

The International Criminal Court (ICC) & Myanmar

Part 1 — Options for Jurisdiction

This handout (Part 1) is about the options for the ICC to have jurisdiction in Myanmar. See Part 2 about the current ICC investigation related to crimes that took place at least in part in Bangladesh.

ICC jurisdiction

There are different options for the ICC to be able to investigate and prosecute crimes committed in a country (that is, for the court to have “jurisdiction”), and they depend on whether the state is a member of the ICC or not. Being a member of the ICC is called being a “State Party” to the Rome Statute, which is the treaty that created the ICC.

When the crimes were committed in a State Party (or by a national of a State Party):

- A State Party may refer the situation to the Court,
- The ICC Prosecutor may initiate an investigation on his own initiative, or
- The UN Security Council may refer the situation to the Court.

When the crimes were **not** committed in a State Party (or by a national of a State Party):

- The State where the crimes took place may make a “declaration” accepting the jurisdiction of the ICC for a specific situation, or
- The UN Security Council may refer the situation to the Court.

There are therefore several ways that the ICC could be allowed to take action in relation to Myanmar, as described below.

Current investigation

There are different options for the ICC to be able to investigate and prosecute crimes committed in a country (that is, for the court to have “jurisdiction”), and they depend on whether the state is a member of the ICC or not. Being a member of the ICC is called being a “State Party” to the Rome Statute, which is the treaty that created the ICC.

UN Security Council referral

The UN Security Council has the power to make a referral of the situation of Myanmar to the ICC. Such a referral could have retroactive effect, giving the ICC jurisdiction to examine the crimes committed in Myanmar in the past (Article 13(b) of the ICC Rome Statute). This is something civil society and some UN bodies have long called for. In practice, it is extremely unlikely that this will happen, as any of the permanent members of the UN Security Council (including China and Russia) has the power to veto its resolutions and can therefore block a possible referral.

Becoming a State Party (accession)

The main way for the ICC to be able to investigate and prosecute crimes committed in a country is for the State where the crimes occurred to become a “State Party” to the ICC Rome Statute. To do that, representatives of the State need to send a formal document called an “instrument of accession” to the UN Secretary General (Article 125(3) of the ICC Rome Statute).

Once a country becomes a State Party, the ICC is able to investigate and prosecute crimes committed after the State became a member of the ICC (but the State can also make a declaration to cover situations from the past – *see below*)

As of November 2021, no representatives of Myanmar have tried to file an instrument of accession. Myanmar has not tried to become a State Party. The National Unity Government (NUG) has filed a “declaration”, which is different (see below). If the NUG were to file an instrument of accession, the UN Secretary General would have to decide if the NUG is the legal representative of the Myanmar State. He would probably look to the position of the UN General Assembly and other UN bodies on the issue.

Declaration accepting ICC jurisdiction

Another way for the ICC to be able to investigate and prosecute crimes committed in a country is for the State to make a “declaration” saying it accepts the jurisdiction of the ICC for a specific situation (for example, a specific timeframe), in accordance with article 12(3) of the Rome Statute. The State can decide, in the declaration, the date when it wants the ICC to start having jurisdiction. It can be retroactive (that is, starting from a date in the past) as long as it is after the date the ICC was created (July 2002).

The National Unity Government (NUG) stated that, on 17 July 2021, they “lodged a declaration with the Registrar of the ICC, accepting the Court’s jurisdiction with respect to international crimes committed in Myanmar territory since 1 July 2002.”

The ICC Registrar and Prosecutor need to decide if they accept the declaration by the NUG. They have to decide whether the NUG is the legal representative of the Myanmar State. They would probably follow a determination by the UN General Assembly.

As of December 2021, we do not know when the ICC will make a decision on whether to accept the declaration. Based on past experience, unless the UN General Assembly makes an explicit determination that the NUG is the legal representative of Myanmar, there is little chance that the ICC will accept the declaration.

Possible engagement by civil society

Civil society can:

- Help explain the ICC and its limitations to the general public.
- Lobby ICC departments to do outreach and provide public information to all Myanmar communities.
- Provide evidence to the Prosecutor (including via the IIMM).
- Advocate & lobby the ICC Prosecutor to accept the declaration and to inform the public about the process.
- Advocate for Myanmar to take the steps to become a State Party to the ICC (accession).
