

FACTSHEET | JULY 2020

## Q&A: The International Criminal Court Investigation into the Situation in Bangladesh/Myanmar

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On 14 November 2019, the International Criminal Court (“ICC” or “the Court”) authorized the Court’s Prosecutor to investigate alleged international crimes occurring during a wave of violence in Rakhine State, Myanmar in 2016 and 2017. The investigation follows a brutal campaign of violence by Myanmar’s security forces against Myanmar’s Rohingya Muslims. These so-called “clearance operations” were conducted through widespread and systematic murder, [rape and sexual violence](#), and other abuses that forced more than 740,000 Rohingya to flee to Bangladesh.

The ICC Prosecutor’s investigation, and any prosecutions that result, is one process among many aimed at accountability for crimes committed by Myanmar’s security forces (Tatmadaw). While somewhat limited in scope, the investigation carries the potential to hold individuals responsible for grave violations against the Rohingya and other ethnic minorities.

**This fact sheet answers fundamental questions about the ongoing ICC investigation and individual criminal responsibility for crimes committed against the Rohingya.**

### 1. What is the ICC and how is it different from other international courts?

The ICC is a permanent international court empowered to investigate and prosecute individuals for the crimes of genocide, war crimes, crimes against humanity, and aggression. Established by an international treaty called the Rome Statute, the ICC is an independent mechanism that operates as a court of last resort—only stepping in when domestic courts are unable or unwilling.

The ICC is not the same court as the International Court of Justice (“ICJ”). The ICJ, or World Court, is the United Nations’ (“UN”) principal judicial organ. The ICJ settles international legal disputes between states and provides advisory opinions on questions of international law for certain UN organs and specialized agencies. The ICJ does not adjudicate criminal cases.

The main differences between the ICC and the ICJ are the types of cases each hears, the parties to those cases, and the type of legal responsibility they determine. The ICC hears *criminal* cases about whether an *individual* person committed a *crime*; the ICJ *resolves disputes* between *states* about questions of *public international law*.

### 2. How is the ICC’s Prosecutor able to investigate crimes against the Rohingya and other groups?

There are four ways for the ICC to exercise its jurisdiction: (1) the alleged crimes were committed in the territory of a State Party to the Rome Statute; (2) the alleged perpetrator is a national of a State Party to the Rome Statute; (3) a State not party to the Rome Statute chooses to accept the Court’s jurisdiction; or (4) the UN Security Council refers the situation to the Court’s Office of the Prosecutor (“OTP”). The investigation into crimes against the Rohingya and other groups is based on the first of these jurisdictional grounds—the alleged crimes occurred in a State Party to the Rome Statute. Notably, the way in which the Court is approaching territorial jurisdiction in this case is new.

Myanmar is not a State Party to the Rome Statute. Thus, since none of the other bases of jurisdiction exist, the ICC does not have authority to investigate crimes that occurred entirely within Myanmar’s territory.

However, Bangladesh is a State Party to the Rome Statute, and certain of the crimes allegedly committed by the

*Tatmadaw* entailed Rohingya refugees crossing the Myanmar-Bangladesh border. Accordingly, the [Court decided](#) that since several principles of international law allow for jurisdiction over transboundary crimes, the OTP can investigate crimes where at least one element of the crime occurred within Bangladesh. Stated another way, the Court has jurisdiction over an alleged crime where at least one element of the crime occurred in the territory of a State Party to the Rome Statute. Since Bangladesh is a State Party to the Rome Statute and since elements of certain alleged crimes occurred once the Rohingya crossed the Myanmar-Bangladesh border, the ICC can exercise jurisdiction over those crimes.

Notably, while any charges resulting from this investigation will have to meet these criteria, other crimes outside of the ICC's jurisdiction can be investigated to provide context for the alleged crimes within its jurisdiction. Furthermore, the Security Council could still decide to refer the situation to the OTP. Doing so would broaden scope of the Prosecutor's investigation to include crimes occurring entirely inside Myanmar.

### 3. Which crimes is the Office of the Prosecutor investigating?

Technically, as stated above, OTP may investigate any war crime, crime against humanity, act of genocide or aggression where one element of that crime occurred in Bangladesh and where the crime is sufficiently linked to the waves of violence accompanying the *Tatmadaw's* so-called "clearance operations" in Rakhine State beginning in 2016. However, the Prosecutor has indicated she is focusing on the crimes against humanity of deportation or forcible transfer, persecution on the grounds of ethnicity and/or religion, and other inhumane acts.

In the context of the OTP's investigation, the "crime of deportation or forcible transfer" [entails](#) coercive acts forcing the victim to leave an area in which they are lawfully present to go to another State or location; the crime of persecution [entails](#) deportation and intentional and severe deprivation of the right to return; and the crime of "other inhumane acts" [entails](#) infliction of great suffering or serious injury by intentionally and severely violating the right of displaced persons to return safely and humanely to their State of origin.

However, the Prosecutor has [been clear](#) that should evidence of other crimes within the Court's jurisdiction arise, her investigation will include them.

### 4. What other international efforts are currently under way to hold either the state of Myanmar or individuals accountable?

There are currently two main avenues for achieving international legal accountability for the *Tatmadaw's* crimes: (1) individual criminal responsibility; and (2) Myanmar's responsibility as a state. These efforts are complementary and each serve as a crucial aspect of realizing justice.

As described above, the ICC investigation is concerned with individual criminal accountability—the investigation may result in indictments and prosecutions of individuals for crimes against the Rohingya or other groups.

In addition to the ICC, the UN's Independent Investigative Mechanism for Myanmar ("IIMM"), established by the UN Human Rights Council in September 2018, is collecting evidence and preparing case files for the most serious international crimes and violations of international law occurring in Myanmar. The IIMM is not an accountability body in its own right—meaning there is no court or prosecutor attached to it. The IIMM's case files are intended to contribute to prosecutions of individuals in national, regional, or international criminal proceedings.

Concerning Myanmar's responsibility as a State, The Republic of The Gambia has filed a case in the ICJ under the Genocide Convention, claiming that Myanmar has failed in its obligations under the Convention by committing, failing to prevent, and failing to punish genocide against the Rohingya. For more information on The Gambia's case, see [Q&A: The Gambia v. Myanmar](#); and [Updated, Q&A: The Gambia v. Myanmar](#).

### 5. What domestic accountability efforts are underway to hold perpetrators responsible?

Domestic prosecution of international crimes could be carried out by domestic courts in Myanmar, domestic courts in another State with a jurisdictional nexus (such as Bangladesh), or in third party States under the theory of universal jurisdiction. The ICC is a court of last resort and, accordingly, it prosecutes cases only when States are unwilling or unable to do so genuinely through their domestic processes. The ICC considers these issues

(those of “complementarity”) throughout its investigations and trials.

To date, Myanmar’s domestic courts have made no meaningful efforts to hold perpetrators accountable. Myanmar’s Independent Commission of Enquiry (“ICOE”), set up in the aftermath of the so-called “clearance operations,” was marred by [failings](#) in its independence, impartiality, and methodology. According to the UN’s Independent International Fact-Finding Mission on Myanmar (“FFM”), the ICOE [did not](#) meet the standards of an “impartial, independent, effective and thorough human rights investigation.” For example, despite a finding by the FFM that sexual violence was a [hallmark of Tatmadaw operations](#),” the ICOE’s final report dismissed all reports of rape, including gang rape, by the *Tatmadaw*.

Moreover, [domestic structural barriers](#) impede accountability for perpetrators and preclude justice for victims of human rights abuses in Myanmar. Obstacles include: constitutional supremacy and autonomy of the military; constitutional guarantees of impunity; military emergency powers; and a lack of an independent and accountable judicial system.

Outside of Myanmar, in November 2019 the Burmese Rohingya Organisation UK, supported by Grandmothers of the Plaza de Mayo and the Fundación Servicio Paz y Justicia, filed a [universal jurisdiction case in an Argentinian court](#), urging the criminal prosecution of Myanmar’s senior officials responsible for the Rohingya genocide. In its 29 May 2020 decision, a Federal Appellate Court allowed the case to continue, pending a determination of the scope of the ICC’s investigation to avoid overlap. The Rome Statute does not require deference to ICC jurisdiction by domestic courts, meaning the ICC’s investigation will continue while the Argentine case proceeds.

## **6. The Tatmadaw has committed crimes against many of Myanmar’s ethnic minorities. Does the ICC investigation cover these crimes?**

While violations against the Rohingya were the primary focus of the OTP’s request for an authorization to begin an investigation, the Court noted that the Prosecutor is “not restricted to the persons or groups identified in the Request.” Accordingly, the investigation may include crimes committed against other ethnic groups as long as they are sufficiently linked to the waves of violence in Rakhine State. Crimes against other ethnic groups would have to meet the same jurisdictional requirements discussed above—namely, the territorial requirement of at least one element of an alleged crime occurring within a State Party to the Rome Statute; the requirement that the alleged crime be sufficiently linked to the so-called “clearance operations”; and the requirement that the crimes took place within a specified time period. As discussed above, the Security Council is empowered to make a full referral of the situation to the ICC. Such a referral could give the OTP breadth to prosecute a wider range of violations committed within Myanmar and against other ethnic minorities.

## **7. Who might be tried by the ICC?**

The OTP aims to charge those “most responsible” for the alleged crimes. This strategy often entails investigating and charging a limited number of high and mid-level perpetrators while building the evidence base. Lower-level perpetrators tend to be charged only if their conduct was particularly grave or carried a high level of notoriety.

The OTP is impartial and will charge perpetrators on any side of a situation where the evidence shows that they committed crimes under its jurisdiction. While the investigation is primarily based on violations against the Rohingya community by Myanmar’s security forces, the OTP will also keep under review allegations of violence by the Arakan Rohingya Salvation Army (“ARSA”) armed group and local civilians.

## **8. What is the current status of the ICC’s proceedings? What happens next?**

At present, the proceedings are in the investigation stage. Previously, the OTP was in the “preliminary examination stage.” In November 2019, the Court determined that the OTP’s preliminary examination had produced enough evidence to warrant the OTP to open an investigation. During the investigation stage, the OTP will gather evidence and identify suspects. The OTP can then request that the ICC judges issue arrest warrants or summonses to appear for the alleged perpetrators.

If the OTP identifies and obtains arrest warrants or summonses to appear, the case will proceed to the pre-trial

stage. If the accused are arrested or voluntarily present, the judges hold a confirmation of charges hearing to determine whether there is enough evidence to go to trial. If there is, a panel of three judges considers all the evidence, gives a verdict on the accused's guilt or innocence, and issues a sentence. Both the prosecution and defense are entitled to seek an appeal after the trial judgment.

## 9. What role do survivors have in ICC proceedings?

The Rome Statute grants certain rights to victims. "Victims" are defined as individuals who have suffered harm resulting from the commission of a crime within the ICC's jurisdiction. Victims can submit information to the OTP, testify as witnesses in a trial, and seek reparations. Notably, they also have the right to participate in proceedings through a legal representative. In this capacity, they can present their views or concerns to the judges independent of either the prosecution or defense.

In January 2020, the Pre-Trial Chamber ordered the Registry of the Court in collaboration with the Prosecutor to establish a system of public information and outreach activities with the affected communities. Since the order, the Prosecutor has sent a delegation to Bangladesh to explain the process and several victims have signed up to engage in the outreach efforts.

The Rome Statute also requires the Court to take reasonable measures to protect victims and witnesses' safety, dignity, and privacy. The Victims and Witnesses Unit can advise the OTP and the Court on how best to meet this duty.

## 10. What happens if the ICC finds individuals criminally responsible?

If an individual is convicted of an international crime, the Court can sentence them to a term of imprisonment, fines, and forfeiture of property and assets derived from the crimes. Typically, the maximum prison sentence is 30 years of imprisonment; but under exceptional circumstances, life in prison may be ordered. The sentences are carried out in countries that have agreed to enforce ICC sentences. Conditions of detention must be in line with international standards. The ICC cannot impose the death penalty.

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