Court Ruling Opens Bumpy Road for Myanmar Prosecutions

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A landmark decision by the International Criminal Court begins an obstacle course for prosecutors seeking to put Myanmar military commanders on trial for the purge of ethnic Rohingya, while opening the door to other potential cases involving mass exodus, such as Syria.

The crackdown on the Rohingya killed around 10,000 people and sent some 700,000 fleeing into neighboring Bangladesh; a call by United Nations investigators for genocide prosecutions appeared fruitless because Myanmar isn’t a member of the ICC and has China’s backing in the Security Council.

‘It’s significant for the Rohingya case because it’s at least a narrow path for some accountability for the crimes committed,’ said Alex Whiting, a Harvard Law School professor who previously oversaw investigations for the court.

Numerous hurdles remain and it could be years before any charges are brought for alleged crimes against the Rohingya.

For prosecutors, the next step after the split decision by ICC judges—who determined the Hague-based court has jurisdiction because Bangladesh has signed on to its authority—is for prosecutors to apply to the judges to open an investigation.

Even that step requires legal legwork, such as establishing that Myanmar has no adequate national mechanism for accountability.

Under Thursday’s decision, any charges brought would be limited to alleged crimes that took place in Bangladesh, such as illegal deportation.

Charges such as murder or torture that took place in Myanmar couldn’t be prosecuted based on the ruling, unless a cross-border dimension is established.

Myanmar rejected the court’s decision on Friday, saying it was ‘of dubious legal merit.’ The office of Myanmar’s president’s said the court had been placed in an ‘emotional bind’ from reading Rohingya testimonies.

Legal experts said the court would face hurdles if it gets to the stage of charging suspects and issuing arrest warrants since Myanmar has rejected its authority to exercise jurisdiction there. The court has struggled in the past to enforce arrest warrants in such cases, such as in Sudan, where President Omar al-Bashir is shielded from an arrest warrant for alleged war crimes.

U.N. investigators, advocacy groups and journalists have documented village burnings, rape and killings by Myanmar soldiers and militia allies against the Rohingya since Aug. 25 last year, following attacks on security forces by Rohingya militants.

A U.N. investigation has said Myanmar leader Aung San Suu Kyi, a Nobel peace laureate, bears a degree of responsibility for crimes against the Rohingya. But any future prosecution would likely focus on members of the military, as they had ultimate command responsibility, said a lawyer with experience at the ICC.

Myanmar generals have faced limited consequences, mostly in the form of sanctions by the U.S., the European Union and Canada. Ms. Suu Kyi has said the military was acting in response to terrorist attacks.

The court’s ruling could have a broader impact, by setting a precedent allowing it to exercise jurisdiction in conflicts from which it has previously been barred. Those include the war in Syria, a non-signatory to the court; the flight of Syrians to Jordan, a member of the court, could allow the court some jurisdiction.

‘It’s a sort of foot in the door for the ICC to have something to say about atrocities occurring in places where we might have thought they couldn’t reach,’ said Mr. Whiting, of the legal argument advanced by the court’s decision.

The U.S., which isn’t a member of the court, has opposed moves to extend the court’s jurisdiction over nationals of non-signatory countries—such as its attempt to investigate U.S. soldiers for alleged crimes in Afghanistan—absent a Security Council referral or the consent of the non-signatory state.

A State Department official said the U.S. was aware of the ICC’s decision, but didn’t comment further on the court’s role.

‘The United States continues to work with our allies and partners to explore options to help ensure that there will be justice for victims and that those responsible for atrocities and other human-rights violations and abuses will be held accountable, including for atrocities committed in Burma, including Rakhine, Kachin and Shan States,’ the official said.

The Myanmar government led by Ms. Suu Kyi, which runs Myanmar in partnership with a military that controls the security portfolios, has largely refused access by international investigators and news media to affected areas within its borders.

Kyaw Hla Aung, a Rohingya lawyer living in Myanmar who has spent years in prison for advocating for the rights of the long-persecuted minority, said the ICC decision would put pressure on Myanmar’s government and could lead to greater cooperation with the U.N. to guarantee the group’s safety.

But Soe Myint Aung, a Myanmar political analyst, said he feared the ICC’s decision would ‘only contribute to deepening the political crisis as well as the Myanmar public’s mistrust of international institutions.’

The Rohingya are regarded in Myanmar as illegal migrants from Bangladesh, though many have been in the country for generations.