



Establishing an International Criminal Tribunal for Myanmar: Summary

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The international community must do more to end impunity in Myanmar.

Calls for leaders of the Myanmar military to be held accountable for the atrocities they have committed, and continue to commit, against the Myanmar people have been made for decades. Following the military's attempted coup of February 2021, calls from within Myanmar for international support in advancing accountability have grown louder. The international community has so far failed to act. Establishing an international criminal tribunal would be a practical way of responding to the calls of the Myanmar people and taking concrete steps towards justice and accountability in Myanmar.

The need for accountability is urgent.

United Nations (UN) human rights mechanisms have concluded that members of ethnic nationalities have been victims of war crimes and crimes against humanity and other human rights violations since Myanmar's independence. This includes the military's repeated campaigns of violence against the Rohingya, most recently in 2016 and 2017, during which it committed crimes against humanity, war crimes and possibly genocide. Since 2021, the military has intensified violence on the entire population of Myanmar. There are reasonable grounds to conclude that crimes against humanity and war crimes have again been perpetrated by the military and are escalating. The number of armed actors in Myanmar has also grown dramatically, and with

it the number of potential perpetrators.

Myanmar's domestic justice system is currently unable and unwilling to prosecute those accused of committing international crimes.

The justice system inside Myanmar has been crippled by military juntas over many years, making fair trials impossible. During the period of coalition government between the military and the National League for Democracy (NLD), when the justice sector received significant international investment, it continued to fall short of international standards. Since 2021, courts in military-occupied zones are not independent and operate without legal authority. Courts in areas of Myanmar under resistance control are under-resourced, and face capacity and other serious constraints. The military has a secretive internal system of justice such that its personnel, if prosecuted at all, are prosecuted by military courts in secret, with no public transparency. The situation therefore requires an international solution.

An international criminal tribunal would be consistent with calls for justice from Myanmar.

The military-NLD coalition government opposed previous efforts by the UN to advance international justice for Myanmar. This situation has now changed. Myanmar's National Unity Government



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(NUG) is responding to growing calls from the Myanmar public and is itself taking steps to advance accountability through international mechanisms. An international tribunal could therefore be created with the support and cooperation of Myanmar's government and people, making justice much more achievable.

An international criminal tribunal would be consistent with UN resolutions and recommendations.

UN bodies, the Human Rights Council in particular, but also the General Assembly and the Security Council, have repeatedly made calls for justice and accountability in Myanmar. Resolutions on Myanmar adopted by the General Assembly and the Human Rights Council following the attempted coup have emphasised the need to hold accountable those responsible for international crimes and human rights violations through independent national or international criminal justice mechanisms. An international tribunal is an international criminal justice mechanism, so is consistent with these UN resolutions.

The international community is already taking steps towards justice in Myanmar.

In 2018, the Human Rights Council established the **Independent Investigative Mechanism for Myanmar** (IIMM). The IIMM's mandate is to collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011. The IIMM is not, however, a prosecutorial body.

The Prosecutor of the **International Criminal Court** (ICC) has an open investigation into the situation of Bangladesh/Myanmar, in relation to the expulsion of Rohingya from 2016. The investigation is progress towards accountability. However, it does not cover the full extent of the crimes committed against the Rohingya, including possible genocide, or the enormity of crimes committed across Myanmar over decades. It is SAC-M's view that the ICC has full jurisdiction over Myanmar. The Prosecutor has not acted on this. Alternative avenues for the ICC to obtain jurisdiction over Myanmar also remain open. [See SAC-M Briefing Paper: Myanmar and the International Criminal Court.](#)

Under the principle of **universal jurisdiction**, States may prosecute the most serious crimes under international law as they are the concern of the entire international community, even if the crime did not occur in their territory or involve their nationals as victims or perpetrators. In recent years, there have been several cases relating to international crimes committed in Myanmar commenced under universal jurisdiction, including in Argentina and Turkey.

These mechanisms and cases all represent significant progress in achieving justice for victims in Myanmar. However, more can and must be done.

To consider what might be appropriate for Myanmar, it is useful to explore the different ways international tribunals have been, and could be, established.

The **Security Council** previously established by resolution the International Criminal Tribunal for



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the former Yugoslavia (ICTY) and, at the request of Rwanda, the International Criminal Tribunal for Rwanda (ICTR). Both tribunals had jurisdiction to try specified crimes under international law, including war crimes, crimes against humanity and genocide, and had international staff including judges, meaning that none were nationals of Yugoslavia or Rwanda.

Sierra Leone and Cambodia had what are called “**hybrid tribunals**” to try alleged perpetrators of crimes that occurred during armed conflicts in their respective nations. They were established by treaty negotiated between the UN and the respective State. These tribunals used a combination of international and domestic law, and international and domestic staff and judges.

The tribunals created following both the First and Second World Wars were established by treaty between the winning States. A more recent example of a special tribunal created by **treaty between States** is the Extraordinary African Chambers (EAC), which was created by treaty between the African Union and Senegal to try crimes committed in Chad in the 1980s. The ICC is also a treaty-based court. However, unlike most other treaty-based tribunals, its jurisdiction is not limited to a specific period or a specific situation, and it is not time limited.

The **General Assembly** created the UN Administrative Tribunal (UNAT) in 1949. The UNAT is not a criminal tribunal, but it is an independent judicial body pronouncing judgements that are binding on the UN and the General Assembly (which consists of all 193 UN member States). The General Assembly may recommend that UN member States take collective measures

to maintain or restore international peace and security under its “Uniting for Peace” procedure. It is possible that the General Assembly could create an international criminal tribunal under this procedure, using the precedent of having established the UNAT.

The **Human Rights Council** is a subsidiary of the General Assembly. Under its mandate to address situations of violations of human rights, including gross and systematic violations, the Human Rights Council could also establish an international criminal tribunal.

A proposal for Myanmar

Considering previous international tribunals as well as the unique context presented by Myanmar, an international criminal tribunal could be created through the following alternative methods:

- The NUG, representing Myanmar, could request the General Assembly or the Human Rights Council to establish a special tribunal. Either of those bodies could then: (a) ask the Secretary-General to negotiate a bilateral treaty between the UN and Myanmar establishing the tribunal or (b) adopt a resolution establishing the tribunal.
- The Human Rights Council could adopt a resolution that expands the mandate of the IIMM to attach a special tribunal where prosecutions of alleged perpetrators can take place.
- The NUG could write directly to the Secretary-General requesting he negotiate a bilateral treaty between the UN and Myanmar to



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establish a special tribunal. States that support this action could also write to the Secretary-General expressing their support.

- The NUG and ASEAN and / or any other supporting States could enter into a treaty to establish a tribunal outside the UN system.

Certain criteria for an international tribunal for Myanmar are essential, regardless of the mode used to establish it. The tribunal that is established should:

1. Have jurisdiction to try crimes under international law, including crimes against humanity, war crimes and genocide, that have occurred in Myanmar since 1 July 2002. Use of Myanmar's criminal law is not suggested.
2. Be comprised of international judges and prosecutors. Due to the historical lack of independence and impartiality of many Myanmar judges, it would not be in accordance with the norms of justice and the rule of law for Myanmar judges to be part of the international criminal tribunal.
3. Be located outside Myanmar and outside the Myanmar justice system. This is necessary for the protection of victims and witnesses as well as to ensure that the tribunal is able

to operate independently and impartially and in accordance with justice and the rule of law, away from possible interference by the Myanmar military.

Challenges and opportunities

- Identifying a suitable location for the international criminal tribunal outside of Myanmar.
- Collection of evidence by investigators, considering the ongoing violence perpetrated by the Myanmar military.
- Arrest of perpetrators, in particular senior military leaders who are not present on the battlefield but have the highest responsibility for alleged crimes.
- Enforcing the tribunal's decisions, as only the Security Council can make enforceable decisions; however, this challenge is minimised as the NUG is seeking to hold perpetrators to account.
- Funding the tribunal, which will be costly.
- Political will. Establishing an international criminal tribunal is an action that requires the international community to finally put words into actions.

Read the full report here: [Click Here](#)

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.

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