myanmar military junta lacks support within Myanmar—as demonstrated by ongoing, nationwide anti-coup, anti-junta protests.⁴⁴

⁴⁰ Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810, 1948, Art. 21.

⁴¹ Committee Representing Pyidaungsu Hluttaw, “Formation of the National Unity Government,” Announcement No. 23/2021, April 16, 2021, <https://crphmyanmar.org/formation-of-the-national-unity-government/>.

⁴² *Ibid.* See also, National Unity Government (NUG) of the Republic of the Union of Myanmar, “Heads of Government,” *website*, <https://www.nugmyanmar.org/en/>.

⁴³ Participants of the nationwide Civil Disobedience Movement have publicly asserted their belief that the NUG represents the Government of Myanmar as have countless protesters throughout the country.

⁴⁴ See, e.g., Fortify Rights, “Myanmar’s Armed Forces Day Massacre,” March 27, 2021, https://www.fortifyrights.org/our-films/#post_id=6237; Fortify Rights, “Silent Strike in Myanmar,” March 26, 2021, https://www.fortifyrights.org/our-films/#post_id=6230; Fortify Rights, “Crackdown in Myeik, Thanintharyi region of Myanmar,” March 26, 2021, https://www.fortifyrights.org/our-films/#post_id=6228; Fortify Rights, “50th Day of Myanmar Protest,” March 23, 2021, https://www.fortifyrights.org/our-films/#post_id=6220; Fortify Rights, “Myanmar Women on the Protest Frontlines,” March 9, 2021, https://www.fortifyrights.org/our-films/#post_id=6183; Fortify Rights, “Protests Continue in Myanmar Despite Junta

Although the Myanmar military is attempting to exert control over the country by violence and force, control over a territory or people does not necessarily provide a basis of authority to represent and act on behalf of the state. The U.N. has repeatedly recognized the authority of non-military officials representing states that are otherwise effectively controlled by militaries or militias. For example, the U.N. recognized the credentials of officials representing the ousted government in Sierra Leone following a 1997 military coup.⁴⁵ Similarly, the junta in Haiti remained isolated and unrecognized and faced intense economic sanctions following a 1991 coup, while the U.N. continued to accept the credentials of the pre-coup government of Haiti.⁴⁶ The Taliban also never represented Afghanistan in the U.N. despite its control over the territory of Afghanistan.⁴⁷

In establishing the authority of officials to represent and act on behalf of a state, precedent indicates the importance of recognition by members of the international community. For example, in 2019, more than 50 states recognized Juan Guaidó's government as the legitimate Government of Venezuela after he declared invalid the victory of President Juan Maduro in the 2018 elections. This recognition allowed the Guaidó government to deposit an instrument of (re-)accession to the Inter-American Treaty of Reciprocal Assistance at the Organization of American States headquarters on August 6, 2019.⁴⁸ Moreover, in the 1980s, with the support and recognition of at least 80 states, the U.N. Secretary-General allowed various Cambodian governments in exile—including the Government of Democratic Kampuchea and the Coalition Government of Democratic Kampuchea—to sign on behalf of Cambodia multiple multilateral treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.⁴⁹ The Provisional Government of the Algerian Republic also acceded to the Geneva Conventions in 1960, despite the lack of recognition of the government by a minority of states.⁵⁰

These examples demonstrate that it is not necessary that all states recognize the authority of the government to represent and act on behalf of a state and that recognition by a significant number of states could suffice.⁵¹

Violence,” March 8, 2021, https://www.fortifyrights.org/our-films/#post_id=6159; Fortify Rights, “End Lethal Attacks on Myanmar Protesters,” March 5, 2021; Fortify Rights, “Myanmar Crackdown on Peaceful Protesters,” March 1, 2021, https://www.fortifyrights.org/our-films/#post_id=6125; Fortify Rights, “22222 Nationwide Protest in Myanmar,” February 23, 2021, https://www.fortifyrights.org/our-films/#post_id=6097; Fortify Rights, “Mass Protests Continue in Myanmar,” February 18, 2021, https://www.fortifyrights.org/our-films/#post_id=6079; Fortify Rights, “Shots Fired During Protests in Myitkyina, Myanmar,” February 17, 2021, https://www.fortifyrights.org/our-films/#post_id=6060; Fortify Rights, “Violent Crackdown on Protesters in Mandalay, Myanmar,” February 16, 2021, https://www.fortifyrights.org/our-films/#post_id=6058; Fortify Rights, “Myanmar Nationwide Protest,” February 12, 2021, https://www.fortifyrights.org/our-films/#post_id=6041; Fortify Rights, “Myanmar Police Use Excessive Force Against Peaceful Protesters,” February 12, 2021, https://www.fortifyrights.org/our-films/#post_id=6036; Fortify Rights, “Protests Countrywide Against the Myanmar Military Junta,” February 8, 2021, https://www.fortifyrights.org/our-films/#post_id=5986.

45 U.N. General Assembly, *Report of the Credentials Committee*, U.N. Doc. A/52/719, December 11, 1997, https://digitallibrary.un.org/record/247946/files/A_52_719-EN.pdf.

46 U.N. General Assembly, *First Report of the Credentials Committee*, U.N. Doc. A/47/517, October 9, 1992, https://digitallibrary.un.org/record/151883/files/A_47_517-EN.pdf.

47 U.N. General Assembly, *First Report of the Credentials Committee*, U.N. Doc. A/51/548, October 23, 1996, https://digitallibrary.un.org/record/222884/files/A_51_548-EN.pdf

48 See, *Inter-American Treaty of Reciprocal Assistance (ITRA)*, adopted September 2, 1947, 21 U.N.T.S. 77, <https://treaties.un.org/doc/Publication/UNTS/Volume%2021/volume-21-I-324-English.pdf>. While the status of Venezuela's accession to the ITRA is controversial and remains uncertain given the continued presidential crisis, the Organization of American States of the State Parties to the ITRA continues to regard the instrument as effectively valid.

49 The Secretary-General allowed the signature over the express protest of states who did not recognize the authority of the exiled governments as the legitimate governments of Cambodia. Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Oxford: Oxford University Press, 2004), p. 121.

50 *Id.* at pp. 120–121.

51 *Id.* at pp. 120–123 (noting “it is not necessary that the authority in exile is recognized as a government by the majority of the parties, although an infinitesimal number probably will not suffice”). It is worth noting that “[t]he signature of or accession to a treaty by an authority in exile recognized as a government by some but not by all parties to the

The NUG has received support and recognition from a significant number of members of the international community.⁵² For example, NUG ministers have engaged in high-level meetings, including with representatives of the governments of the U.S., U.K., Japan, France, Ireland, Venezuela, the European Union, senior U.N. officials, and others. On June 30, 2021, 150 senators from France signed a resolution to recognize the NUG as the official Government of Myanmar. The U.N. Special Rapporteur on the situation of human rights in Myanmar, Thomas Andrews, also recognized the position of the NUG in a statement to the U.N. Human Rights Council on July 7, 2021, telling U.N. member states that the NUG “deserves to be embraced.” He said:

The National Unity Government—established by parliamentarians whom the junta illegally denied the right to form a government—is laying the groundwork for a new, unified Myanmar. It has taken the historic step of welcoming the Rohingya ethnic minority back into the national fabric of Myanmar, assuring them justice and full citizenship rights. The National Unity Government is helping to coordinate humanitarian assistance into the country and has committed to ensuring international justice and accountability for victims of atrocity crimes, indicating its willingness to pursue justice through the International Criminal Court.⁵³

The will of the people of Myanmar, as expressed through the 2020 elections as well as explicit acts to demonstrate a rejection of the junta, provides the NUG with a strong basis of authority of government under international human rights law to represent and act on behalf of the people of Myanmar. The NUG is also increasingly recognized by the international community as the authorized representative of the state. Given the NUG’s authority to represent Myanmar, it should be able to engage and take binding actions on international treaties.

treaty does not, however, create treaty relations between it and the non-recognizing parties, irrespective of whether or not the latter make an express statement to that effect.” Even still, this disparity does not “prevent [the acceding authority in exile] from exercising general rights under the treaty.”

⁵² See, Dr. Sasa (@DrSasa22222), “Good news from the 150 Senators of France...,” *Twitter* June 30, 2021, 11:31 a.m., <https://twitter.com/DrSasa22222/status/1410259694598254600>. See also, “Some Countries will Officially Recognise Myanmar’s Shadow Government in the Coming Days, Says New Minister,” *Myanmar Now*, April 16, 2021, <https://www.myanmar-now.org/en/news/some-countries-will-officially-recognise-myanmars-shadow-government-in-the-coming-days-says-new>; U.S. Welcomes Pledge by Myanmar Shadow Government to Help Rohingya, *VOA News*, June 7, 2021, <https://www.voanews.com/east-asia-pacific/us-welcomes-pledge-myanmar-shadow-government-help-rohingya>; International Trade Union Confederation, “Myanmar: National Unity Government Must Be Recognised,” April 19, 2021, <https://www.ituc-csi.org/myanmar-national-unity-government>.

⁵³ OHCHR, “Statement by Thomas H. Andrews UN Special Rapporteur on the Situation of Human Rights in Myanmar, United Nations Human Rights Council,” July 7, 2021, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27283&LangID=E>.

II. Can the National Unity Government Delegate Jurisdiction to the International Criminal Court?

The NUG has an opportunity to reverse the culture of impunity in Myanmar and potentially prevent future atrocities by delegating jurisdiction to the International Criminal Court (ICC). As the representative government of the people of Myanmar, the NUG has two non-exclusive options to facilitate ICC jurisdiction. One option is to lodge a declaration under Article 12(3) of the Rome Statute to specify the jurisdiction of the Court. The second option is to formally accede to the Rome Statute. The NUG should explore and use both options to extend jurisdiction to the ICC to prosecute past, ongoing, and future atrocity crimes.

This chapter explores each option in turn. To ensure immediate ICC jurisdiction over past and current atrocity crimes and to guarantee jurisdiction over any future atrocity crimes perpetrated in Myanmar, the NUG should urgently lodge a declaration under Article 12(3) of the Rome Statute while also prioritizing full accession to the Rome Statute.

Lodging an Article 12(3) Declaration

Article 12(3) of the Rome Statute states:

If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.⁵⁴

To engage the ICC and give the Court jurisdiction to investigate and possibly prosecute atrocity crimes that occurred or may occur in Myanmar, the NUG can present a declaration to the Registrar of the Court, recognizing the jurisdiction of the Court with respect to certain crimes committed in a specified time. The Registrar accepts and confirms receipt of the declaration, then transmits it to the OTP for further consideration.⁵⁵ The declaration, if accepted by the Registrar, would have immediate effect.⁵⁶

⁵⁴ Rome Statute, arts. 12(2) and (3).

⁵⁵ See, e.g., International Criminal Court, "Letter of H.E. Herman von Hebel, Registrar of the ICC, to H.E. Mr. Mahmoud Abbas, President of the State of Palestine, 2015/IOR/3496/HvH, January 7, 2015, <https://www.icc-cpi.int/iccdocs/PIDS/press/150107-Registrar-Letter-to-HE-President-Abbas-regarding-Palestine-Art-12-3--Declaration.pdf>.

⁵⁶ *Ibid.*

The NUG could present multiple Article 12(3) declarations to extend jurisdiction for the Court to consider various crimes. For example, the Government of Ukraine lodged an Article 12(3) declaration on April 17, 2014 to provide the ICC jurisdiction to consider crimes committed in Ukraine between November 21, 2013 and February 22, 2014.⁵⁷ On September 8, 2015, it lodged a second Article 12(3) declaration to provide the Court with jurisdiction starting from February 20, 2014 without an end date.⁵⁸ The second declaration simply stated, “This Declaration is made for an indefinite duration and will enter into force upon its signature.”⁵⁹ Similarly, the NUG could, theoretically, also lodge an Article 12(3) declaration of indefinite duration (*i.e.*, without a specified end date) to provide immediate jurisdiction to the Court over past *and* future atrocity crimes, while also beginning, in parallel, the process to formally accede to the Rome Statute.

After depositing a declaration with the Registrar of the Court, the OTP could request a jurisdictional ruling from a Pre-Trial Chamber on the validity of the declaration.⁶⁰ State Parties to the Rome Statute may also challenge the validity of an Article 12(3) declaration when the Court is considering its jurisdiction over a case.⁶¹ For example, in December 2014, Palestine lodged an Article 12(3) declaration, despite Israel’s control over the territory in question.⁶² Given that Israel is not a State Party to the Rome Statute, it was unable to formally contest the validity of the declaration. However, the OTP petitioned the Pre-Trial Chamber for a finding on jurisdiction over the situation in Palestine, and the Pre-Trial Chamber invited Israel to comment and participate in the proceedings as a third party whose legal interests were at stake.⁶³ Israel declined, and the Pre-Trial Chamber ultimately found the Palestinian situation to be within the Court’s jurisdiction.⁶⁴ However, the Court largely relied on Palestine’s referral once it gained status as a State Party to the Rome Statute.

Based on the Pre-Trial Chamber’s heavy reliance on Palestine’s status as a State Party to the Rome Statute, it remains unclear to what extent the Pre-Trial Chamber may accept an Article 12(3) declaration lodged by the NUG if Myanmar does not also become a State Party. Thus, while an Article 12(3) declaration would provide a direct and expedient way to open an investigation into the military’s actions and theoretically convey express jurisdiction to the ICC, its likelihood of success without Myanmar also attempting to accede to the Rome Statute is uncertain. However, accession to the Rome Statute, in addition to lodging an initial Article 12(3) declaration, would likely increase Myanmar’s success in holding the military accountable for international crimes.

⁵⁷ ICC, “Declaration by Ukraine Lodged Under Article 12(3) of the Rome Statute,” No. 61219–673–384, April 9, 2014, <https://www.icc-cpi.int/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf>; ICC, “Note Verbale of the Acting Minister for Foreign Affairs of Ukraine, Mr. Andrii Deshchytzia,” No. 72/35–620–1134, April 17, 2014, <https://www.icc-cpi.int/itemsDocuments/997/UkraineMFAdocument16-04-2014.pdf>. See also, ICC, “Ukraine Accepts ICC Jurisdiction Over Alleged Crimes Committed Between 21 November 2013 and 22 February 2014,” April 17, 2014, <https://www.icc-cpi.int/Pages/item.aspx?name=pr997>.

⁵⁸ ICC, “Declaration by Ukraine Lodged Under Article 12(3) of the Rome Statute,” September 8, 2015, https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf. See also, ICC, “Ukraine Accepts ICC Jurisdiction Over Alleged Crimes Committed Since 20 February 2014,” September 8, 2015, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1146>.

⁵⁹ *Ibid.*

⁶⁰ Rome Statute, Art. 19(3).

⁶¹ *Id.* at Art. 19.

⁶² ICC, “Declaration Accepting the Jurisdiction of the International Criminal Court,” December 31, 2014, https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf. See also, ICC, “Palestine Declares Acceptance of ICC Jurisdiction Since 13 June 2014,” January 5, 2015, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1080>.

⁶³ *Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine*, No. ICC-01/18, January 22, 2020, https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF. See also, *Decision on the ‘Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine*, ICC-01/18, February 5, 2021, https://www.icc-cpi.int/CourtRecords/CR2021_01165.PDF.

⁶⁴ *Decision on the ‘Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine*, ICC-01/18, February 5, 2021.

Acceding to the Rome Statute

According to international treaty law, for a state to become a party to a treaty, the state must “demonstrate, through a concrete act, its willingness to undertake the legal rights and obligations contained in the treaty. In other words, it must express its consent to be bound by a treaty.”⁶⁵

A state may express consent to be bound by a treaty through “ratification,” “accession,” “acceptance,” or “approval.” While the legal effect is the same for all of these, accession takes place after a treaty is already negotiated and signed by other states, whereas a “ratification,” “acceptance,” or “approval” applies only to states that are also signatories to the treaty.⁶⁶ States with domestic laws that do not require a head of state to ratify treaties will often use instruments of “acceptance” or “approval,” instead of “ratification” to express consent to be bound by a treaty.⁶⁷

When treaties are being negotiated, states are provided with a limited period of time, specified within the treaty, for when they can sign onto a treaty. The period provided for states to sign onto the Rome Statute ran from July 17, 1998 to December 31, 2000.⁶⁸ Myanmar did not sign the Rome Statute during this period.⁶⁹ As a result, Myanmar may only express its consent to be bound by the Rome Statute by acceding to it.

To accede to the Rome Statute, the NUG must deposit an “instrument of accession” with the Secretary-General of the U.N.⁷⁰ An “instrument of accession” may be a formal or informal document, such as a letter or notification; however, it must include:

1. Title, date, and place of conclusion of the concerned treaty;
2. Full name and title of the person signing the instrument;
3. An unambiguous expression of the intent of the Government, on behalf of the state, to consider itself bound by the treaty and to undertake faithfully to observe and implement its provisions;
4. Date and place where the instrument was issued; and
5. Signature (an official seal is inadequate) of the official with authority to represent the state.⁷¹

⁶⁵ U.N., *United Nations Treaty Handbook*, 2012, p. 8, <https://treaties.un.org/doc/source/publications/THB/English.pdf>. The Vienna Convention on the Law of Treaties (VCLT) is generally regarded as a codification of the customary international law of treaties. VCLT, entered into force on January 27, 1980, 1155 U.N.T.S. 331, May 23, 1969, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. See, e.g., Karl Zemanek, *Vienna Convention on the Law of Treaties*, U.N., 2009, <https://legal.un.org/avl/pdf/ha/vclt/vclt-e.pdf>. (“In the *Gabčíkovo-Nagymaros Project* case the Court observed: “[The Court] needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law” (I.C.J. Reports 1997, p. 38, para. 46). The Court’s opinion, together with the relatively high number of parties to the Convention, suggests that the instrument states the current general international law of treaties. This is also confirmed by the fact that its substantive provisions were by consensus copied into the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.”)

⁶⁶ VCLT, arts. 2(1)(b), 14(1), and 16 (regarding ratification) and arts. 2(1)(b) and 15 (regarding accession). See also, *Treaty Handbook*, p. 10 (“Accession has the same legal effect as ratification, acceptance or approval. However, unlike ratification, acceptance or approval, which are preceded by signature to create binding legal obligations under international law, accession requires only one step, namely, the deposit of an instrument of accession.”). All methods apply for expressing consent to be bound by the Rome Statute. Rome Statute, arts. 125(2) and (3).

⁶⁷ VCLT, arts. 2(1)(b) and 14(2).

⁶⁸ Rome Statute, Art. 125(1) (“This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.”)

⁶⁹ ICC, “The States Parties to the Rome Statute,” *website*, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

⁷⁰ Article 125(3) of the Rome Statute provides that it is “open to accession by all States.” Rome Statute, art. 125(3). According to the U.N. Treaty Section of the Office of Legal Affairs: “[A]ccession requires only one step, namely, the deposit of an instrument of accession.” U.N., *Treaty Handbook*, p. 10.

⁷¹ U.N., *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, U.N. Doc. ST/LEG/7/Rev. 1, 1999, para. 128. See also, U.N., *Treaty Handbook*, Annex 4.

The instrument must be deposited with the U.N. Secretary-General at the U.N. Headquarters in New York.⁷² The Secretary-General's role as the depositary is administrative and includes "receiving and keeping custody of any instruments, notifications and communications relating to [the treaty]" and "examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question."⁷³

After the Secretary-General receives an instrument for deposit, the Treaty Section examines the document to verify that the conditions for participation in the treaty, if any, are met, the instrument "include[s] clear and fair expression[s] of commitment to undertake the rights and obligations to the treaty," and it is signed by the proper official.⁷⁴ Article 7(2)(a) of the Vienna Convention on the Law of Treaties provides that the Head of State, Head of Government, and Minister of Foreign Affairs are generally regarded as holding the authority to enter into treaties as a representative of the state.⁷⁵

The Secretary-General will also inform State Parties and others of "acts, notifications, and communications relating to the treaty."⁷⁶ This may invite objections from states, but, based on prior practice, such objectives are unlikely to stop the Secretary-General from accepting the instrument for deposit unless the objections are numerous.⁷⁷

While the Secretary-General's function as depositary is administrative, in situations of potential ambiguity, the process may be guided by previous determinations and recommendations of the General Assembly. For example, when accepting Palestine's instrument of accession to the Rome

⁷² Although it is permissible to provide the instrument to a UN official outside New York, the instrument only becomes effective once received at the Secretary-General's office. See, U.N., *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, paras. 139, 141. The U.N. Office of Legal Affairs recommends, if feasible, that a translation of the instrument into English and French be provided as well. U.N., *Treaty Handbook*, p. 11.

⁷³ The Treaty Section in the Office of Legal Affairs is responsible for supporting the Secretary-General's role as depositary. The functions of the depositary are explained in detail in Article 77 of the VCLT. See U.N., *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, para. 311, Annex XVI. U.N. Office of Legal Affairs, "Treaty Section," website, 2010, https://legal.un.org/ola/div_treaty.aspx?section=treaty (including in the Section's "Core Functions" the role of "[d]ischarging the Secretary-General's depositary functions under multilateral treaties.") Note that no conditions for participation are specified in the Rome Statute. Article 125(3) states: "This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations."

⁷⁴ U.N., "Daily Press Briefing by the Office of the Spokesperson for the Secretary-General," April 10, 2014, <https://www.un.org/press/en/2014/db140410.doc.htm>.

⁷⁵ The general rule set forth in Article 7 is that a person is regarded as representing the State where the person can produce "full powers." Article 7(2)(a) is essentially an exception, confirming the well-established rule in customary law that the Head of State, Head of Government, and Minister of Foreign Affairs inherently possess such "full powers." Whether "full powers" could be provided to other representatives of the civilian authorities of the democratically elected government in Myanmar would depend on the domestic law of Myanmar relating to who can sign such powers and under what conditions. In most domestic systems, only the Head of State, Head of Government, or Minister of Foreign Affairs are capable of authorizing "full powers." However, Article 7(1)(b) stipulates that a person may be regarded as representing the State where "it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers." VCLT, arts. 7(2)(a) and 7(1)(b). Article 7(1)(b) has generally been regarded as not relevant to multi-lateral treaties, such as the Rome Statute. See, Carlos Ivan Fuentes and Santiago Villalpando, "Treaty Formation," in *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2020), pp. 201, 212. However, a consistent pattern and practice of individual States recognizing the NUG as possessing governmental authority for purposes under international law could arguably be considered "other circumstances" suggesting that the individual Rome Statute member States "intend[ed]" to consider the detained heads of State of the elected government "as representing the State for such purposes."

⁷⁶ VCLT, Art. 77(1)(e). In the case of the NUG depositing an instrument of accession, the Secretary-General may notify the putative junta-sponsored representative to the U.N. if, at the time of deposit, there remained any uncertainty or ambiguity concerning the identity of the authorized representative to the U.N. The junta-sponsored representative may then lodge an objection. Pursuant to VCLT Article 77(2), the Secretary-General may defer the deposit and forward the disputed accession to the Assembly of States. VCLT, Art. 77(2).

⁷⁷ On past practice, see Chapter I of this report.

Statute, the Secretary-General consulted U.N. General Assembly Resolution 67/19, which gave Palestine “non-member observer State status in the United Nations.”⁷⁸ The Pre-Trial Chamber of the ICC noted that it “is reported” that the U.N. Office of Legal Affairs indicated to the Secretary-General in an interoffice memorandum that the Secretary-General should view such a “State status” as relevant to and determinative of his decision to deposit Palestine’s instrument of accession to the Rome Statute.⁷⁹

Given this precedent, the Secretary-General may consider resolutions or other recommendations from the General Assembly to determine if NUG officials qualify as authorized representatives of the sovereign government of Myanmar.

Beyond the acceptance of the Secretary-General and the physical deposit of the instrument of accession, there are no further requirements for acceding to and becoming a State Party to the Rome Statute.⁸⁰ Therefore, if the international community sufficiently recognizes the authority of the government depositing the instrument of accession, then the state becomes a member of the Rome Statute and can exercise full rights under the treaty.⁸¹

After the instrument of accession is deposited, the Rome Statute enters into force for that state on the first day of the month after the 60th day following deposit.⁸² Under Article 11, this means that the Court has jurisdiction “only with respect to crimes committed after entry into force of this Statute for that State.”⁸³

Challenging Accession

Limited grounds exist under international law to challenge a state’s accession to a treaty. This section explores two potential ways that accession could be challenged. The first way is for the acceding State to seek to nullify its accession by challenging the validity of its consent to be bound by the treaty. The second way is for a State Party to the Rome Statute to challenge the validity of the accession. However, the likelihood a state would successfully nullify its accession to a treaty, or the likelihood a State Party would successfully challenge the validity of accession to the Rome Statute, is low.

Nullification of Consent

Article 46 of the Vienna Convention on the Law of Treaties outlines the conditions for a state to challenge an earlier accession to a treaty and claim that it is not bound by the treaty.⁸⁴ Specifically, Article 46 stipulates that a state may seek to invalidate a previous accession by establishing a “manifest” violation of domestic law of “fundamental importance” relating to the “competence

⁷⁸ *Decision on the ‘Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine*, ICC-01/18, February 5, 2021, para. 98.

⁷⁹ *Ibid.*

⁸⁰ As recently noted by Pre-Trial Chamber I of the ICC: “With respect to the Rome Statute, article 125(3) of the Statute provides that the ‘Statute shall be open to accession by all States’ and neither this provision nor any other provision in the Court’s legal texts imposes additional criteria on, or otherwise qualifies, the accession to the Statute. *Id.* at 97.”

⁸¹ This is what occurred in the situation of Palestine’s accession to the Rome Statute. Canada expressly objected to the accession and stated that it did not recognize Palestine as authorized to accede to a treaty under international law. See, U.N., “Canada: Communication,” U.N. Doc. No. C.N.57.2015.TREATIES-XVIII.10, January 23, 2015, <https://treaties.un.org/doc/Publication/CN/2015/CN.57.2015-Eng.pdf>. Nonetheless, the Secretary-General accepted Palestine’s instrument of accession, and Palestine has ever since enjoyed the full rights and privileges of membership. See, e.g., *Decision on the ‘Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine*, ICC-01/18, February 5, 2021, para. 100.

⁸² Rome Statute, Art. 126(2).

⁸³ Rome Statute, Art. 11(2). Article 11(2) also provides that pursuant to Article 12(3), a state can consent to jurisdiction to crimes that occurred before the entry into force of Statute for that State.

⁸⁴ VCLT, Art. 46.

to conclude treaties.”⁸⁵ In other words, a state may challenge on the grounds that the process of accession violated a key domestic law invalidating the process altogether.⁸⁶

Despite the provisions of Article 46, the international law of treaties generally views domestic legal regimes as secondary to international law, given the challenges involved in interpreting domestic law.⁸⁷ Extra-constitutional regimes, like a military junta, further complicates the analysis of domestic law and limits the use of Article 46 to nullify an accession to a treaty.⁸⁸

The NUG is not a government in exile. The acting president, the prime minister, and 70 percent of NUG cabinet ministers are reportedly in Myanmar, “working inside the country.”⁸⁹ However, in analyzing the competence of a “government in exile” or a legitimate government without effective control over its territory and population to engage in treaties, the conclusion is that “such constitutional, i.e., internal law, restrictions have had no effect on the treaty-making competence of recognized governments in exile under international law.”⁹⁰ Furthermore, “treaties concluded by authorities in exile recognized as a government by the other party or parties to the treaty cannot be invalidated on the ground that the recognized government in exile did not comply with the State’s internal law regarding competence to conclude treaties.”⁹¹

In the case of Myanmar, the junta may attempt to claim that the NUG lacked constitutional capacity

85 *Id.* As to the type of law that could be invoked, constitutional provisions plainly qualify as laws of “fundamental” importance, although “it is clear that elements of domestic procedure laid down in some inter-ministerial circular or internal memorandum will not qualify.” See, Jan Klabbers, “Avoiding or Exiting Treaty Commitments,” in *The Oxford Guide to Treaties*, pp. 545, 555. The substantive limitation to laws concerning “competence to conclude treaties” excludes provisions solely concerning validity and implementation of the treaty itself under domestic law (as opposed to the validity of the expression of consent to be bound by it), but otherwise “must be read broadly as encompassing both procedural and substantive limitations of the treaty-making power.” Oliver Doerr and Kristen Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*, (Berlin: Springer, April 16, 2020), para. 34.

86 VCTL, Art. 46.

87 See, e.g., Michael Bothe, “Invalidity, Termination, and Suspension of the Operation of Treaties,” *The Vienna Conventions on the Law of Treaties* (Oxford: Oxford University Press, May 26, 2011), pp. 1090, 1095 (noting that the actual interpretation and application of similar constitutional orders varies greatly under various States’ legal regimes and “solutions adopted by various constitutions vary”; “there is a rather vast scope of application, and its limits are difficult to draw”). In the case of Cameroon versus Nigeria, Nigeria asserted that it should be able to invoke Article 46 of the VCTL to nullify a treaty regarding certain border issues and that, pursuant to Article 46, Cameroon should have known that the Head of State of Nigeria lacked authority to enter legally binding commitments without the concomitant approval of the Nigerian Government. The Court rejected Nigeria’s position, holding that a limitation on the authority of the Head of State was not “manifest” “unless at least properly publicized.” *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, 2002 I.C.J. 303, paras. 258, 265–266. Doerr and Schmalenbach explain: “Consequently, a violation of internal law would only be manifest if the limitation of the representative’s authority could have been ascertained by simply reading the foreign State’s internal law, provided the pertinent legal instruments were ‘properly publicized’ and easily accessible. This will, however, only rarely be the case since, typically, the applicable provisions of internal law are difficult to interpret or superseded by subsequent practice.” Doerr and Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*, para. 49. Olivier Corten and Pierre Klein, *The Vienna Conventions on the Law of Treaties*, pp. 1091, 1096 (“The solution finally adopted is based on a position which favours the functioning of the international legal system, namely a general inadmissibility of invoking internal law, subject however to a limited and reasonable exception.”) (“It can be concluded that Article 46 practically solves the tension between the constitutional order and the democratic principle, on the one hand, and the efficiency of the international legal order, on the other hand, in favour of the latter.”)

88 Corten and Klein, *The Vienna Conventions on the Law of Treaties*, pp. 1095–1097 (“[O]ne can ask what matters more, the constitutional text or actual practice? What about a State with a dictatorial regime where the parliament may be dissolved, but the normally applicable text of the constitution is still formally applicable? All these examples show that the notion ‘objectively evident’ must be interpreted very restrictively.”)

89 “Interview with Dr. Sasa on the Formation of the National Unity Government,” *Al Jazeera*, April 17, 2021, <https://www.facebook.com/DrSasa22222/videos/728990474454546>.

90 Talmon, *Recognition of Governments in International Law*, pp. 129–130.

91 *Ibid.*

to bind Myanmar under international law.⁹² However, it is reasonable to expect that recognition of the NUG would not amount to a “manifest” violation of Myanmar law capable of invalidating Myanmar’s consent to be bound to the treaty at a later date.⁹³

Challenging the Validity of Accession

A State Party to the Rome Statute could also challenge the validity of another state’s accession to the Statute. The Assembly of States Parties to the Rome Statute is responsible for considering and resolving any challenge to a state’s accession in line with Article 119(2) of the Rome Statute.⁹⁴

Article 112 of the Rome Statute established the Assembly of States Parties as the ICC’s “management oversight and legislative body.” It comprises representatives from all States that have ratified or

⁹² See, e.g., Ei Ei Toe Lwin, “Parliament Rejects Motion to Join International Civil Rights Treaty,” *Myanmar Times*, September 12, 2019, <https://www.mmtimes.com/news/parliament-rejects-motion-join-international-civil-rights-treaty.html> (noting a disagreement between NLD legislators and military legislators on the proper procedure for treaty ratification under the Myanmar constitution).

⁹³ This conclusion does not consider the legality of the NUG under Myanmar’s domestic law. However, the conclusion presupposes that *even if* the NUG formed in violation of Myanmar law, a potential accession to the Rome Statute could not be invalidated if State Parties to the Rome Statute recognized the NUG as “authorized” to enter the treaty.

⁹⁴ Rome Statute, Art. 119(2). A Pre-Trial Chamber of the ICC also recently affirmed the authority of the Assembly of States Parties to resolve questions on accession to the Rome Statute in a decision issued on February 5, 2021 regarding a challenge to Palestine’s accession to the Rome Statute on January 2, 2015. See, “State of Palestine: Accession,” U.N. Doc. C.N.13.2015.TREATIES-XVIII.10, January 6, 2015. The U.N. Secretary-General circulated Palestine’s instrument of accession among the State Parties to the Rome Statute upon receipt. *Decision on the ‘Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine*, ICC-01/18, February 5, 2021, para. 100. Canada formally objected to the accession, stating:

[T]he Permanent Mission of Canada notes that “Palestine” does not meet the criteria of a state under international law and is not recognized by Canada as a state. Therefore, in order to avoid confusion, the Permanent Mission of Canada wishes to note its position that in the context of the purported Palestinian accession to the Rome Statute of the International Criminal Court, “Palestine” is not able to accede to this convention, and that the Rome Statute of the International Criminal Court does not enter into force, or have an effect on Canada’s treaty relations, with respect to the “State of Palestine.”

“Canada: Communication,” U.N. Doc. No. C.N.57.2015.TREATIES-XVIII.10. The Secretary-General accepted Palestine’s accession on January 6, 2015, over Canada’s express objection. “[O]n 1 April 2015, the then President of the Assembly of States Parties to the Rome Statute . . . greeted Palestine in a welcoming ceremony, which ‘marked the entry into force of the Rome Statute for the State of Palestine [...] thereby becoming the 123rd State Party.’” Palestine then became an active member State in the Assembly of States. On May 22, 2018, Palestine referred the *Situation in the State of Palestine* to the Office of the Prosecutor for the ICC pursuant to articles 13(a) and 14 of the Rome Statute for investigation and prosecution. On January 22, 2020, the Prosecutor requested that the Pre-Trial Chamber rule on the Court’s territorial jurisdiction in Palestine. The Pre-Trial Chamber assigned to the case then invited written submissions on jurisdiction from Israel, victims, and other interested parties, including other States, organizations, and individuals. It was through these submissions and observations that various arguments against the validity of Palestine’s accession were eventually raised, solely on the basis of Palestine not being a “State” qualified to accede to an international treaty. In its ruling, the ICC Pre-Trial Chamber found:

[T]he only manner of challenging the automatic entry into force of the Statute for an acceding State Party is through the settlement of a dispute by the Assembly of States Parties under article 119(2) of the Statute. This conclusion further entails that, in all other circumstances, the outcome of an accession procedure is binding. The Chamber has no jurisdiction to review that procedure and to pronounce itself on the validity of the accession of a particular State Party would be *ultra vires* as regards its authority under the Rome Statute.

See, e.g., *Decision on the ‘Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine*, ICC-01/18, February 5, 2021, para 27, 99, 100–103. The Pre-Trial Chamber’s ruling established that once a State has successfully deposited an instrument of accession with the Secretary-General, that State is considered a State Party to the Rome Statute as soon as the accession enters into force and cannot be questioned as such for jurisdictional purposes by the ICC. Instead, the appropriate mechanism for challenging accession is by recourse to Article 77(2) of the Vienna Convention on the Laws of Treaties, which—in the context of the Rome Statute— means raising a dispute within the Assembly of States Parties to the Rome Statute.

acceded to the Statute.⁹⁵ According to Chapter IV of the Rules of Procedure of the Assembly of States Parties, the Assembly of States Parties will approve one representative from each state, whose credentials are issued by the Head of State, Head of Government, or Minister of Foreign Affairs of that State.⁹⁶

According to Article 119(2) of the Rome Statute:

[A] dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties.⁹⁷

The Assembly can settle the dispute by an Assembly-wide vote or make recommendations on other means to settle the dispute, including referring the dispute to the International Court of Justice.⁹⁸ If it chooses to settle the dispute by vote, then it would require a two-thirds majority of all states present to vote to invalidate an accession.⁹⁹ However, the language in Article 119(2) indicates that the Assembly of States is allowed, *but is not required*, to settle or make recommendations to resolve a dispute between States Parties.¹⁰⁰ Specifically, the language of Article 119(2) provides that a dispute “*shall* be referred to the Assembly” if it is not resolved by negotiations—meaning that the referral is mandatory. However, permissive language is used (“may . . . seek to settle,” “may make recommendations”) to allow, but not require, the Assembly to then resolve that dispute once it is referred.

In the case of Myanmar, it is unlikely that an existing State Party would challenge a NUG-led accession to the Rome Statute. Notably, states that may be predisposed to challenging the civilian government’s ability to effect Myanmar’s accession to the Rome Statute—such as China, the Russian Federation, and certain governments in Southeast Asia—are not States Parties to the Rome Statute.¹⁰¹ The Myanmar junta also could not challenge an accession to the Rome Statute by the NUG without itself becoming a State Party to the Rome Statute, which is unlikely.¹⁰² Even if a State Party did challenge a NUG-led accession, then it is unlikely that such a challenge would be successful, particularly given the untried dispute-settlement system of the Assembly of States Parties and the obstacles of challenging the authority of the NUG as a democratically elected and internationally recognized government.

⁹⁵ Rome Statute, Art. 112. See also, ICC, “Assembly of States Parties,” *website*, <https://www.icc-cpi.int/asp>.

⁹⁶ ICC, *Assembly of States Parties to the Rome Statute of the International Criminal Court: First Session*, U.N. Doc. ICC-ASP/1/3, 2002, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N02/603/35/PDF/N0260335.pdf?OpenElement>.

⁹⁷ Rome Statute, Art. 119(2).

⁹⁸ *Ibid.* As the Court responsible for addressing disputes between states, the ICJ may be called by either the U.N. Secretary General or the Assembly of States Parties to resolve a challenge to the accession of one State Party by another State Party.

⁹⁹ *Id.* at Art. 112(7)(a) (“Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting.”)

¹⁰⁰ *Id.* at 119(2).

¹⁰¹ As permanent members of the U.N. Security Council, China and the Russia Federation, for example, have a track record of protecting Myanmar from collective action in response to mass-atrocity crimes. Likewise, member states of the Association of Southeast Asian Nations have consistently opposed measures at the U.N. with respect to Myanmar, including, for example, the Human Rights Council resolution that created the Independent Investigative Mechanism for Myanmar.

¹⁰² Rome Statute, Art. 119(2).

Recommendations

To the National Unity Government of Myanmar:

- **LODGE** an Article 12(3) declaration under the Rome Statute to urgently provide broad jurisdiction to the International Criminal Court. Ensure the Article 12(3) declaration provides jurisdiction that extends to atrocity crimes dating back to 2002 and continuing for an indefinite duration.
- **DEPOSIT** an instrument of accession with the United Nations Secretary-General, expressing consent to be bound by the Rome Statute.
- **APPOINT** an ethnic-Rohingya representative to the National Unity Government to assist in the implementation and expansion of policies concerning the Rohingya people, including efforts to achieve justice and accountability for the genocide and other atrocity crimes.
- **COOPERATE** with current and future international efforts to hold to account perpetrators of genocide, war crimes, and crimes against humanity in Myanmar, including by sharing evidence with the Independent Investigative Mechanism for Myanmar.
- **ISSUE** a standing invitation to cooperate with United Nations special procedures, in particular the Special Rapporteur on the situation of human rights in Myanmar.
- **ACCEDE** to the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and their respective protocols as well as other international human rights instruments in addition to the Rome Statute.

To United Nations Member States:

- **RECOGNIZE** the National Unity Government as the legitimate government of Myanmar. Support the National Unity Government's existing credentials at the United Nations and other international organizations.
- **PROVIDE** financial and technical support as needed for the National Unity Government, including on international human rights laws and standards and other matters of governance.
- **ENSURE** international justice for past and ongoing atrocity crimes in Myanmar and press the United Nations Security Council to refer Myanmar to the International Criminal Court or, alternatively, to establish an *ad hoc* international criminal tribunal to investigate and prosecute genocide, crimes against humanity, and war crimes.
- **SUPPORT** a resolution at the United Nations Security Council to impose a global arms embargo on the Myanmar military and targeted sanctions against military-owned enterprises, with special attention to blocking the junta's access to natural gas revenues and access to financial services.
- **IMPOSE** bilateral arms embargoes and targeted sanctions, with special attention to blocking the junta's access to natural gas revenues and access to financial services.
- **SUPPORT** the mandate and recommendations of the United Nations Special Rapporteur on the situation of human rights in Myanmar.
- **PUBLICLY** acknowledge, through formal determinations, the Rohingya genocide and other atrocity crimes perpetrated in Myanmar, including war crimes and crimes against humanity.

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Fortify Rights extends thanks, solidarity, and support to the many human rights defenders and survivors of atrocity crimes who have contributed to exposing the crimes of the Myanmar security forces, often at great personal risk. Special thanks also to the generous supporters of Fortify Rights who make our work possible.

For decades, the Myanmar military and police have committed human rights violations that amount to war crimes, crimes against humanity, and even genocide. The perpetrators of these crimes have enjoyed complete impunity.

On February 1, 2021, the Myanmar military carried out a *coup d'état*, seizing political power while killing and imprisoning opponents *en masse*. Following the coup, elected legislators and others in the country formed the National Unity Government (NUG) to oppose military rule and reflect the will of the people.

This report finds that the NUG can delegate jurisdiction to the International Criminal Court in The Hague to investigate and possibly prosecute mass-atrocity crimes in Myanmar dating back to 2002. Such a move has the potential to deter future atrocities and significantly alter Myanmar's path to justice and accountability.



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