

International Criminal Court

1. What is the International Criminal Court (ICC)?

The ICC is a court created by a treaty called the Rome Statute. It is based in The Hague, The Netherlands. The ICC has the power to investigate and prosecute persons for “the most serious crimes of international concern” (article 1, Rome Statute). These crimes are the following:

- Genocide
- Crimes against humanity
- War crimes
- Crime of aggression

The ICC complements national criminal jurisdictions. This means the ICC will not examine cases if the case in question is being investigated or prosecuted by a State-party according to its national legal system. *However*, if the State-party is unwilling or unable genuinely to carry out the investigation or prosecution nationally, or has decided not to investigate or prosecute based on unwillingness or inability to do so genuinely, the ICC can then look into the matter.

[To assess what the Myanmar Government has done, see information sheet on Accountability in Myanmar.]

2. Is Myanmar a party to the Rome Statute creating the ICC?

No. Myanmar is not a party to the Rome Statute. This means that, generally, the Rome Statute does not apply to Myanmar.

The Rome Statute has 123 State-parties globally, with 19 State-parties from Asia-Pacific. Bangladesh is a party to the Rome Statute. Therefore, the Rome Statute applies to Bangladesh.

3. If Myanmar is not a party to the Rome Statute, do the Rohingya access justice at the ICC?

Yes. The ICC Prosecutor can investigate any crime (e.g. genocide, crimes against humanity) that was committed at least in part on the territory of Bangladesh, a party to the Rome Statute, *and occurring since* 1 June 2010, the date that the Rome Statute came into force in Bangladesh.

This means the ICC can investigate past and future crimes beyond those committed during the military ‘clearance operations’ in 2016 and 2017, as long as a part of the crime occurs in Bangladesh and happened on or after 1 June 2010.

4. What are crimes against humanity?

Crimes against humanity occur when certain acts, such as **murder, torture, rape, persecution, and deportation**, among others, are knowingly directed against any civilian population as part of a widespread or systematic attack. The attack must happen multiple times showing a course of conduct reflecting a State or organizational policy.

(a) What is torture?

“Torture” means intentionally causing severe pain or suffering whether physical or mental, to a person under custody or control of the accused. It does not include pain or suffering connected with lawful sanctions.

(b) Are other forms of sexual violence included in crimes against humanity apart from rape?

Yes. Sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity are also punishable acts.

(c) What is persecution?

“Persecution” is the intentional and severe deprivation of fundamental rights from a particular group by reason of their collective identity. Persecution can be directed against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law.

(d) What is deportation?

“Deportation or forcible transfer of population” means the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, without lawful grounds.

Crimes against humanity include a whole range of acts beyond murder, torture, rape, persecution and deportation, such as:

- Extermination

Extermination includes intentionally inflicting conditions of life, such as deprivation of access to food and medicine, that is calculated to bring about the destruction of part of a population.

- Enslavement
- Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law
- Enforced disappearance of persons
- The crime of apartheid
- Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health

5. What is genocide?

“Genocide” happens when certain acts, such as killing, are committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

However, killing members of a protected group is not the only way for genocide to happen. The following acts can also form the basis of the crime of genocide:

- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;
- forcibly transferring children of the group to another group.

6. What is the difference between persecution (item 4) and genocide (item 5)?

Genocide and persecution are not the same. Persecution must occur in the context of a widespread and systematic attack against the civilian population, while genocide can be committed against either civilians or soldiers taking direct part in the hostilities.

Although both crimes target the members of a particular group and are discriminatory in nature, they also vary greatly.

For one, genocide protects a more limited scope of characteristics (national, ethnic, racial or religious), while persecution has a wider scope (political, racial, national, ethnic, cultural, religious and gender grounds, or other grounds universally recognized under international law).

Genocidal intent is the intent to destroy, in whole or in part, a national, ethnic, racial or religious group. Discriminatory intent for persecution does not need intent to destroy the group; instead, intent to discriminate against individuals based on protected grounds is enough.

7. What are the anticipated challenges of this case?

Myanmar has expressed that it will not cooperate with the ICC. This will present challenges in evidence-gathering. Further, if the Prosecutor decides to bring a case and an arrest warrant is accordingly issued by the ICC judges against one or more accused located in Myanmar, Myanmar is unlikely to help arrest the accused. The ICC has no police force and relies on the cooperation of countries who are party to the Rome Statute to execute the arrest warrant. A trial cannot take place if the perpetrators are not arrested and brought to the ICC.

8. How can the ICC protect the interests of victims throughout the proceedings?

A "victim" is a person who:

- has suffered direct harm as a result of the crime, or
- has suffered harm as a result of the crime targeting another person related to her (e.g. family member of a victim).

Victims can play three crucial roles at the ICC:

First, victims can participate in the proceedings at the ICC by providing their views and concerns during court proceedings through a lawyer who represents them in court. For instance, Rohingya groups filed a submission on 4 August 2020 with the ICC requesting the initiation of an assessment process to hold the potential trial in a venue closer to Bangladesh, where the affected groups are, instead of The Netherlands, where the ICC is located.

Second, victims can participate as witnesses during the trial stage. Victims and witnesses can benefit from psychological assistance, security and inclusion in a protection program, and travel and medical support from the ICC in accordance with ICC regulations.

Third, victims can claim reparations, which is ordered in the event of a conviction of one or more accused. Reparations can be in the form of money, return of property, rehabilitation or symbolic measures such as apologies or memorials. It can be awarded to individual victims or collectively to an entire community, such as the building of victim services centers or the taking of symbolic measures. The accused will be ordered to pay reparations to the victims of the crimes of which the person was found guilty. This can also be paid through the ICC's Trust Fund for Victims if the accused does not have sufficient resources to satisfy the Order for reparations.

9. How long will the proceedings take and what might the result be?

There is no specific time period within which the Prosecutor must complete the investigation. On average, ICC investigations last three years; as a practical matter, however, a longer duration is likely depending on how the situation came before the ICC.

There are three ways that the ICC can look into a particular situation. First, a state-party refers a situation within its territory to the ICC (self-referral). Second, the UN Security Council refers the matter to the ICC even if the matter occurred within the territory of a state-party that is not a party to the Rome Statute. Third, when the ICC Prosecutor initiates the proceedings herself. The case of Bangladesh/Myanmar falls under the third category.

Based on the situations and cases before the ICC, the situations that had the shortest investigation periods were the situations under the first option (self-referral). For example, the situations in Uganda, Central African Republic, and the Democratic Republic of Congo which have pending cases before the ICC at present were all a result of self-referrals.

In contrast, the situations that have been referred to the ICC by the UN Security Council as well as investigations that were initiated by the ICC itself have been beset with challenges. For example, the Sudan situation was referred by the UN Security Council to the ICC in 2005, and two arrest warrants were issued in 2007 against former Sudan president Omar Al Bashir. However, to this day, neither arrest warrant has been implemented despite the UN Security Council's involvement in referring the situation to the ICC. Notably, the defendant Ali Kushayb currently in ICC custody in connection with the Sudan situation was a result of Ali Kushayb's voluntary surrender, after more than a decade since his arrest warrant had been issued on 27 April 2007. It was not a result of an arrest being made.

10. How can the ICC help the Rohingya (beyond the reparations in item 8)?

An ICC investigation represents a significant step towards holding accountable the individuals most responsible for the atrocities that the Rohingya suffered in Myanmar. In a country that has known impunity for widespread gross human rights violations for more than five decades, an ICC investigation into such actions, including those that can be attributed to the military, can powerfully convey the message that no one is above the law. This could help deter future similar acts from happening in the future.

The ICC could also contribute to the dignified and safe return of Rohingya refugees to Myanmar as its proceedings deter people from committing further violations, protecting the population of Myanmar.

The ICC does have limitations. For one, even if the investigation leads to criminal charges against specific individuals, trial cannot proceed without the accused being surrendered in the ICC (see item 7). The ICC is also narrow in scope, it only focuses on the criminal accountability of the leaders involved (persons most responsible). It cannot order the amendment of laws, regulations, and practices, such as Myanmar's 1982 Citizenship Law, that contribute to the systemic discrimination against the Rohingya in Myanmar.