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Briefing Paper:

Myanmar and the International Criminal Court

15 December, 2022



**Special Advisory Council for
Myanmar**

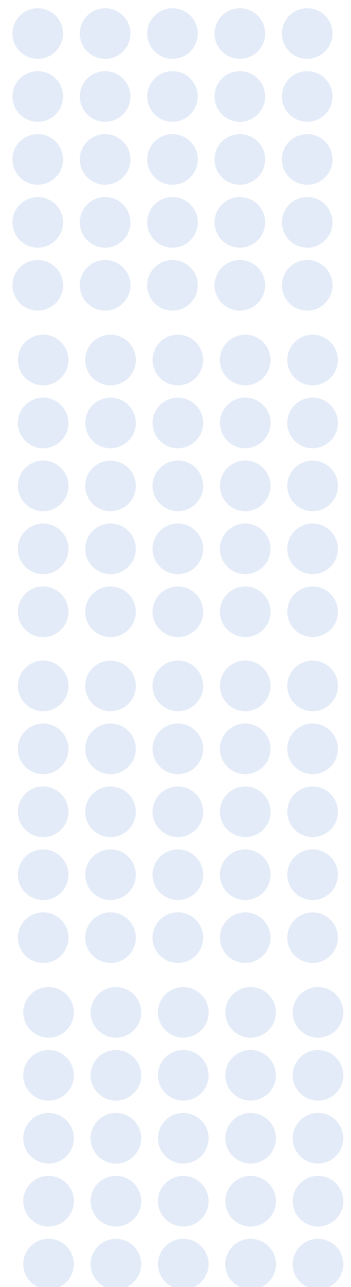


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Introduction

In response to widespread human rights atrocities in Myanmar following the military's attempted coup in February 2021, the Myanmar public and civil society have called for criminal prosecutions in the International Criminal Court (ICC) to hold the leaders of the military to account. These calls, however, have not yet been acted upon by the ICC, on the presumed basis that the Court does not have jurisdiction over the alleged international crimes.

This briefing paper gives a short explanation of the ICC, the ways in which the ICC can gain jurisdiction over crimes in different countries, and how the ICC investigates crimes and prosecutes individuals. The paper concludes that the ICC has jurisdiction in relation to Myanmar as a whole, dating back to 2002, and that the international community has a responsibility to ensure that the leaders of the Myanmar military are prosecuted for genocide, crimes against humanity and war crimes without further delay.



Background

- ❖ Human rights violations and abuses throughout Myanmar amount to the most serious crimes under international law, warranting investigation and prosecution at the international level. The primary perpetrators are members of its terrorist military, who continue to enjoy impunity which, in turn, fuels the commission of further violations.¹
- ❖ Currently the ICC is investigating certain crimes against Rohingya who entered Bangladesh as refugees from Myanmar. But the ICC is not fully investigating the atrocities that the Rohingya have experienced, on the presumed basis that it has no jurisdiction for gross human rights violations happening throughout Myanmar, including those perpetrated since the attempted military coup in 2021.
- ❖ The United Nations (UN) Independent Investigative Mechanism for Myanmar (IIMM) is investigating and developing case files on crimes occurring throughout Myanmar, but it is not a court, and it cannot initiate arrests and prosecutions.
- ❖ So, currently, there is still no international court that is both willing and able to be fully seized of atrocities in Myanmar, despite Myanmar's National Unity Government (NUG) accepting ICC jurisdiction throughout the country, and other referral options remaining available.
- ❖ The international community must address this accountability gap by supporting a full investigation on Myanmar by the ICC and the prosecution of leaders of the military for alleged international crimes. Such moves are critical to facilitate justice for Myanmar and to deter further atrocity crimes from being repeated.

What Is the ICC?

The ICC was established in 2002 by a treaty, the Rome Statute 1998. Its purpose is to hold individuals accountable for serious crimes under international law and to facilitate justice for victims. The ICC is based in the Hague in the Netherlands, and its investigators and staff travel around the world. The ICC is not formally part of the UN system, but it does have links to it.²

The normal situation globally is for crimes to be tried in the State where they occur. Ideally, there could be fair trials in Myanmar, examining crimes under international law, yet that seems unlikely to be possible anytime soon. Courts in Myanmar under the control of the military are not independent and do not meet international standards of justice and the rule of law, while those in ethnic areas and under resistance authorities face severe capacity and other constraints due to the military's ongoing attack on the population. The ICC exists for these situations, where domestic authorities are unable or unwilling to facilitate justice themselves.

The ICC focuses on the most serious crimes under international law: acts of genocide, crimes against humanity, and war crimes.³ These crimes are listed in the Rome Statute.



Currently, 123 States from across the world are parties to the Rome Statute and so accept the jurisdiction of the ICC. In 2022, Myanmar's NUG committed to Rome Statute ratification in its addendum submission to the UN Universal Periodic Review (UPR).⁴

The Court conducts trials against individuals alleged to have perpetrated the crimes listed above. Like domestic criminal law, the Court's focus is on the criminal responsibility of individuals. The ICC cannot investigate or prosecute States, or governments, for crimes under international law. However, leaders, officials and soldiers can be investigated and prosecuted. Members of non-State armed groups can also be investigated and prosecuted.

To do this, the ICC has judges, investigators, analysts, prosecutors, and defence lawyers. Its other staff serve a variety of functions including management of detention facilities, provision of witness protection programs, and victim support activities.



Where Can the ICC Investigate?

Importantly, the ICC can only investigate and conduct trials if crimes took place in territory where the ICC has legal jurisdiction. There are four main ways in which the ICC can gain jurisdiction over a territory, and each of them offers a pathway for the investigation of crimes under international law in Myanmar:

1. ICC Membership (by State Parties)

The ICC has jurisdiction for crimes under international law (that are in the Rome Statute) in relation to countries that are Member States to the Rome Statute. If the State is unable or unwilling to effectively investigate and prosecute, then the ICC complements the State's justice system by taking on these tasks.

In 2019, ICC judges authorized prosecutors to investigate certain crimes perpetrated against Rohingya in Rakhine State in 2016 and 2017, which had partly taken place in Bangladesh. Bangladesh is a member of the

ICC, but Myanmar is not. So, where at least one element of a crime covered by the Rome Statute is perpetrated in Bangladesh (such as the crime against humanity of forced deportation) the ICC has jurisdiction, despite Myanmar not being an ICC member. However, this means that crimes not involving Bangladesh, such as acts only taking place inside Myanmar, cannot come under ICC jurisdiction on this basis.

2. Declaration by Non-States Parties

If a State not already a Party to the Rome Statute wants to facilitate justice but is unable to do so, it can make a declaration to refer a situation to the ICC, enabling the court to then exercise jurisdiction.⁵ This is provided for under Article 12(3) of the Rome Statute.

For example, in 2014, the State of Palestine lodged such a declaration, eventually leading to the opening of an ICC investigation. The referral can also be a pathway to membership.

In July 2021, several months after the Myanmar military's unlawful attempted power grab, the country's NUG lodged a declaration accepting ICC jurisdiction in Myanmar since 1 July 2002. This was submitted by the Acting President who as Head of State is duly authorised to do so under international law.⁶

This declaration should grant the ICC authority to investigate the situation in the entire territory of Myanmar, for which investigations are clearly warranted, as has been noted by authoritative UN entities, and by civil society.⁷ However, it appears that such investigations have not commenced, and that Myanmar's declaration remains embroiled in the ongoing failure of the international community to recognise its legitimate government. The UN General Assembly has refused to recognise the illegal military junta as the representative of Myanmar and continues to accept the appointee of the NUG as the representative of Myanmar, although the UN International Court of Justice appears to have taken a divergent approach. The ICC is legally entitled to accept the Article 12(3) Declaration made by the NUG as valid acceptance of the Court's jurisdiction in Myanmar⁸ but the ICC's position on this is unclear.⁹

In any case, the UN IIMM is mandated to investigate the entire situation in Myanmar since 2011 and has cooperation arrangements in place to share information with the ICC. The case files of the Mechanism should assist the ICC in building prosecutions for crimes perpetrated outside the relatively limited scope of the Bangladesh/Myanmar situation, if the ICC were to accept the NUG's declaration.

3. Referral by States Parties

State Parties to the Rome Statute can request the ICC's Prosecutor to initiate an investigation, which can include instances whereby the situation is not covered by State

Party membership of the Rome Statute. The Rome Statute's Article 14 provides for this.

For example, in March 2022, 39 State Parties to the Rome Statute referred the situation in Ukraine to the ICC, after which the Prosecutor announced the opening of an investigation.¹⁰ Although Ukraine is not a State Party to the Rome Statute, it had previously made Article 12(3) declarations accepting the Court's jurisdiction, which was part of the justification for the referral. Similarly, as Myanmar's NUG has submitted the same type of declaration, this route to a full investigation can and should be pursued for Myanmar.

4. Referral by the UN Security Council

Even if a State is not a party to the Rome Statute, the UN Security Council can refer a situation to the ICC if it is deemed to constitute a threat to international peace and security.¹¹ This would enable the ICC to investigate the situation in the entire territory of Myanmar, including crimes under international law persistently being perpetrated by soldiers against populations in most, if not all, parts of the country.

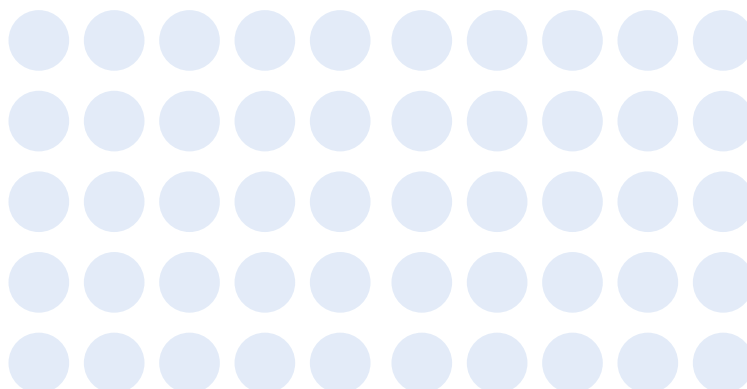
For a referral to take place, at least nine of the Security Council's 15 members must vote in support of a resolution on referral, with no use of veto power against it by any of the five permanent members (China, France, Russia, UK and US).¹²

The first case the Security Council referred to the ICC was the situation in Sudan's Darfur region in 2005. Then in 2011, the situation in Libya was referred, with Security Council members acting in reference to the "responsibility to protect" (R2P) principle. Yet, since then, and generally, the Security Council has failed to take actions under R2P, including by not using its authority to refer the situation in Myanmar to the ICC.¹³

So far, no Security Council member has sought to refer the Myanmar situation to the ICC. The UK, which is historically the lead drafter of resolutions on Myanmar, has not tabled such a resolution on the basis it would be vetoed by another permanent member, for example Russia or China, with close ties with the junta. But Security Council members have not been deterred by the prospect of vetos in relation to other countries: for example, in February 2022, the US and Albania tabled a resolution condemning Russian aggression against Ukraine, despite the inevitability of Russia exercising its veto. Subsequently, in April 2022, the General Assembly adopted a landmark resolution aimed at discouraging and increasing accountability for use of veto powers in the Security Council.¹⁴

If the UK or another State were to propose that the Security Council refer the situation in Myanmar to the ICC, the process and vote would further demonstrate the junta's isolation in the international community. Even if the vote was unsuccessful, this would show that the Security Council is dysfunctional and unable to address the situation, which may prompt the General Assembly or the Human Rights Council to consider stronger action. Either the General Assembly or the Human Rights Council could, for example, seek to address the accountability gap by establishing a special tribunal for Myanmar, complete with a court to host trials.

In July 2021, Myanmar's National Unity Government lodged a declaration accepting ICC jurisdiction in Myanmar since 1 July 2002.





This picture, obtained from a Buddhist village elder and published by Reuters, was taken during what has come to be known as the “Inn Din” massacre. The Inn Din massacre occurred during the atrocities committed against the Rohingya in Rakhine State in 2016 and 2017. Those responsible for the atrocities have still not been held to account for their crimes.

How Does the ICC Investigate and Prosecute?

ICC investigators seek to travel to crime scenes to gather information and evidence. To investigate the Bangladesh/Myanmar situation, ICC investigators have travelled to Bangladesh, but they have not travelled to Myanmar, primarily because they have been denied visas by Myanmar authorities. This makes evidence collection more difficult but not impossible. Information can be gathered by meeting people outside Myanmar, by talking to people inside Myanmar remotely through online channels, and also by collecting relevant information available in documents, videos, photographs and satellite imagery or on the internet. Once investigators have built case files, the ICC Prosecutor will decide whether to pursue this through issuing an indictment,

after which there is the possibility of a trial if the perpetrator can be detained and transferred to the Hague.

A challenge for these processes and decisions is that the ICC does not always have the necessary financial and human resources to conduct their activities effectively. Another challenge is that investigating crimes under international law tends to be more difficult than investigating domestic crimes. This is because more criteria must be met to prove an individual is responsible for the crime, which means that more information is often required.¹⁵ For example, for the “crime against humanity of murder” several criteria must be met, including

that more than one killing must have taken place, and that they happened during an attack against a civilian population.

Historically, usually individuals with the highest level of responsibility are prosecuted, rather than lower-ranked soldiers. This could be a military commander who has ordered the crimes. It could also be a government official. To effectively prosecute such individuals, it must be demonstrated beyond reasonable doubt that they knew or ought to have known about the crimes taking place, as well as several other criteria including those noted above. Lower-ranked soldiers and officials can provide useful information to help to build the case, and, depending on the circumstances, they could also be prosecuted.

Investigators tend to look for two main types of evidence: “crime base” and “linkage”. The crime base information is about what happened at the crime scene, for example a video or photo or witness testimony about an event. It could include footage from somebody’s mobile phone or a CCTV camera. It could include an interview with someone who witnessed the event. It could also include an autopsy report. The linkage information is about how somebody who was not at the crime scene may have been linked to the crime, for example a military commander who was not at the crime scene but who was involved in planning or ordering crimes. Linkage information can include documents about command structure, orders and rules, communications, emails and Messenger chats. The most useful linkage information is from “insiders”: people from inside the military or government, usually at high-level, who can speak with authority and experience about relationships and communications between senior officials and events on the ground.

All types of evidence are critical for an investigation to be effective. If the quality and quantity of evidence becomes sufficient, as a court the ICC can issue an “indictment” against an individual, calling for the arrest.

For this to take place against high-level officials, linkage evidence is required to show how they are criminally responsible for things that are happening on the ground. This type of evidence also tends to be difficult to obtain.

Before a trial can start, the alleged perpetrator must be taken into the custody of the ICC. Often this is challenging, particularly if suspects do not travel internationally. The ICC has no police force of its own, so relies on other States Parties to the Rome Statute to act upon their obligations to detain suspects, should that suspect travel through their country. If arrested and transferred to the Hague, the trial will commence. The accused person will have all the rights associated with due process and natural justice, in accordance with international standards of justice, including the right to legal counsel, the presumption of innocence and the right to appeal. If convicted, the accused will be likely to serve significant time in prison, either in the Hague or in another country willing to host them.

Victims also have rights in these proceedings, including to participate at each stage. For example, Rohingya refugees in Bangladesh have had opportunities to meet with ICC representatives, to share their views and learn about the process. Victim testimony is also an important and powerful part of the justice process, to make the prosecution effective, but also to allow victims an opportunity to share their experience. The ICC also has authority to order measures to assist victims of crimes, for example by requiring a convicted perpetrator’s assets to be redistributed to victims.

Conclusion

The ICC's Prosecutor has rightly taken proactive steps to address crimes perpetrated by Myanmar's military, by initiating an investigation into crimes against the Rohingya. However, the investigation is limited to only those crimes with a cross-border element, principally the crime against humanity of forced deportation from Myanmar into Bangladesh. So, it does not cover the full extent of the crimes perpetrated against the Rohingya, including possible genocide. SAC-M has also heard from Rohingyas who are frustrated that the process appears to be moving quite slowly, with accountability considered central to creating conditions conducive to Rohingya returning home to Myanmar from refugee camps in Bangladesh.

Legal grounds exist for the ICC's investigation to extend to all crimes perpetrated by Myanmar's military against the Rohingya, and also to all crimes in the Rome Statute perpetrated against civilians throughout Myanmar since 2002, including crimes perpetrated for many years against ethnic minorities throughout the country, and crimes perpetrated against civilians more broadly and particularly following the attempted coup of February 2021. These grounds include the Article 12(3) declaration by Myanmar's NUG accepting ICC jurisdiction, a referral by the UN Security Council, or a referral by other States Parties to the Rome Statute. With multiple routes to ICC jurisdiction available, and the ongoing widespread commission of human rights violations amounting to the most serious crimes under international law in Myanmar, the international community has a responsibility to ensure that leaders of the Myanmar military are prosecuted for genocide, crimes against humanity and war crimes without further delay.

If none of the available measures is pursued to expand the current ICC investigation, then the international community should consider robust alternative action to address the accountability deficit, such as establishing an ad hoc international criminal tribunal through the UN General Assembly or the UN Human Rights Council. Such a tribunal could provide a forum to use the case files produced by the UN IIMM, and to begin conducting trials in cases where perpetrators can be identified and arrested.

The Special Advisory Council for Myanmar is a group of independent international experts, who came together in response to the military's attempted coup of February 2021 in Myanmar, to support the peoples of Myanmar in their fight for human rights, peace, democracy, justice and accountability. For information about SAC-M and details of our work, please visit -

<https://specialadvisorycouncil.org/>

¹ For a discussion of these acts, see for example: SAC-M, "Briefing Paper: The Myanmar Military is a Terrorist Organisation Under Law," 14 December 2021, available at: <https://specialadvisorycouncil.org/2021/12/briefing-paper-the-myanmar-military-is-a-terrorist-organisation-under-law/>.

² The UN Security Council can refer situations to the ICC for investigation, and the UN Independent Investigative Mechanism for Myanmar has arrangements in place to share information with the ICC regarding crimes.

³ The crime of aggression was inserted to the Rome Statute by resolution RC/Res.6 of 11 June 2010. However not all States Parties have ratified it at this stage. Broadly, the crime of aggression refers to illegal attacks by one State on another State (consider the Russia/Ukraine case).

⁴ Paragraph 37 of the UPR addendum submission states: "Myanmar will accede to the Rome Statute of the International Criminal Court (ICC) and extends its full cooperation to the ICC."

⁵ Article 12(3) of the Rome Statute of the ICC.

⁶ According to a statement posted to the Twitter account of the National Unity Government on 20 August 2021, see: <https://twitter.com/nugmyanmar/status/1428739347717648389?lang=en>. Note that a "lawfully accredited representative" typically means someone who has clearly been authorised, by the Head of State or Head of Government or Foreign Minister, with "full powers" to enter agreements on behalf of the State. This authority can only be delegated to a specific person, not to an office or diplomatic position. See the 1969 Vienna Convention on the Law of Treaties, Article 7: "1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if: (a) he produces appropriate full powers; or (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers. 2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State: (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty; (b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited; (c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ."

⁷ See for example: UN IIMM, "Evidence of crimes against humanity in Myanmar escalate, with women and children severely impacted, according to Myanmar Mechanism Annual Report," 9 August 2022, available at: <https://iimm.un.org/press-release-evidence-of-crimes-against-humanity-in-myanmar-escalate-with-women-and-children-severely-impacted-according-to-myanmar-mechanism-annual-report/> (accessed August 2022).

⁸ See: Myanmar Accountability Project (MAP) "Legal Opinion: In the Matter of the Statute of the International Criminal Court and the Matter of the Declaration Made by the National Unity Government as the Republic of the Union of Myanmar Accepting the Jurisdiction of the International Criminal Court," 16 August 2022, available at <https://the-world-is-watching.org/wp-content/uploads/2022/08/Wilde-Burma-ICC-opinion-15-Aug.pdf>

⁹ The ICC's Prosecutor has stated that he engages with States rather than governments. See: "ICC prosecutor for working with Myanmar," 28 February 2022, available at: <http://newagebd.net/article/163942/icc-prosecutor-for-working-with-myanmar> (accessed August 2022). For further discussion of the issue of recognition of governments, see the following SAC-M briefing papers: "Recognition of Governments," 22 August 2021, and "Myanmar's Representation in the United Nations," 11 August 2021, both available at: <https://specialadvisorycouncil.org/briefings/>. See also: "ICJ Judgement on Preliminary Objections Welcome, but Court Must Rectify Myanmar's Representation and More States Must Intervene in the Case," 23 July 2022, available at: <https://specialadvisorycouncil.org/2022/07/icj-judgement-un/>.

¹⁰ See: <https://www.icc-cpi.int/ukraine>.

¹¹ Authority under Chapter 7 of the UN Charter, read with Article 13(b) of the Rome Statute.

¹² The UN Security Council has five permanent members alongside ten States whose membership is on a rotating basis for terms of two years. For a list of members, see: <https://www.un.org/securitycouncil/content/current-members>.

¹³ See: SAC-M, "Briefing Paper: The Responsibility to Protect (R2P) in Myanmar," 1 September 2021, available at: <https://specialadvisorycouncil.org/2021/09/briefing-paper-the-responsibility-to-protect-r2p-in-myanmar/>.

¹⁴ See: "General Assembly Adopts Landmark Resolution Aimed at Holding Five Permanent Security Council Members Accountable for Use of Veto," 26 April 2022, available at: <https://press.un.org/en/2022/ga12417.doc.htm> (accessed August 2022).

¹⁵ These criteria are detailed in the Rome Statute and also the ICC's "Elements of Crimes" document, available at: <https://www.icc-cpi.int/sites/default/files/ElementsOfCrimesEng.pdf> (accessed August 2022).