

Towards Gender Inclusive Justice and Accountability for Serious Crimes under International Law Committed in Myanmar

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International Commission of Jurists

P.O. Box 1740

Rue des Buis 3

CH 1211 Geneva 1

Switzerland

t: +41 22 979 38 00

f: +41 22 979 38 01

www.icj.org

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**“There’s really no such thing as the
‘voiceless.’ There are only the deliberately
silenced, or the preferably unheard.”**

- Arundhati Roy

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Foreword

The Women's League of Burma (WLB) is honoured to contribute this foreword to the International Commission of Jurists' report, *"Towards Gender Inclusive Justice and Accountability for Serious Crimes under International Law Committed in Myanmar"*, an important document that addresses the critical need for gender-responsive justice mechanisms in Burma/Myanmar. As a women's rights organization deeply involved in supporting survivors of sexual and gender-based violence (SGBV) and promoting women's political leadership, we recognize the importance of integrating gender competence into international accountability mechanisms.

For decades, the military junta has systematically used sexual violence as a weapon of war, targeting women, girls, and gender-diverse individuals. Even before the 2021 coup, the military's patriarchal structures, deeply rooted in Myanmar's sociocultural traditions, enabled the widespread perpetration of sexual violence against women and LGBTQI+ persons, including rape, murder, and using women as human shields. After the 2021 attempted coup, the situation has deteriorated further, with the military intensifying its attacks on civilians. Our recent situation update report from January to June 2024 documents a sharp rise in sexual and gender-based violence, with women facing increased displacement, assault, and exploitation as the conflict escalates. The psychological and physical toll of living under constant threat of violence is devastating. The international community must act to address these atrocities and ensure that the experiences of women and marginalized groups are not ignored. Without a gendered lens, justice and accountability will remain out of reach for women in Burma/Myanmar.

This report by the ICJ echoes many of the same challenges we have documented, including the under-investigation and under-prosecution of gender-based crimes in Burma/Myanmar. While international mechanisms like the International Criminal Court (ICC) and the Independent Investigative Mechanism for Myanmar (IIMM) are making strides, we call for a stronger, survivor-centered approach that integrates local expertise and ensures that the voices of women and girls are prioritized. Our findings show that without gender-responsive outreach and support, the most vulnerable communities remain marginalized in the pursuit of justice. And again, the justice in Burma/Myanmar will not be fully realized while the military junta remains in power. The primary task for us and for the people of Burma/Myanmar is to overthrow the military junta and build a federal democratic state. Only then will the system of impunity end and true justice be achieved.

As we continue our work on the ground, supporting women who face atrocities, we urge the international community to heed the recommendations within this report. Meaningful progress toward accountability in Burma/Myanmar must prioritize gender competency at every level, from investigations to prosecutions and reparations. The Women's League of Burma stands ready to collaborate with global actors to ensure that justice for the women of Burma/Myanmar.

Sincerely,

Women's League of Burma (WLB)

Abbreviations

AA	Arakan Army
ARSA	Arakan Rohingya Salvation Army
BROUK	Burmese Rohingya Organisation UK
FFM	Fact-Finding Mission
GCU	Gender and Children Unit
HRC	Human Rights Council
ICC	International Criminal Court
GJC	Global Justice Centre
IIMM	The Independent Investigative Mechanism for Myanmar
IIIM	The International, Impartial and Independent Mechanism for Syria
LGBTQI+	Lesbian, gay, bisexual, transgender, queer, intersex plus
NGO	Non-governmental Organization
OTP	Office of the Prosecutor of the ICC
SGBC	Sexual and Gender-based Crimes
SOGI	Sexual Orientation and Gender Identity
UN	United Nations
UNITAD	The United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh
VAI	Victims' Advocates International
VPRS	Victim Participation and Reparation Section of the ICC

Glossary

Given the evolving nature of international law pertaining to sexual and gender-based crimes, there are few commonly accepted definitions for the terms used in this report. Accordingly, this report relies upon a variety of sources, including international human rights bodies, investigative authorities and courts, to provide examples of definitions that represent the most developed, progressive and authoritative in the field. The terms used throughout the report are assigned the meanings below for purposes of this report alone, and do not necessarily reflect the International Commission of Jurists' position.

- **Gender:** There is no single, prevailing definition of gender. However, significant progress has been made in understanding gender under international human rights law and international criminal law. Gender has been increasingly recognized as an evolving social and ideological construct associated with being male and female, and serving as means to categorize, order, and symbolize power relations.¹ As such, gender varies within societies and from society to society.² This understanding of gender differentiates gender from sex, ensuring critical engagement with rigid categorizations of sex that are often taken for granted.³
- **Sex:** Sex is the classification of a person as having female, male and/or intersex biological characteristics, often ascribed on the basis of individuals' reproductive function.⁴ While infants are usually assigned the sex of male or female at birth based on the appearance of their external anatomy alone, a person's sex is a combination of a range of bodily sex characteristics.
- **Gender-based crimes:** The ICC OTP lists gender-based crimes within the ICC's jurisdiction as "sexual violence, reproductive violence, and/or other forms of gender-based violence."⁵ The IIIM defines gender-based crimes more broadly as "international crimes committed against persons because of their sex and/or socially constructed gender roles."⁶
- **Gender-based violence:** The ICC OTP defines gender-based violence as "an umbrella term for any harmful act that is perpetrated based on socially ascribed differences based on gender, usually because of a person's actual or perceived gender, sex, or sexual orientation."⁷ They note that it

*includes acts that inflict physical, sexual or mental harm or suffering, threats of such actions, coercion, and other deprivations of liberty. This conduct can occur in public or in private. It violates a person's human rights. Rooted in structural gender inequalities and power imbalances, gender-based violence is both a symptom of gender inequity and a tool to reinforce it. [It] includes sexual violence and reproductive violence.*⁸

The IIIM defines gender-based violence as "structural violence directed towards or disproportionately affecting someone because of their gender or sex, including perceived transgression of the gender norms in their community or society."⁹

¹ UN Special Procedures, Joint Statement "Re: Comments to the Draft Crimes Against Humanity Convention," 30 November 2018, p2. <https://www.ohchr.org/sites/default/files/Documents/Issues/Executions/LetterGender.pdf>. Agnès Callamard, Report of the Special Rapporteur on extrajudicial, summary or arbitrary killings, UN Doc. A/HRC/3523 (6 June 2017), para.17; See also International Criminal Court, Office of the Prosecutor Policy Paper on Gender-Based Crimes (December 2023), paras. 16-17.

² International Criminal Court, Office of the Prosecutor Policy Paper on the Crime of Gender Persecution (December 2022), p. 3. See also International Criminal Court, Office of the Prosecutor Policy Paper on Gender-Based Crimes (December 2023), para. 17.

³ UN Special Procedures, Joint Statement "Re: Comments to the Draft Crimes Against Humanity Convention," 30 November 2018, p2. <https://www.ohchr.org/sites/default/files/Documents/Issues/Executions/LetterGender.pdf>.

⁴ International, Impartial and Independent Mechanism to Assist the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic (*hereinafter IIIM*), IIIM Gender Strategy and Implementation Plan (technical version)(30 September 2022), p. 8.

⁵ International Criminal Court, Office of the Prosecutor Policy Paper on Gender-Based Crimes (December 2023), para. 42.

⁶ IIIM Gender Strategy and Implementation Plan (technical version)(30 September 2022), p. 14.

⁷ International Criminal Court, Office of the Prosecutor Policy Paper on Gender-Based Crimes (December 2023), para. 27.

⁸ International Criminal Court, Office of the Prosecutor Policy Paper on Gender-Based Crimes (December 2023), paras. 28-29.

⁹ IIIM Gender Strategy and Implementation Plan (technical version)(30 September 2022), p. 13.

- **Gender identity:** According to the UN OHCHR’s 2019 report on sexual orientation, gender identity and sex characteristics, gender identity “reflects a deeply felt and experienced sense of one’s own gender. Most people have a gender identity, which is part of their overall identity. A person’s gender identity or gender identities may or may not be aligned with the sex assigned to them at birth.”¹⁰ The UN Independent Expert on sexual orientation and gender identity states that gender identity includes “the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other gender expressions, including dress, speech, and mannerisms.”¹¹
- **Gender diverse:** The UN Independent Expert on sexual orientation and gender identity uses “gender diverse” to refer to persons whose gender identity, including their gender expression, is at odds with what is perceived as being the gender norm in a particular context at a particular point in time.¹²
- **Gender perspective:** The ICC refers to gender perspective as “the understanding of differences in status, power, roles, and needs between men and women, including/and LGBTQI+ persons, and how gender inequality and discrimination on the basis of sex, gender identity or sexual orientation may impact people’s opportunities, interactions, and experiences in a given context. This understanding includes an awareness of how gender-related norms can vary within and across contexts.”¹³ The IIIM gender strategy also considers how these differences impact individuals with diverse sexual orientations or gender identities.¹⁴
- **Intersectionality:** The ICC OTP describes intersectionality as “the way distinct forms of discrimination can combine and compound to result in consequences that differ from those resulting from any one of the individual forms of discrimination. An intersectional analysis, therefore, surfaces the way multiple systems or structures of oppression can accumulate to produce unique outcomes for those individuals or communities bearing multiple, overlapping identities or characteristics. In the context of international criminal law, intersectionality describes how multiple aspects of a person’s identity (for example, race, ethnicity, gender, religion, age, sexual orientation, (dis)ability, or indigenous status) can render them particularly vulnerable to specific or overlapping systems of discrimination, oppression or violence.”¹⁵
- **Gender-competent analysis:** The ICC OTP defines the term “gender-competent analysis” as “part of the systematic, intersectional analytical process that asks what has happened, against whom, by whom, and why, in light of relevant intersecting factors such as gender, age, nationality and ethnicity. It also accounts for different individuals’ relationships to structural oppression and exacerbated violence in a given context.”¹⁶ The OTP notes that gender-competent analysis “increases awareness of differences in power, roles, and needs between people of different genders, and the way gender may contribute to people’s vulnerability and their experience of harm. It also helps illuminate how gender norms may contribute to societal institutions that enable, contribute to, or fail to prevent or punish GBC.”¹⁷ The IIIM defines gender analysis as a “systematic analytical process that uses sex-disaggregated and other relevant information to understand how gendered inequalities, and related social norms and power relationships, may affect the commission, experience, consequences and impact of relevant crimes and violations.”¹⁸

¹⁰ UN Office of the High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law* (2nd Edition: 2019), p.5, https://www.ohchr.org/sites/default/files/Documents/Publications/Born_Free_and_Equal_WEB.pdf;

¹¹ Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Report on Legal Recognition of Gender Identity and Depathologization, UN doc. A/73/152 (12 July 2018), para. 2.

¹² *Ibid.*, para 5.

¹³ International Criminal Court, Office of the Prosecutor Policy Paper on Gender-Based Crimes (December 2023), p. 11.

¹⁴ IIIM Gender Strategy and Implementation Plan (technical version)(30 September 2022), p. 9.

¹⁵ ICC Policy Paper on Gender-Based Crimes (December 2023), paras 40-41. See also IIIM Gender Strategy and Implementation Plan (technical version)(30 September 2022), p. 43.

¹⁶ International Criminal Court, Office of the Prosecutor Policy Paper on Gender-Based Crimes (December 2023), para. 20.

¹⁷ International Criminal Court, Office of the Prosecutor Policy Paper on Gender-Based Crimes (December 2023), para. 21.

¹⁸ IIIM Gender Strategy and Implementation Plan (technical version)(30 September 2022), p. 9.

- **LGBTQI+:** According to the ICC OTP, “[t]he acronym LGBTQI+ refers to a diversity of sexual orientations, gender identities and expressions, and sex characteristics. Specifically, it stands for: lesbian, gay, bisexual, transgender, queer and intersex persons, with a plus sign to indicate the non-exhaustive nature of this list.”¹⁹
- **Reproductive violence:** The ICC OTP defines reproductive violence as “violence [that] violates reproductive autonomy and/or [that] is directed at people on account of their actual or potential reproductive capacity, or perceptions thereof.”²⁰
- **Sexual orientation:** Sexual orientation refers to a person’s physical, romantic and/or emotional attraction towards other people. Most people have a sexual orientation, which is part of their identity. For example, gay men and lesbian women are attracted to individuals of the same sex as themselves; heterosexual people are attracted to individuals of a different sex from themselves; bisexual people may be attracted to individuals of the same or different sex; pansexual people are attracted to individuals of any sex or gender; and asexual people are not sexually attracted to individuals of any sex or gender. Heterosexual, “[l]esbian, gay, ...bisexual, [pansexual and asexual] persons may have any gender identity or sex characteristics.”²¹
- **Sexual violence:** According to the ICC OTP, “[s]exual violence is a form of gender-based violence that involves the commission or attempted commission of sexual acts. An act can be ‘sexual’ even without physical contact, such as psychological violence that arises from threats of rape or genital mutilation. An act may be sexual regardless of whether sexual gratification was part of the intent or result. Finally, sexual violence can be committed by and against any person regardless of sex or gender; they may also involve persons of the same sex.”²² The OTP goes on to state that “there is no single understanding of the term ‘sexual’, nor should one be imposed. Rather, in many ways, the sexual nature and gravity of an act is determined by myriad factors such as identity, ability, age, race, sex, culture, religion, historical precedents, ethnicity, indignity and whether there was consent. It is also critical to take into account survivors’ own perspectives as to what constitutes an ‘act of a sexual nature’.”²³
- **Universal jurisdiction:** Under universal jurisdiction, a State can prosecute individuals for serious international crimes, irrespective of the nationality of the victim or perpetrator or the territory in which the crime was committed. Subject to the principle of *aut dedere aut judicare*, States are obligated under international law to exercise universal jurisdiction over serious crimes under international law including crimes against humanity, war crimes, genocide, torture, extrajudicial killings, and enforced disappearances.²⁴ Universal jurisdiction is usually exercised by States as a last resort when the State in which the crimes were committed is unable or unwilling to investigate and prosecute the crimes.

¹⁹ International Criminal Court, Office of the Prosecutor Policy Paper on Gender-Based Crimes (December 2023), para. 38.

²⁰ International Criminal Court, Office of the Prosecutor Policy Paper on Gender-Based Crimes (December 2023), para. 35.

²¹ See UN Office of the High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law (Second Edition)* (2019), p. 5, <https://www.ohchr.org/en/publications/special-issue-publications/born-free-and-equal-sexual-orientation-gender-identity-and>

²² ICC Policy Paper on Sexual and Gender-Based Crimes (December 2023), paras. 31-32.

²³ ICC Policy Paper on Sexual and Gender-Based Crimes (December 2023), para. 33.

²⁴ See e.g., Article 49, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)(12 August 1949); Art. 50, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) (12 August 1949); Art. 129, Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)(12 August 1949); Art. 146, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (12 August 1949); Art. 85, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)(8 June 1977); Article IV(b), International Convention on the Suppression and Punishment of the Crime of Apartheid (1974); Article II, Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948); Article 5(2), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); Article 1, International Convention for the Protection of All Persons from Enforced Disappearance (20 December 2006); The Princeton Principles on Universal Jurisdiction, Princeton University Press (2001), principle 2(1); Principle 18, UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted by the UN Economic and Social Council (ECOSOC) Resolution 1989/65 of 24 May 1989.

Executive Summary

a. Background

Decades of ethnic division and conflict have driven the perpetration of a harrowing array of human rights violations and abuses by the Tatmadaw and other State and non-State actors in Myanmar, particularly in the context of the 2016 and 2017 “clearance operations” against the Rohingya and the 2021 military coup. Like many other contexts, the commission of atrocity crimes is gendered, with rape, other acts of sexual violence, reproductive violence and other crimes being committed against women, girls, men, boys and LGBTQI+ persons based on their gender. The UN Human Rights Council mandated Independent International Fact-Finding Mission for Myanmar reported extensively on the commission of sexual violence and other gender-based crimes, linking such violations with the entrenched gender norms and inequality within the country and ethnic communities and noting that intersecting identities including ethnicity result in the double victimisation of survivors.

The accountability deficit for atrocity crimes at the domestic level led the Prosecutor of the International Criminal Court (ICC) to seek permission to open an investigation in 2018 and States to intervene by establishing the Independent Investigative Mechanism for Myanmar (IIMM) in 2018, filing a genocide case before the International Court of Justice in 2019 and opening investigations under the principle of universal jurisdiction in multiple jurisdictions in 2021, 2022 and 2023. While these mechanisms combined may fill some accountability gaps, without due attention being given to adopting gender-competent approaches such judicial endeavours can overlook or inadequately address gender discrimination and patriarchal heteronormative structures which may drive the crimes and fail to promote a truly inclusive justice system where all voices are heard, regardless of gender or other intersecting identities.

With the objective of advancing gender-competent justice for atrocity crimes allegedly committed in Myanmar, the International Commission of Jurists (ICJ) conducted research to examine whether and how current international accountability mechanisms and actors with jurisdiction over the situation in Myanmar incorporate a gender perspective in their work. The ICJ carried out desk research and consultations with representatives of the ICC, IIMM, Gambia legal team in the case before the International Court of Justice and victim representatives filing complaints based on universal jurisdiction in Argentina. This inquiry focused on identifying specific measures and strategies implemented to address GBC in Myanmar, aiming to both evaluate progress and recommend further actions for enhanced gender-informed justice initiatives.

Focusing on gender competence is necessary given that gender-based crimes (GBC) continue to be under-investigated and/or under-prosecuted, including in situations of armed conflict or repression where such crimes are prevalent; that documenting gender differentiated harms is essential to enable victims/survivors to seek and obtain adequate and transformative reparations; and that multidimensional and structural forms of discrimination impeding affected groups’—notably women’s—access to justice domestically, also hinder gender-inclusive participation in international justice mechanisms. Without a proactive approach to integrating a gender perspective in justice processes, GBC and gender-differentiated harms are less likely to be identified and addressed, and gender-inclusive participation in the justice process less likely to be achieved.

b. Findings

These accountability actors, with their distinct mandates, are forging a path toward redress for war crimes, crimes against humanity, and possible genocide committed in Myanmar. They play a crucial role in identifying GBC, understanding the gendered harms of all crimes, and ensuring their engagement with witnesses adheres to best practice survivor-centred and trauma-informed approaches. Although confidentiality and the preliminary stages of these processes prevent a full assessment, the strides made to embed gender considerations in these efforts are evident and demonstrate a commitment to ongoing progress. Moving forward, further steps can be taken to ensure a gender-competent and intersectional approach is fully integrated in their work, so that it can ultimately result in concrete gender-sensitive remedies for survivors.

The Office of the Prosecutor of the ICC has increasingly prioritized the adoption of a gender-competent approach in its preliminary examinations, investigations and prosecutions since its establishment in 2002, including through the adoption of its 2014 Policy Paper on Sexual and Gender-Based Crimes, revised and republished in two comprehensive policies on Gender Persecution (2022) and Gender-Based Crimes (2023). These subsequent policies, as well as steps to increase the size and influence of its Gender and Children Unit, and mainstream both gender competence and context specific expertise in the OTP's unified teams responsible for preliminary examinations, investigations and prosecutions, reflect learnings made over the course of the last two decades of practice; learnings which the OTP has indicated inform their Myanmar-related work. Ongoing limitations, including resource constraints limiting the inclusion of local context specific gender experts in unified teams, fact-based complementarity assessments limiting the fair characterization of GBC at the domestic level and barriers to effective outreach, particularly to direct engagement in Cox's Bazaar in Bangladesh and to engagement with women and girls, continue to hamper the ICC's effectiveness in pursuing gender-competent approaches in the Myanmar context and more broadly.

The IIMM prioritizes gender-competent methodologies in its operations, focusing on the investigation of GBC and gendered harms, and striving for inclusivity in victim engagement. The ICJ was informed that the IIMM was giving due consideration in recruitment to factors such as geographic representation, gender balance and expertise in the investigation of GBC and that they had established a GBC working group. They also have a dynamic "red flags" system for identifying GBC during investigations, which all staff involved in investigations are trained on, as well as a GBC policy in development. As a result, a gender perspective has been incorporated in several of its analytical reports as well as a dedicated thematic report on GBC. The development of internal policies and analytical tools reflects a gender-competent approach. However, there is room for the IIMM to enhance its engagement with Myanmar's civil society and affected communities, to publish more information about how it implements gender-competent approaches in practice, and to serve as a focal point for coordination and knowledge sharing amongst Myanmar-related accountability actors.

The Gambia's application against Myanmar to the International Court of Justice, joined by seven other States, highlights GBC by referring to the killing of men and boys, restrictions on the right to marry and bear children and acts of sexual violence. In their filing, the seven intervening States also sought to obtain findings inclusive of GBC in the Court's assessment of Article 2 of the Genocide Convention. The Gambia's memorial to the Court is not public, such that it is not possible to comprehensively reflect on the extent to which a gender perspective and analysis are integrated in The Gambia's submission. However, based on the application, a fuller analysis of GBC could be outlined by the parties, including by addressing sexual violence against men and boys and LGBTQI+ persons. To ensure a more gender-competent approach, the parties could introduce comprehensive evidence of GBC from all affected gender groups and expert evidence on GBC, and the Court could actively request information and evidence from the parties on gender norms and constructs in Myanmar, GBC and gendered harms. Outreach efforts also need amplification, such as direct engagement in Cox's Bazaar to better inform affected communities about the case.

Numerous civil society organisations and survivors have also attempted to invoke universal or other forms of extraterritorial jurisdiction over atrocity crimes committed in Myanmar, including in Argentina, which opened an investigation. These early efforts underscore the necessity of advocating for the application of gender-competent and survivor-centred approaches. Victims' representatives can strengthen these efforts by filing evidence related to GBC, including through context specific gender experts, and encouraging domestic authorities to adopt gender-sensitive survivor-centred approaches in their investigative and prosecutorial activities and collaborate with international mechanisms such as the IIMM.

The multiplicity of accountability mechanisms and efforts, while positive, has generated some confusion amongst affected communities on which mechanism is doing what and on potential outcomes. Coordination between these accountability mechanisms exists but can be further intensified, particularly in the areas of public information and outreach. These mechanisms and actors could engage in further exchange on their respective strategies, experiences, and challenges in addressing gendered barriers to justice with a view of making justice inclusive.

c. Key recommendations

Based on a comprehensive analysis of the above issues, the ICJ made findings and recommendations for consideration by the accountability bodies and actors involved in the research, with a view to strengthening their capacity to incorporate a gender perspective in their work and ensure gender-competent justice for survivors. The relevance of these findings extends beyond Myanmar, potentially informing international and national justice efforts alike in other atrocity crime contexts. A selection of the key recommendations from the report are set out below.

Recommendations pertaining to the ICC

To all organs and sections of the ICC

- Ensure inter-organ and section coordination in the integration of a gender perspective in key functions of the court, including stakeholder engagement and mapping, outreach and engagement with victims/survivors and affected communities;

To the Office of the Prosecutor

- Increase consultation with civil society organizations, experts and other actors with context-specific gender expertise to identify and address: (i) gender constructs relevant to the commission of crimes within the jurisdiction of the Court, including structural factors enabling the commission of crimes; and (ii) gender barriers impacting access to justice in a gender-competent, survivor-centric and trauma-informed manner, with a view to identifying measures to assist to overcome them;
- Ensure diversity, including gender diversity, and context-specific expertise in the staff appointed to and engaged in each investigation, including the Myanmar/Bangladesh situation, employing a context-specific gender (ideally GBC) expert in the unified team to review evidence and advise the team on GBC at all stages of the Unified Team's work;
- Make gender-specific strategies accessible – in relevant languages and formats – to civil society organizations and other actors working on ICC situation countries, as well as to victims/survivors and affected communities;
- Coordinate with other accountability mechanisms and actors engaged in the Myanmar situation, including the IIMM and domestic authorities investigating crimes under international law committed in Myanmar, as well as civil society organizations, in relation to gender strategies and with a view to tailoring gender-related strategies to the specific situation;
- Ensure that crimes charged and prosecuted in the context of the Myanmar/Bangladesh situation adequately reflect their gendered nature by being explicitly charged as GBC, and by charging GBCs involving sexual or reproductive violence as sexual or reproductive violence crimes. Such charges should additionally be cumulative with other relevant charges, such as, torture, outrages on personal dignity, and other inhuman acts.
- Meet the OTP's commitments to ensuring full and faithful characterization of GBC when making complementarity assessments and considering whether the "same conduct" is being addressed in domestic proceedings by having regard to how crimes are or could be characterized at the domestic level. When providing support to domestic authorities under the principle of complementarity, ensure gender is prioritized in any judicial cooperation and technical support for investigations and prosecutions.

To the Registry

- Intensify outreach efforts to affected communities, in particular women and girls and persons who are or may be perceived to be LGBTQI+, in coordination with other mechanisms and actors involved in the Myanmar situation, with a view to enhancing awareness of victims' rights and means to participate in ICC proceedings;
- Make training on gender mainstreaming and a gender sensitive approach compulsory for all Registry staff engaged with victims, particularly those working on victim participation and outreach, and invite external and country specific experts to conduct parts of these trainings.

Recommendations pertaining to the IIMM

- Conduct and provide sufficient time for consultations with civil society organizations (particularly those from and based in Myanmar working on GBC), gender experts and other accountability mechanisms and actors from the outset of the development of and/or prior to finalization of policies, strategies and, where possible, implementation plans relating to gender and intersectionality, SGBC and outreach and public information. Ensure the participation of women and LGBTQI+ persons, with diverse religious and ethnic backgrounds, in such consultations, particularly those from grassroots organizations.
- Ensure national staff and/or consultants play a primary role in the analysis of gender constructs and related crime patterns, as well as in the review of evidence, including in its original language. Ensure views and insights offered by national staff are used to inform policies, strategies, working methods and practices from the outset.
- Make gender-related policies and strategies, including abridged versions, public and available in multiple languages, including in relevant Myanmar languages and those in which the main accountability mechanisms operate.
- Conduct periodic consultations with relevant actors working on accountability with respect to the situation in Myanmar to ensure coordination in relation to, implementation of and reflection on IIMM's and others' gender policies and strategies and intersecting matters, such as outreach and an engagement with victims/survivors and witnesses, as well as reflection on litigation efforts and challenges in relation to SGBC.
- Develop public versions of analytical modules on gender constructs in Myanmar, and their impact on the commission of crimes and harms experienced by survivors, taking into account the need to protect the rights of the victims/survivors and witnesses and possible suspects in future investigations and prosecutions and other accountability-oriented proceedings, enabling them for use by other actors engaged in accountability-related work, policy making or humanitarian intervention.
- Establish a formal "exchange platform" among relevant accountability bodies to exchange information and expertise necessary for the advancement of gender-competent accountability for the situation in Myanmar and ensure coordination among them. Within such platform, the IIMM could disseminate good practice and practical proposals relating to gender-competent outreach, victim and witness protection, evidentiary collection and analysis and guidance on other relevant topics that may not be fully assessed by actors requesting assistance.

Recommendations pertaining to the Gambia v. Myanmar genocide case at the International Court of Justice

Recommendations to The Gambia and to State interveners in the case:

- Advance in subsequent filings the integration of gender analysis of all alleged genocidal acts, against all survivor groups, namely, women and girls, men and boys, and LGBTIQ+ persons. Request, where needed, assistance from the IIMM in relation to the collection and availability of evidence and legal analysis, or other aspects relating to engagement with survivors, and from civil society organizations with gender expertise. In addition, engage with non-governmental organizations, women's rights groups, and experts in gender and SGBC, to build submission to enrich the Court's understanding and approach to gender related aspects of the case. Provide survivor-centric, gender-competent and trauma-informed support to any engaged survivors;
- Continue to engage with civil society organizations, particularly those facilitating engagement with survivors and affected communities, to ensure dissemination of information and an accurate understanding of case developments, including, subject to a security assessment, by the Rohingya people in Myanmar. Ensure that women's voices be central to community engagement with the case.

Recommendations to the International Court of Justice:

- Implement gender sensitivity training for both judges and court clerks, focusing on providing a comprehensive grasp of gender theory, the role it plays within the realm of international law, and a detailed understanding of the complexities surrounding GBC.
- Formalize Gender Guidelines for Proceedings, drawing upon the best practices from institutions like the ICC or IIMM, which would serve to standardize a gender-competency protocol for examining evidence and testimonies in human rights cases, promote the use of gender-sensitive language throughout court proceedings, and offer a consistent framework for interpreting State obligations.
- Pursue and establish gender parity among judges as an essential reform, ensuring a judiciary that reflects a broad spectrum of perspectives.
- Actively seek comprehensive data on gender constructs within Myanmar, especially as they relate to the Rohingya community/people, to better inform their analysis of the case.
- Request additional evidence or information on GBC that may support or expand upon the parties' existing submissions. Such requests should particularly go toward filling in gaps of information, such as GBC as it relates to men and LGBTIQ+ individuals within the Rohingya community and other forms of GBC. As such, encourage parties to solicit evidence from gender experts and civil society organisations, as well as victims/survivors and other witnesses.
- Request observations from public international organisations, in particular the IIMM, on gender and GBC in Myanmar and in particular Rakhine State, including any existing analysis or reports relevant to the case and in particular on GBC.
- To the extent necessary, call for an expert to fill any gaps in information on gender and GBC in Myanmar and in particular Rakhine State.

Recommendations to lawyers and organizations involved, or who may in the future be involved, in bringing cases under the framework of universal jurisdiction:

- Integrate gender analysis in the filing of complaints and submissions to competent authorities, including by consulting with civil society organizations, experts and other actors with context-specific gender expertise to identify and address (i) gender norms relevant to the commission of crimes, including the gendered structures enabling the commission of crimes and differentiated harms experienced by survivors based on their gender, and taking into account intersecting identities and characteristics; and (ii) gender barriers impacting the disclosure of information and evidence of GBC and access to justice in a gender-competent, survivor-centred and trauma-informed manner, with a view to identifying measures to assist to overcome them;
- Encourage the Office of the Prosecutor and Court to request information, evidence and analysis from the IIMM on gender and GBC committed in Myanmar.
- Request the Office of the Prosecutor to call expert/s on gender and/or GBC committed in Myanmar, in particular those with the expertise to reflect on and apply intersectional approaches to their evidence.
- Continue to advocate for the adoption of a survivor-centred, gender-competent and trauma-informed approach to the investigation, prosecution and adjudication of crimes committed in Myanmar by the Office of the Prosecutor and the Court, including by relying upon existing criminal procedure laws and domestic guidelines and protocols which may be adapted to meet good practice standards required in international crimes cases;
- Adopt a collaborative approach with other accountability actors engaged in the situation in Myanmar, and others engaged in universal jurisdiction cases more broadly, to ensure continued dialogue and exchange lessons learned in advancing gender-competent accountability.

Preliminary recommendations to the Office of the Prosecutor and Investigating Judges

- Adopt a survivor-centred, gender-competent and trauma-informed approach to the investigation, prosecution and adjudication of crimes committed in Myanmar, including by relying upon existing criminal procedure laws and domestic guidelines and protocols and adapting them to meet good practice standards required in international crimes cases where possible, and ensuring referral pathways for access to mental health and psychosocial, somatic and legal support are established and implemented.
- Request information, evidence and analysis from the IIMM and ICC on gender and GBC in Myanmar, including any existing analysis or reports relevant to the case as well as tailored analysis carried out for the purposes of the Argentinian case, and including with an intersectional lens.
- Engage expert witnesses in the proceedings on gender and GBC in Myanmar, particularly as they relate to the Rohingya and Rakhine State, in particular those with the expertise to reflect on and apply intersectional approaches to their evidence.
- Implement measures to protect the dignity, privacy and security of victims and witnesses, especially survivors of GBC, during their testimony.
- Adapt courtroom procedures to create a supportive environment for victims and witnesses of all genders to give testimony, including the use of video links or screens to prevent direct confrontation with the accused.

I. Introduction

a. About the research

With the objective of advancing gender-competent justice for serious crimes under international law allegedly committed in Myanmar, this report examines whether and how current international accountability mechanisms and actors with jurisdiction over the situation in Myanmar incorporate a gender perspective in their work. For many years, the International Commission of Jurists (ICJ) has been documenting human rights violations and abuses in Myanmar, and has been increasingly concerned about the scale and severity of the crimes under international law committed, including in the context of the “clearance operations”²⁵ against the Rohingya in 2016 and 2017 and the attacks against other ethnic minorities before and after the military *coup* in 2021, which has further and exponentially upended the protection of human rights across the country.²⁶

This report forms part of the ICJ’s continued efforts to promote accountability for violations and abuses of international human rights law and international humanitarian law.²⁷ It also forms part of the ICJ’s efforts to address inequality and discrimination on the basis of gender, sexual orientation and gender identity and other intersecting identities, as well as its work on women’s human rights, including their right to access to justice and to a remedy and reparation for gender-based violence.²⁸

Focusing on gender competence in justice and accountability processes is necessary for multiple reasons. Firstly, despite significant progress towards the codification of gender-based crimes (GBC) in international criminal law, these crimes continue to be under-reported, under-investigated and under-prosecuted, including in situations of armed conflict or repression where such crimes are prevalent. Secondly, there is a growing recognition that harms resulting from all crimes under international law are often gender differentiated and that documenting such harms is essential to enable victims/survivors to seek and obtain adequate and transformative reparations that recognize the context of inequality in which these crimes were committed.²⁹ Finally, the multidimensional and structural forms of discrimination impeding affected groups’—notably women’s—access to justice domestically, also hinder a gender-inclusive participation in international and domestic justice mechanisms. As a result, without a proactive approach to integrating a gender perspective in justice processes, GBC and gender-differentiated harms are less likely to be identified and addressed, and gender-inclusive participation in the justice process less likely to be achieved. Accordingly, this report addresses not only sexual violence and gender persecution — which, in practice, have often been treated

²⁵ Myanmar authorities use the term “clearance operations” to describe their disproportionate and violent military operations targeting the Rohingya population in Myanmar, largely in Rakhine State, following attacks by Arakan Rohingya Salvation Army (ARSA) on military posts and security force outposts in 2016 and 2017 where nine and twelve security personnel were killed, respectively. The operations were presented by the authorities to eliminate the “terrorist threat” posed by ARSA, yet, as acknowledged by the Myanmar FFM, were a result of the systematic oppression of the Rohingya and previous waves of violence. The operations resulted in the partial or total destruction of 40% of villages in northern Rakhine (where the majority of the Rohingya live) and the forced displacement of 725,000 Rohingya who fled to Bangladesh. See, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar (FFM report), UN Doc. A/HRC/39/CRP.2, (17 September 2018), paras. 749-754.

²⁶ ICJ, “Myanmar: Military Coup d’état violates principles of rule of law, international law and Myanmar’s Constitution,” 8 February 2021, <https://www.icj.org/myanmar-military-coup-detat-violates-principles-of-rule-of-law-international-law-and-myanmars-constitution/>; ICJ, “Myanmar: Human rights implications of the crisis, UN Special Session,” 12 February 2021, <https://www.icj.org/myanmar-human-rights-implications-of-the-crisis-un-special-session/>; ICJ, “Myanmar: Post-Coup Legal Changes Erode Human Rights,” 2 March 2021, <https://www.icj.org/myanmar-post-coup-legal-changes-erode-human-rights/>; ICJ, “Myanmar: Security forces’ killings of protesters should be investigated as crimes against humanity,” 4 March 2021, <https://www.icj.org/myanmar-security-forces-killings-of-protesters-should-be-investigated-as-crimes-against-humanity/>; ICJ, “Myanmar: Accountability needed for crimes against humanity,” 12 March 2021, <https://www.icj.org/myanmar-accountability-needed-for-crimes-against-humanity-un-statement/>; ICJ, “Myanmar: a civilian government and the rule of law must be restored,” 15 March 2021, <https://www.icj.org/myanmar-a-civilian-government-and-the-rule-of-law-must-be-restored-un-statement/>; ICJ, “ICJ urges referral of Myanmar human rights situation to International Criminal Court,” 7 July 2021, <https://www.icj.org/icj-urges-referral-of-myanmar-human-rights-situation-to-international-criminal-court-un-statement/>.

²⁷ For more information on the International Commission of Jurists’ Global Accountability Initiative, see: <https://www.icj.org/themes/accountability/>.

²⁸ For more information, see ICJ, “ICJ compilation in sexual orientation and gender identity in human rights,” 2007, <https://www.icj.org/theme/sexual-orientation-and-gender-identity/>, and [Women’s Human Rights | International Commission of Jurists \(icj.org\)](https://www.icj.org/).

²⁹ International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, second edition, (2017), p. 82; International Criminal Court, Office of the Prosecutor Policy on Gender-Based Crimes, para. 143; Guidance Note of the Secretary General, Reparations for Conflict-Related Sexual Violence (2014), p. 5; Nairobi Declaration on Women’s and Girl’s Right to a Remedy and Reparation (2015).

as synonymous with GBC — but all crimes with a gender component; sexual violence, reproductive violence and other forms of violence committed on the basis of victims’ sex, gender, gender identity and/or sexual orientation, whether actual or perceived.³⁰

Given Myanmar’s unwillingness and inability to ensure meaningful accountability for such crimes at the domestic level, the focus and the intended audience of this report are limited to international investigative, prosecutorial, and judicial mechanisms and actors, and in particular: the IIMM; the ICC; The Gambia, in relation to the case it brought against Myanmar before the International Court of Justice;³¹ and other States who have or may intervene in the case; and civil society organizations and lawyers engaged in universal jurisdiction cases or efforts.

To research the subject matter of this report, the ICJ initiated a conversation with these mechanisms and actors to understand the concrete measures they had taken to advance gender-competent justice and integrate a gender perspective in their work. In addition, the ICJ analysed relevant policies and tools those institutions and actors had developed for this purpose and considered how those are specifically tailored to the situation in Myanmar. The intention of this research is to take stock of and raise awareness of the progress already made by each of the mechanisms and efforts detailed below and to help further these strides in the advancement of gender-competent justice. While the research focuses on strengthening gender competence in relation to the situation in Myanmar, the findings and recommendations are relevant to other situations before the targeted institutions.

This research paper is divided into five parts. This introduction presents the background to and methodology of the research, its limitations, and acknowledgments. Part II presents a brief overview of the situation in Myanmar, including reports documenting GBC allegedly committed in the country, particularly since 2012, and a brief introduction to how the mosaic of international and extra-territorial accountability mechanisms were created or became engaged in the situation. Part III outlines elements to be considered when advancing gender-competent justice, including pre-existing gender discrimination and disempowerment. Part IV presents an overview of the mandate, jurisdiction or legal basis of investigations or cases by international accountability mechanisms and actors engaged in Myanmar, and efforts to integrate a gender perspective therein, with recommendations directed to the specific accountability mechanism or actor.

b. Methodology

This report is primarily informed by consultations conducted between September 2022 and February 2023 with representatives from the IIMM, the ICC, and with lawyers acting on behalf of The Gambia in the case before the International Court of Justice and those representing victims/survivors before the courts of Argentina.³² The culminating report was subject to subsequent research, a review by ICJ and external experts, a reflection on relevant updates taking place across 2023 and further input by the research participants.

The research commenced with a desk review of literature on allegations of international crimes, including violations and abuses of international human rights law and international humanitarian law, committed in Myanmar. The literature review further examined available information on access to justice, including effective and gender-competent remedies at the domestic and international level, and barriers to accessing justice, including for gender-based crimes. Key consultations with researchers, representatives of civil society organizations and human rights activists were also conducted to better understand context-specific gender constructs and the resulting needs and concerns for achieving gender-competent and inclusive justice processes. The findings that emerged from these consultations are anecdotal and do not paint a comprehensive picture of gender constructs in Myanmar, or of the related concerns and needs, as this would require far more extensive consultations. In any event, such a comprehensive picture is beyond the scope of the objectives of this report,

³⁰ See also “gender-based crimes” in Glossary.

³¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, International Court of Justice (11 November 2019), <https://www.icj-cij.org/sites/default/files/case-related/178/178-20191111-APP-01-00-EN.pdf>.

³² For a description of the case, see Section IV(iii) below.

The findings did, however, inform questions and discussion points raised in exchanges that took place thereafter with representatives from the IIMM, the ICC, and with lawyers involved in the cases before the International Court of Justice and the courts of Argentina. Through these exchanges, the ICJ aimed to learn about how gender was taken into account by these actors in the discharge of their mandates or their accountability efforts. For accuracy and clarity purposes, representatives of accountability mechanisms and actors were given the opportunity to review the sections of this report that draw from consultations with them and, where necessary, to make additions, deletions or corrections. A final review of the report took place in July 2024 prior to the report's publication.

c. Limitations

Insights drawn from consultations with accountability mechanisms and actors are necessarily generic, considering the confidential nature of investigations or submissions, or the early stages of accountability efforts in which those mechanisms and actors are engaged. As such, this report cannot present the full extent to which accountability mechanisms and actors have integrated a gender perspective in their work, nor the tools and strategies they have adopted for doing so. Additionally, since the consultations were held, such mechanisms and actors may have taken further steps to adopt gender-competent approaches to their work.

For security reasons and to prevent re-traumatization, this research did not include interviews with victims/survivors and affected communities to which the explored policies, strategies or other efforts relate. Therefore, the evaluation of the efficacy and impact of such policies or efforts is inevitably incomplete since it has not benefitted from the input of these key constituencies.

d. Acknowledgements

The International Commission of Jurists extends its appreciation to the representatives of the IIMM, the ICC's Office of the Prosecutor and Registry, the lawyers acting on behalf of The Gambia in the case before the International Court of Justice and the lawyers representing victims/survivors in the case in Argentina for their readiness to engage with this research and the work towards gender-competent accountability. The International Commission of Jurists is further grateful to the lead researcher and drafter, Amal Nassar, as well as Akila Radhakrishnan, Kate Vigneswaran, Priya Pillai, Sunil Pal and David Eichert, as well as Myanmar civil society organisations and actors that cannot be named for security reasons, for their review and expert input to this report.

II. Context

a. Colonial legacy of ethnic division

Myanmar—a country populated by groups with significant ethnic, linguistic and religious diversity arising from successive waves of immigration over centuries—has been mired with successive military *coups* and state-sponsored violence against ethnic groups since independence from British rule in 1948 and the adoption of a seemingly constitutional order based on a colonial legacy of dividing and ruling the population along ethnic lines.

Britain colonized Myanmar in 1886, ruling it as a province of British India and allowing the free flow of migrants between the two countries by removing immigration boundaries.³³ The population was categorized into ethnic groups³⁴ and then further classified into “martial” and “non-martial” races, in which individuals from the majority Bamar ethnic group were excluded from service in the British military.³⁵ Britain administered Burma, as it was then called by the administration, through Indian civil servants, except for the ethnic minority dominated highlands, which were semi-self-governed by “hereditary chiefs.”³⁶

Upon independence from Britain in 1948, the “deep divisions and ethnic group tensions” were enshrined in Myanmar’s then new constitution, which granted citizenship only to “indigenous races”—a concept defined in the 1948 Citizenship Law as ethnic groups that had made their home in Myanmar prior to 1823³⁷—and access to fundamental rights and freedoms only to citizens.³⁸ Myanmar’s military, the “Tatmadaw”, and other State actors have instrumentalized the absence of a list of “indigenous races” provided for by law³⁹ and reliance upon outdated British categorizations of “ethnic groups” to restrict access to citizenship and basic human rights protections by some ethnic groups, such as the Rohingya.⁴⁰ While “non-indigenous” groups residing in Myanmar after three generations could claim citizenship by law, in practice they have been relegated to “lower tier citizens or denied citizenship altogether.”⁴¹

b. Violations and abuses of international human rights law and international humanitarian law

The inequality experienced by individuals from minority ethnic groups in Myanmar, which now make up more than 30 per cent of Myanmar’s population,⁴² has driven conflict between minority ethnic armed groups and State forces. Following the military *coup* by General Ne Win in 1962 and measures taken by Myanmar’s military, the “Tatmadaw”, under the pretence of protecting the sovereignty and national integrity of the country,⁴³ political, economic and State-sponsored violence and discrimination have blighted the daily lives of people from minority ethnic groups. Despite hope that the 2016 democratic election of Aung Sun Sui Kyi as State Counsellor of Myanmar and Minister of Foreign Affairs, and *de facto* leader of the country, would lead to rule of law reforms, the commission of violations and abuses of international human rights law and international humanitarian law continued during the armed conflicts between the Tatmadaw and minority ethnic armed groups and in the context of the military’s escalated targeting of the Rohingya in Rakhine

³³ International Crisis Group, “Identity Crisis: Ethnicity and Conflict in Myanmar,” (“Crisis Group Report 2020”) (28 August 2020), p.5, <https://www.crisisgroup.org/asia/south-east-asia/myanmar/312-identity-crisis-ethnicity-and-conflict-myanmar>.

³⁴ The last census under British rule in 1931 identified approximately 135 different ethnic groups. These groups were mostly determined by language and theories of ethnicity/race that are now considered scientific racism, but which have “come to be regarded as immutable and biologically determined.” See *ibid.*, p. 5.

³⁵ *Ibid.*, p. 4.

³⁶ *Ibid.*, p. 4.

³⁷ *Ibid.*, p. 6. This concept reiterated in the Nationality Law of the same year.

³⁸ *Ibid.*, p. 7; Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN doc. A_HRC_39_CRP.2 (17 September 2018), para. 66; Myanmar Constitution of 2008, Chapter VIII, https://www.constituteproject.org/constitution/Myanmar_2008.

³⁹ The Burma Citizenship Law of 1982 similarly fails to enumerate a list of indigenous groups. A list published by the military-led government in 1990, based on the 1931 census, contains numerous duplicate entries, errors and exclusions (of the Panthay and Rohingya). See Crisis Group Report 2020, pp. 7-8.

⁴⁰ Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN doc. A_HRC_39_CRP.2 (17 September 2018), para. 67; Crisis Group Report 2020, pp. 7-8.

⁴¹ See Crisis Group Report 2020, p. 7.

⁴² World Population Review, Myanmar Population 2022 (Demographics, Maps, Graphs), <https://worldpopulationreview.com/countries/myanmar-population>

⁴³ Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN doc. A_HRC_39_CRP.2 (17 September 2018), para. 71.

State through “clearance operations” starting in 2016 continued.⁴⁴ Another military *coup* in 2021 reversed any progress towards democratic reform and brought in a new wave of gross human rights violations and abuses, including the perpetration of serious crimes under international law against Myanmar’s people, particularly in Rakhine, Kachin and Shan States, as well as elsewhere.

International outcry and persistent advocacy by Myanmar and international human rights groups and activists over the targeting of Rohingya in Rakhine State⁴⁵ through “clearance operations” in 2016 led the Human Rights Council (HRC) to establish an Independent International Fact-Finding Mission (hereafter the Myanmar FFM or the Mission) in March 2017.⁴⁶ The Myanmar FFM was mandated to “establish the facts and circumstances of the alleged human rights violations by military and security forces, and abuses, in Myanmar,”⁴⁷ and its successive reports have documented the perpetration of crimes under international law and the prevalence of impunity for them, as well as the resultant urgent need to ensure redress for victims/survivors.⁴⁸

Subsequent “clearance operations” against the Rohingya in 2017,⁴⁹ coupled with the continuing human rights violations and abuses in Kachin and Shan States, led the HRC to establish the Independent Investigative Mechanism for Myanmar (hereafter the IIMM or the Mechanism) in September 2018 to “collect, consolidate, preserve, analyze and share evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011.”⁵⁰ At the same time, the HRC renewed the Myanmar FFM’s mandate until the IIMM was operational.⁵¹ The FFM concluded its work in September 2019, “transferr[ing] the information it collected about serious crimes under international law to the [IIMM].”⁵²

Several other efforts are underway to seek accountability for serious crimes under international law committed in Myanmar. On 14 November 2019, Pre-Trial Chamber III of the ICC authorized the Prosecutor to proceed with an investigation into alleged crimes committed against Rohingya because, while Myanmar is not a State Party to the Rome Statute, part of the alleged criminal conduct had taken place on the territory of Bangladesh, a State party to the ICC.⁵³ The ongoing investigation is focused on, but may expand beyond, the crimes of deportation, other inhumane acts, and persecution committed after 1 June 2010.⁵⁴

⁴⁴ For a detailed description of the 2016 and 2017 Tatmadaw military campaign, named “clearance operations,” against the Rohingya Muslim civilian population, see, e.g., Fortify Rights, “They Gave Them Long Swords: Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar,” (19 May 2018), <https://www.fortifyrights.org/mly-inv-rep-2018-07-19/>; Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN doc. A_HRC_39_CRP.2 (17 September 2018).

⁴⁵ Rakhine State, located in western Myanmar, is home to numerous ethnic and religious groups, with ethnic Rakhine and Buddhists forming the majority. The Rohingya people and other Muslim groups constitute the second largest religious group in the Rakhine State. Other groups present in the State include the Chin, Daingnet, Khami, Maramgyi, Mro, Thet and Hindus. See “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar,” UN doc. A_HRC_39_CRP.2 (17 September 2018), paras. 405-406.

⁴⁶ Human Rights Council, Resolution adopted by the Human Rights Council on 24 March 2017, Situation of human rights in Myanmar, UN Doc. A/HRC/RES/34/22 (3 April 2017), para. 11, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/34/22.

⁴⁷ Human Rights Council, Resolution adopted by the Human Rights Council on 24 March 2017, Situation of Human rights in Myanmar, UN Doc. A/HRC/RES/34/22 (3 April 2017), para. 11.

⁴⁸ For each of the reports of the Myanmar FFM, see: [OHCHR | Independent International Fact-Finding Mission on Myanmar](https://www.ohchr.org/en/press-releases/2019/09/myanmars-rohingya-persecuted-living-under-threat-genocide-un-experts-say?LangID=E&NewsID=24991).

⁴⁹ On 25 August 2017, the Tatmadaw launched a violent attack upon the Rohingya population in Rakhine State in retaliation for a coordinated attack by the Arakan Rohingya Salvation Army (ARSA) on 30 security force outposts across Rakhine State, in which 12 security personnel were killed. The “clearance operations” that followed thereafter resulted in the partial or total destruction of 40% of the villages in northern Rakhine (where the majority of the Rohingya live) and the forced displacement of 725,000 Rohingya, who fled to Bangladesh. The Myanmar FFM found that ARSA’s attacks were a result of the systematic oppression of the Rohingya and previous waves of violence. Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN doc. A_HRC_39_CRP.2 (17 September 2018), para. 749-751.

⁵⁰ UN Human Rights Council, Situation of Human rights of Rohingya Muslims and Other Minorities in Myanmar, UN Doc. A/HRC/RES/39/2 (27 September 2018), para. 22.

⁵¹ Human Rights Council, Resolution adopted by the Human Rights Council on 27 September 2018, Situation of human rights in Myanmar, UN Doc. A/HRC/RES/39/2 (3 October 2018), paras. 1, 30.

⁵² Office of the High Commissioner for Human Rights, “Myanmar’s Rohingya Persecuted, Living under Threat of Genocide, UN Experts Say” (16 September 2019), <https://www.ohchr.org/en/press-releases/2019/09/myanmars-rohingya-persecuted-living-under-threat-genocide-un-experts-say?LangID=E&NewsID=24991>.

⁵³ ICC Press Office, “ICC judges authorise opening of an investigation into the situation in Bangladesh/Myanmar,” 14 November 2019, <https://www.icc-cpi.int/news/icc-judges-authorise-opening-investigation-situation-bangladesh/myanmar>.

⁵⁴ Request for Authorisation of an Investigation Pursuant to Article 15, International Criminal Court, Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-7, 4 July 2019, <https://www.icc-cpi.int/court-record/icc-01/19-7>.

The Gambia, with the support of the Organization of Islamic Conference (OIC), also filed a case against Myanmar before the International Court of Justice for alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (hereafter the Genocide Convention).

Finally, numerous civil society organizations have also filed criminal complaints pursuant to the principle of universal jurisdiction in a number of countries, including in Argentina, where the court authorized the opening of an investigation,⁵⁵ and in Germany,⁵⁶ where the prosecutor declined to commence one.⁵⁷

c. Gender-based crimes committed in Myanmar

The Myanmar FFM, UN bodies and civil society organizations have documented and reported on GBC committed by the military, other State security forces, State-affiliated armed groups and ethnic armed groups across the country, and particularly in Rakhine, Kachin and Shan States.⁵⁸ These reports indicate that persecutory policies against minority ethnic groups have particular gendered dimensions.⁵⁹

The nexus of GBC to the broader context of gender inequality in Myanmar has often given rise to international attention and concern.⁶⁰ In a dedicated report in 2019, the FFM documented the high prevalence of GBC—a hallmark of the Tatmadaw’s “clearance operations”⁶¹—including rape, against Rohingya women and girls, men and boys, and transgender⁶² women⁶³ in northern Myanmar and Rakhine State and found grave violations amounting to torture, war crimes, crimes against humanity and acts of genocide.⁶⁴ In the context of genocide, the FFM found that:

...sexual violence perpetrated against women and girls that began on 25 August 2017 was a sixth factor that indicated the Tatmadaw’s genocidal intent to destroy the Rohingya people, including by means of killing female members of the Rohingya community, causing Rohingya women and girls serious bodily or mental harm, deliberately inflicting on the Rohingya women and girls conditions of life calculated to bring about the destruction of the Rohingya in whole or in part, and imposing measures that prevented births within the group. This conclusion is based on the Mission’s analysis of the widespread and systematic killing of women and girls, the systematic selection of women and girls of reproductive ages for rape, attacks on pregnant women and on babies, the mutilation and other injuries to their

⁵⁵ British Rohingya Organization UK (BROUK), “Historic Decision By Argentine Courts to Take Up Genocide Case Against Myanmar,” 28 November 2021, <https://www.brouk.org.uk/historic-decision-by-argentinian-courts-to-take-up-genocide-case-against-myanmar/>.

⁵⁶ Fortify Rights, “Criminal Complaint Filed in Germany against Myanmar Generals for Atrocity Crimes” 24 January 2023, <https://www.fortifyrights.org/mya-inv-2023-01-24/>.

⁵⁷ Fortify Rights, “On the Dismissal of the Criminal Complaint Filed in Germany against Myanmar General and Others for Genocide, War Crimes and Crimes Against Humanity,” 30 November 2023, <https://www.fortifyrights.org/mya-inv-stm-2023-11-30/>.

⁵⁸ See Shan Women’s Action Network, “License to Rape,” 2002, <https://shanhumanrights.org/licence-to-rape/>; Women’s League of Burma, “System of Impunity,” 2004, https://burmacampaign.org.uk/media/SYSTEM_OF_IMPUNITY.pdf; Karen Women’s Organisation, “Shattering Silences,” 2004, <https://karenwomen.org/2004/08/27/shattering-silences>; Mon Women’s Organization, “Catwalk to the Barracks,” 2005, <https://www.burmalibrary.org/en/catwalk-to-the-barracks-conscription-of-women-for-sexual-slavery-and-other-practices-of-sexual>; Human Rights Watch, “They Came and Destroyed Our Villages Again,” 2005, <https://www.hrw.org/reports/2005/burma0605/burma0605text.pdf>; Karen Women’s Organisation, “State of Terror,” 2007, <https://karenwomen.org/2007/08/27/state-of-terror/>; Women’s League of Burma, “Same Impunity, Same Patterns” (2014), https://womenofburma.org/sites/default/files/2018-06/2014_Jan_SameImpunitySamePattern_English-final.pdf; Women’s League of Burma, “If They Had Hope, They Would Speak” 2014, https://www.womenofburma.org/sites/default/files/2018-06/2014_Nov_VAW_Iftheyhadhope_TheywouldSpeak_English.pdf.

⁵⁹ Fortify Rights, “Policies of Persecution,” 2014, p. 22, https://www.fortifyrights.org/downloads/Policies_of_Persecution_Feb_25_Fortify_Rights.pdf.

⁶⁰ CEDAW Committee, Concluding Observations, UN Doc. CEDAW/C/MMR/CO/3 (2008), para. 117.

⁶¹ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 2; UN Human Rights Council, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2 (17 September 2018), para. 1371-1374 (hereinafter “FFM Report 2018”).

⁶² The transgender victims of SGBC likely include members of the Rohingya community who identify as hijra (“hizara” in the Rohingya language), which includes transgender, non-binary, gender-diverse and other individuals who do not fit into a clear gender binary. See Translators Without Borders, *Rohingya Language Guidance*, p. 2, https://translatorswithoutborders.org/wp-content/uploads/2019/03/RohingyaLanguageGuidance_Gender_Final.pdf. For more context, see Harvard Divinity School, *The Third Gender and Hijras*, 2018, https://hwpi.harvard.edu/files/rpl/files/gender_hinduism.pdf

⁶³ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019) (hereinafter “FFM Report 2019”), paras. 2-7.

⁶⁴ FFM Report 2018, para. 438-441.

reproductive organs, the physical branding of their bodies by bite marks on their cheeks, neck, breast and thigh, and so severely injuring victims that they may be unable to have sexual intercourse with their husbands or to conceive and leaving them concerned that they would no longer be able to have children.⁶⁵

With respect to Rohingya men and boys, the FFM also found that the Tatmadaw, other State security actors and “members of ethnic Rakhine communities” committed “rape and gang rape, genital mutilation, forced nudity and other forms of sexual violence” against them in detention settings,⁶⁶ and that these acts “constituted crimes against humanity, including rape, torture, and other inhuman acts entailing great suffering or serious injury to body or to mental or physical health.”⁶⁷ The FFM noted the stigma and taboo that these survivors face, as well as the severe mental and physical harms, as a result of the SGBC committed against them.⁶⁸

In addition, the FFM found that transgender women had been subjected to the crimes against humanity of torture, rape, other inhumane acts and persecution, and that further investigation was required to determine whether some cases of sexual violence were sufficiently connected to the conflict so as to constitute sexual violence, torture, cruel treatment, and outrages upon personal dignity as war crimes.⁶⁹ Such women are “victimized twice”—for their ethnicity and for their sexual orientation—resulting in a tolerance for the GBC committed against them.⁷⁰

With respect to other ethnic groups in Rakhine State, the FFM found that the Tatmadaw committed rape and other forms of sexual violence against ethnic Rakhine women and girls in the context of land grabbing, extortion and forced labour, and in heavily militarized areas.⁷¹ Women and girls abducted for forced labour were given “feminized chores” and subjected to rape and other acts of sexual violence.⁷² Such women and girls subsequently “face[d] rejection by their families or communities.”⁷³

The FFM also documented secondary accounts of the abduction and rape of women by the Tatmadaw in Rakhine State during the armed conflict with the Arakan Army⁷⁴ (AA).⁷⁵ However, unlike sexual violence against the Rohingya, the FFM found no evidence of mass sexual violence against civilians by the Tatmadaw in its military strategy to combat the AA.⁷⁶ The FFM underscored the risk for men and boys of all ethnicities in Rakhine State of being subjected to forced labour by the Tatmadaw.⁷⁷ They also received credible reports of ethnic Rakhine men and boys being subjected to torture or gender based violence, including sexually humiliating treatment, because they were assumed to be AA members based on their gender.⁷⁸

⁶⁵ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 96.

⁶⁶ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), paras. 154-157. See also, *ibid.*, paras. 159-170.

⁶⁷ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 169.

⁶⁸ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 171.

⁶⁹ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 188.

⁷⁰ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 180.

⁷¹ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 100.

⁷² FFM Report 2019, paras. 101, 103.

⁷³ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 103.

⁷⁴ The Arakan Army is an armed group which has been engaged in armed conflict with the Tatmadaw for over a decade. See Kyaw Hsan Hlaing, “*Insurgents in Myanmar’s Rakhine State Return to War on the Military*,” United States Institute of Peace, (3 October 2022) <https://www.usip.org/publications/2022/10/insurgents-myanmars-rakhine-state-return-war-military>

⁷⁵ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 105.

⁷⁶ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 106.

⁷⁷ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 106.

⁷⁸ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), paras. 106-107.

The FFM also found the Tatmadaw also committed sexual violence—including “abduction, rape, including gang rape and attempted rape, rape-murder, forced nudity, sexual assault”⁷⁹—against women and girls in military operations in Kachin and Shan States since 2011,⁸⁰ and that there were credible reports the Tatmadaw committed and sexual slavery. The FFM found these acts may have constituted rape, sexual violence, torture, cruel treatment, outrages upon personal dignity and sexual slavery as war crimes, as well as corresponding underlying acts of crimes against humanity, including persecution.⁸¹ In several cases the FFM noted the stigma survivors faced in their communities, as well as the “fear, trauma, marginalization and ostracism [survivors of child rape and their family members to whom they spoke faced] from their community and authorities.”⁸²

While there was more limited information available about GBC committed by ethnic armed organizations (EAOs), the FFM reported on “credible information” about rape and other acts of GBC, including “incidents of women and girls being sexually harassed, intimidated and assaulted, sometimes on a daily basis, by members of EAOs.”⁸³

Men and boys of a “fighting age” in Kachin and Shan States were also targeted for recruitment by minority EAOs.⁸⁴ In turn, the Tatmadaw raped, tortured and ill-treated and killed men and boys based on the assumption they belonged to such groups.⁸⁵ Women and girls left behind, often facing discrimination and violence, including as a result of limitations on their rights to own or inherit land, were exposed to insecurity and targeted for GBC.⁸⁶ Young and childless women were also targeted for recruitment by minority ethnic armed groups and are given “women’s work,” such as cooking or cleaning.⁸⁷

The FFM emphasized the “direct nexus between the lack of gender equality more generally within the country and within ethnic communities, and the prevalence of sexual and gender-based violence,” as well as the double victimization of women and girls, because of their gender and as members of minority ethnic communities.⁸⁸ Rohingya women and girls, for examples, face restrictions on reproductive rights. Pervasive gender inequality has also contributed to impunity for GBC.⁸⁹ The FFM also found that the armed conflict impacts different people of different genders differently, because of inequalities and widespread discrimination contributing to and resulting from the commission of GBC.⁹⁰ Rohingya women and girls in refugee camps in Bangladesh, for example, were exposed to child, early and forced marriage, in and of itself a form of GBV, greatly increasing their exposure to GBC.⁹¹

The FFM also frequently referred to the likely underreporting of GBC by affected communities, due to “culturally-based stigmatisation and ostracism of sexual violence survivors.”⁹² They noted in particular that underreporting by Rohingya men and boys is “exacerbated by the patriarchal, lack of awareness and

⁷⁹ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 112.

⁸⁰ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 112. See also paras. 113-143.

⁸¹ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), paras. 145-147.

⁸² UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 130. See also *ibid.*, para. 124.

⁸³ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 198. See also, paras. 204, 209.

⁸⁴ *Ibid.*, para. 199.

⁸⁵ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), paras. 109, 172, 179 and 199.

⁸⁶ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), paras. 199-200.

⁸⁷ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 202.

⁸⁸ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 4. See also paras. 48, 52, 199.

⁸⁹ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), paras. 4 and 69.

⁹⁰ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 9.

⁹¹ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), paras. 211 and 215-216.

⁹² UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 70.

religious nature of the Rohingya community.”⁹³

The CEDAW Committee, following an exceptional reporting procedure in 2019, published its observations in which it noted that the “sexual violence against women and girls included rape, gang rape, sexual slavery, forced nudity, sexual humiliation, mutilation and sexual assault and in some cases [killing]” was reflective of “similar patterns of abuses [that] have been reported for at least three decades, with no evidence of measures taken to effectively prevent and address the human rights violations committed.”⁹⁴ Rohingya women and girls had been subjected to at least four incidents of mass violence, in 1977, 1991, 2012 and 2016/2017.⁹⁵

d. Ongoing impunity in Myanmar

Successive governments in Myanmar have been unwilling and unable to fulfil their obligations under international law to prevent, investigate, prosecute, adjudicate and sanction crimes under international law committed in Myanmar and provide effective remedies and reparations for them. To the contrary, there has been no acknowledgment of the occurrence of these crimes, which are instead denied and disputed.⁹⁶ EAO “internal” justice systems were also found by the FFM to be “inadequate” to address these crimes.⁹⁷

Victims/survivors and their families in Myanmar are consequently also left without State support necessary to address the resultant mental and physical harms. This failure had been repeatedly highlighted in the reports of the Special Rapporteur on the human rights situation in Myanmar, observations made by UN Treaty Bodies following their reviews of the country human rights record, and reports of the Myanmar FFM.⁹⁸ As such, there is currently no prospect of accountability at the domestic level, resulting in impunity, which, in turn, fosters the continued perpetration of crimes. Against this backdrop, and upon the end of the mandate of the Myanmar FFM in September 2019, its Head, Marzuki Darusman, raised the “clear accountability deficit” in Myanmar with UN Member States, asking them to “mandate alternative accountability mechanisms, if needed.”⁹⁹ Since then, however, no further accountability mechanisms have been created.

In light of this, international and domestic mechanisms and actors pursuing accountability for serious crimes under international law constitute the only existing possibility to fight against impunity for serious crimes under international law committed in Myanmar. These mechanisms and actors have the potential to address crimes falling under their mandates or scope of efforts, including GBC, and to cast a light on the gender-differentiated harms of all crimes concerned. This task, however, requires a proactive approach to address the continued challenge of accurately capturing GBC and gender-based harms in the investigation, prosecution, adjudication and sanctioning of serious crimes under international law, as well as that of ensuring gender-inclusive victim and witness participation in and engagement with the justice process.

⁹³ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 158.

⁹⁴ CEDAW Committee, Concluding observations on the report of Myanmar submitted under the exceptional reporting procedure, UN Doc. No. CEDAW/C/MMR/CO/EP/1 (18 March 2019), para. 5, <https://www.ohchr.org/en/documents/concluding-observations/cedawcmmrcoep1-concluding-observations-report-myanmar-submitted>.

⁹⁵ CEDAW Committee, Concluding observations on the report of Myanmar submitted under the exceptional reporting procedure, UN Doc. No. CEDAW/C/MMR/CO/EP/1 (18 March 2019), para. 6, <https://www.ohchr.org/en/documents/concluding-observations/cedawcmmrcoep1-concluding-observations-report-myanmar-submitted>.

⁹⁶ CEDAW Committee 2008 report, CEDAW/C/MMR/CO/3, para. 24, *supra*; UN Human Rights Council, Report of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/64 (12 September 2018), para. 82; CEDAW Committee, Concluding Observations on the Report of Myanmar Submitted under the Exceptional Reporting Procedure (18 March 2019), para. 33.

⁹⁷ UN Human Rights Council, Sexual and Gender-Based Violence in Myanmar and the Gendered Impact of its Ethnic Conflicts, UN Doc. A/HRC/42/CRP.4 (22 August 2019), paras. 205-208.

⁹⁸ FFM Report 2019, paras. 231-249; United Nations, *Report of the Working Group on the Universal Periodic Review: Myanmar*, A/HRC/47/13 (12 April 2021); United Nations, *Myanmar Spiralling 'From Bad to Worse, to Horrific', Human Rights Council Hears* (21 September 2022), <https://news.un.org/en/story/2022/09/1127361>.

⁹⁹ UN OHCHR, *UN Independent International Fact-Finding Mission on Myanmar calls on UN Member States to Remain Vigilant in the Face of the Continued Threat of Genocide* (23 October 2019), www.ohchr.org/en/press-releases/2019/10/un-independent-international-fact-finding-mission-myanmar-calls-un-member. See also “UN Independent International Fact-Finding Mission on Myanmar calls on UN Member States to remain vigilant in the face of the continued threat of genocide,” 23 October 2019, <https://www.ohchr.org/en/press-releases/2019/10/un-independent-international-fact-finding-mission-myanmar-calls-un-member?LangID=F&NewsID=25197>.

III. Towards gender-competent accountability with respect to serious crimes under international law in Myanmar

Women, girls, men, boys and persons with other gender identities may be affected by armed conflict and other crises in different ways because of pre-existing gender norms and inequalities in the societies in which these events unfold, and as a result of gendered roles and hierarchies arising from them.¹⁰⁰ Correlatively, victims/survivors of gross human rights violations and abuses amounting to crimes under international law may be targeted with certain crimes – as opposed to others – or experience specific or disproportionate resultant harms because of their gender. Gender norms and inequalities may also adversely affect survivors' access to opportunities for seeking justice, for example, by creating barriers to engagement with the justice process. Without identifying, understanding, and addressing these obstacles, certain crimes and the voices of their victims/survivors will inevitably be obscured, and justice efforts will only be partial at best.¹⁰¹

The integration of a gender perspective is now a core component of authoritative human rights monitoring and the effective investigation and prosecution of crimes under international law. The International Criminal Court, international investigative bodies and several national courts addressing conflict-related or systematic crimes have devised specific strategies and policies for the investigation of GBC¹⁰² that advance "gender analysis" as a tool for:

- a) understanding gender constructs and inequalities in a given situation;
- b) examining whether, and in what ways, those constructs and inequalities relate to the perpetration of crimes in a given situation; and
- c) identifying whether and how such crimes lead to gender differentiated harms and/or impact engagement with victims and witnesses.¹⁰³

When identifying gender constructs and pre-existing gender inequalities,¹⁰⁴ it is important to develop a context-specific understanding of what "gender" is, given that socially constructed roles and identities that inform gender vary between societies and among groups within them. A range of factors, including ethnicity, religion, age, sexuality and economic and social background, influence how gender is perceived and attendant norms.¹⁰⁵ Moreover, gender constructs are not static, but changeable, including due to time or location.¹⁰⁶ As such, while lessons learnt and best practices from other contexts are of significant value, international and domestic accountability bodies, mechanisms and actors must ensure they have a context-specific understanding of gender constructs in Myanmar, including with respect to each of the groups impacted by

¹⁰⁰ OHCHR, "Integrating a Gender Perspective Into Human Rights Investigations: Guidance and Practice," 2018, p. 17, https://www.ohchr.org/sites/default/files/Documents/Publications/IntegratingGenderPerspective_EN.pdf.

¹⁰¹ See Priya Gopalan, "Breaking Binaries and Honing-in on Harms: Inclusive Approaches Towards Sexual and Gender-Based Crimes", in *Contemporary International Criminal Law Issues: Contributions in Pursuit of Accountability for Africa and in the World*, edited by Takeh B.K. Sendze, Adesola Adebeyejo, Howard Morrison, Sophia Ugwu, Asser Press, The Hague, 2023.

¹⁰² Human Rights Council, Accelerating efforts to eliminate all forms of violence against women: preventing and responding to rape and other forms of sexual violence, HRC Res. 23/25, UN Doc. A/HRC/RES/23/25, 25 June 2013, <https://documents.un.org/doc/undoc/gen/g13/150/98/pdf/g1315098.pdf?token=NxcuKpmKnEmJlPh1Yv&fe=true>; see also, OHCHR, "Integrating a Gender Perspective Into Human Rights Investigations: Guidance and Practice," 2018, p. 17, https://www.ohchr.org/sites/default/files/Documents/Publications/IntegratingGenderPerspective_EN.pdf; ICC Office of the Prosecutor, Sexual and Gender-based Crimes Policy (2014), <https://www.icc-cpi.int/news/policy-paper-sexual-and-gender-based-crimes-0>; The International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (also referred to as IIIM), IIIM Gender Strategy and Implementation Plan: Addressing the Adverse Impact of the Discriminatory Gender Hierarchy to Facilitate Inclusive Justice for International Crimes in the Syrian Arab Republic, 30 September 2022, [Gender-Strategy-Implementation-TechnicalEnglish.pdf \(un.org\)](https://www.iiim.org/en/gender-strategy-implementation-technical-english).

¹⁰³ OHCHR, "Integrating a Gender Perspective Into Human Rights Investigations: Guidance and Practice," 2018, p. 4, 7, [Policy Paper on Sexual and Gender-Based Crimes - June 2014 \(icc-cpi.int\)](https://www.ohchr.org/sites/default/files/Documents/Publications/IntegratingGenderPerspective_EN.pdf); IIIM Gender Strategy and Implementation Plan, p. 6.

¹⁰⁴ Michelle Jarvis, *Overview: The Challenges of Accountability for Conflict-related Sexual Violence Crimes*, in *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, Oxford, 2016, pp. 10-11.

¹⁰⁵ Michelle Jarvis, "Overview: The Challenges of Accountability for Conflict-related Sexual Violence Crimes," in *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press (2016), p. 10-11; See OHCHR, *Impact of Multiple and Intersecting Forms of Discrimination and Violence in the Context of Racism, Racial Discrimination, Xenophobia and Related Intolerance on the Full Enjoyment of All Human Rights by Women and Girls - Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/35/10 (21 April 2017), <https://www.ohchr.org/en/documents/reports/impact-multiple-and-intersecting-forms-discriminationand-violence-context-racism>.

¹⁰⁶ See UN Women, *Concepts and Definitions*, <https://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>. See also, the definition of gender in the Policy on the Crime of Gender Persecution of the Office of the Prosecutor of the International Criminal Court, p. 3.

the alleged crimes under international law with which they are concerned.

Women and girls in Myanmar, and particularly those belonging to minority ethnic groups, continue to experience discrimination and marginalization in nearly every sphere of life. Myanmar ranks as the 149th country out of 189 in the UN Gender Inequality Index—an index measuring gender-based disadvantage in the areas of reproductive health, empowerment and the labour market.¹⁰⁷ As stressed by the Myanmar FFM, there is a link between gender inequality and gender-based violence: “Women are more likely to experience violence in countries with high gender inequality.”¹⁰⁸ Crimes under international law committed in Myanmar were therefore perpetrated within a continuum of existing gender inequality and discrimination.

Gender inequality and discrimination against women in Myanmar is rooted in, among other things, domestic legislation and customary laws still in force today.¹⁰⁹ For example, the 2008 Constitution contains numerous provisions violating women’s human rights, referring to women as “mothers” and to public office positions that are suitable only for men.¹¹⁰ There is still no effective law on the protection of women and girls and LGBTIQ+ persons from violence, despite attempts to draft one.¹¹¹ Customary law,¹¹² applied in parallel informal justice systems and predominantly used by ethnic groups, with only a fraction of grievances coming before formal justice system,¹¹³ employ discriminatory cultural norms towards women, negatively impacting their human rights, including their right to access to justice for GBC and more generally.¹¹⁴ The Myanmar FFM characterized these cultural norms, and the resultant underreporting of cases, as resulting in the double victimization of women and girls based on their gender and ethnicity.¹¹⁵

According to the Committee for the Elimination of Discrimination against Women (CEDAW Committee) in 2008, women in rural and remote areas, which make up the majority of women in the country, are in a “disadvantaged position...which is characterized by poverty, illiteracy, difficulties in access to health care, education and social services, and a lack of participation in decision-making processes at the community level.”¹¹⁶ The Committee also expressed concern at women’s limited awareness of their rights under the Convention for the Elimination of All Forms of Discrimination against Women and how to claim them.¹¹⁷ Coupled with harmful cultural norms, this means that women have historically had limited participation in decision-making at the community level,¹¹⁸ and even more so at the national level, including in governmental functions, the judiciary and the military.¹¹⁹ Even though women may have had greater access to decision-making during the period of relative democracy, as the CEDAW Committee’s report on Myanmar 2019,¹²⁰

¹⁰⁷ UN Gender Inequality Index, [HDR21-22_Statistical_Annex_GII_Table.xlsx](#) (accessed on 21 July 2024).

¹⁰⁸ Myanmar Fact Finding Mission, Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts, UN Doc. A/HRC/42/CRP.4, (22 August 2019), para. 48.

¹⁰⁹ Committee on the Elimination of Discrimination against Women, Concluding observations, UN. Doc. CEDAW/C/MMR/CO/3, (7 November 2008), para. 10, <https://documents.un.org/doc/undoc/gen/n08/603/49/pdf/n0860349.pdf?token=xxA5jRbG7Su8Hj6qh&fe=true>; CEDAW Committee, Concluding observations on the report of Myanmar submitted under the exceptional reporting procedure, UN Doc. CEDAW/C/MMR/CO/EP/1 (18 March 2019), paras. 13-22, <https://www.ohchr.org/en/documents/concluding-observations/cedawcmmrcoep1-concluding-observations-report-myanmar-submitted>.

¹¹⁰ Committee on the Elimination of Discrimination against Women, Concluding observations, UN Doc. CEDAW/C/MMR/CO/3, (7 November 2008), para. 10. See, e.g., Constitution of Myanmar, Articles 351-352.

¹¹¹ CEDAW Committee, Concluding observations on the report of Myanmar submitted under the exceptional reporting procedure, UN Doc. No. CEDAW/C/MMR/CO/EP/1 (18 March 2019), para. 17, <https://www.ohchr.org/en/documents/concluding-observations/cedawcmmrcoep1-concluding-observations-report-myanmar-submitted>; Global Justice Centre, Factsheet, Myanmar’s Proposed Prevention of Violence Against Women Law: A Failure to Meet International Human Rights Standards (July 2020), https://wordpress-537312-2488108.cloudwaysapps.com/temp-uploads/2020/07/20200710_MyanmarPOVAWLawAnalysis.pdf.

¹¹² At times also referred to as ‘village law’, ‘religion law’ or ‘culture law.’ Justice Base, “Voices from the Intersection: Women’s Access to Justice in the Plural Legal system of Myanmar,” (30 April 2016), p. 39.

¹¹³ Justice Base, “Voices from the Intersection: Women’s Access to Justice in the Plural Legal system of Myanmar,” (30 April 2016), p. 15, 39.

¹¹⁴ Justice Base, “Voices from the Intersection: Women’s Access to Justice in the Plural Legal system of Myanmar,” (30 April 2016), p. 15, 39.

¹¹⁵ Myanmar Fact Finding Mission, Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts, UN Doc. A/HRC/42/CRP.4, (22 August 2019), para. 52.

¹¹⁶ CEDAW Committee, Concluding observations of the Committee on the Elimination of Discrimination against Women, UN Doc. No. CEDAW/C/MMR/CO/3 (7 November 2008) (“CEDAW Committee 2008 report”), para. 44.

¹¹⁷ CEDAW Committee 2008 report, para. 12.

¹¹⁸ CEDAW Committee 2008 report, para. 44.

¹¹⁹ CEDAW Committee 2008 report, para. 28, 50. Myanmar Fact Finding Mission, Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts, UN Doc. A/HRC/42/CRP.4, (22 August 2019).

¹²⁰ CEDAW Committee, Concluding observations on the report of Myanmar submitted under the exceptional reporting procedure, UN Doc. No. CEDAW/C/MMR/CO/EP/1 (18 March 2019), <https://www.ohchr.org/en/documents/concluding-observations/cedawcmmrcoep1-concluding-observations-report-myanmar-submitted>;

and reports by civil society demonstrate,¹²¹ little had changed as far as their subordinate position in society was concerned.

Gender analysis is needed to examine whether and how discriminatory laws, norms and practices relate to the perpetration and the consequences of crimes under international law. Moreover, such analysis can better reflect the characterisation and gravity of these crimes, including whether, for instance, they were used as a form of torture or as grounds for persecution,¹²² and in terms of their actual impact on the victims/survivors, including with respect to the harms that may be experienced by individuals based on their gender and other identities. A gender perspective is also needed to address the disempowerment experienced by women and girls in Myanmar, and to enable their engagement with the justice process.

International and domestic accountability bodies, mechanisms and actors should analyse victim and witness protection and support measures, as well as outreach to affected communities, from a gender perspective to ensure that gender inequalities and barriers preventing victims/survivors and witnesses from coming forward are addressed. The gender strategy of the IIIM is a good example of the integration of a gender-competent approach within ongoing accountability efforts addressing serious crimes under international law. For example, among other things, it specifically seeks to identify the “underrepresentation of statements from victim/survivor witnesses, expert witnesses, insider witnesses, defectors, overview witnesses and/or any other category, from certain genders.”¹²³

Gender analysis has also been used to examine how the differing status, power, roles and needs may impact individuals of non-heterosexual, non-heteronormative sexual orientations, gender identities or expressions (SOGIE).¹²⁴ While some civil society organizations have made efforts to cast light on the victimization of such persons and to advance the investigation and prosecution of GBC in other situations,¹²⁵ there is insufficient awareness at the international level that crimes under international law are perpetrated against victims/survivors exclusively or in part because of their real or imputed SOGIE. In Myanmar, limited understanding of SOGIE combined with its attribution to past sins, karma, or persons choosing to be “crazy,” has led to persons with SOGI experiencing discrimination, rejection, pressure and violence,¹²⁶ which are exacerbated in situations of armed conflict.¹²⁷ As mentioned in the previous section, LGBTQI+ persons have experienced numerous human rights violations, amounting to crimes under international law, in the context of the “clearance operations”. It is important to analyse whether and how such violations and crimes may relate to people’s real or perceived SOGIE, and their distinct needs, including as relating to victims/survivors’ engagement with the justice process.

Furthermore, a gender analysis enables a reflection on the experiences and gender constructs relating to men and boys, who are generally expected to assume protection and leadership roles, which, in turn, may drive them to join ethnic armed groups, or at times be forcibly recruited in such groups.¹²⁸ As described in the earlier section, men of a recruitable age have been targeted for crimes under international law based on the assumption that they were members of armed groups. A gender analysis is needed to better understand the gendered nature of the various crimes under international law perpetrated against men and boys, including sexual and other types of crimes.

¹²¹ See, e.g., Global Justice Centre, Factsheet, Myanmar’s Proposed Prevention of Violence Against Women Law: A Failure to Meet International Human Rights Standards (July 2020), https://wordpress-537312-2488108.cloudwaysapps.com/temp-uploads/2020/07/20200710_MyanmarPOVAWlawAnalysis.pdf.

¹²² *Ibid.*

¹²³ IIIM Gender Strategy, p. 31.

¹²⁴ *Ibid.*, p. 9.

¹²⁵ See All Survivors Project (ASP), “Laying Down Arms, Reclaiming Souls” (2022), p. 9 and 23, <https://allsurvivorsproject.org/wp-content/uploads/2022/06/Public-report-SV-men-boys-armed-conflict-Colombia-19-june-2022.pdf>. As ASP reports: “As of April 2022, the Victims Unit [of the Special Jurisdiction of Peace] had registered 32,904 victims of crimes against sexual integrity and freedom in the course of the armed conflict between 1985 and 2016. Of these, 29,724 were women and girls, 2,669 were men and boys, 507 were identified as LGBTI and three people as intersex.”

¹²⁶ Myanmar Fact Finding Mission, Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts, UN Doc. A/HRC/42/CRP.4, (22 August 2019), paras. 151-153. See also International Alert, Phan Tee Eain, “Thingaha Gender Organisation, Behind the masks Masculinities, gender, peace and security in Myanmar,” (2018), p. 21-22.

¹²⁷ Myanmar Fact Finding Mission, Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts, UN Doc. A/HRC/42/CRP.4, (22 August 2019),

¹²⁸ UN Doc. A/HRC/42/CRP.4, p. 20, 23

Finally, while it is essential to understand and address gender constructs and inequalities, it is important to avoid presumptions when engaging with victims/survivors, affected communities and actors. For instance, a report by Asia Justice and Rights points to an ongoing assumption and treatment of women victims as “helpless”, leading to their exclusion, marginalization and disempowerment by nearly all stakeholders.¹²⁹ In a consultation with Victim Advocates International, it was pointed out that humanitarian organizations refused to conduct activities for LGBTQI+ persons in Cox’s Bazar on the assumption that they would not want to participate in the programs publicly. However, in the view of Victim Advocates International, LGBTQI+ persons displayed readiness and a desire for engagement with the humanitarian organizations.

¹²⁹ Asia Justice and Rights, [Asia_AJAR-2015-09-23-Opening_the_Box-en.pdf \(burmalibrary.org\)](#), p.6

IV. International accountability mechanisms and actors engaged in Myanmar

a. The International Criminal Court

The ICC is a permanent international court with jurisdiction over certain crimes under international law located in The Hague, the Netherlands, which investigates, prosecutes, adjudicates and sanctions crimes in the *Rome Statute of the International Criminal Court*, its founding treaty; namely genocide, crimes against humanity, war crimes and aggression (Rome Statute crimes). The ICC can exercise jurisdiction when:

- a) Rome Statute crimes are perpetrated, at least in part, in the territory of a State that is a party to the Rome Statute;
- b) where the accused is a national of a State party to the ICC;
- c) where a State over whose territory they have been committed has accepted the ICC jurisdiction;¹³⁰
or
- d) where a situation is referred to the ICC by the UN Security Council under Chapter VII of the UN Charter.¹³¹

As the ICC is a Court of last resort, it exercises jurisdiction only when States with the primary duty to investigate and prosecute Rome Statute crimes are unable or unwilling to do so.¹³²

The Rome Statute expressly codifies the broadest range of SGBC at present in international criminal law.¹³³ The Rome Statute and ICC Rules of Procedure and Evidence also contain procedures to ensure the Registrar, Chambers, Prosecutor and Victims and Witnesses Unit adopt gender-sensitive protection measures and trauma-informed approaches for *inter alia* victims/survivors of GBC.¹³⁴ The Rome Statute also stipulates that States parties *shall* take into account the need for “equitable geographical representation” and “[a] fair representation of female and male judges” in judicial elections, as well as expertise with specific issues, including “violence against women or children.”¹³⁵ The Prosecutor is also required to appoint advisers with legal expertise on specific issues, including “sexual and gender violence and violence against children.”¹³⁶ Among the 17 special advisers appointed by current Prosecutor Karim Khan, three are advisors on GBC or crimes with gendered dimensions, in particular on gender persecution, sexual violence in conflict and slavery crimes.¹³⁷

The relatively progressive legal and procedural frameworks of the Rome Statute are what make the Court a “model for gender justice.”¹³⁸ As such, attention to the performance of the Court in operationalizing such frameworks and fighting impunity for GBC has been high since the Court’s establishment.

¹³⁰ Under Article 12(3) of the Rome Statute, States not party to the Statute may also submit a declaration to the ICC accepting the Court’s jurisdiction with respect to Rome Statute crimes. Rome Statute of the International Criminal Court (last amended 2010), (17 July 1998), <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

¹³¹ Rome Statute, Arts. 12 and 13.

¹³² *Ibid.*, Art. 1.

¹³³ International Federation for Human Rights (FIDH), *Unheard, Unaccounted: Towards Accountability for Sexual and Gender-Based Violence at the ICC and Beyond* (November 2018), p. 9, https://www.fidh.org/IMG/pdf/sgbv_721a_eng_au_20_nov_2018_13h_web.pdf.

¹³⁴ Rome Statute, Art. 44(6); ICC Rules of Procedure and Evidence, r. 16(1)(d) (the Registrar must “[take] gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings”); r. 17(a)(iv) (the Victims and Witnesses Unit, with respect to victims, witnesses and others at risk on account of the testimony of witnesses, must “[make] available to the Court and parties training in issues of trauma, sexual violence, security and confidentiality”); r. 17(b)(iii) (the Victims and Witnesses Unit, with respect to witnesses, must “[take] gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings”); r. 63(4) (an ICC chamber “...cannot impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the court, in particular, crimes of sexual violence”); r. 70 (setting out circumstances in which consent cannot be inferred, including prior sexual conduct); r. 71 (evidence of prior sexual conduct not admissible); r. 88 (setting out special measures available to *inter alia* traumatized victims and victims of sexual violence crimes); r. 112 (the Prosecutor may rely upon the procedure set out in the rule for questioning persons other than suspect where it “could assist in reducing any subsequent traumatization of a victim of sexual or gender violence...”).

¹³⁵ Rome Statute, Arts. 36(8)(a)(iii) and 36(8)(b).

¹³⁶ Rome Statute, Art. 42(9).

¹³⁷ International Criminal Court, *ICC Prosecutor Mr Karim A.A. Khan QC appoints Seventeen Special Advisers* (17 September 2021), www.icc-cpi.int/news/icc-prosecutor-mr-karim-aa-khan-qc-appoints-seventeen-special-advisers.

¹³⁸ International Federation for Human Rights (FIDH), *Unheard, Unaccounted: Towards Accountability for Sexual and Gender-Based Violence at the ICC and Beyond* (2015), November 2018), p. 12, www.fidh.org/IMG/pdf/sgbv_721a_eng_au_20_nov_2018_13h_web.pdf

For the purposes of this report, the ICJ has focused on the integration of a gender perspective and analysis in the working methods of the Office of the Prosecutor (OTP) and the Registry's Victim Participation and Reparation Section (VPRS) and Public Information and Outreach Section (PIOS). However, other organs and sections of the Court should also address gender in their working methods, including the Registry's Victims and Witnesses Unit (VWU) and the ICC's Chambers. Similarly, the integration of a gender perspective is essential in the work of the Trust Fund for Victims, created by the Assembly of States Parties to the ICC to implement reparations awards ordered against a convicted person by the ICC, and to provide assistance to victims and their families involved in proceedings before the ICC.

i. ICC Jurisdiction over the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (the 'Situation in Bangladesh/Myanmar')

Myanmar is not a State party to the Rome Statute, and those likely to be suspected as responsible for alleged Rome Statute crimes committed in Myanmar are not nationals of a State Party.¹³⁹ The UN Security Council has not referred the situation in Myanmar to the ICC, despite broad calls for it to do so, due to politics at the Council. Such a referral would grant the OTP jurisdiction over all alleged Rome Statute crimes committed in Myanmar.

1. OTP application for ruling on jurisdiction

On 9 April 2018, however, former ICC Prosecutor, Fatou Bensouda, requested a ruling from the Court's judges on whether the Court may exercise jurisdiction over the alleged deportation of the Rohingya population from Myanmar to Bangladesh. The request argued that the Court could assert jurisdiction given that an essential element of the crime of deportation – the crossing of an international border – took place on the territory of a State party, Bangladesh.¹⁴⁰

Several non-government organizations and lawyers submitted *amicus curiae* observations supporting the exercise of the ICC's jurisdiction over the situation, with the majority of them addressing SGBC. While a full examination of the gender-related submissions of these *amici curiae* is beyond the scope of this report, among other things, their observations:

- a) outlined the widespread and systematic use of GBC to persecute Rohingya;¹⁴¹
- b) contended that the Court could exercise jurisdiction over GBC, including forced pregnancy, as coercive acts leading to deportation;¹⁴² and
- c) urged the Court to assess the gendered aspects of crimes and their gendered impacts.¹⁴³

¹³⁹ There are naturally exceptions to this, including but not limited to crimes committed by dual nationals.

¹⁴⁰ *Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, International Criminal Court, Application Under Rule 46(3), International Criminal Court, ICC-RoC46(3)-01/18-1 (9 April 2018) <https://www.icc-cpi.int/court-record/icc-roc463-01/18-1>; see also, International Commission of Jurists, *Amicus Curiae Observations pursuant to Rule 103 of the Rules*, ICC-RoC46(3)-01/18-20 (18 June 2018) https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_03116.PDF.

¹⁴¹ See, e.g. *Submissions on Behalf of the Victims Pursuant to Article 19(3) of the Statute*, International Criminal Court, ICC-RoC46(3)-01/18, paras. 121 and 123, www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_02824.PDF (by Global Rights Compliance on behalf of 11 women of the Shanti Mohila ("Peace Women") – a Rohingya women's survivor group founded in 2017 in Cox's Bazaar – and a survivor group of 400 women and children); *Observation on Behalf of Victims from Tula Toli*, International Criminal Court, ICC-RoC46(3)-01/18, para. 36: www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_03132.PDF (Megan Hirst, acting on behalf of ten survivors from the village of Tula Toli in Myanmar).

¹⁴² *Joint Observations Pursuant to Rule 103 of the Rules, Women's Initiatives for Gender Justice, Naripokkho, Sara Hossein and the European Centre for Constitutional and Human Rights* (18 June 2023), ICC-RoC46(3)-01/18, part 4: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_03128.PDF; *Amicus Curiae Observations by the Bangladeshi Non-Governmental Representatives (pursuant to Rule 103 of the Rules) on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"* (18 June 2023), International Criminal Court, ICC-RoC46(3)-01/18, paras. 45 et al: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_03120.PDF.

¹⁴³ *Joint Observations Pursuant to Rule 103 of the Rules, Women's Initiatives for Gender Justice, Naripokkho, Sara Hossein and the European Centre for Constitutional and Human Rights* (18 June 2023), ICC-RoC46(3)-01/18, part 5: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_03128.PDF; *Amicus Curiae Observations by the Bangladeshi Non-Governmental Representatives (pursuant to Rule 103 of the Rules) on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"* (18 June 2023), International Criminal Court, ICC-RoC46(3)-01/18, paras. 45 et al: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_03120.PDF.

On 6 September 2018, Pre-Trial Chamber I confirmed that the Court could exercise jurisdiction for acts of deportation initiated in a non-State Party and “completed” in a State Party.¹⁴⁴ In doing so, Pre-Trial Chamber I also found that the Court could also exercise jurisdiction over other crimes, namely, persecution and other inhumane acts as crimes against humanity, where some of the elements of those other crimes were committed in Bangladesh (or another State Party).¹⁴⁵ In reaching its conclusion, and without referring to GBC or the Myanmar context specifically, the Pre-Trial Chamber noted that sexual violence, among other conduct, could constitute a coercive act leading to deportation.¹⁴⁶

2. OTP request to open an investigation

Following a preliminary examination, the Prosecutor concluded that the conditions for proceeding with an investigation were met and, on 4 July 2019, requested judicial authorization under Article 15(3) of the Rome Statute¹⁴⁷ to investigate the situation in Myanmar/Bangladesh since 9 October 2016, and in particular, “crimes within the jurisdiction of the [ICC] in which at least one element occurred on the territory of the People’s Republic of Bangladesh.”¹⁴⁸ Such crimes may include, but may also go beyond, the crimes of deportation, other inhumane acts and persecution as crimes against humanity.¹⁴⁹ On the same day, the Prosecutor issued a public notice to “victims who have allegedly been deported from Myanmar to Bangladesh since at least 9 October 2016,” notifying them of their right to make representations to the Chamber, in accordance with Article 15(3) of the Rome Statute, on whether an investigation should be opened.¹⁵⁰

The Prosecutor’s request for authorization referred to information and reports on the perpetration of “rape and other forms of sexual violence”, primarily against women and girls, but also against men and boys, during the 2017 “clearance operations”,¹⁵¹ and also noting that similar conduct was observed in the context of the 2016 “clearance operations”.¹⁵² The request submitted that “rape and other forms of sexual violence” were used to, among other things, force Rohingya out of their homes and villages.¹⁵³ While the Prosecutor noted reports by Inter-Sector Coordination Group¹⁵⁴ and FFM alleging other GBC had been committed,¹⁵⁵ GBC, beyond sexual violence, was not alleged as coercive conduct resulting in deportation. Rather, the Prosecution alleged there was “a reasonable basis to believe that the crime against humanity of persecution, based on ethnic and/or religious grounds [as opposed to gender grounds] under article 7(1)(h), by means of deportation and intentional and severe deprivation of the customary international law right to return, was committed in the context of the 2017 wave of violence.”¹⁵⁶

In the representations submitted to Pre-Chamber III, victims/survivors recounted the frequent occurrence of incidents of rape and other forms of sexual violence.¹⁵⁷

¹⁴⁴ *Decision on the “Prosecution Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”*, International Criminal Court, Request Under Regulation 46(3) of the Regulations of the Court, Pre-Trial Chamber I, ICC-RoC46(3)-01/18 (6 September 2018), para. 73.

¹⁴⁵ *Ibid.*, para. 74-78.

¹⁴⁶ *Ibid.*, para. 61.

¹⁴⁷ International Criminal Court, *ICC Prosecutor, Fatou Bensouda, requests Judicial Authorisation to Commence an Investigation into the Situation in Bangladesh/Myanmar* (4 July 2019), www.icc-cpi.int/news/icc-prosecutor-fatou-bensouda-requests-judicial-authorisation-commence-investigation-situation.

¹⁴⁸ The Office of the Prosecutor of the International Criminal Court, *Summary of the Prosecutor’s Request for Authorisation of an Investigation Pursuant to Article 15 of the Rome Statute* (4 July 2019), para. 1, www.icc-cpi.int/sites/default/files/itemsDocuments/2019-07-04-otp-summary-request-Bangladesh-Myanmar-eng.pdf.

¹⁴⁹ *Request for Authorisation of an Investigation Pursuant to Article 15, International Criminal Court, Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, Office of the Prosecutor, International Criminal Court, ICC-01/19-7 (4 July 2019).

¹⁵⁰ The Office of the Prosecutor of the International Criminal Court, *Public Notice of the ICC Prosecutor* (4 July 2019), <http://www.icc-cpi.int/sites/default/files/itemsDocuments/2019-07-04-otp-public-notice-bangladesh-myanmar-eng.pdf>.

¹⁵¹ *Request for Authorisation of an Investigation Pursuant to Article 15*, para. 94-105, *supra*.

¹⁵² *Ibid.*, para. 101.

¹⁵³ *Ibid.*, para. 95.

¹⁵⁴ A coordination group for humanitarian actors operating in Cox’s Bazaar, Bangladesh.

¹⁵⁵ See *Request for Authorisation of an Investigation Pursuant to Article 15*, para. 94 and fn. 394. The section in which these reports are referred to (paras. 94-105 is headed “rape and other forms of sexual violence.”)

¹⁵⁶ *Request for Authorisation of an Investigation Pursuant to Article 15*, para. 172.

¹⁵⁷ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, International Criminal Court, Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27, para. 31.

On 14 November 2019, Pre-Trial Chamber III authorized the ICC Prosecutor to proceed with an investigation.¹⁵⁸ In its decision Pre-Trial Chamber III referred to victims' representations and other information on allegations of sexual violence as part of the coercive acts that resulted in the forced deportation of Rohingya from Myanmar to Bangladesh or other countries.¹⁵⁹ The Chamber also acknowledged victims' representations containing information on sexual violence and rape perpetrated against "third-gender" persons,¹⁶⁰ which were not explicitly addressed in the Prosecutor's request. While these crimes are not part of the authorized investigation *per se*, the Chamber stated that they may be considered to establish the contextual elements of crimes against humanity.¹⁶¹ The Chamber did not discuss persecution on gender grounds or GBC more broadly.

3. Jurisdiction post-military coup

Separately, following the military *coup* in Myanmar, on 17 July 2021 the National Unity Government¹⁶² submitted a declaration to the ICC under Article 12(3) of the Rome Statute accepting the Court's jurisdiction with respect to ICC crimes committed in Myanmar since February 2002.¹⁶³ There has been no public communication from the OTP in relation to this declaration, and public information suggests that the current investigation remains limited to crimes with at least one element occurring in Bangladesh.

ii. Gender in the Working Methods of the Office of the Prosecutor

The first years of the Court's operation were marked with missed opportunities and setbacks in the prosecution of GBC, including with respect to situations where these crimes were prevalent.¹⁶⁴ These setbacks could be summarized as: the failure to bring a broad range of charges of GBC, and in some cases none at all; the characterization of GBC as torture or outrages upon personal dignity either by the OTP or by judges, rendering the sexual and gendered nature of the violence invisible; and instances where such charges, when they were brought, were withdrawn by the Prosecution or did not succeed in court.¹⁶⁵

Strides of progress at the policy and prosecutorial levels, however, were achieved under the tenure of Fatou Bensouda as Prosecutor (2012-2021). For instance, in June 2014, the Prosecutor adopted a Policy Paper, developed in a consultative process, on Sexual and Gender-Based Crimes (2014 SGBC Policy).¹⁶⁶ The adoption of this policy signalled a commitment to learning from past shortcomings and to ensuring that these crimes be adequately addressed. In August 2016, the OTP adopted a gender analysis tool, comprising guidelines for the collection, analysis and reporting of the gender dimensions of alleged crimes or in a given context.¹⁶⁷ Attention to GBC and engagement with survivors have also been present in the strategic plans of the OTP since at least 2009.¹⁶⁸

¹⁵⁸ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Pre-Trial Chamber III, International Criminal Court, ICC-01/19-27 (14 November 2019), para. 58.

¹⁵⁹ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, paras. 28, 31, 86.

¹⁶⁰ *Ibid.*, para. 31.

¹⁶¹ *Ibid.*, para. 93.

¹⁶² The NUG is an opposition government largely consisting of previously elected officials to the Myanmar Pyidaungsu Hluttaw (legislature) now in exile following the February 2021 military coup d'état. The NUG claims to be the legitimate government of Myanmar.

¹⁶³ National Unity Government of the Republic of the Union of Myanmar (20 August 2021), <https://www.burmalibrary.org/sites/burmalibrary.org/files/obl/2021-08-20-The-NUG-of-the-Republic-of-the-Union-of-Myanmar-accepts-the-jurisdiction-of-the-ICC-top-en.pdf>.

¹⁶⁴ See Kim Thuy Seelinger, *Sexual and Gender-Based Crimes: Observations on the ICC Office of the Prosecutor*, in *Völkerrechtsblog* (15 July 2022), <https://voelkerrechtsblog.org/sexual-and-gender-based-crimes/>.

¹⁶⁵ See International Federation for Human Rights (FIDH), *Unheard, Unaccounted: Towards Accountability for Sexual and Gender-Based Violence at the ICC and Beyond*, pp. 14-19.

¹⁶⁶ ICC, Policy Paper on Sexual and Gender-Based Crimes (June 2014) <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>.

¹⁶⁷ The 2014 OTP Policy Paper on Sexual and Gender Based Violence describes gender analysis as examining "the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes. In the context of the work of the Office, this involves a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities". International Federation for Human Rights (FIDH), *Unheard, Unaccounted: Towards Accountability for Sexual and Gender-Based Violence at the ICC and Beyond*, p. 23, *supra*.

¹⁶⁸ Strategic Goal 4 of the ICC [2019-2021 OTP Strategic Plan](#) is "to refine and reinforce its approach to victims, in particular for victims of Sexual and Gender-Based Crimes and crimes against or affecting children; Strategic Goal 2 of the [2016- 2018](#)

While the OTP's performance in the investigation and prosecution of these crimes improved under the tenure former prosecutor Fatou Bensouda, several areas have continued to require attention, including:

- furthering an intersectional approach that recognizes gender persecution not only against women and girls, but also against persons who are or may be perceived to be LGBTQI+, and that, in addition to gender, takes into account intersecting characteristics and identities, such as age, ethnicity and religion;
- improving the OTP's record in bringing charges of GBC committed against men and boys; and
- remedying the underutilization of the "any other form of sexual violence" as a charge, particularly given its potential to capture context-specific acts that are viewed by the survivors and/or the perpetrators in the specific situation as sexual.¹⁶⁹

Recommendation: ensure that crimes charged and prosecuted in the context of the Myanmar/Bangladesh situation adequately reflect their gendered nature, where relevant, by being explicitly charged as GBC, and by charging GBCs involving sexual or reproductive violence as sexual or reproductive violence crimes, in addition to cumulatively with other suspected crimes.

Recommendation: Coordinate with the Registry to intensify outreach efforts to affected communities, in particular women and girls and persons who are or may be perceived to be LGBTQI+, with a view to enhancing affected communities understanding the scope of the investigation and role of the OTP vis-à-vis other accountability bodies.

Other experts also highlighted the need for a systematic approach to gender analysis and for tackling emergent issues, including, for instance, in the area of open-source investigations into GBC.¹⁷⁰

The integration of a gender lens in the work of the OTP and the investigation of GBC remains a priority for the Office under the leadership of Prosecutor Karim Khan, who took office in June 2020.¹⁷¹ According to consultations carried out by the ICJ with the OTP's Gender and Children Unit (GCU), the GCU is now better integrated in the OTP's Unified Teams,¹⁷² providing legal, investigative and strategic input during all phases of the OTP's work, including at the preliminary examination, investigation, trial, appeal, sentencing and reparations stages.¹⁷³ GCU seeks to provide support by advising and assisting in the monitoring of implementation of its advice. In addition, persons with GBC expertise (and expertise in crimes against and affecting children) work within the OTP's Unified teams. Additionally, GCU seeks to enhance the capacity of all staff, including through training and closely working with focal points and team members.¹⁷⁴

Strategic Plan is to "continue to integrate a gender perspective in all areas of the Office's work and to implement the policies in relation to SGBC and crimes against children". ICC, Strategic Plan 2019-2021 (17 July 2019) <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20190726-strategic-plan-eng.pdf>. Strategic Goal 3 of the 2012-2015 Strategic Plan is to "enhance the integration of a gender perspective in all areas of [our] work and continue to pay particular attention to sexual and gender based crimes and crimes against children." ICC, Strategic Plan 2012-2015 (11 October 2013), <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Strategic-Plan-2013.pdf>; Strategic Goal 1 of the 2009-2012 Prosecutorial Strategy states that "the Office will work with external actors, inter alia, with regard to sexual and gender crimes to constantly update prosecutorial techniques." ICC Prosecutorial Strategy 2009-2012 (1 February 2010), <https://www.icc-cpi.int/sites/default/files/OTPProsecutorialStrategy20092013.pdf>.

¹⁶⁹ International Federation for Human Rights (FIDH), *Accountability for Sexual and Gender-Based Crimes at the ICC: An Analysis of Prosecutor Bensouda's Legacy* (June 2021), pp. 16-18, *supra*; See Kim Thuy Seelinger, *Sexual and Gender-Based Crimes: Observations on the ICC Office of the Prosecutor*, in *Völkerrechtsblog* (15 July 2022), <https://voelkerrechtsblog.org/sexual-and-gender-based-crimes/>.

¹⁷⁰ See Kim Thuy Seelinger, *Sexual and Gender-Based Crimes: Observations on the ICC Office of the Prosecutor*, in *Völkerrechtsblog* (15 July 2022), <https://voelkerrechtsblog.org/sexual-and-gender-based-crimes/>. See also Alexa Koenig, Ulic Egan, "Power and Privilege: Investigating Sexual Violence with Digital Open Source Information", in *Journal of International Criminal Justice*, Volume 19.1, March 2021, pp. 55-84.

¹⁷¹ <https://www.icc-cpi.int/about/otp/who-s-who/karim-khan>.

¹⁷² For more information on the OTP unified teams and the current structure of the OTP more broadly, see: [factsheet-otp-web-v.3-eng.pdf](https://www.icc-cpi.int/sites/default/files/otp/unified-teams-2022-03-03-eng.pdf) (icc-cpi.int)

¹⁷³ Meeting between the International Commission of Jurists and representatives from the Office of the Prosecutor of the ICC, 1 November 2022.

¹⁷⁴ Meeting between the International Commission of Jurists and representatives from the Office of the Prosecutor of the ICC, 1 November 2022; follow-up exchanges in January 2023.

Recommendation: Integrate gender analysis in all OTP Court filings, bringing attention to the gendered nature of crimes and resulting harms.

In November 2022, the OTP released for public consultation a Draft Policy on the Crime of Gender Persecution, developed in a consultative process under the leadership of Special Adviser on Gender Persecution, Lisa Davis.¹⁷⁵ The final Gender Persecution Policy,¹⁷⁶ launched on the margins of the 21st session of the Assembly of States Parties to the Rome Statute in December 2022,¹⁷⁷ seeks to enhance accountability for gender persecution, noting that:

*gender-based crimes are used by perpetrators to regulate or punish those who are perceived to transgress gender criteria that define "accepted" forms of gender expression manifest in, for example, roles, behaviors, activities, or attributes. These criteria often regulate every aspect of life, determining the extent of individuals' freedom of movement, their reproductive options, who they can marry, where they can work, how they can dress and whether they are simply allowed to exist.*¹⁷⁸

The Policy also outlines the OTP's interpretation of key terms (see the Glossary above), showing an evolution in the understanding of "gender" and "sex" compared with the 2014 SGBC Policy; it also introduces additional terms, such as "intersex", "context of society", "LGBTQI+" and "gender persecution",¹⁷⁹ and instructs those interviewing survivors to address them in a culturally and gender sensitive manner using their preferred gender pronouns¹⁸⁰ – if gender pronouns exist in the language in question. The Policy states that the OTP "will strengthen the concrete steps it has taken to enhance the skills of staff in the application of a gender and child-competent approach to its work," and pursue an intersectional approach.¹⁸¹ For staff working on investigations, this includes "trainings designed to help them identify patterns, red flags and factual indicators related to persecutory conduct, including on grounds of gender," for the purposes of investigations.¹⁸² They will also "receive briefings and be required to proactively familiarise themselves with local traditions, religious practices, customs, and cultural issues, including the status of women, girls, men, boys, and LGBTQI+ persons within this context," noting that the OTP "may appoint country experts to individual Unified Teams with situation-specific knowledge and/or expertise of these matters"¹⁸³ and/or identify networks or intermediaries to assist in overcoming challenges to engaging with victims of gender persecution.¹⁸⁴

In January 2024, the Prosecutor announced a related initiative to develop "principles on gender persecution to provide guidance for increasing its prevention, and ensuring protection and participation of its survivors," inviting comments prior to the first draft being circulated.¹⁸⁵

In December 2023, under the leadership of Special Adviser on Sexual Violence, Kim Thuy Seelinger,¹⁸⁶ and following public consultations, the Prosecutor also published a revised "Policy on Gender-Based Crimes"

¹⁷⁵ ICC, Draft Policy on the Crime of Gender Persecution, November 2022. According to the OTP, "[o]ver 500 organisations, institutions, States, UN experts, independent experts, activists, scholars and academics, representing over 100 countries and territories made submissions for consideration." See p. 5 and para. 20.

¹⁷⁶ International Criminal Court, Office of the Prosecutor, *Policy on the Crime of Gender Persecution*, 7 December 2022, <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf>, (2022 Gender Persecution Policy).

¹⁷⁷ International Criminal Court, *Prosecutor of the International Criminal Court (ICC), Karim A.A. Khan KC Publishes Policy on the Crime of Gender Persecution* (7 December 2022), www.icc-cpi.int/news/prosecutor-international-criminal-court-icc-karim-aa-khan-kc-publishes-policy-crime-gender.

¹⁷⁸ 2022 Gender Persecution Policy, para. 4.

¹⁷⁹ 2022 Gender Persecution Policy, para. 3.

¹⁸⁰ 2022 Gender Persecution Policy, para. 77.

¹⁸¹ 2022 Gender Persecution Policy, para. 29. See also *ibid*, para. 111.

¹⁸² 2022 Gender Persecution Policy, para. 73.

¹⁸³ 2022 Gender Persecution Policy, para. 74.

¹⁸⁴ 2022 Gender Persecution Policy, paras. 75-76.

¹⁸⁵ ICC, "The Office of the Prosecutor launches public principles to advance understanding of the crime of gender persecution," 17 January 2024, <https://www.icc-cpi.int/news/office-prosecutor-launches-public-principles-advance-understanding-crime-gender-persecution>.

¹⁸⁶ Meeting between the International Commission of Jurists and representatives from the Office of the Prosecutor of the ICC, 1 November 2022.

(2023 GBC Policy) governing crimes involving “sexual, reproductive and other gender-based violence.”¹⁸⁷ This Policy “integrates and references the Office’s other policy documents, to support the proper contextualisation of crimes and to ensure a coherent and holistic approach to its work generally.”¹⁸⁸ In choosing to reference only GBC in the title of this revised policy, outlining how all crimes falling within the Rome Statute may have gender-dimensions whether in “motive, form, implementation or impact” and including guidance on how sexual, reproductive and other gender-based violence may intersect and overlap, the OTP moves away from the historical framing of gender-based crimes as only sexual violence.¹⁸⁹ The Policy outlines 10 principles applicable “through all operational stages of the Office’s work, from preliminary examination, through to sentencing and reparations,”¹⁹⁰ including *inter alia*:

- the need to adopt survivor-centred and trauma-informed approaches and an intersectional perspective; ensure gender competence;
- address myths, stereotypes and misconceptions;
- fully and faithfully contextualize victims’ experiences and the nature of GBC; and
- monitor and evaluate implementation and revise policy and practice where needed.¹⁹¹

The 2023 GBC policy recognizes that “[c]haracterising GBC fully and faithfully is necessary to capture and to convey the complexity and nuance of survivors’ experiences accurately.”¹⁹² To do so, in turn, requires the OTP to cumulatively charge GBC “when the underlying conduct fulfils the materially distinct elements of different GBC”,¹⁹³ and reflect on the “underlying [gendered] harms and protected values” when making submissions on the commission of crimes more broadly.¹⁹⁴ This would ensure the sexual and gendered-nature of the crimes is not made invisible by being labelled only as, for example, torture or outrages upon personal dignity. Nevertheless, when making complementarity assessments (i.e.. when assessing whether the relevant domestic authorities are willing or able to investigate or prosecute), the Prosecutor leaves open the possibility of deferring to domestic investigations and prosecutions, notwithstanding the fact that the very the same conduct may not be characterized as GBC or charged as a crime under international law within such domestic proceedings. The Policy states that legal qualifications may be relevant to complementarity assessments – which to date have been factually-driven – noting that:

*This is a case-specific determination. Various national barriers to genuine GBC investigations and prosecutions may be relevant. Such barriers include discriminatory attitudes and gender/other stereotypes in substantive law, and/or procedural rules limiting access to justice, the existence of amnesties or immunity laws and statutes of limitations, the absence of proper protective measures for victims, the lack of political will (including official attitudes of trivialisation, minimisation, or denial of these crimes).*¹⁹⁵

Nevertheless, the Policy goes on to state that, in implementing its “positive and dynamic approach to complementarity and cooperation,” the OTP will “encourage genuine national investigations and prosecutions of GBC by States, by proactively engaging with national authorities and giving prompt and effective assistance where feasible.”¹⁹⁶ How this approach is applied in practice will be guided by the OTP’s policy on Complementarity and Cooperation released in April 2024.¹⁹⁷

¹⁸⁷ International Criminal Court, Office of the Prosecutor, *Policy on Gender-Based Crimes: Crimes involving sexual, reproductive and other gender-based violence*, December 2023: <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf> (2023 GBC Policy).

¹⁸⁸ 2023 GBC Policy, para. 7. See also, para. 9.

¹⁸⁹ 2023 GBC policy, p. 2 and paras. 42-45.

¹⁹⁰ 2023 GBC policy, p. 3.

¹⁹¹ 2023 GBC policy, part V.

¹⁹² 2023 GBC Policy, para. 86.

¹⁹³ 2023 GBC Policy, para. 86.

¹⁹⁴ 2023 GBC Policy, para. 87.

¹⁹⁵ 2023 GBC Policy, para. 102.

¹⁹⁶ 2023 GBC Policy, para. 103.

¹⁹⁷ International Criminal Court, Office of the Prosecutor, *Policy on Complementarity and Cooperation* (1 April 2024), <https://www.icc-cpi.int/sites/default/files/2024-04/2024-comp-policy-eng.pdf>, (2024 Complementarity and Cooperation Policy).

A more proactive approach than previously adopted¹⁹⁸ to encouraging domestic authorities to conduct gender-competent investigations and prosecutions would be welcomed, given past cases in which assessments have focussed on whether the “same conduct” is being investigated or prosecuted rather than how it could be characterised.¹⁹⁹ Focussing on perpetrator conduct alone to make complementarity assessments, rather than how such conduct is characterised, could result in the gendered nature of the perpetrators’ intent or harms experienced by survivors being excluded from the charges and from any assessment of reparations to be awarded to the survivors.

The 2024 OTP policy on Complementarity and Cooperation recognizes this concern and supports a more inclusive approach. It highlights the “need to create strong incentives to promote harmonization between international and national legal qualifications to avoid impunity gaps.”²⁰⁰ Specifically, it emphasizes that in cases involving sexual and gender-based crimes, the Appeals Chamber has ruled that domestic legal qualifications must include “a sexual or gender component” when assessing whether there is an advancing process of domestic investigations and prosecutions of the underlying facts and circumstances.²⁰¹

This approach is exemplified in a complementarity assessment of the domestic proceedings in Venezuela concerning alleged acts that fall within the Rome Statute. The ICC Appeals Chamber found that the domestic classification of acts of a sexual nature as “torture” or “cruel treatment” failed to address the distinctive legal interests protected by the crimes of rape and other forms of sexual violence.²⁰² As a result, the Appeals Chamber agreed with the Pre-Trial Chamber’s conclusion that, without proceedings categorizing these acts as crimes with a sexual or gender component, Venezuela had not sufficiently demonstrated that its domestic proceedings mirrored the full scope of the ICC Office of the Prosecutor’s investigation. This finding ultimately led to the authorization of the continuation of the investigation at the ICC.²⁰³

However, in a number of situations involving GBC since Prosecutor Khan took office, in which the OTP decided to close the preliminary examinations on the basis of complementarity, GBC has not been a focus in the reasoning in the decision or cooperation agreements between the OTP and domestic authorities published by the OTP. For instance, the preliminary examination of alleged Rome Statute crimes committed in the context of the 28 September 2009 events at the Conakry stadium in Guinea – which focussed on the crime against humanity of rape and other forms of sexual violence – was closed on 29 September 2022, one day after the opening of a long-awaited domestic trial relating to the repression of protests of 28 September 2009, where more than 150 people were allegedly massacred and others subjected to sexual violence, torture, imprisonment and persecution.²⁰⁴ In explaining the closing of the preliminary examination, the OTP concluded that, “there was not a reasonable basis to believe that potential case(s) arising from an investigation of the situation would be admissible.”²⁰⁵ While present to observe the opening of the trial in Guinea, ICC Prosecutor signed a *Memorandum of Understanding (MoU) with the Guinean Transitional Government on complementarity and closure of the Preliminary Examination*. The MoU commits Guinea to a number of measures in support of the domestic trial.²⁰⁶ However, since then, there has been no other communication on an exchange between the ICC OTP and justice actors in Guinea on how to further a gender-competent prosecution and how to further complement this trial with other efforts to fully address GBC.

¹⁹⁸ See e.g., International Commission of Jurists, *Libyan Proceedings and the International Criminal Court: Assessment of Complementarity Challenges* (2020), <https://www.icc-cpi.int/sites/default/files/2024-04/2024-comp-policy-eng.pdf>.

¹⁹⁹ *Ibid.*

²⁰⁰ 2024 Complementarity and Cooperation Policy, para. 156.

²⁰¹ *Ibid.*; See e.g., *Judgement in “The Situation in the Bolivarian republic of Venezuela I,”* Appeals Chamber, International Criminal Court, ICC-02/18/OA (1 March 2024), paras 325- 33.

²⁰² *Judgement in “The Situation in the Bolivarian republic of Venezuela I,”* Appeals Chamber, International Criminal Court, ICC-02/18/OA (1 March 2024), paras 329. See also, *Prosecution Response to the Bolivarian Republic of Venezuela’s Appeal against the Pre-Trial Chamber I’s Decision authorizing the resumption of the investigation pursuant to article 18(2) of the Statute*, International Criminal Court, ICC-02/18-62-Red (29 November 2023), para. 133.

²⁰³ *Ibid.*, para. 332.

²⁰⁴ See International Criminal Court, Preliminary Examination: Guinea: <https://www.icc-cpi.int/situations/guinea>; FIDH, “Guinea: 13 years after the crimes, the trial of the 28 September 2009 massacre has been opened” (28 September 2022), <https://www.fidh.org/en/region/Africa/guinea-conakry/guinea-opening-trial-massacre-28-September-2009>.

²⁰⁵ See ICC, “Statement by ICC Prosecutor Karim A.A. Khan KC regarding the opening of the trial related to events of 28 September 2009 in Guinea, signature of Agreement with Transitional Government on complementarity and closure of the preliminary examination (22 September 2022) <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-regarding-opening-trial-related-events-28-september>.

²⁰⁶ See Memorandum of Understanding Between the Republic of Guinea and The Office of the Prosecutor of the International Criminal Courts (2022) [2022-09-29-mou-icc-guinea-ns-eng.pdf \(icc-cpi.int\)](https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-regarding-opening-trial-related-events-28-september)

With respect to the preliminary examination focussing “on alleged crimes against humanity and war crimes committed in the context of the armed conflict between and among government forces, paramilitary armed groups and rebel armed groups” in Colombia, after the closure of the 17-year-long preliminary examination, the OTP stated that, “[t]he absence of a preliminary examination does not...mean an end to the Office’s engagement with Colombia or its support to the accountability processes underway,” but “marks the beginning of a new chapter of support and engagement – an example of positive complementarity in action.”²⁰⁷ However, the Cooperation agreement signed by the OTP and the government of Colombia states that the OTP “commits to continue supporting Colombia’s accountability efforts within its mandate and means” in general terms, without mentioning gender competent accountability as part of the support or the factors assessed in the continued engagement.²⁰⁸

Based on the foregoing that, in at least some prior complementarity assessments, including those subject to confirmation by an ICC chamber, the OTP has not adequately considered whether domestic proceedings are capable of ensuring GBC are appropriately characterised. The new GBC and Complementarity policies provide the OTP with an opportunity to implement its gender-related priorities in future complementarity related assessments.

Recommendation: Meet the OTP’s commitments to ensuring full and faithful characterization of GBC when making complementarity assessments and considering whether the “same conduct” is being addressed in domestic proceedings by having regard to how crimes are or could be characterized at the domestic level, taking into account the domestic legal framework, to ensure that the gendered nature of the perpetrators’ intent or harms experienced by victims/survivors be included in the investigation and charges, and in any assessment of any reparations that could be awarded to the victims/survivors. When providing support to domestic authorities under the principle of complementarity, ensure gender is prioritized in any judicial cooperation and technical support for investigations and prosecutions.

Importantly, the GBC Policy recognizes the need to include GBC expertise in unified teams and prioritize GBC at all stages of the OTP’s work.²⁰⁹ At the preliminary examination stage, the OTP commits to conducting gender-competent analysis to determine whether GBC have been committed.²¹⁰ To do so, they will “consult ... a range of local, regional, national and international actors and expertise, including survivors’ groups, as relevant,” as well “rely upon its country experts.” Similarly, at the investigation stage, the OTP will include GBC expertise in the team (including through secondees) and consult country experts. During the ICJ’s consultations, the OTP indicated gender analysis begins at the preliminary examination phase, albeit in a limited manner given it relies mostly on open-source information.²¹¹ Once a situation proceeds to the investigation phase, however, external cultural and gender experts brief the unified team at the OTP.²¹² The OTP similarly indicated it is sensitive to the need to engage international, national and local actors, and engages with multiple actors to inform its strategies to better understand the context-specific gender constructs.²¹³ At the time the ICJ conducted research for this report, the OTP was also working to enhance its analytical capacity, factoring country-specific knowledge and intersectionality into its working methods, not limited to SGBC or crimes against children but extending to other context-specific factors and at risk persons.²¹⁴ Part of GCU’s priorities and commitment was to hold and organize OTP-wide trainings on SGBC

²⁰⁷ ICC, “Mr Karim A. A. Khan QC, concludes the preliminary examination of the Situation in Colombia with a Cooperation Agreement with the Government charting the next stage in support of domestic efforts to advance transitional justice” (28 October 2021) <https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-khan-qc-concludes-preliminary-examination-situation-colombia>.

²⁰⁸ See Cooperation Agreement Between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia (2021) [20211028-OTP-COL-Cooperation-Agreement-ENG.pdf \(icc-cpi.int\)](https://www.icc-cpi.int/news/20211028-OTP-COL-Cooperation-Agreement-ENG.pdf).

²⁰⁹ 2023 GBC Policy, para. 94. See also paras. 107 of the 2022 Gender Persecution Policy, which states that “providing adequate support to the GCU and enhancing mainstreaming of gender competencies within each Unified Team and other specialised Sections and Units are some of the ways of ensuring that proper focus is put on the investigation and prosecution of gender persecution.”

²¹⁰ 2023 GBC Policy, para. 101, and para. 41.

²¹¹ *Ibid.*; ICJ follow-up exchanges in January 2023.

²¹² *Ibid.*

²¹³ *Ibid.* See also, e.g., 2023 GBC Policy, paras. 101 and 105.

²¹⁴ *Ibid.*

and crimes against and affecting children.²¹⁵ The Bangladesh/Myanmar team, at the investigation stage, recruited two country experts—one with Rohingya specific expertise and the other with country specific and regional expertise—in addition to the GBC experts internal to the team.

While consultations with local experts are essential to situating crimes in their context, investigations and thereby subsequent prosecutions would be strengthened by embedding such expertise in the team. Additionally, rather than consulting separate context and gender experts, it would be beneficial to ensure that a context specific gender (and ideally GBC) expert is integrated in the team, to ensure they are not just consulted by team members with access to evidence but can review evidence with a view to identifying conduct with gendered constructs, within individual cases or patterns of conduct. The OTP indicated that, given funds are already stretched across an increasing number of situations and the difficulty of hiring one country specific expert on both GBC and crimes against children, it is not able to hire context specific gender experts in each case.

GCU is, however, bolstering the role and size of its Gender and Children Unit, including with the hire of more legal advisors and administrative support. Beyond the Unit, the OTP integrates gender and child-related expertise through focal point systems across all Teams. The Office is also seeking to engage in a targeted way with embassies to ensure greater diversity and geographical representation in its staffing and secondees. GCU's priority is to hold and organize OTP wide trainings on SGBC and crimes against and affecting children,²¹⁶ and review all investigation, interview and mission plans for gender (and child) competence. The goal is to ensure all unified teams have a focal point on GBC and expertise is consolidated in each team.²¹⁷ The Office's first Senior Coordinator for Gender- based Crimes is at the P5 level, enabling them to exercise oversight of investigation teams and approval of investigation and mission plans, as well as control expenditure of GBC related budgets.²¹⁸ This further facilitates the integration of the GBC policy within and across ICC investigation teams, including the team on Bangladesh/Myanmar.

Recommendation: Ensure diversity, including gender diversity, and context-specific expertise in the staff appointed to and engaged in the Myanmar/Bangladesh situation (as well as others), employing a context-specific gender (ideally GBC) expert in the unified team to review evidence and advise the team on GBC at all stages of the Unified Team's work.

Recommendation: Increase consultation with civil society organizations, experts and other actors with context-specific gender expertise to identify and address: (i) gender constructs relevant to the commission of crimes within the jurisdiction of the Court, including structural factors enabling the commission of crimes; and (ii) gender barriers impacting access to justice in a gender-competent, survivor-centric and trauma-informed manner, with a view to identifying measures to assist to overcome them.

While the policies shed light on the OTP's approach to addressing GBC, how they are implemented in practice remains confidential. The Gender Persecution Policy states that the "Office will create and maintain regular and situation-specific updates for investigative materials to further assist in identifying and investigating gender persecution, such as: (1) topic questionnaires, (2) elements guidelines, and (3) practical guidelines for implementation of this Policy."²¹⁹ The 2023 GBC policy notes that it will be integrated into internal operational guidance for staff.²²⁰ Internal guidance is not published to protect the confidentiality and integrity of the OTP's work.

²¹⁵ *Ibid.*

²¹⁶ Follow-up exchanges in January 2023.

²¹⁷ Follow-up exchanges in March 2024.

²¹⁸ Follow-up exchanges in March 2024.

²¹⁹ Gender Persecution Policy, para. 111.

²²⁰ 2023 GBC policy, paras. 7 and 145.

There may be aspects of such guidance that could provide insights for victims/survivors, affected communities and others who engage with the OTP in the context of investigations and prosecutions into how a gender perspective and gender analysis will be integrated into the day-to-day work of the office – aside from simply embedding GBC expertise in a unified team – and how they can therefore support the Office in this regard. Moreover, such guidance could contribute to increasing the understanding and expertise of other practitioners engaged in international criminal justice work about good practices for ensuring gender-competent approaches to their work. The OTP could give consideration to publishing discrete operational guidance – only to the extent this does not jeopardize the integrity and security of the OTP’s work – on the practical implementation of its gender-related policies for broader use.

Recommendation: Make gender-specific strategies accessible – in relevant languages and formats – to civil society organizations and other actors working on ICC situation countries, as well as to victims/survivors and affected communities;

Recommendation: Develop and publish discrete operational guidance – taking into account the need to protect the integrity and security of the OTP’s work – on the practical implementation of its gender-related policies:

- ***to provide survivors, affected communities and others who engage with the OTP much needed insight into how a gender perspective and gender analysis is integrated into the OTP’s work and how they can therefore support the Office in this regard;***
- ***to contribute to increasing the understanding and expertise of other practitioners engaged in international criminal justice work about best practice approaches to ensuring gender-competency in their work.***

Continued self-reflection and learning also remain needed as the ICC moves into its third decade of operation. For instance, the OTP could consider how best to share its gained knowledge in unpacking gender-dynamics prevalent in a specific situation or case, often spanning multiple years, with other ICC organs or entities who may engage with victims and witnesses much later than the OTP and must possess the same understanding for such engagement.

The consultations carried out for this research indicated that while the ICC collaborates with the IIMM on the ongoing investigation, there is no specific exchange between the two bodies relating to their respective gender strategies.²²¹ The OTP should also work to tailor its gender strategies to the specific country situation that is the focus of each investigations and prosecution, including by strengthening its engagement with other accountability mechanisms focusing on the same situation, some of which have their own related strategies.

Recommendation: Coordinate with other accountability mechanisms and actors engaged in the Myanmar situation, including the IIMM and domestic authorities investigating crimes under international law committed in Myanmar, as well as civil society organizations, in relation to gender strategies and with a view to tailoring gender-related strategies to the specific situation.

iii. Gender in the working methods of the Registry’s Outreach Section

Given that the ICC is seated in The Hague, the Court is geographically distant from most countries with which it is concerned. As a result, significant outreach activities are needed to ensure that the mandate and developments of the Court be well-understood, particularly by victims/survivors and affected communities. Outreach – carried out by the Registry’s Public Information and Outreach Section (PIOS) – is a vital tool for

²²¹ Meeting between the International Commission of Jurists and representatives from the Office of the Prosecutor of the ICC, 1 November 2022 and follow-up exchanges in January 2023.

the Court to enable victims' awareness, and consequently, exercise of their rights.²²²

Still, civil society organizations have often critiqued the insufficiency of outreach activities by the Court and the failure to initiate them sufficiently early in multiple situations.²²³ An Independent Expert Review of the Court found that there "appear[ed] to be significant delays in the Court/OTP outreach...commenc[ing] only when] a formal investigation is opened", and that the Court's Strategic Plan for Outreach "ha[d] not been effectively implemented," thus placing the "burden on civil society organisations to keep affected communities informed about the developments at the Court."²²⁴ However, with roughly 50,000 euros per annum allocated to outreach – a sum that an Independent Review of the Court carried out by independent experts appointed by the Assembly of States Parties described as "minuscule"²²⁵ – resource limitations, including as far as human resources are concerned, are a key obstacle to effective ICC outreach. At the time research for this report was conducted, the outreach section of PIOS included only three staff members, one of whom works part-time, to manage outreach activities relating to the 17 situations before the Court.²²⁶

On 20 January 2020, Pre-Trial Chamber III rendered an *Order on Information and Outreach for Victims of the Bangladesh/Myanmar situation*.²²⁷ The Chamber noted that the crimes under investigation were of a continuous nature, thereby finding it appropriate for survivors to continue to be informed to ensure they could communicate with the Court effectively.²²⁸ The Chamber further noted that survivors of crimes allegedly committed after it had authorized the Prosecutor to proceed with an investigation, who may also fall within the scope of the investigation, have not had an opportunity to submit their views on authorization to the Court and may also wish to participate in future judicial proceedings.²²⁹ The Chamber stated that, pursuant to Article 68(3) of the Statute, "the Court has an obligation to permit victims' views and concerns to be presented and considered at stages of the proceedings determined to be appropriate."²³⁰ For this obligation to be fulfilled, the Chamber explained, victims must have access to "complete and accurate information" on their rights and roles in the different stages of the proceedings. As such, the Order states that outreach is a tool enabling victims to exercise their rights and for the Court to fulfil its duties and aim to respond to victims' concerns and expectations.²³¹

The 20 January 2020 Order also specified that outreach activities should be conducted in coordination with other sections and organs of the Court, and specifically in consultation and coordination with the OTP.²³² It also specified that the Registry should take the specific context of the situation into account in carrying out outreach activities, including languages, local customs and traditions, literacy rates and access to media and technology.²³³ However, the Order did not explicitly mention context-specific gender dynamics that would impact outreach activities or survivors' concerns.

²²² International Federation for Human Rights (FIDH), "Chapter III: Outreach", in *Victims' Rights Before the ICC* (2007), p. 3.

²²³ See e.g. International Federation for Human Rights (FIDH), *The Rome Statute at Twenty (1998-2018): 10 Challenges to an Effective and Independent International Criminal Court* (July 2018), pp. 13-14, www.fidh.org/IMG/pdf/report_20_years_icc_rome_statute-2.pdf.

²²⁴ Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report (30 September 2020) paras. 392-394: https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf.

²²⁵ Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report 30 September 2020, para. 398: https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf.

²²⁶ Follow up exchange between the ICJ and the Outreach Section on the Margins of the 21st Assembly of States Parties, 5-10 December 2022. In the proposed 2024 budget submitted by the Court to the Assembly of States Parties, the Outreach Unit requested funding for eight professional level staff, one of whom works part-time, and six general services staff. The overall proposed budget, part of which would be directed towards staffing increases, was reduced by the Assembly from 196,827,000 euros to 187,084,300 euros. The extent to which this will affect outreach staffing levels was not available at the time of publication.

²²⁷ *Order on Information and Outreach for the Victims of the Situation*, International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19 (14 November 2019) <https://www.icc-cpi.int/court-record/icc-01/19-27>.

²²⁸ *Ibid.*, para. 6.

²²⁹ *Ibid.*

²³⁰ *Ibid.*, para. 7.

²³¹ *Ibid.*, para. 10.

²³² *Ibid.*, para. 8-9.

²³³ *Ibid.*, para. 9.

Recommendation: Ensure inter-organ coordination in the integration of a gender perspective in key functions of the court, including stakeholder engagement and mapping, outreach and engagement with victims/survivors and affected communities.

On 6 July 2020, the Registry submitted an initial report to the Chamber, following which it has continued to report every six months, including on the progress of and challenges to its outreach and information activities.²³⁴ At the time this report was published, the Registry had submitted eight confidential reports to the Chamber, with publicly redacted versions being made available.²³⁵ In its first report, the Registry described the PIOS's joint mission with the VPRS to Cox's Bazar in December 2019, which occurred following Pre-Trial Chamber III's decision authorizing the Prosecutor to proceed with an investigation.²³⁶

In its first report, the Registry reported that the VPRS was only able to meet a small number of victims,²³⁷ and that special attention is needed to reach out to women.²³⁸ In subsequent reports, the Registry's reports communicated its inability to conduct further missions to Cox's Bazar due to travel and other restrictions resulting from the COVID-19 pandemic, resource limitations and/or competing priorities.²³⁹ In its most recent report to Pre-Trial Chamber I, the Registry reported on "the massive confusion among the Rohingya between the various international justice mechanisms available, their mandates, activities and roles played by their different staff members in the camps in Cox's Bazaar and the need for awareness raising," along with "the feeling of abandonment."²⁴⁰

When conducting outreach activities on the ground, the PIOS indicated it considers the needs of specific groups including those of women, but also other groups such as the elderly, youth and children.²⁴¹ For instance, in the situation of the Central African Republic, radio programs were designed to provide information about the Court and judicial developments. However, it was later made known to the PIOS that women generally do not have a choice of which radio channels or programs they listen to (a choice otherwise made by men). Accordingly, the PIOS organized "listening clubs" specifically for women, further considering the range of their responsibilities and thereby, their availability.²⁴² In the situation of the Democratic Republic of Congo, arrangements were made to accommodate women attending information sessions with their children.²⁴³

Similar targeted strategies do not appear to have been implemented in the Bangladesh/Myanmar situation. Outreach has largely been carried out online and in a limited manner due to the aforementioned challenges. The Registry reported on commencing a PIOS Strategy specific to the situation, and on a mapping report,²⁴⁴ the latter completed in the second half of 2021. These tools constituted the first steps of conducting outreach

²³⁴ *Ibid*, para. 12.

²³⁵ These publicly redacted versions can be found in the Court records listed under the Bangladesh/Myanmar investigation, found here: [https://www.icc-cpi.int/case-records?f\[0\]=c_sit_code:1165](https://www.icc-cpi.int/case-records?f[0]=c_sit_code:1165).

²³⁶ *Public Redacted Version of "Registry's First Report on Information and Outreach Activities"*, 6 July 2020, ICC-01/19-33, International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, paras. 11-16: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_04049.PDF.

²³⁷ *Public Redacted Version of "Registry's First Report on Information and Outreach Activities"*, 6 July 2020, ICC-01/19-33, International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, para. 17.

²³⁸ *Ibid*, para. 15.

²³⁹ ICC, *Public Redacted Version of "Registry's Second Report on Information and Outreach Activities"*, 18 December 2020, ICC-01/19-39; ICC, *Public redacted version of "Third Registry Report on Information and Outreach Activities"*, 18 June 2021, ICC-01/19-45-Conf; International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, para. 6-7, <https://www.icc-cpi.int/court-record/icc-01/19-45-red>; *Public redacted version of "Fourth Registry Report on Information and Outreach Activities"*, 17 December 2021, ICC-01/19-46-Conf, International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, para. 6-7 and 12, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_11696.PDF; *Public redacted version of "Fifth Registry Report on Information and Outreach Activities"*, 17 June 2022, ICC-01/19-47-Conf, International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, para. 6, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_04872.PDF.

²⁴⁰ *Public redacted version of the "Eighth Registry Report on Information and Outreach Activities"*, International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-Red, 18 December 2023, para. 11: <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd1806c122f.pdf>.

²⁴¹ ICJ Meeting with the Outreach section, 15 November 2022.

²⁴² *Ibid*.

²⁴³ *Ibid*.

²⁴⁴ *Public redacted version of "Third Registry Report on Information and Outreach Activities"*, International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-45-Red, 18 June 2021, para. 8, *supra*.

activities and, to a large extent, the PIOS indicated to ICJ that it is still learning about the situation and the necessary communication tools.²⁴⁵ Despite the reliance on online means of outreach and communication, the PIOS had not yet assessed the ability of certain groups, including women and girls, to access digital or online information, and thereby to access the conveyed information.²⁴⁶

At the time of the ICJ's consultations for this report, the PIOS' focus was on working towards making information accessible to women.²⁴⁷ For instance, the PIOS was training a group of civil society representatives and community activists, half of whom are women, on key aspects of the Court's work with a view of engaging them in the future when judicial developments take place.²⁴⁸ Nevertheless, targeting women with outreach activities was not mentioned in publicly redacted version of the seventh and eighth Registry reports to Pre-Trial Chamber I in 2023.²⁴⁹ Ensuring accessibility of information to other groups, including persons who are or may be perceived to be LGBTQI+, is not part of current strategies, but may be in the future.²⁵⁰

Recommendation: Intensify outreach efforts to affected communities, in particular women and girls and persons who are or may be perceived to be LGBTQI+, in coordination with other mechanisms and actors involved in the Myanmar situation, with a view to enhancing awareness of victims' rights and means to participate in ICC proceedings.

Although PIOS hoped to conduct an outreach mission may be organized in 2023 should a budget increase occur (albeit human resource limitations would continue to pose a challenge),²⁵¹ no outreach missions were conducted in 2023. PIOS alternatively indicated it would attempt to organize hybrid information sessions in a meeting room in Cox's Bazar where victims/survivors could gather and participate, with Court officials joining online. However, according to the seventh and eighth Registry reports to Pre-Trial Chamber I in June and December 2023, respectively, the organization of hybrid information sessions was postponed to 2024.²⁵² The PIOS participated in "joint" (with partners unspecified) interactive questions and answers (Q&A) videos with court officials answering questions on general issues regarding the Court and specific questions regarding the scope of the Myanmar investigation.²⁵³ In June 2024, PIOS indicated it planned to conduct a mission "when and if conditions permit (including budgetary and security conditions)" to meet with an unspecified (due to redactions) person or body "for the purpose developing outreach projects and providing ICC-related trainings, ...including in the Rohingya camps."²⁵⁴

²⁴⁵ ICJ Meeting with the Outreach section, 15 November 2022.

²⁴⁶ ICJ Meeting with the Outreach section, 15 November 2022.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ Public redacted version of the "Seventh Registry Report on Information and Outreach Activities", International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-Red, 16 June 2023; Public redacted version of the "Eighth Registry Report on Information and Outreach Activities", International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-Red, 18 December 2023,

²⁵⁰ *Ibid.*

²⁵¹ Public redacted version of the "Sixth Registry Report on Information and Outreach Activities", 18 June 2021, ICC-01/19-48-Red, 16 December 2022, para. 14; Follow up exchange between the ICJ and the Outreach Section on the Margins of the 21st Assembly of States Parties, 5-10 December 2022.

²⁵² Public redacted version of the "Seventh Registry Report on Information and Outreach Activities", International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-Red, 16 June 2023, para. 6; Public redacted version of the "Eighth Registry Report on Information and Outreach Activities", International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-Red, 18 December 2023, para. 12.

²⁵³ Although it is unclear from the redacted text, it appears these videos are pre-recorded and then shared with affected communities. Public redacted version of the "Seventh Registry Report on Information and Outreach Activities", International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-Red, 16 June 2023, para. 7; Public redacted version of the "Eighth Registry Report on Information and Outreach Activities", International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-Red, 18 December 2023, para. 6.

²⁵⁴ See Public redacted version of the "Ninth Registry Report on Information and Outreach Activities", International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-62-Red, 14 June 2024, para. 14. See also, Public redacted version of the "Seventh Registry Report on Information and Outreach Activities", International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-Red, 16 June 2023, para. 11; Public redacted version of the "Eighth Registry Report on Information and Outreach Activities", International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-Red, 18 December 2023, para. 13.

Such missions are crucial for engagement with survivors, affected communities and civil society, and particularly for engaging with groups that face particular barriers to accessing information in the Myanmar context, including women and persons who are or may be perceived to be LGBTQI+.

The Registry still does not have a field office in the Asia region, despite advocates urging the Registrar to establish one.²⁵⁵ The lack of presence of ICC staff on the ground may negatively impact the participation of women and persons who are or may be perceived to be LGBTQI+, which requires proactive and consistent action from Court representatives. It is also likely to limit the “two-way communication” of outreach activities, whereby the Court’s sections better learn survivors’ concerns and expectations by engaging in two-way real-time dialogue. While the virtual sessions may provide some valuable insights, this format is likely to discourage certain persons or groups from sharing their views, questions or concerns due to a range of factors, including the prevailing gender dynamics and discriminatory attitudes prevalent in the Rohingya community.

Recommendation: Increase engagement with civil society organizations, including grassroots organizations with a presence in Cox’s Bazar, Bangladesh, and at other locations, with a view to increasing understanding of the ICC’s mandate as well as enhanced dissemination of any prosecutorial or judicial developments.

iv. Gender in the working methods of the Victims Participation and Reparations Section of the Registry

The ICC is often described as a victims’ court with its Statute remedying victims’ exclusion from other judicial proceedings, permitting them instead to present their views and concerns where their interests are affected.²⁵⁶ In the Bangladesh/Myanmar situation, survivors submitted their views in two stages of proceedings: firstly, in relation to the Prosecutor’s request for a ruling on whether the Court had jurisdiction, pursuant to Article 19(3); and secondly, in making representations in relation to the Prosecutor’s request for authorization to proceed with an investigation, pursuant to Article 15(3).

In relation to the Prosecutor’s request for a ruling on jurisdiction, Pre-Trial Chamber I did not instruct the Victims Participation and Reparations section (VPRS) to collect survivors’ views and concerns. Nevertheless, Pre-Trial Chamber I granted a number of individuals and organizations’ requests to submit *amicus curiae* observations, and several external lawyers and organizations made submissions on victim/survivors’ behalf.

In relation to the authorization of the OTP’s investigation, the victim consultation process under Article 15(3) was carried out by the VPRS from 28 June to 28 October 2019.²⁵⁷ VPRS requested an extension of the prescribed 30-day timeline under Regulation 50(1) of the Regulations of the Court to finalize its the victim consultation process, a request that the Chamber granted, prescribing, in turn, a duration of time considered “generous” in comparison with previous similar processes in other situations.²⁵⁸ Four missions were conducted by the VPRS to Cox’s Bazar to facilitate the process,²⁵⁹ in addition to one preparatory mission before the commencement of the victim consultation proper to conduct a preliminary assessment of the situation and identify relevant stakeholders.²⁶⁰

²⁵⁵ See Annex to the Eighth Registry Report on Information and Outreach Activities (Public Redacted), ICC-01/19-59-Anx-Red, 18 December 2023, p. 2: <https://www.icc-cpi.int/court-record/icc-01/19-59-anx-red>.

²⁵⁶ The Rome Statute, Articles 15(1), (2) and (6), 19(3), 68(3), 53 and 75; ICC Rules on Evidence and Procedure, Rules 49, 104, and 92(1) and (2). See International Federation for Human Rights (FIDH), *Victims at the Center of Justice from 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC* (December 2018), p. 4, www.fidh.org/IMG/pdf/droitsdesvictimes730a_final.pdf; Gilber Bitti, “A Court for Victims?” in *ibid*, pp. 6-7.

²⁵⁷ *Public Redacted version of Annex I to the Final Consolidated Registry Report on Victims’ Representations Pursuant to the Pre-Trial Chamber’s Decision ICC-01/19-6 of 28 June 2019*, International Criminal Court, Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-22-AnxI-Red, para. 1, https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2019_06862.PDF.

²⁵⁸ ICJ Meeting with VPRS, 11 November 2022.

²⁵⁹ *Public Redacted version of Annex I to the Final Consolidated Registry Report on Victims’ Representations Pursuant to the Pre-Trial Chamber’s Decision ICC-01/19-6 of 28 June 2019*, para. 1, *supra*.

²⁶⁰ *Ibid*.

VPRS rolled out the victim consultation process with an “open approach,” which entailed making the form used to collect survivor representations available on the Court’s website in Burmese and Bangla, as well in an audio format in the Rohingya language.²⁶¹ A total of 328 victim representations were received by the Registry,²⁶² a great majority of which were collected in-person,²⁶³ reflecting the poor internet connection and the scarcity of resources for Rohingya in the camps outlined by the Registry in its report on VPRS missions to Cox’s Bazaar.²⁶⁴ Most representations were collective, i.e., on behalf of multiple victims, such as whole families, “entire camps” or, as in one representation, one village.²⁶⁵ During another mission conducted after the decision authorizing the investigation, the VPRS started informing victims and affected communities about this decision.²⁶⁶ However, as noted above, resource limitations and the COVID-19 pandemic hampered these missions.

Similarly to the requirements of conducting effective outreach, enabling gender inclusive participation of victims requires a proactive and targeted approach that enables persons and groups of persons who would otherwise be excluded or underrepresented to meaningfully participate. With respect to the ICC investigation into crimes against humanity and war crimes in Afghanistan, for instance, 94 per cent of individual representations were submitted by or made on behalf of men.²⁶⁷ Due to the security situation in Afghanistan, the VPRS was unable to facilitate a victim consultation process for the purposes of collecting or facilitating representations. As a consequence, nearly all forms were submitted online or via email.²⁶⁸ The Registry identified low literacy levels, particularly among women, as well as women’s scarce engagement with formal justice processes and underrepresentation in traditional justice processes domestically, as the key challenges hampering women’s engagement in the participation processes and in collecting their representations.²⁶⁹

Recommendation: Make training on gender compulsory for all Registry staff engaged with victims, particularly those working on victim participation and outreach, and invite external and country specific experts to conduct parts of these trainings.

When the VPRS carries out the victim consultation process directly, as was the case in the Myanmar/Bangladesh situation, it takes some measures to enable the engagement and participation of women and persons who are or may be perceived to be LGBTQI+. The lack of engagement with victims and affected communities prior to the triggering of such a victim consultation process often places the VPRS at a disadvantage in identifying and addressing context-specific gender dynamics, and interlocutors who could support an inclusive consultation process.²⁷⁰ One of the “major challenges” identified by the Registry in its request to the Chamber for an extension of time in the victim consultation process in the Myanmar/Bangladesh situation was “the extent to which it will be possible to properly engage with Rohingya communities and particularly to interact directly with affected women and children.”²⁷¹

To address such challenges, the Registry stated that targeted communication strategies towards women would be crucial, as well as information campaigns explaining to men why women’s views would be sought.²⁷² Further, it recommended to use “female staff” and intermediaries in the process when engaging

²⁶¹ *Ibid.*, para. 16.

²⁶² *Ibid.*, para. 44.

²⁶³ *Ibid.*, para. 46.

²⁶⁴ *Ibid.*, para. 21.

²⁶⁵ *Ibid.*, para. 53, 57, 59.

²⁶⁶ *Public redacted version of “Registry’s First Report on Information and Outreach Activities”, 6 July 2020, ICC-01/19-33, para. 11-16, supra.*

²⁶⁷ *Public Redacted version of Annex I to the Final Consolidated Registry Report on Victims’ Representations Pursuant to the Pre-Trial Chamber’s Decision ICC-01/19-6 of 28 June 2019, para. 35, supra.*

²⁶⁸ *Ibid.*, para. 18.

²⁶⁹ *Ibid.*, para. 36-37.

²⁷⁰ ICJ Meeting with VPRS, 11 November 2022.

²⁷¹ *Public Redacted Version of “Registry’s Request for Extension of Notice Period and Submissions on the Article 15(3) Process”, 26 June 2019, ICC-01/19-3, International Criminal Court, Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, para. 14, www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03428.PDF.*

²⁷² *Public redacted version of “Registry’s Request for Extension of Notice Period and Submissions on the Article 15(3) Process”, 26 June 2019, ICC-01/19-3, para. 31, supra.*

with women.²⁷³ However, again, the limited amount of time for the consultation process in addition to the absence of any preparation time would remain a concern. Other victim participation processes in pre-trial and trial proceedings generally benefit from more time and an enhanced knowledge of the context. Still, enabling inclusive participation may continue to be a challenge in these processes even with additional time and knowledge.²⁷⁴

Measures taken by VPRS in the victim representation process in the Bangladesh/Myanmar situation included specific resource allocation for the participation of women's family members to enable women to participate, as well as identifying and engaging women interpreters.²⁷⁵ Following initial meetings where the majority of attendees were men, the VPRS also engaged with stakeholders in the camp seeking to ensure women make up 50 per cent of the attendees in meetings and other consultations, in addition to organizing meetings dedicated for women participants to ensure meaningful participation.²⁷⁶ While women's participation did increase, ensuring the desired level continued to constitute a challenge.²⁷⁷ Several sub-groups, including widowed and elderly women, in particular, remained underrepresented, as their informed and meaningful participation would have required additional time and resources.²⁷⁸ The VPRS also made a proactive effort to engage victims who are or may be perceived to be LGBTQI+ in the process, including through identifying interlocutors already engaged with them.²⁷⁹ In the end, however, the extent to which such persons were in fact engaged in the process is not clear.

The form used for victim representation collects various information about the victim(s). An open-ended question is used for collecting information on gender, allowing any response to be written.²⁸⁰ The guidelines on how to fill in the victim representation form use "other" as one of the examples for how this section can be filled.²⁸¹ Yet, the guidelines conflate sex with gender in providing "51 male, 48 female" as an example of gender.²⁸² This conflation is also present in some Registry reports to the Chamber on the gender breakdown of victim participants.²⁸³ The victim representation form does not collect information on sexual orientation at all. With the majority of representations being collective and with some potential overlap (e.g. with individuals potentially being represented in both a "camp" related application and a "village" related application, or list of victims, where sufficient coordination to avoid duplication was not ensured), it was not possible for the VPRS to provide accurate information on the gender breakdown of victim participants in the Myanmar/Bangladesh victim representation process.²⁸⁴

The ICC Victim's Booklet serves as a guide for victims/survivors or those assisting them to participation in ICC proceedings. While it requires ICC units engaged with victims to "pay special attention to the particular needs of children, women, the elderly, persons with disabilities and survivors of sexual violence,"²⁸⁵ it does not provide further guidance on addressing barriers to participation, including those that may arise as a result of gender inequality and discrimination. The Booklet could include guidance on team composition and expertise, using gender-competent and inclusive language, as well as on addressing gendered barriers to participation, including in the sections on security and confidentiality and legal representation and in the instructions on how to complete the application form for participation.²⁸⁶ Finally, while several trainings on

²⁷³ *Ibid.*

²⁷⁴ See *Public Redacted Version of Update on Victim Applications for Participation*, International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-02/05-01/20-462-AnxII-Red, para. 25, www.icc-cpi.int/sites/default/files/RelatedRecords/CR2021_07774.PDF.

²⁷⁵ Meeting with VPRS, 11 November 2022.

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ Victim Representation Form, on file with the ICJ.

²⁸¹ How to Fill in the Victim Representation Form, on file with the ICJ.

²⁸² *Ibid.*

²⁸³ See, for example, *Public Redacted version of Annex I to the Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Decision ICC-01/19-6 of 28 June 2019*, p. 11, <https://www.icc-cpi.int/court-record/icc-01/19-27>.

²⁸⁴ ICJ Meeting with VPRS, 11 November 2022.

²⁸⁵ International Criminal Court, *Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the ICC*, p. 15, www.icc-cpi.int/sites/default/files/VPRS_Victim-s_booklet.pdf.

²⁸⁶ *Ibid.*, pp. 22-23 and 30.

gender have been rolled out for the VPRS, participation in the training is not compulsory.²⁸⁷

Recommendation: Update internal manuals and forms, including on victim participation, to fully integrate a gender dimension and to ensure the use of gender-competent language.

Recommendation: Ensure inter-organ transfer of knowledge and good practice, including in the use of gender-competent language and in the integration of gender considerations in manuals and guidance documents relating to engagement with victims/survivors and affected communities, and in actual engagement with them.

b. The Independent Investigative Mechanism for Myanmar

i. Mandate

Established on 27 September 2018 by the UN Human Rights Council, the IIMM is mandated to “collect, consolidate, preserve and analyse evidence of the most serious crimes and violations of international law committed in Myanmar since 2011”²⁸⁸ and to share the material with investigative, prosecutorial and judicial authorities.²⁸⁹ In short, the Mechanism aims to facilitate and expedite fair and independent criminal proceedings by preparing and sharing files containing information and evidence and related analysis with national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes. As the Terms of Reference for the IIMM outline, “the most serious international crimes and violations of international law” include “genocide, crimes against humanity, war crimes and other serious violations of international human rights law and international humanitarian law, as defined in relevant sources of international law.”²⁹⁰

The IIMM was established in direct response to reports demonstrating that there were reasonable grounds to believe that gross human rights violations amounting to serious international crimes and violations of international law had been, and were continuing to be, committed in Myanmar, in particular in Rakhine, Kachin and Shan States.²⁹¹ The absence of an end date to its temporal jurisdiction enables it to address ongoing or future credible allegations of serious crimes and violations of international law, including those committed during and since the February 2021 military *coup*.²⁹²

The IIMM seeks to carry out its mandate in accordance with international human rights law and standards.²⁹³ Therefore, the Mechanism will only share information, documentation and evidence with investigative, prosecutorial and judicial authorities to facilitate proceedings that are compliant with international human rights law and standards, including the right to a fair trial, and with “[UN] policy against international accountability mechanisms sharing evidence for use in criminal proceedings in which capital punishment could be imposed or carried out.”²⁹⁴ Furthermore, in sharing information, documentation and evidence, the Mechanism will consider confidentiality, any protection concerns arising from the use of such information, and the consent of the sources of information, including the informed consent of victims.²⁹⁵

²⁸⁷ Meeting with VPRS, 11 November 2022.

²⁸⁸ UN Human Rights Council, “Situation of human rights of Rohingya Muslims and other minorities in Myanmar, Resolution 39/2, UN Doc. A/HRC/RES/39/2, (2 October 2018) <https://documents.un.org/doc/undoc/gen/g18/293/69/pdf/g1829369.pdf?token=YbGOu3GzPDy6Fegikf&fe=true>.

²⁸⁹ Terms of Reference (ToR) of the IIMM, annexed to ‘Letter Dated 16 January 2019 from the Secretary-General addressed to the President of the General Assembly’, UN Doc. A/73/716 (21 January 2019), para. 18 (hereinafter IIMM ToR).

²⁹⁰ IIMM TOR, para. 6.

²⁹¹ See IIMM, “What is the Independent Investigative Mechanism for Myanmar?”, iimm.un.org/what-is-the-independent-investigative-mechanism-for-myanmar/.

²⁹² See IIMM, Statement of Nicholas Koumjian, Head of the Independent Investigative Mechanism for Myanmar, on the Anniversary of the Military’s Seizure of Power in Myanmar (1 February 2022), iimm.un.org/statement-of-nicholas-koumjian-head-of-the-independent-investigative-mechanism-for-myanmar-on-the-anniversary-of-the-militarys-seizure-of-power-in-myanmar.

²⁹³ IIMM TOR, para. 20.

²⁹⁴ IIMM ToR, para. 20.

²⁹⁵ IIMM ToR, paras 20, 29.

Gender equality and gender-based crimes are expressly referenced in the IIMM's Terms of Reference (ToR). For instance, the Head of the IIMM shall, among other requirements, be committed to "upholding justice, accountability and human rights and ensuring gender equality"²⁹⁶ and the Secretariat must include staff with experience in, *inter alia*, sexual and gender-based crimes and violence, women's rights and victim and witness protection.²⁹⁷ Moreover, due consideration is to be given to ensuring that the IIMM has "gender balance, regional expertise, in particular concerning Myanmar, and relevant language skills."²⁹⁸

The Mechanism's working procedures and methods must also be survivor-centered and "sensitive to considerations of sex, gender, age, religion and ethnicity."²⁹⁹ The Mechanism, for instance, provides protection and support services to witnesses, some of whom are also victims/survivors, who provide information and evidence to the Mechanism.³⁰⁰ The Mechanism also has a Burmese speaking Witness Support Officer who has enhanced its ability to offer psychosocial support to witnesses and survivors who engage with the Mechanism. According to its ToR, the IIMM must also "assist in referring vulnerable victims and witnesses who cooperate with the Mechanism, in particular children, women and survivors of [SGBV] to relevant bodies [providing] appropriate medical and psychosocial support."³⁰¹ The IIMM "has established relationships with psychologists and psychosocial experts who are available to be present for interviews when survivors are asked to recall and recount their traumatic experiences."³⁰² State and civil society cooperation is also necessary to effectively provide protection and support to victims and witnesses in a survivor-centred manner. The IIMM relies particularly on the extrabudgetary resources from UN Member States to provide support to high-value witnesses in extreme danger as a result of their cooperation with the Mechanism or for those who require medical support and/or psychosocial assistance.³⁰³

The Head of the Mechanism officially commenced his functions on 1 July 2019 and the IIMM became operational in August 2019. The IIMM is seated in Geneva, Switzerland, as determined by the UN Secretary-General. While a field presence in Myanmar's neighbouring countries may be desirable for several reasons, including for proximity to evidence, survivors and witnesses and to ensure affected communities have direct access to information about the IIMM's accountability efforts, the mechanism is not currently able to have staff based outside of Geneva. However, regular investigative missions to the countries where survivors have sought refuge were carried out in 2022 and 2023.³⁰⁴ Such missions will continue into 2024 and beyond, provided the IIMM is able to conclude cooperation agreements with the States concerned.³⁰⁵

ii. Prioritising GBC and gender in the working methods of the Myanmar Mechanism

While acknowledging that it requires targeted outreach and dedicated expertise,³⁰⁶ the investigation of SGBC is a priority for the IIMM.³⁰⁷ As the Mechanism stated in its third annual report and reiterated in consultations carried out for this research, "the Mechanism's investigation strategy ensures that these crimes [including crimes against children] continue to be integrated in all investigations, are given particular attention from the outset, and that their full range of criminality, gravity and impact is holistically addressed alongside other conduct, incidents and patterns of crimes."³⁰⁸

²⁹⁶ *Ibid.*, para. 22.

²⁹⁷ *Ibid.*, para. 25.

²⁹⁸ *Ibid.*, para. 26.

²⁹⁹ *Ibid.*, para. 28.

³⁰⁰ *Ibid.*, para. 31; ICJ follow up exchange with the IIMM, 14 December 2022.

³⁰¹ IIMM ToR, para. 31.

³⁰² 5th report, para. 14.

³⁰³ 5th report, para. 52.

³⁰⁴ 5th report, para. 13.

³⁰⁵ 5th report, para. 13.

³⁰⁶ UN Human Rights Council, Report of the Independent Investigative Mechanism for Myanmar, UN Doc. A/HRC/48/18 (5 July 2021), para. 8, [iimm.un.org/wp-content/uploads/2021/08/A_HRC_48_18_E.pdf](https://www.un.org/press/en/2021/08/A_HRC_48_18_E.pdf).

³⁰⁷ The IIMM uses gender-based crimes to refer to "crimes directed against someone because of their sex at birth or because of their gender." Sexual crimes are used by IIMM to refer to "Sexual crimes include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, forced sexual acts, threats and attempts of any form of rape or other sexual violence. They also include conduct that is carried out in a sexualized manner and is of comparable gravity, such as forced nudity, unwanted or coerced touching or contact, forcing a person to commit or to watch an act of sexual violence, and any form of violence to a victim's genitals." IIMM Bulletin, Issue 6 (March 2022), [iimm.un.org/wp-content/uploads/2022/03/2022-03-07-IIMM-Bulletin-EN.pdf](https://www.un.org/press/en/2022/03/2022-03-07-IIMM-Bulletin-EN.pdf).

³⁰⁸ *Ibid.*

The IIMM has also repeatedly specified in its reporting to the UN Human Rights Council that the investigation of SGBC is “at the forefront of their investigative missions.”³⁰⁹ In particular, it has “sought to identify witnesses of SGBC who have not previously been approached by other fact-finding or documentation entities and whose plight is often overlooked, including individuals with divergent gender identities and sexual orientations.”³¹⁰ For example, the IIMM “has commenced a dedicated line of inquiry focusing on the experiences of the hijra (transgender) Rohingya community.”³¹¹

1. Structure and human resources

The IIMM reported on 5 July 2021 that, to translate its commitment into action, it has been “developing specialized policies for addressing victims/survivors of sexual and gender-based crimes.”³¹² Moreover, the IIMM reported on 8 August 2022 that it was nearly at full staffing levels, and that, in recruitment, due consideration was being given to factors such as geographic representation, gender balance and expertise in the investigation of SGBC.³¹³ At the time of publication, the IIMM had two SGBC investigators, one Gender and Child Rights senior legal officer, one SGBC legal officer and one analyst dedicated to working on SGBC.³¹⁴

There is no standalone unit for SGBC at the Mechanism, which is part of a deliberate effort to ensure that this work is not performed in silos but, rather, integrated and mainstreamed in the work of all investigation teams.³¹⁵ In 2021, the Mechanism established an SGBC Working Group, composed of investigators, lawyers, analysts, witness support officers and specialists with relevant experience in SGBC, including staff with linguistic, cultural, and context-specific expertise, across the Mechanism. The purpose of this working group is to ensure that SGBC and gender and intersectional methodologies are mainstreamed and integrated throughout.³¹⁶ The Working Group meets on a regular basis and is guided by good practice and lessons learned.³¹⁷ According to the research participants, the core members of the working groups (SGBC Legal Officer, SGBC Investigators and Gender and Child Rights Senior Legal Officer) meet with team members assigned to individual incidents separately and are involved in all aspects of the Mechanism’s work. An SGBC Working Group member attends all team meetings and management-level Mechanism Investigation Meetings. The Gender and Child Rights Senior Legal Officer advises across all investigations including in interviews. SGBC is discussed in every team meeting, and priorities and strategic decisions are regularly discussed with the Head and Deputy Head of the Mechanism, attesting to the Mechanism’s commitment to integrating a gender perspective.³¹⁸

The SGBC Working Group has, in practice, shaped the IIMM’s gender-related methodologies, integrating gender early in the IIMM’s work process.³¹⁹ For instance, the Working Group reviews investigation work plans and oversees mission preparations to ensure the integration of a gender perspective. Moreover, according to their survivor-centred and trauma-informed approach to obtaining informed consent, they must examine “conditions of vulnerability,” also from a gender perspective.³²⁰ Where required, protection, safety and security and the risk of (re)traumatization are assessed.³²¹ In doing so, a witness support officer carries out a “vulnerability assessment,” which is part of a holistic process that does not isolate gender from other intersecting grounds.³²²

³⁰⁹ 5th report, para. 15

³¹⁰ 5th report, para. 15

³¹¹ 5th report, para. 15

³¹² UN Human Rights Council, Report of the Independent Investigative Mechanism for Myanmar, UN Doc. A/HRC/48/18 (5 July 2021), para. 52, [iimm.un.org/wp-content/uploads/2021/08/A_HRC_48_18_E.pdf](https://www.unhcr.org/wp-content/uploads/2021/08/A_HRC_48_18_E.pdf).

³¹³ UN Human Rights Council, Report of the Independent Investigative Mechanism for Myanmar, UN Doc. A/HRC/51/4 (12 July 2022), para. 56, [iimm.un.org/wp-content/uploads/2022/08/A-HRC-51-4-E.pdf](https://www.unhcr.org/wp-content/uploads/2022/08/A-HRC-51-4-E.pdf).

³¹⁴ Meeting between the International Commission of Jurists and the IIMM, 21 September 2022.

³¹⁵ *Ibid.*

³¹⁶ Meetings between the International Commission of Jurists and the IIMM, 21 September 2022 and 1 December 2022; ICJ follow up exchange with the IIMM, 18 March 2024.

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ Meeting between the International Commission of Jurists and the IIMM, 21 September 2022.

³²⁰ *Ibid.*

³²¹ Meetings between the International Commission of Jurists and the IIMM, 21 September 2022 and follow up exchanges on 14 December 2022.

³²² *Ibid.*

Recommendation: Continue prioritizing hiring national staff and/or consultants with expertise and experience working on gender-based crimes in the Myanmar context and with the necessary language skills.

- **Ensure such staff and/or consultants play a primary role in the analysis of gender constructs and related crime patterns, as well as in the review of evidence, including in its original language.**
- **Ensure views and insights offered by national staff are used to inform policies, strategies, working methods and practices from the outset.**
- **Include national staff members with diverse backgrounds and relevant expertise in the Working Group.**

2. The integration of a gender perspective

The Mechanism seeks to integrate a gendered and intersectional perspective throughout its work, including by “looking more broadly at the gendered impacts of conflict and the crimes committed and aiming to ensure inclusivity in the voices of victims and witnesses reflected in its work.”³²³ This perspective is also applied to the examination and analysis of linkage evidence – that is, evidence establishing a connection between a perpetrator and a crime – to ensure that criminal liability for gender-based crimes resulting from policy, common practice or that were extensively prevalent, goes beyond direct perpetrators to also encompass all of those who may be criminally liable for those offences.³²⁴ The IIMM recognises that applying an intersectional lens enables it to better understand the cultural, economic, religious, political, legal, sociological, and other factors that shape gender dynamics and the way in which gender impacts how all these victims experience harm.³²⁵

One tool developed by the SGBC working group is guidance “red flags” that help to identify or may lead to identifying incidents of SGBC in information collected.³²⁶ The red flags, which are subject to continued reflection and additions, are compiled in a document that provides a background on the root causes of gender-based violence in Myanmar, known patterns and settings of conflict-related gender-based crimes and warning signs constituting indicia that SGBC have, or are likely to have, been committed.³²⁷ IIMM SGBC investigators/advisors provide dedicated training on the red flags to all personnel working on investigations.³²⁸ One training on gender by external experts for all IIMM personnel also took place in September 2021.³²⁹ The SGBC Working Group also holds internal trainings on interviewing vulnerable witnesses and gender and intersectional analysis

3. Policy development

At the time of consultations with the ICJ, the IIMM was developing internal policies related to SGBC, including guidance on gender and intersectionality—with both at the internal draft stage at the time the research for this report was conducted.³³⁰ The guidance on gender and intersectionality was being developed as a

³²³ IIMM, Legal Concepts, iimm.un.org/legal-concepts/.

³²⁴ Follow up exchange with the IIMM, 14 December 2022.

³²⁵ Follow up exchange with the IIMM, 18 March 2024.

³²⁶ For example, the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (“International Protocol”) lists certain situations and incidents that can be indicators, or “red flags,” that the perpetration of sexual violence is imminent or going. Such situations include, but go, beyond: looting by military or armed groups; the presence of checkpoints; situations of detention; situations where men and women are forcibly separated; reports of torture; and flight and displacement. As the Protocol underscores, sexual violence may be perpetrated without the presence of any such indicators. For additional examples, see page 24 of the International Protocol.

³²⁷ ICJ Follow up exchange with the IIMM, 12 December 2022.

³²⁸ Meetings between the International Commission of Jurists and the IIMM, 21 September 2022 and 1 December 2022.

³²⁹ ICJ Follow up exchange with the IIMM, 14 December 2022.

³³⁰ The ICJ has not had access to the draft policy documents and thereby cannot comment on their scope and substance. Meetings between the International Commission of Jurists and the IIMM, 21 September 2022 and follow up exchanges on 14 December 2022.

dedicated document aiming to ensure that gender and intersectional analysis be conducted for all crimes, as opposed to being limited to SGBC,³³¹ and that such analysis be applied beyond investigative and analytical work, such as witness protection and outreach.³³² These policy documents will consolidate in written form methodologies, approaches, and best practices that the Mechanism is already implementing in its work to integrate and spotlight SGBC and gender and intersectional analysis into its work. Additionally, an outreach and public information strategy was under evaluation and review with a view to finalizing it in late 2024.³³³

The IIMM indicated that the policies are being developed through a learning process based on the Mechanism's work.³³⁴ At the time of the consultation, the ICJ was not informed of plans to consult external stakeholders, including, for instance, Burmese civil society organizations and/or gender experts, for the purposes of further developing or providing input to the policies relating to gender, intersectionality and SGBC. However, since then, the IIMM reported that it has conducted numerous consultations with CSOs and women's organisations on a variety of issues relevant to these policies, including how to effectively engage with survivors from all affected communities, referrals, gender-sensitive methodologies and child-sensitive approaches. For instance, in May 2023, the IIMM held the first Civil Society Dialogue, which brought together representatives from 20 diverse CSOs including representatives of women's organisations, LGBTQI+ rights organisations, and senior leadership, lawyers, and investigators from the IIMM. Over three days, CSO participants discussed the realities and challenges they face in their work, and how this impacts their engagement with the IIMM to help inform the IIMM's methods of working and to strengthen cooperation.³³⁵ This is in contrast with the approach taken by the International, Impartial and Independent Mechanism for Syria (IIIM) and the ICC, for example, which solicited public input in the development of their gender strategies, so that they were guided by the experiences of a range of actors and experts and engaged directly with affected communities.³³⁶

Recommendation: Ensure that policies and strategies remain subject to continued reflection, learning and updating through periodic internal reviews, and external consultations in which input from relevant experts is facilitated and/or independent evaluations.

At the time this research was conducted, the IIMM was consulting external interlocutors, including civil society organizations, on modalities for outreach and public information for the purposes of its outreach strategy.³³⁷ Such consultations, however, were not based on CSO and other expert reviews of the draft strategy. When this research was conducted, the IIMM indicated that internal policies and strategies may not be shared externally for confidentiality reasons and the integrity of operations.³³⁸ The IIMM indicated that they were primarily investigative tools, specifically designed to guide its inner-workings.³³⁹

³³¹ ICJ Meeting between the International Commission of Jurists and the IIMM, 1 December 2022.

³³² *Ibid.*

³³³ ICJ Meetings between the International Commission of Jurists and the IIMM, 21 September 2022; follow up exchange with the IIMM, 14 December 2022.

³³⁴ ICJ Meeting between the International Commission of Jurists and the IIMM, 21 September 2022.

³³⁵ ICJ Follow up exchange with the IIMM, 18 March 2024.

³³⁶ The full name is the International, Impartial and Independent Mechanism for Syria serious crimes under International Law committed in the Syrian Arab Republic since March 2011. See <https://iiim.un.org/>.

³³⁷ *Ibid.*

³³⁸ ICJ Follow up exchange with the IIMM, 14 December 2022.

³³⁹ ICJ Follow up exchange with the IIMM, 18 March 2024.

Recommendation: Conduct and provide sufficient time for consultations with civil society organizations (particularly those from and based in Myanmar working on gender-based crimes), gender experts and other accountability mechanisms and actors from the outset of the development of and/or prior to finalization of policies, strategies and, where possible, implementation plans relating to gender and intersectionality, SGBC and outreach and public information. Subject to a do-no-harm assessment, engage with victim and survivor associations as part of these consultations.

- **Allow participants in such consultations to provide input based on review of the draft policies, strategies and, to the extent possible, implementation plans.**
- **Ensure the participation of women and LGBTQI+ persons, with diverse religious and ethnic backgrounds, in such consultations, particularly those from grassroots organizations.**

Not publishing policies and strategies would be in contrast to the transparent approach adopted by other accountability bodies. For instance, the IIMM published the IIMM Gender Strategy and Implementation, in Technical and Abridged versions and both Arabic and English;³⁴⁰ the Office of the Prosecutor of the International Criminal Court (ICC) published its Policy on the Crime of Gender Persecution³⁴¹ and its Policy on Gender-based Crimes in multiple languages;³⁴² and the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD) published its Trauma-Informed Field Investigations Guide, which includes *inter alia* guidance on trauma-informed interviewing techniques for victims/survivors of SGBC.³⁴³

The International Commission of Jurists underscored to IIMM the importance of making public versions of strategies, with a view to enabling civil society organizations, experts and the public more broadly to understand how the institution will carry out its work and how they can engage with it in accordance with their thematic expertise. However, the IIMM indicated that strategies would not be shared externally for confidentiality reasons and the integrity of operations.³⁴⁴

Recommendation: Make gender-related policies and strategies, including abridged versions, public and available in multiple languages, including in relevant Myanmar languages and those in which the main accountability mechanisms operate.

Recommendation: Proactively integrate gender into reviewing and responding to requests or opportunities for assistance, including through proactively sharing relevant policies, strategies and analytical modules and identifying other opportunities for advancing gender analysis in response to requests for assistance.

4. Gender in analytical reports

The ICJ raised the importance of sharing gender knowledge, expertise and sensitivity to actors and mechanisms receiving information, documentation or evidence from the IIMM. The IIMM noted that several of their analytical reports, including those on the profiles of armed groups, integrate a gender perspective. The IIMM also reported that it has commissioned historical and cultural experts to prepare thematic reports

³⁴⁰ IIMM Gender Strategy and Implementation: Addressing the Adverse Impact of the Discriminatory Gender Hierarchy to Facilitate Inclusive Justice for International Crimes in the Syrian Arab Republic, Technical Version (30 September 2022), <https://iim.un.org/wp-content/uploads/2023/02/Gender-Strategy-Implementation-TechnicalEnglish.pdf>; IIMM Gender Strategy and Implementation: Addressing the Adverse Impact of the Discriminatory Gender Hierarchy to Facilitate Inclusive Justice for International Crimes in the Syrian Arab Republic, Abridged Version (30 September 2022), <https://iim.un.org/wp-content/uploads/2023/02/Gender-Strategy-Implementation-Abridged.pdf>.

³⁴¹ ICC Office of the Prosecutor Policy on the Crime of Gender Persecution (7 December 2022), <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf>.

³⁴² ICC Office of the Prosecutor Policy on Gender-based Crimes: Crimes involving sexual, reproductive and other gender-based violence (December 2023), <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf>.

³⁴³ UNITAD, Trauma-Informed Field Investigations Guide (2021), <https://www.unitad.un.org/content/trauma-informed-investigations-field-guide>.

³⁴⁴ ICJ Follow up exchange with the IIMM, 14 December 2022.

on various ethnic groups in Myanmar,³⁴⁵ featuring a section on the gender constructs prevalent in the given ethnic group.³⁴⁶ In its report to the UN General Assembly in June 2023, the IIMM reported that it had “advanced its analysis ...through the preparation of three analytical reports,” one of which addressed the failure of the Myanmar authorities to investigate, let alone punish SGBC. The ICJ understands the other two reports—addressing the structure of and reporting lines within the Myanmar military and the organized spread of hate speech content on Facebook by the Myanmar military before, during and after the 2017 “clearance operations”—did not incorporate a gender analysis.³⁴⁷ The IIMM indicated it intended to share these reports with prosecuting and judicial authorities, including the ICC, the International Court of Justice and the Attorney-General’s Office in Argentina.³⁴⁸

If shared with relevant judicial processes at the outset of investigations, such reports could be critical to raising awareness of gender constructs and related considerations particular to the various ethnic groups, and to ensuring they are addressed throughout the criminal justice process, including in the scope of information collected, the framing of criminal charges, sentencing and possible reparations.³⁴⁹ For instance, the IIMM could share information with States intervening in the ongoing case before the International Court of Justice, *The Gambia v. Myanmar*, concerning the application of the Genocide Convention, on how to make submissions on genocide and resulting harms from a gender perspective. Where it does not jeopardize the rights or security of survivors, witnesses and accused in future proceedings, publishing redacted or more general versions of analytical briefs – including on gender constructs, their impact on the commission of crimes in Myanmar and the harms experienced by victims/survivors, particularly those not fully explored in prior documentation or fact-finding efforts – may also inform civil society documentation and accountability-related work and related policy-making at the domestic and international levels, as well as assist in the development of humanitarian support strategies for survivors.

Recommendation: Develop public versions of analytical modules on gender constructs in Myanmar, and their impact on the commission of crimes and harms experienced by survivors, taking into account the need to protect the rights of the victims/survivors and witnesses and possible suspects in future investigations and prosecutions and other accountability-oriented proceedings. By publishing such materials, other actors engaged in accountability-related work, policy making or humanitarian intervention will benefit from it.

5. Implementation plans

At the time the ICJ conducted research for this report, the IIMM aimed to devise implementation plans for the policies it had developed closer to their finalization.³⁵⁰ Developing an implementation plan could provide the opportunity to make guidance available to IIMM staff on how to implement gender-competent approaches outlined in IIMM policies; assist the IIMM to identify additional resources or work methods needed; facilitate systematic reporting on the results and challenges in implementing IIMM policies; and set regular review periods for the policies and implementation plans to be evaluated and updated.³⁵¹ By publishing such plans, in full or in part, subject to the need to maintain confidentiality and the integrity of operations, the IIMM could: (i) provide clarity regarding how the Mechanism integrates a gender perspective into its operations and how various policies are interlinked; and (ii) increase affected communities and civil

³⁴⁵ UN Human Rights Council, Report of the Independent Investigative Mechanism for Myanmar, UN Doc. A/HRC/51/4 (12 July 2022), para. 23, *supra*.

³⁴⁶ Meeting between the International Commission of Jurists and the IIMM, 21 September 2022.

³⁴⁷ UN Human Rights Council, Report of the Independent Investigative Mechanism for Myanmar, UN Doc. A/HRC/54/19 (30 June 2023), para. 18.

³⁴⁸ UN Human Rights Council, Report of the Independent Investigative Mechanism for Myanmar, UN Doc. A/HRC/54/19 (30 June 2023), para. 18.

³⁴⁹ *Ibid.*

³⁵⁰ Follow up exchange with the IIMM, 14 December 2022.

³⁵¹ Evaluating staff performance based on their gender competence and the leadership’s support for the integration of a gender perspective are key factors for ensuring meaningful commitment to the implementation of gender-related policies. As Michelle Jarvis describes: “[O]ur experience confirms that successful outcomes are unlikely unless the chief prosecutor and other senior managers are open to understanding the impact of gender in the office’s case work and willing to prioritize strategies to improve the integration of gender perspectives.” Michelle Jarvis, “Overview: The Challenges of Accountability for Conflict-related Sexual Violence Crimes” in *Prosecuting Conflict-related Sexual Violence at the ICTY*, p. 16, *supra*.

society's understanding of how it can better support the IIMM's work; and solicit expert input to improve them through periodic review cycles.³⁵²

At the time this paper was published, however, no policies or implementation plans had been published by the IIMM.

Recommendation: Adopt a policy implementation plan/s providing guidance to IIMM staff on how to implement gender-competent approaches outlined in IIMM policies and strategies and ensure systematic reporting on implementation to facilitate periodic reviews. Publish such plans, in whole or in part, subject to operational security needs, to:

- (i) ensure transparency regarding how the Mechanism integrates a gender perspective into its operations and how various policies are interlinked;**
- (ii) increase affected communities and civil society's understanding of how it can better support the IIMM's work; and**
- (iii) solicit expert input to improve them through periodic review cycles.**

Recommendation: Conduct periodic consultations with relevant actors working on accountability with respect to the situation in Myanmar to ensure coordination in relation to, implementation of and reflection on the IIMM's gender policies and strategies and intersecting matters, such as outreach and an engagement with victims/survivors and witnesses, as well as reflection on litigation efforts and challenges in relation to SGBC.

6. Engagement with other accountability bodies and competent jurisdictions

The IIMM shares evidence and analysis with competent investigative, prosecutorial and judicial authorities in accordance with the previously outlined human rights law and standards.³⁵³ Based on the ninth IIMM Bulletin, the IIMM has "over 160 packages of information and analysis available for sharing with relevant authorities."³⁵⁴ In its fifth annual report, the IIMM stated that "27 packages (comprising over 5,000 information items) have already been shared with requesting authorities."³⁵⁵

The ICJ considers that the IIMM is in a vantage position to convene an "exchange platform" among relevant accountability bodies specific to the advancement of gender-competent accountability for the situation in Myanmar. It could, for instance, disseminate good practice and practical proposals relating to gender-competent outreach, victim and witness protection, evidentiary collection and analysis and other relevant topics that other actors may not have fully assessed or explicitly focussed on in their requests for assistance. Such an "exchange platform" could also ensure further coordination among the various accountability mechanisms and actors to reduce confusion within affected communities arising from the mechanisms' distinct mandates and efforts.

Recommendation: Establish a formal "exchange platform" among relevant accountability bodies to exchange information and expertise necessary for the advancement of gender-competent accountability for the situation in Myanmar and ensure coordination among them. Within such platform, the IIMM could disseminate good practice and practical proposals relating to gender-competent outreach, victim and witness protection, evidentiary collection and analysis and guidance on other relevant topics that may not be fully assessed by actors requesting assistance.

³⁵² See, IIMM Gender Strategy's implementation plan

³⁵³ See Section III, herein, titled "Towards gender-competent accountability with respect to serious crimes under international law in Myanmar."

³⁵⁴ IIMM, "Bulletin Issue 09" (October 2023) p.2, <https://iimm.un.org/wp-content/uploads/2023/10/2023-October-Bulletin-EN.pdf>.

³⁵⁵ 5th report, para. 11.

c. The International Court of Justice

The International Court of Justice, established in 1945 by the Charter of the United Nations and seated in the Hague, The Netherlands, is the principal judicial organ of the UN. The International Court of Justice entertains “contentious cases,” which are legal disputes between States submitted to it by them.³⁵⁶ Judgments of the International Court of Justice are final, binding on the States parties to a case and without appeal.³⁵⁷ The International Court of Justice may also give advisory opinions on legal questions referred to it by United Nations organs, specialized agencies or related organizations authorized to make such requests.³⁵⁸ In determining disputes or issuing advisory opinions, the Court must apply international treaties and conventions in force; international custom; the general principles of law; judicial decisions; and the teachings of the most highly qualified publicists.³⁵⁹

The Court's procedures and the scope of its jurisdiction and authority are governed by its Statute, which is an integral part of the UN Charter, as well as by the Rules of Court³⁶⁰ that the Court itself formulates and can amend.³⁶¹ These foundational documents, along with the sources of law outlined above, established legal precedents and the practice of the Court, provide the basis for incorporating a gender-sensitive approach into its operations.

Although the Statute does not explicitly mention gender or a gender-sensitive approach, the provisions governing the Court's function and powers lay a broad foundation for the Court to interpret and apply international law in a manner that reflects contemporary understandings of gender equality and non-discrimination.³⁶²

Additionally, the procedural Rules of Court offer several avenues for integrating a gender-sensitive approach.³⁶³ In particular, the evidentiary rules³⁶⁴ grant the Court considerable discretion in instructing parties on the submission of evidence and conducting inquiries, pursuant to which the Court could request the parties to make submissions on particular issues,³⁶⁵ call for evidence and expert testimony³⁶⁶ and question witnesses directly.³⁶⁷ The Court can also arrange an enquiry or expert opinion where it considers necessary.³⁶⁸ In both contentious cases and advisory proceedings, the Court can order or approve submission of *amicus curiae* memorials from third-party States and public international organisations.³⁶⁹ These rules provide numerous opportunities for the parties to present, and for the Court to seek evidence and legal arguments on, gender-related issues relevant to the case.

To protect survivors and potential targets of GBC, the Court can order provisional measures *proprio motu* or upon the request of a party to preserve the rights of either party,³⁷⁰ which can include measures to protect the rights of individuals until the Court reaches a decision. The Statute and Rules of the Court do not contain

³⁵⁶ Only States (States Members of the United Nations and other States which have become parties to the Statute of the Court or which have accepted its jurisdiction under certain conditions) may be parties to contentious cases. See Statute of the International Court of Justice, art. 34-38.

³⁵⁷ Parties may nevertheless submit requests for the revision of judgements, within ten years of judgement, based on the discovery of a new fact, the subsequent discovery of which was not due to negligence. See Statute of the International Court of Justice, art. 61.

³⁵⁸ Statute of the International Court of Justice, art. 65.

³⁵⁹ Statute of the International Court of Justice, art. 38.

³⁶⁰ International Court of Justice, Rules of the Court (1978) adopted on 14 April 1978 and entered into force on 1 July 1978, <https://www.icj-cij.org/index.php/rules>

³⁶¹ Statute of the International Court of Justice, art. 30.

³⁶² See, e.g., Statute of the Court, art. 38(1)(outlining the sources of law the Court must apply allows the Court to consider international human rights norms and principles that emphasize gender sensitivity and non-discrimination).

³⁶³ These rules were updated in 24 October 2023 “in order to render the provisions therein gender inclusive.” International Court of Justice Rules of the Court, fn. 1, <https://www.icj-cij.org/rules>.

³⁶⁴ See, in particular, Rules of the Court, art. 57 to 69.

³⁶⁵ Rules of the Court, art. 61.

³⁶⁶ See Rules of the Court, art. 62. Under article 63, the Parties may request approval to call witnesses or experts not on the original list provided to the Court.

³⁶⁷ Rules of the Court, art. 65.

³⁶⁸ Rules of the Court, art. 67.

³⁶⁹ Statute of the International Court of Justice, arts. 34(2) and 66(2)-(3); Rules of the Court, art. 69(1)-(2). To avoid any doubt, article 69(4) of the Rules of the Court state that a “public international organization. denotes an international organization of States.

³⁷⁰ Rules of the Court, arts. 41 and 73-76.

any provisions on the protection of witnesses appearing before the Court, except insofar as they allow the Court to “take the necessary steps for the examination of witnesses otherwise than before the Court itself” *proprio motu* or upon the request of a party.³⁷¹

Finally, the International Court of Justice has significant discretion in interpreting its Statute and procedural rules.³⁷² This flexibility enables the Court to adopt practices and methodologies responsive to evolving interpretations of international law, including the integration of gender perspectives. The Court's interpretative practices can thus evolve to incorporate gender-sensitive analyses, reflecting developments in international human rights law, international humanitarian law and international criminal law.

i. The Gambia v. Myanmar

On 11 November 2019, The Gambia instituted proceedings against Myanmar before the International Court of Justice, with the support of the 57 members of the Organization of Islamic Cooperation. In its application to the Court, The Gambia argued they had a dispute with Myanmar – a necessary requirement to establish the Court's jurisdiction – based on Myanmar's continued denial of wrongdoing in response to concerns expressed by The Gambia and other actors about acts committed by Myanmar authorities deemed to violate the Genocide Convention.³⁷³ The Gambia concluded that “a dispute therefore exists between The Gambia and Myanmar relating to the interpretation and application of the Genocide Convention and the fulfilment by Myanmar of its obligations to prevent genocide and to desist from its own acts of genocide, as well as Myanmar's obligation to make reparations to the victims and offer assurances and guarantees of non-repetition.”³⁷⁴ The dispute relates to alleged genocidal acts against the Rohingya group, which The Gambia describes as a distinct ethnic, racial and religious group that resides in Rakhine State.³⁷⁵

The Gambia brought the application against Myanmar on the basis that all States parties to the Genocide Convention have a binding obligation to prevent and punish genocide. This obligation is part of customary international law and has an *erga omnes partes* character, meaning it is an obligation owed by any State party to the Genocide Convention to all other State parties who share a common interest, that is, compliance with the Convention obligations.³⁷⁶ The Convention foresees this collective responsibility in Article IX, which allows any State party to bring a dispute before the International Court of Justice, including on the responsibility of another State for genocide.³⁷⁷ Both The Gambia and Myanmar are parties to the Genocide Convention and to the Statute of the International Court of Justice.³⁷⁸

In its application to the Court against Myanmar, The Gambia included an urgent request for provisional measures pursuant to Article 41 of the Statute of the International Court of Justice and Articles 73, 74 and

³⁷¹ Rules of the Court, art. 63(2).

³⁷² Article 36(6) of the International Court of Justice Statute establishes, “In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court,” and Article 30 additionally states that “[t]he Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure”. The General Assembly in its second session, during its discussion of the “[n]eed for greater use by the United Nations and its organs of the International Court of Justice”, considered the issue of whether the UN organs may refer questions on constitutional interpretations of the Charter. Subsequently, under General Assembly Resolution No.171 it was recommended that points of law relating to the interpretation of the Charter or the constitutions of the special agencies “should be referred to the Court for an advisory opinion.” See GA Res. No. 171 (11), 1947. For additional analysis of the International Court of Justice's case law in interpreting implied powers, see, Mahasen M. Aljaghoub, “The Doctrine of Implied Powers” in *The Advisory Function of the International Court of Justice 1946-2005* (2006), p. 159-161.

³⁷³ *Application Instituting Proceedings and Request for Provisional Measures*, International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), paras. 21-22.

³⁷⁴ *Ibid*, para. 23.

³⁷⁵ *Ibid*, para. 2.

³⁷⁶ In its order on provisional measures, the International Court of Justice cited advisory opinion in Reservations to the Genocide Convention (*Advisory Opinion of May 28th, 1951*, International Court of Justice, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide) to grant The Gambia standing on the basis of *erga omnes partes* of the obligations under the Genocide Convention: “[A]ll the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention.” *Order of 23 January 2020*, International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), para. 41. See also Nawi Ukabiala, Duncan Pickard & Alyssa Yamamoto, “*Erga Omnes Partes* before the International Court of Justice: From Standing to Judgment on the Merits,” in *ILSA Journal of International & Comparative Law*, Volume 27.2, 2021, pp. 234-235.

³⁷⁷ Neither The Gambia nor Myanmar has made reservations to Article IX of the Convention.

³⁷⁸ See International Court of Justice, States entitled to appear before the Court, <https://www.icj-cij.org/states-entitled-to-appear>.

75 of the Rules of Court, namely “to protect against further, irreparable harm to the rights of the Rohingya group under the Genocide Convention, which continue to be violated with impunity.”³⁷⁹ The Court held public hearings from 10 to 12 December 2019 and, on 23 January 2020, ordered Myanmar “to take all measures within its power” to prevent the commission of genocide; to prevent the destruction and ensure the preservation of evidence; and to submit regular reports to the Court concerning the measures it has taken to comply with the order.³⁸⁰

The Gambia filed its Memorial on 23 October 2020, the deadline for submission set by the Court.³⁸¹ Instead of filing its Counter-Memorial, due on 23 July 2021, on 20 January 2021 Myanmar filed its “preliminary objections to the jurisdiction of the Court and the admissibility of the Application.”³⁸² From 21 to 28 February 2022, the Court held public hearings on these preliminary objections, which it eventually rejected on 22 July 2022, finding The Gambia’s Application to be admissible.³⁸³ Following multiple extensions, on 24 August 2023, Myanmar filed its Counter-Memorial. The Court subsequently fixed 16 May 2024 as the deadline for The Gambia to submit a Reply, and 16 December 2024 as the time-limit for Myanmar to submit its Rejoinder.³⁸⁴

On 10 November 2023, Canada along with Denmark, France, Germany, The Netherlands and Britain filed a joint declaration of intervention in The Gambia’s case.³⁸⁵ The intervention seeks a finding inclusive of GBC, as well as crimes against children, in relation to the types of underlying acts that constitute genocide within Article II of the Genocide Convention.³⁸⁶ The joint intervention states, in particular, that the “underlying act of genocide may take the form of sexual and gender-based violence,” and that sexual and gender based violence may also constitute the acts of: (i) causing serious bodily or mental harm to members of the group, (ii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, and (iii) measures intended to prevent births within the group.³⁸⁷ Canada and The Netherlands announced that their intervention was intended to “assist with the complex legal issues that are expected to arise and will pay special attention to crimes related to sexual and gender-based violence, including rape.”³⁸⁸ The Director-General for Germany’s Legal Affairs also confirmed that the filing is intended “to make a contribution to clarifying and combating genocide. We are particularly focus[ing] on violence against women and children.”³⁸⁹ On 3 July 2024, the Court unanimously approved the joint declaration to

³⁷⁹ *Ibid*, para. 115.

³⁸⁰ *Order of 23 January 2020*, International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), paras. 76-86.

³⁸¹ Article 45 of the Rules of the Court States that “The pleadings in a case begun by means of an application shall consist, in the following order, of: a Memorial by the applicant; a Counter-Memorial by the respondent.” As Article 49 describes, “A Memorial shall contain a statement of the relevant facts, a statement of law, and the submissions”, whereas “A Counter-Memorial shall contain: an admission or denial of the facts stated in the Memorial; any additional facts, if necessary; observations concerning the statement of law in the Memorial; a statement of law in answer thereto; and the submissions.”

³⁸² *Preliminary Objections of the Republic of the Union of Myanmar*, International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar).

³⁸³ *Judgment of 22 July 2022*, International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar).

³⁸⁴ *Order of 16 October 2023*, International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) <https://www.icj-cij.org/sites/default/files/case-related/178/178-20231016-ord-01-00-en.pdf>.

³⁸⁵ Joint Declaration of Intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain, In the Case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide (10 November 2023), <https://www.icj-cij.org/sites/default/files/case-related/178/178-20231115-wri-01-00-en.pdf>.

³⁸⁶ *Ibid*.

³⁸⁷ *Ibid.*, para. 26-37.

³⁸⁸ Canada, *Joint statement of Canada and the Kingdom of the Netherlands Regarding Intention to Intervene in The Gambia v. Myanmar Case at the International Court of Justice* (2 September 2020), www.canada.ca/en/global-affairs/news/2020/09/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-intention-to-intervene-in-the-gambia-v-myanmar-case-at-the-international-cou.html; The Netherlands, *Joint statement of Canada and the Kingdom of the Netherlands regarding intention to intervene in The Gambia v. Myanmar case at the International Court of Justice* (2 September 2020), www.government.nl/documents/diplomatic-statements/2020/09/02/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-intention-to-intervene-in-the-gambia-v.-myanmar-case-at-the-international-court-of-justice; The Maldives, *Maldives welcomes the joint statement by Canada and the Kingdom of the Netherlands announcing their intention to intervene in The Gambia v. Myanmar case at the International Court of Justice* (4 September 2020), www.gov.mv/en/news-and-communications/maldives-welcomes-the-joint-statement-by-canada-and-the-kingdom-of-the-netherlands-announcing-their-intention-to-intervene-in-the-gambia-v-myanmar-case-at-the-international-court-of-justice; The United Kingdom, *Fifth Anniversary of the Rohingya crisis in Myanmar* (25 August 2022), www.gov.uk/government/news/uk-statement-on-the-5th-anniversary-of-the-rohingya-crisis.

³⁸⁹ Tania von Uslar, German Director-General of Legal Affairs, Twitter post, 16 November 2023, https://twitter.com/GermanyOnIntLaw/status/1725212623904317935?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1725212623904317935%7Ctwgr%5Ea6a53294a16686011624e91c33e1c13e3572afd5%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.aljazeera.com%2Fnews%2F2023%2F11%2F17%2Ffive-european-nations-join-myanmar-genocide-case

intervene.³⁹⁰ While such interventions may lengthen the proceedings, they present an opportunity to further advance argument on, *inter alia*, the gender dimensions of genocide.³⁹¹

ii. Gender, genocide and The Gambia's case³⁹²

Pursuant to the Genocide Convention, genocide is the commission of specified acts with the intention to destroy, in whole or in part, a national, ethnic, racial or religious group.³⁹³ To date, jurisprudence on genocide shows limited understanding of how gender constructs are instrumentalized in the destruction of a group. This limited understanding inevitably leads to partial recognition of cycles of violence that, for all intents and purposes, may have been genocidal and, as a result, to partial redress. As Deputy Head of the IIIM, Michelle Jarvis, notes: "Given that gender constructions form an inherent part of the fabric of any community group, damaging or destroying that community usually involves specifically targeting the gendered constructions on which the community rests."³⁹⁴ As such, understanding how genocide is gendered means unpacking how the perpetrators' campaign of destruction is informed by meanings attached to being female and male in a targeted society.³⁹⁵

Genocide continues to be understood particularly as requiring an element of mass killing, which can obscure non-lethal acts, the gendered dimensions of all genocidal acts, including killings and the relationship of certain genocidal acts with one another in forming a campaign of destruction; this is particularly more so when men are the primary targets of killing.³⁹⁶ Having been satisfied that sufficient killings have been carried out to constitute genocide, other conduct against women and LGBTQI persons may be left unexplored.

While jurisprudence recognizing rape as a genocidal act now exists,³⁹⁷ other gendered acts, such as the prevention of births and certain types of serious bodily or mental harm or their gendered consequences, need more attention.³⁹⁸ The joint intervention in The Gambia's case by Canada, Denmark, Germany, The Netherlands and the United Kingdom, seeking a gendered interpretation of Article II of the Genocide Convention, is an effort to advance an understanding that non-lethal acts, including gendered harms, can constitute genocide.³⁹⁹

The Gambia's Memorial to the International Court of Justice is not public. As such, this report cannot comprehensively reflect on the extent to which a gender perspective and analysis are integrated in The Gambia's submission. Still, insights can be drawn from The Gambia's Application to institute proceedings, which relies upon reports of UN bodies, including those of the Myanmar FFM and demonstrates some attention

³⁹⁰ Order of Admissibility of the Declarations of Intervention, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (the Gambia v. Myanmar), International Court of Justice, General list No. 178 (3 July 2024), <https://www.icj-cij.org/sites/default/files/case-related/178/178-20240703-ord-01-00-en.pdf>.

³⁹¹ On 3 July 2024, the Court issued an Order deciding the Declaration of the six states was admissible, as was a Declaration submitted by the Republic of the Maldives on XX. See *Order of 3 July 2024*, International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), para. 49. The Declaration of the Republic of Maldives focussed on Myanmar's duty under the Genocide Convention to punish perpetrators, irrespective of their official position, and enact legislation to provide effective penalties. See Declaration of Intervention of the Republic of Maldives, Intervention Pursuant to Article 63 of the Statute of the International Court of Justice, In the Case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide (10 November 2023), <https://www.icj-cij.org/sites/default/files/case-related/178/178-20231115-wri-02-00-en.pdf>.

³⁹² This section is informed by information publicly available, including filings available on the website of the International Court of Justice. It is also based on consultation with the legal team representing The Gambia, conducted on 11 October 2022 and follow up exchanges in November and December 2022.

³⁹³ Article II of the Genocide Convention. Genocidal acts are a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

³⁹⁴ Michelle Jarvis, Overview: The Challenges of Accountability for Conflict-related Sexual Violence Crimes, in *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press (2016), p. 12, *supra*.

³⁹⁵ Global Justice Center, *Beyond Killing: Gender, Genocide & Obligations Under International Law* (December 2018), p. 8, www.globaljusticecenter.net/files/Gender-and-Genocide-Whitepaper-FINAL.pdf.

³⁹⁶ *Ibid*, p. 2-3.

³⁹⁷ See, e.g. *Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, ICTR-96-4-T (2 September 1998), para. 496.

³⁹⁸ See Akila Radhakrishnan and Sareta Ashraph, "The Akayesu Judgment at 20: Looking Back, Pushing Forward," in *IntLawGrrls Blog* (2 September 2018), <https://ilq2.org/2018/09/02/the-akayesu-judgment-at-20-looking-back-pushing-forward>.

³⁹⁹ Joint Declaration of Intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain, In the Case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide (10 November 2023), <https://www.icj-cij.org/sites/default/files/case-related/178/178-20231115-wri-01-00-en.pdf>.

to gender in the presentation of alleged genocidal acts. For instance, The Gambia's Application highlights the systematic killing of men and boys aged 12 or older, as well as restrictions on Rohingya men and women's ability to marry and bear children.⁴⁰⁰ Further, gender dynamics are considered in describing acts of extreme brutality, which, The Gambia argues, constitute elements of genocide.⁴⁰¹ With respect to sexual violence, the Application notes the massive scale on which sexual violence was committed, and the commission of rape, including gang rape, forced nudity and other instances of sexual violence, as constituting elements of genocide.⁴⁰² However, in illustrating these acts, The Gambia lists extracts from testimonies of women and girls only, without mentioning men, boys or LGBTQI+ persons.⁴⁰³ In its request for provisional measures, The Gambia again refers to rape and other forms of sexual violence committed only against women and girls.⁴⁰⁴

Concerns have been expressed over the exclusion of men and boys in The Gambia's Application and the characterization of sexual violence as a "women's issue," particularly given that information on sexual violence against men and boys is available in the same FFM reports that The Gambia relied upon.⁴⁰⁵ The FFM report also expressly addresses sexual and other gender-based violence against hijra/transgender people.⁴⁰⁶ In its submission to the Court, The Gambia stated it did not intend to exclude evidence or reports of sexual violence against men and boys⁴⁰⁷ but, instead, aimed to mirror the primary focus of the Myanmar FFM's reports, where one of the main indicia of genocide was sexual violence against women and girls.⁴⁰⁸ The Gambia's legal team also considered that sexual violence against women and girls ties more directly with international jurisprudence on genocide.⁴⁰⁹ The team nevertheless noted that it could consider evidence of sexual violence against men and boys in its reply brief to Myanmar's Counter-Memorial,⁴¹⁰ due in May 2024.

International case-law and practice confirms that sexual violence against members of the targeted group, irrespective of gender,⁴¹¹ can constitute the underlying acts of genocide.⁴¹² Yet, there is much less jurisprudence on the broader use of gender-based violence to commit genocide. However, in the *Srebrenica* cases before the International Criminal Tribunal for the former Yugoslavia, without explicitly referring to gender or gender constructs in the given society, the Tribunal took into account the impact of killing large numbers of men and boys of military age and forcibly displacing women, girls and elderly on Bosnian Muslims from Srebrenica (the group) would have "on the survival of a traditionally patriarchal society," stating that the

⁴⁰⁰ *Application Instituting Proceedings and Request for Provisional Measures*, para. 33, 52, 78.

⁴⁰¹ Meeting between a representative of the legal team representing The Gambia and the International Commission of Jurists, 11 October 2022.

⁴⁰² *Application Instituting Proceedings and Request for Provisional Measures*, para. 62, *supra*.

⁴⁰³ *Ibid*, para. 62-66, 87, 92-97.

⁴⁰⁴ *Ibid*, para. 114, 116.

⁴⁰⁵ David Eichert, *Concerns About the Non-Inclusion of Sexual Violence Against Men and Boys in The Gambia v. Myanmar*, OpinioJuris Blog (4 March 2020), opiniojuris.org/2020/03/04/concerns-about-the-non-inclusion-of-sexual-violence-against-men-and-boys-in-the-gambia-v-myanmar/; Eva Buzo, *Characterisation of Sexual Violence as a Women's Issue in the Rohingya Crisis: A Response to David Eichert*, OpinioJuris Blog, opiniojuris.org/2020/06/18/characterisation-of-sexual-violence-as-a-womens-issue-in-the-rohingya-crisis-a-response-to-david-eichert/.

⁴⁰⁶ FFM Report 2019, A/HRC/42/CRP.4, para. 180-188.

⁴⁰⁷ Meeting between a representative of the legal team representing The Gambia and the International Commission of Jurists, 11 October 2022.

⁴⁰⁸ *Ibid*.

⁴⁰⁹ Meeting between a representative of the legal team representing The Gambia and the International Commission of Jurists, 11 October 2022.

⁴¹⁰ *Ibid*.

⁴¹¹ A long line of cases from various international courts, including the International Criminal Tribunal for the Former Yugoslavia, the Special Court of Sierra Leone, and the International Criminal Court, have charged and convicted perpetrators for war crimes, crimes against humanity, and genocide for acts of sexual violence against both men and boys, as well as women and girls. See, e.g., *Sentencing Judgment, Prosecutor v Ranko Češić*, Trial Chamber I, International Criminal Tribunal for the Former Yugoslavia, IT-95-10/1-S (11 March 2004), paras. 13-14, 33; *Judgment, Prosecutor v Zdravko Mucić et. al.*, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, IT-96-21-T, (16 November 1998), paras. 1035- 1040; *Sentencing Judgment, Prosecutor v Stevan Todorović*, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, IT-95-9/1-S, Sentencing Judgment (31 July 2001) paras. 39-40; *Judgement, Prosecutor v Blagoje Simić*, Trial Chamber III, International Criminal Tribunal for the Former Yugoslavia, IT-95-9-T, (17 October 2003), para. 728; *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Prosecutor v Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, International Criminal Court, ICC-01/05-01/08, (15 June 2009), para 171; *Judgment, Prosecutor v Issa Hassan Sesay et. al.*, Trial Chamber I, Special Court for Sierra Leone, SCSL-04-15-T, (2 March 2009), paras 1205, 1207- 1208; *Judgment, Prosecutor v Momčilo Krajišnik*, Trial Chamber I, International Criminal Tribunal for the Former Yugoslavia, IT-00-39-T, (27 September 2006), para 304.

⁴¹² See, e.g., *Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, Prosecutor v. Ntaganda*, Trial Chamber VI, International Criminal Court, ICC-01/04-02/06-1707, (4 January 2017), para. 51; *Judgement, Prosecutor v Jean-Paul Akayesu*, Trial Chamber, International Criminal Tribunal for Rwanda, ICTR-96-4-T, (2 September 1998), para. 508; *Summary of the Judgement and Sentence, the Prosecutor v. Pauline Nyiramasuhuko et. al.*, Trial Chamber II, International Criminal Tribunal for Rwanda, ICTR-98-42-T (24 June 2011), para. 25, <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-98-42/MSIC19005R0000564313.PDF>.

Bosnian Serb forces knew this would “inevitably result in the[ir] physical disappearance.”⁴¹³

The case before the International Court of Justice presents an opportunity to advance understanding and jurisprudence on the use of gender-based violence against women, girls, men, boys and LGBTQI+ persons to perpetrate genocide.

Recommendation: Advance in subsequent filings the integration of gender analysis of all alleged genocidal acts, against all survivor groups, namely, women and girls, men and boys, and LGBTQI+ persons. Request, where needed, assistance from the IIMM in relation to the collection and availability of evidence and legal analysis, or other aspects relating to engagement with survivors, and from civil society organizations with gender expertise. In addition, engage with non-governmental organizations, women’s rights groups, and experts in gender and SGBC, to build submission to enrich the Court’s understanding and approach to gender related aspects of the case.

iii. Survivor statements

The Gambia’s Application includes statements from survivors, which were collected by other entities, at least one of which represents the same victims before other accountability bodies/mechanisms. The Gambia’s legal team chose to rely on these statements for several reasons. First, as credible actors have already carried out fact-finding and collected statements that could be relied upon, relying upon them avoids duplication of efforts and potentially retraumatizing victims/survivors. Second, The Gambia filed its case to the International Court of Justice in November 2019, just prior to the COVID-19 pandemic, and faced significant barriers in carrying out work on the ground in mid-2020. And finally, jurisprudence from the Court suggests that statements collected by one party to the proceedings may not be viewed as impartial.⁴¹⁴

The key consideration in selecting and utilizing the statements has been their credibility. While there is some gender balance in the overall statements presented in the case, there is no available data on whether any of these testimonies come from LGBTQI+ persons. Inclusivity in all survivors’ statements that are part of the case is necessary to capture, to the extent possible, the experiences of all groups of survivors of the alleged genocidal campaign, including persons who are or are perceived to be LGBTQI+.

Recommendation: Ensure inclusivity and diversity in both written survivor testimonies presented as part of the case, and if survivors are called to testify in court hearings at a later stage in proceedings. Provide survivor-centric, gender-competent and trauma-informed support to any engaged survivors.

iv. Public information and outreach on the case to affected communities

The Gambia’s legal team has also been working to ensure it liaises with victims/survivors about the case. For instance, while preparing for the hearings on provisional measures, The Gambia team worked with a civil society organization representing survivors before other accountability bodies on facilitating the attendance of three survivors at hearings in the Hague: two women and one man. The legal team worked with this civil society organization on a range of issues, including managing the expectations of the victims/survivors.⁴¹⁵

⁴¹³ *Judgement, Prosecutor v. Krštić*, Trial Chamber I, International Criminal Tribunal for the Former Yugoslavia, IT-98-33-T (2 August 2001), para. 595. Such findings were mirrored in subsequent Srebrenica cases, including *Judgement, Prosecutor v. Zravko Tolimir*, Appeals Chamber, International Tribunal for the Former Yugoslavia, IT-05-88/2-A (8 April 2015); *Judgment, Prosecutor v Radovan Karadžić*, Trial Chamber, International Tribunal for the Former Yugoslavia, IT-95-5/18-T, (24 March 2016), and *Judgment, Prosecutor v. Ratko Mladić*, Appeals Chamber, International Tribunal for the Former Yugoslavia, IT-05-88/2-A (8 April 2015).

⁴¹⁴ *Judgment of 8 October 2007*, International Court of Justice, Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), para. 244-245; *Judgment of 27 June 1986*, International Court of Justice, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), para. 69-70.

⁴¹⁵ This research has not conducted an assessment of such engagement.

This experience provided insights to the team on the feasibility of victims/survivors testifying directly in court, which the team is considering subject to security and other do-no-harm considerations.

The ability of affected communities and other stakeholders to understand developments in the case and the possible outcomes continues to be challenging. As in other situations, particularly those with multiple accountability efforts, there remains confusion among Rohingya people regarding the various accountability processes and their possible outcomes.⁴¹⁶ There is a lack of clarity regarding the potential outcomes of the case before the International Court of Justice, including if the Court were to find Myanmar in violation of the Genocide Convention. For instance, some wonder whether that would result in the confirmation of citizenship rights for the Rohingya,⁴¹⁷ while others expect that they will automatically be able to return to their homes.⁴¹⁸ The legal team stated to the ICJ that they continue to address legitimate confusion and seek to manage expectations through regular (virtual) engagement with civil society groups, including those representing survivors, Rohingya leaders, with particular attention paid to women leaders, and activists. Still, the patriarchal context of Rohingya society limits the ability of women to assume leadership roles, resulting in the engagement of active women leaders largely limited to those from the diaspora. Finally, due to logistical challenges, including those resulting from the COVID-19 pandemic, The Gambia's legal team has not been able to conduct in-person outreach activities in Cox's Bazar.

The Gambia's case is in its early stages, and the arguments made can only be fully analysed, including from a gender perspective, when all parties' submissions are made public and as the case progresses.

Recommendation: Continue to engage with civil society organizations, particularly those facilitating engagement with survivors and affected communities, to ensure dissemination of information and an accurate understanding of case developments, including, subject to a security assessment, by the Rohingya people in Myanmar. Ensure that women's voices be central to community engagement with the case.

Recommendation: Conduct direct engagement with victims/survivors and affected communities, including for instance through conducting missions to Cox's Bazar, Bangladesh and through engagement with victims/survivors' representatives or civil society organizations based in Rakhine State, following key developments in the case.

v. The International Court of Justice's case management and a gender sensitive approach

The Court's deliberations are private,⁴¹⁹ such that a complete analysis of the steps the Court is taking to ensure a gender sensitive approach in the case cannot be assessed. Nevertheless, it is possible to propose measures that would ideally be taken by the Court, particularly considering the gravity of the claims before it. Each will be reviewed in turn below.

1. Generally applicable measures

Before addressing any specific case, the Court should implement a series of preliminary steps to ensure a gender-competent approach is thoroughly integrated into its judicial processes. For example, to the extent it is not already being done on a continuing basis, implementing gender sensitivity training for judges and court clerks is a fundamental step towards this commitment. Such training equips staff with an understanding of gender theory, its implications for the construction and application of international law, and the nature of GBC that may be brought before it under relevant international instruments, like the Genocide Convention.

⁴¹⁶ ICC Registry, Public Redacted Version of "Registry's First Report on Information and Outreach Activities", ICC-01/19-33-Red (7 July 2020), para. 14.

⁴¹⁷ See Victim Advocates International, *Answers from the International Court of Justice* (29 September 2022), www.victimadvocatesinternational.org/answers-from-the-international-court-of-justice/.

⁴¹⁸ Mission of the International Commission of Jurists to Cox's Bazar, September 2022.

⁴¹⁹ International Court of Justice, Rules of the Court (1978) art. 21.

By fostering an environment where the subtleties of gender issues are recognized and respected, Court personnel can ensure their work is reflective of these critical considerations.

Recommendation: Implement gender sensitivity training for both judges and court clerks as a key initiative. This training should focus on providing a comprehensive grasp of gender theory, the role it plays within the realm of international law, and a detailed understanding of the complexities surrounding GBC.

The development of Gender Guidelines for Proceedings could also be pivotal in standardizing a gender-competent approach to handling cases that require a gender sensitive lens, such as whenever the Court is called to rule on the breach of human rights obligations in a contentious case or when it is called to interpret States' obligations in an advisory opinion. The guidelines could include standards for evaluating the credibility of witnesses and victims that take into account the potential for gender bias. Such guidelines could be informed by those from other international courts or mechanisms, like the ICC or IImm, and would establish a framework to assess evidence and testimonies, consider the gender aspects of the cases before it, and assist with ensuring the use of gender-sensitive language in judgments, decisions, orders, and other Court documents.

Recommendation: Formalize Gender Guidelines for Proceedings, drawing upon the best practices from institutions like the ICC or IImm. These guidelines would serve to standardize a gender-aware protocol for examining evidence and testimonies in human rights cases, promote the use of gender-sensitive language throughout court proceedings, and offer a consistent framework for interpreting State obligations.

As has long been observed in relation to the Court,⁴²⁰ striving for gender parity in the composition of the Court is not merely a symbolic gesture but a necessary reform in light of its history, where only six female judges have ever been elected to the bench since its establishment, compared with 106 male judges.⁴²¹ A diverse bench is more likely to understand how gender constructs underpin laws and policies, and the nuanced ways State actions impact individuals based on their gender, thereby making it more likely that these considerations would be integrated into the Court's judicial reasoning and judgments, decisions, orders and other Court documents.

Recommendation: Pursue and establish gender parity among judges as an essential reform, ensuring a judiciary that reflects a broad spectrum of perspectives. This diversity is critical for a more profound and empathetic understanding of the gendered impacts of legal decisions, and would likely lead to the incorporation of such insights into the Court's rationale and judgments, decisions, orders, etc.

Finally, the institution of a robust monitoring and evaluation system is crucial to track the integration and efficacy of these gender-sensitive practices, allowing the Court to adapt and improve its strategies in line with the evolving discourse on gender in international law.

⁴²⁰ Philip Alston, "Vacancies at the ICJ: Yes, there is a special practice, and it has to cease," in EJIL:Talk!, (25 October 2021), <https://www.ejiltalk.org/vacancies-at-the-icj-yes-there-is-a-special-practice-and-it-has-to-cess/>; Heather Barr, Human Rights Watch, "The International Court of Justice Should Have More Women Judges: Just Four Out of 109 Judges Have Been Female," (28 October 2021), <https://www.hrw.org/news/2021/10/28/international-court-justice-should-have-more-women-judges>; Laura Franca Pereira and Raymund Treves, "Symposium on Gender Representation: Promoting Gender Representation at the International Court of Justice," *Opinio Juris*, (7 October 2021), available at: <https://opiniojuris.org/2021/10/07/symposium-on-gender-representation-promoting-gender-representation-at-the-international-court-of-justice/>

⁴²¹ See, e.g., Women in justice: Three trailblazing World Court judges send a powerful message," (10 March 2023), <https://news.un.org/en/story/2023/03/1134487>; <https://www.icj-cij.org/current-members>.

Recommendation: Institute a comprehensive monitoring and evaluation mechanism to ensure the effective adoption and sustained practice of gender-sensitive approaches, with a readiness to evolve these practices in step with the progressive understanding of gender issues in the field of international law.

vi. Specific measures in *The Gambia v. Myanmar* case

In addition to these general measures, the Court could take specific steps in *The Gambia v. Myanmar* case to enhance its understanding and analysis of the gender dimensions of the claims before it and ensure it adopts gender sensitive and inclusive procedures in adjudicating the case.

1. Requesting Information from the parties on gender constructs and GBC

The International Court of Justice bench could proactively request from the parties, or independent experts, detailed information on gender constructs within Myanmar, with a particular focus on those affecting the Rohingya community.⁴²² Such information could shed light on the roles, responsibilities, “vulnerabilities”, and power dynamics defined by gender within Myanmar’s Rakhine State, and more specifically the Rohingya community. Recognizing how these constructs might influence both the perpetration of violence and its impact on different genders is critical to a comprehensive understanding of the underlying conduct that may constitute a breach of the Genocide Convention under Article II.

Additionally, the bench should ask the parties to submit additional information or evidence on GBC, including sexual violence against men, boys and LGBTIQ+ persons, as well as information on GBC other than sexual violence, in accordance with the scope of the parties’ submissions. In doing so, the bench should encourage the parties to integrate an intersectional perspective.

Recommendation: Request additional evidence or information on GBC that may support or expand upon the parties’ existing submissions. Such requests should particularly go toward filling in gaps of information, such as GBC as it relates to men and LGBTIQ+ individuals within the Rohingya community and other forms of GBC. As such, encourage parties to solicit evidence from gender experts and civil society organisations, as well as victims/survivors and other witnesses.

2. Requesting information from third parties

If it has not already done so, the Court could request the IIMM – as a body within a public international organization – to file observations under Article 34(2) of the Statute,⁴²³ including on any analysis or analytical reports relevant to the case, in particular the analytical report the IIMM has already prepared on GBC in Myanmar or any forthcoming such reports.⁴²⁴

Additionally, after hearing the parties and receiving information from the IIMM, the judges could order an expert opinion to fill any gaps.⁴²⁵

Recommendation: Request observations from public international organisations, in particular the IIMM, on gender and GBC in Myanmar and in particular Rakhine State, including any existing analysis or reports relevant to the case and in particular on GBC.

⁴²² Rules of the Court, art. 62.

⁴²³ See also Rules of the Court, art. 69.

⁴²⁴ See IIMM Section.

⁴²⁵ See Rules of the Court, Art. 67.

Recommendation: To the extent necessary, call for an expert to fill any gaps in information on gender and GBC in Myanmar and in particular Rakhine State.

3. Incorporating Gender Analysis in Evidence Assessment

Incorporating gender and intersectional analysis into the assessment of evidence is also a critical step the Court should take when deliberating. A gender analysis would require a thorough examination of how gender might intersect with other factors such as race, ethnicity, religion and socioeconomic status, among others, to impact individuals' experiences before, during, and after the alleged crimes were committed. By applying this analytical lens, the Court would ensure that the evidence is not viewed through a gender-neutral perspective, which could inadvertently perpetuate stereotypes or overlook the gendered dimensions of the violence and resultant harms.⁴²⁶

Recommendation: Actively seek comprehensive data on gender constructs within Myanmar, especially as they relate to the Rohingya community/people, to better inform their analysis of the case.

It is important to not only understand how gender norms, beliefs and structures impact the commission of crimes, but also how they impact victims/survivors' experience of trauma; which will differ from context to context. Evidence presented to the Court might include testimony that reflects gendered experiences of trauma, but which may not conform to conventional expectations of how a survivor/victim "should" behave. Gender analysis therefore requires ensuring judges and court personnel be briefed on how to recognize and understand the complex ways in which individuals process and express trauma in the given context, which, in turn, are influenced by the context's gendered societal norms.⁴²⁷ This approach not only facilitates a deeper understanding of the evidence presented but also promotes a legal environment where all individuals feel seen and understood in the context of their gendered realities.

vii. Reflecting Gender Considerations in Judgments and Remedies

When drafting judgments, the International Court of Justice should explicitly consider and articulate how gender has played a role in the case. This explicit acknowledgment would serve a dual purpose: it would validate the experiences of those who have suffered gender-based harm and set a precedent for future cases, thus contributing to the development of a more gender-responsive legal framework. Remedies, including reparations, to the extent they are ordered in this particular case, should be designed to respond to the particular needs of those affected by GBC within the Rohingya community, supporting not just their immediate recovery but also their long-term empowerment and reintegration into both Rohingya as well as broader Myanmar society.

Recommendation: Explicitly consider and articulate the role of gender in its judgments. This recognition would both validate the experiences of those impacted by gender-based violence and establish a foundation for a more gender-responsive legal framework in future cases.

⁴²⁶ See, for example, ICC Policy on Gender-based Crimes, which analyses SGBC on intersectional grounds including race, ethnicity, socio-economic status, religion, age, sex characteristics, gender (including sexual orientation, identity, and expression), caste, indigenous status, legal or displacement status, and disability.

⁴²⁷ The jurisprudence of the CEDAW committee has been influential in recognizing the harms of judicial stereotyping as a structural cause of discrimination. By highlighting the need to eliminate practices based on stereotyped roles for men and women, international human rights law urges judicial systems to examine and dismantle stereotypes that undermine fair trial rights and contribute to discrimination. See, e.g. General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28 (16 December 2010) <https://www.refworld.org/legal/general/cedaw/2010/en/77255>; *Vertigo v. Philippines*, Committee of all Forms of Discrimination Against Women, CEDAW/C/46/D/18/2008 (22 September 2010), <https://documents.un.org/doc/undoc/gen/n10/545/58/pdf/n1054558.pdf?token=XTXKTL4QmTDk8dIQc3&fe=true>; *VK v. Bulgaria*, Communication No. 20/2008, Committee on the Elimination of All Forms of Discrimination against Women, CEDAW/C/49/D/20/2008 (17 August 2011) <https://www2.ohchr.org/english/law/docs/CEDAW-C-49-D-20-2008.pdf>.

Moreover, when considering remedies, the International Court of Justice should strive to address root causes and social inequalities that give rise to GBC in Myanmar. This could mean ordering measures that go beyond compensatory damages, such as mandating changes in policy or practice that will have a wider societal impact, providing resources for community education programs, or establishing services to help prevent future harm.

Recommendation: ensure that remedies, including reparations, are designed to address the specific needs of those affected by gender-based crimes, such as within the Rohingya community. These remedies should support both immediate recovery and long-term empowerment, while also addressing underlying social inequalities that contribute to gender-based violence through measures like policy reforms and community education initiatives.

d. Universal Jurisdiction

The principle of universal jurisdiction is an increasingly utilized means of pursuing accountability for serious crimes under international law, particularly in contexts where neither domestic nor international jurisdictions are willing or able to conduct genuine criminal investigations and prosecutions. Collaborative efforts between civil society actors, the legal community and importantly, victims/survivors of serious crimes under international law, have been at the forefront of advocacy for and resort to universal jurisdiction.

In 2018, the Myanmar FFM encouraged and made a recommendation to States “to actively pursue investigating and prosecuting crimes committed in Myanmar before their respective domestic courts, under the principle of universal jurisdiction for serious crimes under international law.”⁴²⁸

Since 2018, with varying results, human rights and victim/survivor groups have attempted to instigate or support Myanmar-related cases in third-State domestic courts, in particular in Argentina, Germany, Turkey, Indonesia and the Philippines.

In Argentina, complaints filed by civil society organizations and survivors instigated an ongoing investigation into genocide allegedly committed by Myanmar government officials and military personnel since 2012 and during the 2016 and 2017 “clearance operations.”⁴²⁹ In Turkey, a preliminary investigation was opened in June 2022, following a complaint filed by the Myanmar Accountability Project⁴³⁰ alleging members of the Military Junta committed gross human rights violations following the 2021 military *coup* in Myanmar.⁴³¹ In September 2022, Indonesian civil society, in cooperation with former FFM expert member Marzuki Darusman,⁴³² filed a case in the Indonesian Constitutional Court seeking a ruling on the Human Rights Court’s⁴³³ jurisdiction over foreign nationals, with a view pursuing Myanmar-related cases in Indonesia;⁴³⁴ a petition rejected on 14 April 2023 on the basis that human rights law only applies to Indonesian citizens.⁴³⁵ A universal jurisdiction-based complaint filed by Fortify Rights in Germany was rejected by the domestic Prosecutor’s Office on the basis that the alleged perpetrator was not present, or expected to be present,

⁴²⁸ IIMM, Report of Independent International Fact-Finding Mission on Myanmar (27 August 2018), para. 1657, 1711, <https://www.ohchr.org/en/hr-bodies/hrc/myanmar-ffm/reportofthe-myanmar-ffm>.

⁴²⁹ See “BROUK President Highlights Tatmadaw Crimes as Genocide Trial Opens,” (16 December 2021) <https://www.brouk.org.uk/brouk-president-highlights-tatmadaw-crimes-as-genocide-trial-opens/>.

⁴³⁰ The Myanmar Accountability Project works with civil society in Myanmar to build criminal cases against members of the Myanmar security forces. See <https://the-world-is-watching.org/>.

⁴³¹ Myanmar Accountability Project, *Turkish Authorities Open Unprecedented Investigation into Myanmar Junta* (2 June 2022) <https://the-world-is-watching.org/2022/06/02/turkish-authorities-open-unprecedented-investigation-into-myanmar-junta/>.

⁴³² Indonesian lawyer and Former member of the UN Human Rights Council mandated Myanmar Fact-Finding Mission. See, “Biographies of the members of the Fact-Finding Mission on Myanmar”, available at: <https://www.ohchr.org/en/hr-bodies/hrc/myanmar-ffm/members#darusman>.

⁴³³ The Human Rights Council was established under *Act No. 26 of 2000 Establishing the Ad Hoc Human Rights Court* to hear cases involving gross violations of human rights, in particular crimes against humanity and genocide, committed in Indonesia and by Indonesian nationals outside Indonesia. See <https://policehumanrightsresources.org/content/uploads/2019/07/Law-26-2000-Act-on-the-Human-Rights-Courts-2000-Eng.pdf?x39143>.

⁴³⁴ Myanmar Accountability Project, *Prosecuting Burmese Perpetrators of Serious Human Rights Violations in Jakarta: Indonesia’s Constitutional Court Holds First Hearing into Law 26 of 2000 concerning the Human Rights Court* (27 September 2022), the-world-is-watching.org/2022/09/27/prosecuting-burmese-perpetrators-of-serious-human-rights-violations-in-jakarta/.

⁴³⁵ The Constitutional Court of the Republic of Indonesia, “*Court Rejects Petition on Human Rights Court*” (14 April 2023), <https://en.mkri.id/news/details/2023-04-14/Court-Rejects-Petition-on-Human-Rights-Court>.

on the territory of Germany, and that an investigation by law enforcement authorities would not add any value to the work of the IIMM.⁴³⁶ Finally, on 25 October 2023, a complaint was filed in the Philippines by five Myanmar nationals alleging that ten serving or former members of Myanmar's military committed war crimes against the Chin minority ethnic and religious group;⁴³⁷ a decision on which is still pending.

While several universal jurisdiction cases have made important progress in ensuring that GBC are investigated and prosecuted, research shows that these crimes remain under-investigated and prosecuted domestically. For example, Trial International's Universal Jurisdiction Annual Review for 2021 shows that, out of the 125 charges of international crimes in universal jurisdiction cases worldwide, only 17 included GBC charges.⁴³⁸ According to Trial International, this is the result of a lack of prioritization of GBC and/or of specialized resources, which are unavailable in most domestic justice systems.⁴³⁹

Recommendation: Integrate gender analysis in the filing of complaints and submissions to competent authorities under the framework of universal jurisdiction to bring attention to the gendered nature of crimes and their resulting harms and contribute to ensuring they are effectively addressed in criminal investigations and prosecutions at the domestic level, including by consulting with civil society organizations, experts and other actors with context-specific gender expertise to identify and address:

(i) gender norms relevant to the commission of crimes within the jurisdiction of the Court, including the gendered structures enabling the commission of crimes and differentiated harms experienced by survivors based on their gender, and taking into account intersecting identities and characteristics; and

(ii) gender barriers impacting the disclosure of information and evidence of GBC and access to justice in a gender-competent, survivor-centric and trauma-informed manner, with a view to identifying measures to assist to overcome them.

Recommendation: Ensure legal teams have expertise in GBC and engagement with survivors of GBC, or alternatively, identify and create partnerships with other actors who may provide such expertise in an integrated and systematic manner.

Recommendation: Provide survivor-centred, including gender-competent and trauma-informed, support to any engaged survivors.

i. Reflections on the ongoing investigation in Argentina

There are currently two groups of plaintiffs (*querellantes*) in the investigation in Argentina, granted plaintiff status as organizations representing the collective interest of victims/survivors of the "clearance operations" in Rakhine State in 2016 and 2017:⁴⁴⁰ Burmese Rohingya Organisation UK (BROUK) and Victims Advocates International.

⁴³⁶ Fortify Rights, "On the Dismissal of the Criminal Complaint Filed in Germany against Myanmar General and Others for Genocide, War Crimes and Crimes Against Humanity" (30 November 2023), <https://www.fortifyrights.org/mya-inv-stm-2023-11-30/>.

⁴³⁷ Myanmar Now, *Chin refugees request criminal investigation of Myanmar junta officials by Philippine authorities* (25 October 2023) <https://myanmar-now.org/en/news/chin-refugees-request-criminal-investigation-of-myanmar-junta-officials-by-philippine-authorities/>.

⁴³⁸ TRIAL International, *Universal Jurisdiction Annual Review 2022* (2022), p. 10, [trialinternational.org/wp-content/uploads/2022/03/TRIAL_International_UJAR-2022.pdf](https://www.trialinternational.org/wp-content/uploads/2022/03/TRIAL_International_UJAR-2022.pdf).

⁴³⁹ *Ibid.*

⁴⁴⁰ Judgement of Federal Criminal and Correctional Chamber – Room 1, 26 November 2021, CFP 8419/2019/7/CA 2 "Dte.: Burmese Rohingya Organisation s/ legajo de apelació Juzgado N° 1, Secretaría N° 1 Causa N° 60.529 (PK); Judgement of Federal Criminal and Correctional Chamber – Room 1, 2 August 2022, CFP 8419/2019/9/CA3 "Presentante: Durrieu, Roberto s/legajo de apelacion" Juzgado No 1 – Secretaria No 1 Causa No 61.193 (PK).

BROUK initiated the investigation by submitting a complaint in 2019 on behalf of its President and six other survivors, all of whom are represented by Tomás Ojea Quintana, a former Special Rapporteur on the Situation of Human Rights in Myanmar.⁴⁴¹ BROUK's complaint alleges that State actors committed genocide and crimes against humanity against the Rohingya community since 2012, including rape, gang rape and sexualised torture of women and girls, including pregnant persons, and men and boys;⁴⁴² genital mutilation of men and boys; and other crimes that may have been committed on gender-based grounds, including the stabbing and then burning alive of women and girls in locked houses.⁴⁴³

While the Second Chamber of the Federal Criminal Court in Buenos Aires initially launched a universal jurisdiction case as a result of the complaint,⁴⁴⁴ the Argentinian Court of First Instance dismissed the investigation.⁴⁴⁵ The Federal Appeals Court overturned the dismissal at the end of proceedings where it heard testimony from six victims/survivors represented by Tomás Ojea Quintana (N.J.N.H., R.K.N., N.B.G.M., B.J.S.H., N.B.Z.H. and S.J),⁴⁴⁶ who recounted their experiences and search for justice, with one survivor closing her statement by saying "we want justice from the Argentina court."⁴⁴⁷

Victim Advocates International intervened in the appeal against the Argentine Court of First Instance's dismissal of the investigation. After being rejected by the Court as *amicus*, were subsequently granted plaintiff status, in which capacity the organization seeks to represent a diversity of survivor groups, including women, men and hijra.⁴⁴⁸ When seeking to intervene as *amicus* in the appeal, Victim Advocates International submitted that, without Argentina's investigation, "there will be no avenue for obtaining justice for survivors of sexual violence."⁴⁴⁹

Recommendation: Encourage the Office of the Prosecutor and Court to request information, evidence and analysis from the IIMM, including tailored materials, on gender and GBC committed in Myanmar.

Recommendation: Produce and disseminate accessible updates and information on the case and any key developments; identify other actors able to support the dissemination of such information including, in particular, to affected communities.

Recommendation: Adopt a collaborative approach with other accountability actors engaged in the situation in Myanmar, and others engaged in universal jurisdiction cases more broadly, to ensure continued dialogue and exchange lessons learned in advancing gender-competent accountability.

⁴⁴¹ Complainant Files a Criminal Complaint of Genocide and Crimes Against Humanity Committed Against the Rohingya Community in Myanmar – Universal Jurisdiction (11 November 2019), https://drive.google.com/file/d/1UZWfIWH9_NfdFJQoIHp7iJ4B037_LuS/view.

⁴⁴² IIMM, Report of the Independent international fact-finding mission on Myanmar, UN Doc. A/HRC/39/64, 12 September 2018, para. 38.

⁴⁴³ Complainant Files a Criminal Complaint of Genocide and Crimes Against Humanity Committed Against the Rohingya Community in Myanmar – Universal Jurisdiction, pp. 2, 13, 15, 22-23, 28-33, relying upon inter alia the findings by the Myanmar FFM and the Special Rapporteur on the situation of human rights in Myanmar.

⁴⁴⁴ Global Justice Centre, Q&A: The Universal Jurisdiction Case Against Myanmar – Argentina Court Considers International Crimes Against Rohingya (September 2023), https://www.globaljusticecenter.net/wp-content/uploads/2023/09/Sept2023_ArgentinaMyanmarUJ_OA.pdf.

⁴⁴⁵ The dismissal was based, among other things, on the existence of the ongoing investigation by the ICC, and domestic accountability efforts through Myanmar's Independent Commission of Enquiry. See, Trial International, Universal Jurisdiction Annual Review 2022, p. 2, *supra*.

⁴⁴⁶ Patricia Blanco, Por el principio de 'Justicia Universal,' Argentina Investigará los Crímenes de Lesa Humanidad Contra La Comunidad Rohingya en Myanmar," (28 November 2021), available at: <https://www.infobae.com/politica/2021/11/28/por-el-principio-de-justicia-universal-argentina-investigara-los-crimenes-de-lesa-humanidad-contra-la-comunidad-rohingya-en-myanmar/>

⁴⁴⁷ ICJ Follow up communication with lawyers representing BROUK and N.J.N.H., R.K.N., N.B.G.M., B.J.S.H., N.B.Z.H. and S.J.

⁴⁴⁸ ICJ Meeting with Kate Gibson, Victim Advocates International on 31 October 2022; and meeting with Roberto Durrieu and Tomás A. Guido on 8 November 2022.

⁴⁴⁹ Arakan Rohingya Society for Peace and Human Rights, Rohingya Youth for Legal Action, Rohingya Women Development Forum, Rohingya Women's Empowerment and Advocacy Network, Rohingya Student Unity and Rights y Rohingya Peace Innovation Unity, Filing of Amicus Curiae, available at: <https://www.victimadvocatesinternational.org/rohingya-victims-amicus-curiae/>

ii. Good practices in the investigation and prosecution of GBC

Careful consideration should be paid to ensuring a survivor-centred, trauma-informed and gender-competent approach in universal jurisdiction cases involving GBC.⁴⁵⁰ The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict provides that at a minimum, investigations into conflict-related sexual violence must implement the principle of “Do No Harm,” meaning that “practitioners must be fully aware of the possible negative impacts of documentation on victims and other witnesses, the wider community and the investigators themselves; be prepared for the harm those impacts may inflict; and put in place measures to prevent or minimize that harm.”⁴⁵¹ The Protocol goes on to specify that the safety and dignity of survivors must be at the centre of all aspects of the legal process,⁴⁵² which includes according autonomy to survivors,⁴⁵³ ensuring informed consent,⁴⁵⁴ and guaranteeing confidentiality.⁴⁵⁵

Additionally, as reflected in the ICC OTP’s 2023 GBC Policy, adopting survivor-centred, trauma-informed and gender-competent approaches apply to GBC more broadly, as do a range of other principles set out in the same Policy, including the necessity of, *inter alia*, adopting an intersectional perspective; addressing myths, stereotypes and misconceptions; contextualizing GBC; ensuring full and faithful characterization of the crimes; and ensuring cooperation with a range of stakeholders thought inclusion and relationships. Although in different terms and applicable to a different context, these principles are also reflected in the IIMM’s Gender Strategy and Implementation Plan.⁴⁵⁶ As noted above, the IIMM’s gender strategy has not been made public.

Some of these principles are reflected, to varying degrees, in the Argentinian legal framework and domestic guidelines applicable to the investigations of GBC. For example, the Argentinian Criminal Procedure Code grants rights to survivors and witnesses to receive “dignified and respectful treatment” by the competent authorities,⁴⁵⁷ while the Law on Victims’ Rights refers to the guiding principle of the duty to prevent re-traumatization.⁴⁵⁸ Additionally, the Federal Prosecutor’s Office has issued several guidance documents and protocols aiming to integrate a gender perspective in investigations and criminal proceedings. These include a *2018 Protocol on the investigation and litigation of cases of femicide*,⁴⁵⁹ *2021 Guidelines on the investigation of the disappearance of women and LGBTQI persons*,⁴⁶⁰ *2021 Guidelines for prosecutors in urgent and risky situations in cases of gender violence*, and *2021 Guidelines for conducting interviews with victims or witnesses upon news of the recent, current, or imminent commission of a crime framed in a context of gender violence*.⁴⁶¹ While, in principle, designed to address domestic crimes, these tools demonstrate

⁴⁵⁰ See International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Documentation of Sexual Violence as a Crime or Violation of International Law, 2nd Ed. (March 2017), available at: https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict/International_Protocol_2017_2nd_Edition.pdf

⁴⁵¹ International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, p. 85; See also International Criminal Tribunal for Rwanda (ICTR) Rules of Procedure and Evidence (amended 29 June 1995), Rule 34(B), <https://unictr.irmct.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf>.

⁴⁵² *Ibid.*, p. 85.

⁴⁵³ *Ibid.*, p. 88.

⁴⁵⁴ *Ibid.*, p. 90.

⁴⁵⁵ *Ibid.*, p. 95.

⁴⁵⁶ International, Impartial and Independent Mechanism for Syria, Gender Strategy and Implementation Plan: Technical Version (30 September 2022), <https://iiim.un.org/wp-content/uploads/2023/02/Gender-Strategy-Implementation-TechnicalEnglish.pdf>. See also *ibid.*, the abridged Version: <https://iiim.un.org/wp-content/uploads/2023/02/Gender-Strategy-Implementation-Abridged.pdf>.

⁴⁵⁷ See El DECRETO N° 118/2019 B.O.8/2/2019, Art. 151, por el cual se aprueba el texto ordenado del CÓDIGO PROCESAL PENAL FEDERAL, aprobado por la Ley N° 27.063 con las incorporaciones dispuestas por la Ley N° 27.272 y las modificaciones introducidas por la Ley N° 27.482, el que se denominará “CÓDIGO PROCESAL PENAL FEDERAL (T.O. 2019)”, que como ANEXO I (IF-2019-05102811-APN-MJ) forma parte del Decreto de referencia)

⁴⁵⁸ Art 4(c), Ley de derechos y garantías de las personas víctimas de delitos – Ley 27372

⁴⁵⁹ Protocolo para la investigación y litigio de casos de muertes violentas de mujeres (femicidios) (2018) <https://www.mpf.gob.ar/ufem/files/2018/03/UFEM-Protocolo-para-la-investigaci%C3%B3n-y-litigio-de-casos-de-muertes-violentas-de-mujeres-femicidios.pdf>; See also, Modelo de protocolo latinoamericano de investigación de las muertes violentas de mujeres por razones de género (femicidio/feminicidio), <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/ProtocoloLatinoamericanoDeInvestigacion.pdf>

⁴⁶⁰ Unidad Fiscal Especializada en Violencia contra las Mujeres y Procuraduría de Trata y Explotación de Personas, Pautas para la investigación de casos de desaparición de mujeres y población LGTBIQ+ (2021), https://www.mpf.gob.ar/protex/files/2021/11/Pautas_investigaci%C3%B3n_casos_desapariciones_mujeres_y_poblaci%C3%B3n_LGTBIQ+.pdf.

⁴⁶¹ Pautas de actuación para fiscales ante situaciones urgentes y de riesgo en casos de violencia de género (2021) and Anexo, Pautas para la realización de entrevistas a las víctimas o testigos ante la noticia de la comisión reciente, actual o inminente de un delito enmarcado en un contexto de violencia de género, https://www.mpf.gob.ar/ufem/files/2021/12/UFEM-DOVIC_Pautas-de-actuaci%C3%B3n-para-fiscales-ante-situaciones-urgentes-y-de-riesgo-en-casos-de-violencia-de-g%C3%A9nero.pdf.

some attention to the gender dimensions of crimes and to the needs of victims and are transferable in part to universal jurisdiction cases. For instance:

- The *2021 Guidelines for prosecutors on urgent and risky situations in cases of gender violence* provide detailed guidance on assessing and addressing the risks to victims and witnesses of SGBC.⁴⁶²
- The *2021 Guidelines for conducting interviews with victims or witnesses in the context of gender violence*⁴⁶³ include as a core principle the victim's right to be heard.⁴⁶⁴
- The *Guidelines for conducting interviews*, for example, specify safeguards investigators can adopt, including the promotion of a safe environment while also being sensitive to the effects of trauma in the context of interviews.⁴⁶⁵ The overarching framework created by these Guidelines emphasizes the safety and security of victims and witnesses and goes toward satisfying the duty to protect essential and effective responses to GBC in criminal justice processes.⁴⁶⁶
- The *2018 Protocol on the investigation and litigation of cases of femicide* contains provisions on rights to be accorded to foreign nationals, including the right to receive information in a language the witness understands and to allow remote participation if needed.⁴⁶⁷

While the ICJ did not interview the Argentinian Prosecutor's Office on the implementation of its law, procedures and guidelines for the purposes of this report, reflecting on domestic commitments and capacity to implement best practices with respect to the investigation and prosecution of GBC may assist other actors, including plaintiffs, to identify means and methods of supporting the Argentinian investigation. Plaintiffs in particular play an important role in demanding that good practice be applied in universal jurisdiction cases.⁴⁶⁸

Recommendation: Adopt a survivor-centred, gender-competent and trauma-informed approach to the investigation, prosecution and adjudication of crimes committed in Myanmar, including by relying upon existing criminal procedure laws and domestic guidelines and protocols and adapting them to meet best practice standards required in international crimes cases where possible. In particular, ensure that gender-competent, trauma-informed evidence collection methods are adopted, including by making forensic experts available to document GBC and ensuring referral pathways for access to mental health and psychosocial, somatic and legal support are established and implemented.

Recommendation: Implement measures to protect the dignity, privacy and security of victims and witnesses, especially survivors of GBC, during their testimony.

Recommendation: Adapt courtroom procedures to create a supportive environment for victims and witnesses of all genders to give testimony, including the use of video links or screens to prevent direct confrontation with the accused.

The plaintiffs in the case have already taken some steps towards advocating for the adoption of survivor-centred, gender-competent and trauma-informed approaches in the case. At the time the research for this report was undertaken, the legal team representing the BROUK plaintiffs intended to request the intervention of different agencies specialized in understanding crimes committed against women, namely the Specialized Prosecutor's Unit on Violence against Women (UFEM).⁴⁶⁹ Other organizations made submissions directly to the Chamber on best practice when engaging with survivors of serious international crimes, at the initiative

⁴⁶² Pautas para la realización de entrevistas, p. 15-23; ICJ Meeting on 18 October with Mr. Tomás Ojea Quintana and Carol Quinn.

⁴⁶³ These guidelines are annexed to the Guidelines for prosecutors on urgent and risky situations.

⁴⁶⁴ Pautas para la realización de entrevistas, p. 25.

⁴⁶⁵ Pautas para la realización de entrevistas, p. 27-28.

⁴⁶⁶ Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence against Women and Girls, United Nations Office on Drugs and Crime (UNODC)(2019), at 57, https://www.unodc.org/pdf/criminal_justice/HB_for_the_Judiciary_on_Effective_Criminal_Justice_Women_and_Girls_E_ebook.pdf

⁴⁶⁷ See, *ibid.*, para. 9.6.3.

⁴⁶⁸ ICJ Meeting on 18 October 2023 with Mr. Tomás Ojea Quintana and Carol Quinn.

⁴⁶⁹ Follow up communication with lawyers representing BROUK and N.J.N.H., R.K.N., N.B.G.M., B.J.S.H., N.B.Z.H. and S.J.

of the plaintiff.⁴⁷⁰ The Global Justice Center (GJC) made a submission through the plaintiff in November 2022 on “regional and international best practice for engaging with victims and witnesses of sexual violence and assessing evidence of sexual violence,” providing a detailed overview of international standards in relation to GBC investigations.⁴⁷¹ Further submissions by GJC related to gender may be made as the case progresses, in consultation with BROUK. The Argentinian guidelines and protocols mentioned above, as well as domestic criminal procedure law, could be considered in such ongoing submissions and advocacy.

Recommendation: Call and/or request the Office of the Prosecutor to call expert/s on gender and/or GBC committed in Myanmar as witnesses, in particular those with the expertise to reflect on and apply intersectional approaches to their evidence.

Recommendation: Continue to advocate for the adoption of a survivor-centred, gender-competent and trauma-informed approach to the investigation, prosecution and adjudication of crimes committed in Myanmar by the Office of the Prosecutor and the Court, including by relying upon existing criminal procedure laws and domestic guidelines and protocols which may be adapted to meet best practice standards required in international crimes cases.

iii. External support

As recognized by the Federal Appeal Court in its decision authorizing the investigation, the gathering of evidence in a situation geographically, culturally and linguistically dislocated from Myanmar is a challenge. The Court acknowledged the existence of mechanisms that could assist in gathering and sharing evidence,⁴⁷² referring to an explicit offer of assistance from the IIMM to share relevant information, documentation and evidence.⁴⁷³

Relying upon the IIMM to facilitate the integration of a gender analysis in the investigation, prosecution and adjudication of the Myanmar case would be invaluable, and meet the specific objectives for which the IIMM was established.⁴⁷⁴ For example, in addition to materials already sought, the plaintiffs could request the Prosecutor and/or Court to, and the Prosecutor and/or Court could, request the IIMM to submit any analytical report relating to the Rohingya and Rakhine State generally and any that incorporates a gender and intersectional lens. In addition to accessing existing reports, the IIMM could carry out and submit a focused gender analysis on the alleged genocide in Myanmar in the context of the scope of the Argentinian case, drawing upon its extensive data collection, offering specific gender-based insights into the atrocities allegedly committed and providing the Court with evidence that could inform its proceedings. This strategic use of IIMM's gender-focused analyses and reports would not only strengthen the evidentiary foundation of the case pending in Argentina, but also ensure a more comprehensive understanding of the gender aspects involved. While the scope of the ICC investigation is narrower due to its jurisdictional limitations, the OTP may also have information, evidence and analysis relevant to the Argentinian case.

⁴⁷⁰ Meeting with Tomás Ojea Quintana and Carol Quinn, 18 October 2022.

⁴⁷¹ Meeting with the Global Justice Center, 8 December 2022; Global Justice Center, Global Justice Center Submission to the “Juzgado Nacional en lo Criminal y Correccional Federal No 1” (SPA) on International and Regional Best Practice for Engaging with Victims and Witnesses of Sexual Violence and Assessing Evidence of Sexual Violence, https://www.globaljusticecenter.net/wp-content/uploads/2023/06/GJC_SUBMISSION_TO_THE_ARGENTINA_CRIMINAL_PROCESS.pdf

⁴⁷² Judgement of Federal Criminal and Correctional Chamber – Room 1, 26 November 2021, CFP 8419/2019/7/CA2 “Dte.: Burmese Rohingya Organisation s/ legajo de apelación” Juzgado N° 1, Secretaría N° 1 Causa N° 60.529 (PK), pp.13

⁴⁷³ Supra 197, pp.13 (Camara Criminal Y Correccional Federal - Sala 1, CFP 8419/2019/7/CA2, Dte.: Burmese Rohingya Organisations/ legajo de apelación” Juzgado N° 1, Secretaría N° 1 Causa N° 60.529 (PK), 26 November 2021)

⁴⁷⁴ See, for instance, the IIMM Strategy and the integration of gender analysis into its engagement with competent authorities: “given the specific nature of the IIMM’s mandate, it has many new opportunities to integrate a gender analysis into its engagement with a broad array of interlocutors. The IIMM aims to trigger effective engagement on gender issues with these interlocutors, in order to enhance respective capacities on gender analysis.” IIMM Strategy, p. 36.

Recommendation: Request information, evidence and analysis from the IIMM and ICC on gender and GBC in Myanmar, and particularly Rakhine State, including any existing analysis or reports relevant to the case as well as tailored analysis carried out for the purposes of the Argentinian case, and including with an intersectional lens.

Reliance on expert testimony could also be instrumental in assisting the Argentinian Court to understand evidence related to GBC. Either the Office of the Prosecutor or the plaintiffs may call expert witnesses according to Argentinian law.⁴⁷⁵ Engaging expert witnesses on gender constructs within Myanmar, particularly those related to the Rohingya community, for example, as well as on the nature and dynamics of GBC in Rakhine State, would be a pivotal step in ensuring the procedure fully captures the gendered nature of the crimes committed. Experts could assist in interpreting testimonies and physical evidence within the relevant context, ensuring that the court's findings are grounded in an accurate understanding of the gendered cultural, social and religious context in which the crimes were committed.

Recommendation: Engage expert witnesses in the proceedings on gender and GBC in Myanmar, particularly as they relate to the Rohingya and Rakhine State, particularly those with the expertise to reflect on and apply intersectional approaches to their evidence.

⁴⁷⁵ Expert testimony is permitted under Article 161 of the Argentine Criminal Procedural Code. See, Artículo 161, El DECRETO N° 118/2019 B.O.8/2/2019 por el cual se aprueba el texto ordenado del CÓDIGO PROCESAL PENAL FEDERAL, aprobado por la Ley N° 27.063 con las incorporaciones dispuestas por la Ley N° 27.272 y las modificaciones introducidas por la Ley N° 27.482, el que se denominará "CÓDIGO PROCESAL PENAL FEDERAL (T.O. 2019)", que como ANEXO I (IF-2019-05102811-APN-MJ) forma parte del Decreto de referencia).

V. Conclusion

The ongoing pursuit of gender-competent justice for serious crimes in Myanmar reveals both progress and persistent challenges. Various international accountability mechanisms, including the ICC, the IIMM, and the ICJ, have made significant strides in integrating gender perspectives into their investigations and analyses. These efforts have underscored the importance of addressing the unique gendered harms that arise in contexts of mass violence, as well as recognizing the intersectional nature of these harms as they relate to ethnicity, gender identity, and sexual orientation.

While the advancements made by these mechanisms are notable, each faces unique challenges and opportunities for growth. The recommendations in the report emphasize the necessity for improved coordination among international mechanisms, more proactive outreach to affected communities—especially marginalized groups—and the inclusion of gender expertise at every stage of investigations and prosecutions. Key recommendations include the need for better gender analysis, targeted capacity-building, and ensuring that legal charges fully capture the gendered nature of crimes. Additionally, the report calls for enhanced transparency and public information efforts, particularly in areas where survivors have limited access to resources and information.

As various judicial and investigatory bodies move forward, it is vital to maintain a coordinated and transparent effort, ensuring that all voices, particularly those from marginalized and vulnerable groups, are heard and acknowledged. This report highlights that while the trajectory toward gender-inclusive justice is positive, sustained commitment and enhanced collaboration are needed to fully realize the goals of accountability and reparations. Only then can the justice process genuinely address the gendered dimensions of these atrocities, contributing to long-term empowerment and healing for all affected communities in Myanmar.

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International
Commission
of Jurists

P.O. Box 1740
Rue des Bains 3
CH 1211 Geneva 1
Switzerland

t +41 22 979 38 00
f +41 22 979 38 01
www.icj.org