



Special Advisory Council for
Myanmar



Briefing Paper:

Establishing an International Criminal Tribunal for Myanmar

8 December 2023

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1. Introduction

This briefing paper follows previous papers by the Special Advisory Council for Myanmar (SAC-M) on Myanmar's case at the International Court of Justice (ICJ) and on Myanmar and the International Criminal Court (ICC). It is intended as a tool for advocates for justice in Myanmar who wish to call for an additional path to finally bring about accountability for victims of international crimes committed in Myanmar.

For decades, human rights activists, experts, democracy proponents, members of the international community and many others have sought for members of the Myanmar military to be held accountable for the atrocities they have committed, and continue to commit, against the Myanmar people. This impunity must end. Following its attempted coup of February 2021, the military junta has intensified violence against the Myanmar people, conducting widespread and systematic attacks.

So too have calls for justice intensified, in particular for military leaders to be prosecuted at the ICC for the full spectrum of atrocity crimes committed in the country. These calls, however, have not been acted upon. The United Nations (UN) Security Council could have referred the situation in Myanmar to the ICC, but it has failed to do so. The ICC has also failed to respond to the declaration made by the National Unity Government of Myanmar (NUG) under Article 12(3) of the Rome

Statute giving it jurisdiction over all crimes committed in Myanmar, dating back to 2002. However, as this paper will show, the ICC is not the only avenue for military leaders to be held accountable. One alternative option that should be considered by the international community is establishing a special court or tribunal to prosecute alleged international crimes committed in Myanmar. For consistency and clarity, 'tribunal' will be used throughout this paper.

There have been previous calls for an international criminal tribunal for Myanmar to be established, including by SAC-M members during their respective mandates as UN Special Rapporteur and members of the UN Independent International Fact-Finding Mission on Myanmar (FFM) covering the period of coalition government by the military and the National League for Democracy (NLD) from 2016 to 2021.¹ However, it was clear at that time that the coalition government would not cooperate with any such tribunal. The attempted coup has changed this situation immensely as the NUG, the legitimate government of Myanmar,² supports international justice and accountability and has publicly stated that a special tribunal should be established if the ICC fails to obtain and exercise jurisdiction.³ The current situation is also increasingly grave, with the people of Myanmar facing escalating violence and destruction on an unprecedented intensity and breadth, compounded by a junta-triggered humanitarian crisis. While the situation in Myanmar demands urgent international action, the response has so far been shamefully inadequate.

In this briefing paper, SAC-M argues that international partners could act by establishing a tribunal for Myanmar with the agreement and cooperation of the NUG, and then take practical steps toward holding the perpetrators of international crimes in Myanmar accountable without further delay.

There have been several UN human rights monitoring and reporting mandates established on Myanmar over the years.⁴ Further, there is a pre-prosecutorial investigative mechanism currently in place (the Independent Investigative Mechanism for Myanmar (IIMM)) and many credible domestic and international organisations are collecting evidence of international crimes. But all of this work is in vain without a jurisdiction in which prosecutions can be conducted. A tribunal with jurisdiction over all international crimes committed in Myanmar must be created to try alleged perpetrators and finally deliver justice.

¹ Special Rapporteur on Myanmar, "Report of the Special Rapporteur on the situation of human rights in Myanmar," UN Doc. A/HRC/40/68, May 2019, <https://www.ohchr.org/en/documents/country-reports/ahrc4068-report-special-rapporteur-situation-human-rights-myanmar>, and FFM, "Report of the independent international fact-finding mission on Myanmar," UN Doc. A/HRC/39/64, 12 September 2018, <https://reliefweb.int/report/myanmar/report-independent-international-fact-finding-mission-myanmar-ahrc3964-advance/>.

² SAC-M, "Briefing Paper: Recognition of Governments," 22 August 2021, <https://specialadvisorycouncil.org/2021/08/briefing-paper-recognition-of-governments/>, and SAC-M, "Effective Control in Myanmar," 5 September 2022, <https://specialadvisorycouncil.org/2022/09/briefing-effective-control-myanmar/>.

³ NUG Ministry of Human Rights, "United Nations Human Rights Council 49th session: Statement on the adoption of the resolution on the Situation of human rights in Myanmar," 2 April 2022, <https://mohr.nugmyanmar.org/en/announcements/united-nations-human-rights-council-49th-session-statement-on-the-adoption-of-the-resolution-on-the-situation-of-human-rights-in-myanmar/>.

⁴ Including a Special Rapporteur since 1992, the FFM from 2017-2019, and the Office of the High Commissioner for Human Rights (OHCHR).



2. Background

The military in Myanmar has for decades perpetrated mass atrocities and widespread human rights violations against the population. Ethnic nationality groups have been particularly targeted, including during armed conflicts waged by the military against Ethnic Armed Organisations (EAOs)/Ethnic Resistance Organisations (EROs), which are organised armed groups made up of different ethnic nationalities. UN human rights mechanisms have concluded that members of ethnic nationalities have been victims of war crimes and crimes against humanity, as well as subject to marginalisation, discrimination and other human rights violations, since Myanmar's independence in 1948.⁵ This includes the military's repeated campaigns of violence against the Rohingya group, most recently in 2016 and 2017, forcing hundreds of thousands of people to flee to Bangladesh, committing crimes against humanity, war crimes and possibly genocide. Since the attempted coup in 2021, the military has inflicted violence on the entire population of Myanmar, seeking to destroy all opposition to it and triggering and inflaming armed conflicts in different parts of the country. There are reasonable grounds to conclude that crimes against humanity and war crimes have been perpetrated since

⁵ See Independent International Fact-Finding Mission on Myanmar, <https://www.ohchr.org/en/hr-bodies/hrc/myanmar-ffm/index>, and Special Rapporteur on the situation of human rights in Myanmar, <https://www.ohchr.org/en/special-procedures/sr-myanmar>.

February 2021⁶ and have escalated significantly into and throughout 2023.⁷ Against this backdrop, it is critical that the primary perpetrator, the Myanmar military, be halted in its tracks. One key element of such action is to deliver justice.⁸

Over their decades in power, military juntas crippled Myanmar's justice system. The judiciary was not independent, fair trials were not possible and courts and the legal profession were under-resourced and lacking capacity. Even during the partial transition period after 2011 and the years following the election of the NLD led by Daw Aung San Suu Kyi in 2015, when there was massive international investment in the justice sector, the system failed to function in accordance with international standards. Similarly, legislation that contravened human rights continued to apply and to be enacted, with individuals prosecuted under spurious offences for political and other motivations. Courts in military-occupied zones since the attempted coup are not independent and operate without legal authority, rendering justice and the rule of law non-existent.⁹ Courts have also long operated in areas of Myanmar controlled by EROs and more recently by newer resistance authorities, but they are under-resourced, and face capacity and other constraints due to the military's continuing attacks against the population.

The system designed and ultimately controlled by the military has ensured both de jure and de facto impunity for the military's members. Under the flawed military-drafted and enacted Constitution of 2008 (which the military abrogated by attempting its coup in 2021), members of the military cannot be prosecuted in civilian courts for their acts.¹⁰ 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 system falls well short of international standards.¹¹ There have been very few examples of military personnel being prosecuted for crimes committed against civilians, even fewer cases of convictions and no cases of senior leaders facing justice. Clearly, the Myanmar

⁶ See the reports of OHCHR and IIMM to the Human Rights Council: Report of the United Nations High Commissioner for Human Rights, "Situation of human rights in Myanmar", UN Doc. A/HRC/52/21, 3 March 2023, <https://www.ohchr.org/en/documents/country-reports/ahrc5221-situation-human-rights-myanmar-1-february-2022-report-united>, Report of the Office of the United Nations High Commissioner for Human Rights, "Progress made and remaining challenges with regard to the recommendations of the independent international factfinding mission on Myanmar," UN Doc. A/HRC/51/41, 21 September 2022, <https://reliefweb.int/report/myanmar/progress-made-and-remaining-challenges-regard-recommendations-independent-international-factfinding-mission-myanmar-ahrc5141-advance-unedited-version>, A/HRC/49/71 (OHCHR, 23 March 2022), and IIMM, "Report of the Independent Investigative Mechanism for Myanmar", UN Doc. A/HRC/48/18, 5 July 2021, <https://reliefweb.int/report/myanmar/report-independent-investigative-mechanism-myanmar-ahrc4818>.

⁷ IIMM, "Report of the Independent Investigative Mechanism for Myanmar", UN Doc. A/HRC/54/19, 9 August 2023, <https://reliefweb.int/report/myanmar/report-independent-investigative-mechanism-myanmar-ahrc5419-enarruzh>.

⁸ SAC-M is calling for the Three Cuts: cut the cash (<https://specialadvisorycouncil.org/cut-the-cash/>), cut the weapons (<https://specialadvisorycouncil.org/cut-the-weapons/>), cut the impunity (<https://specialadvisorycouncil.org/cut-the-impunity/>).

⁹ A/HRC/49/71 (OHCHR, 23 March 2022).

¹⁰ Constitution of the Union of Myanmar 2008 section 445.

¹¹ Principle 29 of the Updated Set of principles for the protection and promotion of human rights through action to combat impunity E/CN.4/2005/102/Add.1.

military cannot be responsible for holding its members accountable when its entire *modus operandi* involves committing grave violations of international law. Research recently published by Security Force Monitor found that, since 2011, more than 60% of the senior commanders of the Myanmar military have had disappearances, killings, rape or torture allegedly committed by units under their command.¹² Little is known about the few military trials that have occurred, but it is highly unlikely that they complied with international law standards. Since the attempted coup, there does not appear to have been any trials of military personnel or leaders for alleged crimes against civilians, in spite of the multitude of crimes that have been perpetrated.

Given this situation, where it is clear that the Myanmar domestic justice system is unable and unwilling to prosecute those accused of committing international crimes, where there is no rule of law and no properly functioning independent national court system, there is no path to justice. The situation therefore demands an international solution, and it is the international system's obligation to respond.

[Why a Tribunal Is Consistent With UN Resolutions, Recommendations and Calls For Justice From Myanmar](#)

The establishment of an international criminal tribunal for Myanmar is also consistent with the calls made in the international system for justice and accountability for human rights violations and abuses in Myanmar.

UN bodies, the Human Rights Council in particular, but also the General Assembly and the Security Council, have made repeated calls for justice and accountability in Myanmar. These UN bodies are made up of UN member States that meet periodically to discuss issues and country situations of concern and to adopt resolutions that issue recommendations and mandate actions. The Security Council alone issues enforceable resolutions.

In March 2021, shortly after the attempted coup, the Human Rights Council adopted a consensus resolution that "reiterated the urgent need to ensure that all those responsible for serious international crimes and human rights violations throughout Myanmar are held to account through credible, competent and independent national or international criminal justice mechanisms".¹³ Similarly, the most recent General Assembly resolution on Myanmar emphasised the importance of "holding accountable all those responsible for brutal acts and crimes against all persons, including Rohingya, in order to deliver justice to victims using all legal instruments and domestic, regional and international

¹² Security Force Monitor, "Under Whose Command? Human rights abuses under Myanmar's military rule", <https://myanmar.securityforcemonitor.org/>.

¹³ Situation of human rights in Myanmar, Human Rights Council Resolution, UN Doc. A/HRC/RES/46/21, 24 March 2021, <https://reliefweb.int/report/myanmar/resolution-adopted-human-rights-council-24-march-2021-4621-situation-human-rights>.

judicial mechanisms”.¹⁴ These resolutions refer to “international criminal justice mechanisms” and “international judicial mechanisms”. A special tribunal is an “international criminal justice mechanism” and an “international judicial mechanism”, so its establishment would be consistent with these resolutions.

The Human Rights Council created the mandates for the Special Rapporteur on the situation of Human Rights in Myanmar and the FFM. Both have issued reports calling for those responsible for human rights violations and international crimes to be held accountable. In the case of the Special Rapporteur, those calls have been made since the Myanmar mandate was created in 1992 and, in the case of the FFM, those calls were made in 2018 and 2019 in detailed reports on the multitude of violations and crimes committed by the military since 2011.¹⁵

While the Human Rights Council and other international bodies and actors, including many States, have long called for accountability, Myanmar governments prior to the NUG rejected their efforts. For example, in 2017, the military-NLD coalition government rejected the formation of the FFM and in 2019 it rejected the formation of the IIMM, ultimately refusing to cooperate with either body. That government would almost certainly have rejected the formation of a special international criminal tribunal and refused to cooperate with it. The attempted coup has changed this situation - the NUG is responding to popular calls from the Myanmar public, has issued repeated calls for justice, and has taken concrete steps to advance accountability through international mechanisms. Most significantly, it has submitted a declaration to the ICC under Article 12(3) of the Rome Statute, stating that it accepts the Court’s jurisdiction with respect to crimes under the Rome Statute committed in Myanmar since 1 July 2002.¹⁶ Additionally, in April 2022, the NUG’s Ministry of Human Rights said that “if appropriate jurisdictions cannot be identified then one must be created in the absence of a Referral to the International Criminal Court”.¹⁷ A tribunal could therefore be created with the support and cooperation of Myanmar’s government and people, making justice much more achievable.

¹⁴ Situation of human rights of Rohingya Muslims and other minorities in Myanmar, General Assembly Resolution 76/180, UN Doc. A/RES/76/180, 16 December 2021, <https://digitallibrary.un.org/record/3954767?ln=en>.

¹⁵ Regarding the Special Rapporteur, see <https://www.ohchr.org/en/special-procedures/sr-myanmar>, and regarding the FFM, see <https://www.ohchr.org/en/hr-bodies/hrc/myanmar-ffm/index>.

¹⁶ 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>.

¹⁷ NUG Ministry of Human Rights, “United Nations Human Rights Council 49th session: Statement on the adoption of the resolution on the Situation of human rights in Myanmar,” 2 April 2022.

3. Current International Justice Mechanisms

To deal with the domestic accountability deficit in Myanmar, the international system has stepped in a number of times to support justice. While not accountability mechanisms, the work of the Special Rapporteur and the FFM have significantly contributed towards the cause of justice for the people of Myanmar. There are several significant international justice actions currently underway, however, none is sufficient to deal with the magnitude and scope of past and continuing atrocities in Myanmar.

3.1 Independent Investigative Mechanism for Myanmar (IIMM)



Mr. Nicholas Koumjian, Head of IIMM
Photo - United Nations

In 2018, at the FFM's and the Special Rapporteur's urging, the Human Rights Council established the 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, and to prepare files in order to facilitate and expedite fair and independent criminal proceedings.¹⁸ Part of this involves working with and supporting cases at both international and domestic levels. The IIMM has reported that it is engaging with the ICC, the ICJ and national authorities in Argentina.¹⁹

The IIMM is the first mechanism of its kind created by the Human Rights Council, with the General Assembly having previously created a similar mechanism for Syria.²⁰ The IIMM's establishment was considered controversial by some observers and to have stretched the bounds of what it was possible for the Human Rights Council to do. Nonetheless, the Human Rights Council's action to establish the IIMM has not been challenged. This demonstrates the breadth of the Human Rights Council's mandate. The scope of action it can take is wide and can evolve over time to respond appropriately to different situations.

¹⁸ Situation of human rights of Rohingya Muslims and other minorities in Myanmar, Human Rights Council Resolution 39/2, UN Doc. A/HRC/RES/39/2, 27 September 2018, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/39/2.

¹⁹ UN Doc. A/HRC/51/41, 21 September 2022, para. 37.

²⁰ International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, General Assembly Resolution 71/248, UN Doc. A/RES/71/248, 21 December 2016, <https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F71%2F248&Language=E&DeviceType=Desktop&LangRequested=False>.

3.2 International Criminal Court (ICC)



In 2019, the Office of the Prosecutor of the ICC opened an investigation into the situation of Bangladesh/Myanmar in relation to the expulsion of the Rohingya people.²¹ The expulsion led to Rohingya being forced across the border from Myanmar into Bangladesh, which is a party to the Rome Statute.²² The ICC said that the crime was completed in Bangladesh, a State party, and so the ICC has jurisdiction both in relation to the crime itself and in relation to actions that led to the commission

of the crime. This investigation offered progress towards achieving accountability but it is insufficient. 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 limited to alleged crimes against the Rohingya committed along Myanmar's border with Bangladesh from 2016.

There are several possibilities for the ICC to obtain jurisdiction over the entirety of crimes committed in the territory of a particular State:

- The first is for the government of that State to sign and ratify the Rome Statute. This possibility remains open as the NUG could sign and ratify or accede to the Rome Statute on behalf of Myanmar and the ICC should then accept the NUG's ratification.
- The second is for the government to submit to the jurisdiction of the ICC without becoming a State party to the Rome Statute. The NUG has done so by filing an Article 12(3) declaration with the court, accepting its jurisdiction from 1 July 2002 onward.²³ The Court has so far not responded to that declaration,²⁴ but many international jurists, including SAC-M, consider that the ICC has jurisdiction based on that declaration.
- The third possibility is for a State party to refer to the Prosecutor the whole situation in Myanmar for investigation.²⁵ This possibility also remains open for Myanmar.
- The fourth is for the Security Council itself to refer the situation in Myanmar to the ICC if it regards the situation as a threat to international peace and security.²⁶ This possibility remains open but the Council appears deadlocked and unlikely to refer the situation in the immediate future. The

²¹ For more detail, see SAC-M "Briefing Paper: Myanmar and the International Criminal Court," 15 December 2022, <https://specialadvisorycouncil.org/wp-content/uploads/2022/12/SAC-M-Briefing-Paper-ICC-ENGLISH-1.pdf>.

²² See Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Bangladesh (on the application of Victims) v Prosecutor, Decision pursuant to Article 15 of the Rome Statute on the authorisation of an investigation into the situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Case No ICC-01/19-27, ICL 1959 (ICC 2019), 14th November 2019, International Criminal Court [ICC]; Pre Trial Chamber III [ICC], <https://www.icc-cpi.int/bangladesh-myanmar>.

²³ 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>.

²⁴ See A/HRC/52/21, 3 March 2023.

²⁵ Rome Statute of the ICC Article 14.

²⁶ Rome Statute of the ICC Article 13(b) and Chapter 7 of the UN Charter.

Security Council adopted its first ever resolution on Myanmar (2669) in December 2022 and, while the resolution stressed “the importance of accountability” in a preambular paragraph and in an operative paragraph urged “all parties to respect human rights, fundamental freedoms and the rule of law”, it failed to demand accountability let alone refer the situation in Myanmar to the ICC.²⁷

3.3 Universal Jurisdiction

Under the principle of universal jurisdiction, States may prosecute international crimes 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. Under the principle of complementarity in the Rome Statute, the ICC cannot proceed with a case if the case is being or has been investigated or prosecuted by a State with jurisdiction, provided that the investigation or prosecution is possible under domestic law and the domestic jurisdiction is exercised willingly and ably and genuinely, “having regard to the principles of due process recognized by international law”.²⁸ Universal jurisdiction itself does not have any principle of complementarity so that the same case can be investigated and prosecuted simultaneously in more than one State with jurisdiction provided that is permitted under the relevant domestic law.

In recent years, there have been several cases relating to international crimes committed in Myanmar commenced under universal jurisdiction:

- In Argentina, a case was filed in 2019 that involves a judicial investigation into crimes against humanity and genocide against the Rohingya committed in 2017, including the particular situation of six Rohingya women victims.²⁹
- In Turkey, a case was filed in 2022 under the Convention Against Torture in relation to the crime of torture allegedly committed against victims after the attempted coup.³⁰
- In Germany, a case was submitted in January 2023 alleging the crime of genocide, crimes against humanity and war crimes against the Rohingya and also following the attempted coup. However, the case was dismissed by the German Federal Prosecutor in November 2023, primarily because of a lack of suspects present in Germany and under the belief that its investigation would duplicate the work of the IIMM.³¹

The ongoing cases all represent important progress in the course of achieving justice for victims in Myanmar. However more must still be done, and can be done.

²⁷ Security Council Resolution 2669 (2022) [Myanmar], UN Doc. S/RES/2669 (2022), 21 December 2022, [https://undocs.org/Home/Mobile?FinalSymbol=S%2FRES%2F2669\(2022\)&Language=E&DeviceType=Desktop&LangRe](https://undocs.org/Home/Mobile?FinalSymbol=S%2FRES%2F2669(2022)&Language=E&DeviceType=Desktop&LangRe).

²⁸ See Rome Statute of the ICC Articles 17 and 53.

²⁹ See BROUK, “Historic Decision By Argentinian Courts To Take Up Genocide Case Against Myanmar”, press release, 28 November 2021, <https://www.brouk.org.uk/historic-decision-by-argentinian-courts-to-take-up-genocide-case-against-myanmar/>.

³⁰ See Myanmar Accountability Project, “Turkish Authorities Open Unprecedented Investigation into Myanmar Junta”, press release, 2 June 2022, <https://the-world-is-watching.org/2022/06/02/turkish-authorities-open-unprecedented-investigation-into-myanmar-junta/>.

³¹ See Fortify Rights, “Criminal Complaint Filed in Germany against Myanmar Generals for Atrocity Crimes”, press release, 24 January 2023, <https://www.fortifyrights.org/mya-inv-2023-01-24/>.



4. International Criminal Tribunals

Special tribunals to prosecute international crimes are not a new or novel phenomenon. Over the last century, when situations demanded justice that could not be delivered through regular means, tribunals were created to prosecute alleged crimes under international law. Several tribunals were created following wars, including the First and Second World Wars, and after situations of mass human rights atrocities, such as those relating to Rwanda and to the former Yugoslavia in the 1990s.

Each tribunal that has been established has been unique in order to meet the specificities of the particular context. Tribunals range from being purely international (in that the law they apply is international law) and comprised of international judges (rather than judges from the State in question), to tribunals that are a hybrid, meaning that they apply both international and national law, and have both international and national judges. Some tribunals have been located outside the State in question, while others have been embedded within the relevant national jurisdiction, including being physically located in the State. There have been a number of different ways in which tribunals have been established, including by a Security Council resolution, by treaty or by an agreement between a State or States and the UN.

In order to consider what might be appropriate for Myanmar, it is useful to explore examples of the different modalities of various international tribunals that have been established previously.

4.1 Tribunals Established by the Security Council

In the 1990s, the Security Council established by resolution the International Criminal Tribunal for the former Yugoslavia (ICTY)³² and, at the request of Rwanda, the International Criminal Tribunal for Rwanda (ICTR).³³ To do so, the Security Council used its enforceable powers under Chapter VII of the UN Charter relating to threats to the peace, breaches of the peace and acts of aggression. This meant that the Balkan States succeeding the former Yugoslavia and Rwanda were obligated under international law to cooperate with the tribunals. Both tribunals had jurisdiction to try specified crimes under international law, including war crimes, crimes against humanity and genocide,³⁴ and had international staff including judges, meaning that none were nationals of Yugoslavia or Rwanda. The ICTY was located in The Hague and the ICTR was located in both Tanzania and The Hague, and both tribunals were responsible for the prosecution of hundreds of senior and mid-level government and military figures, as well as politicians, religious leaders, members of armed groups and the media, responsible for atrocity crimes. Note that both of these tribunals were created before the ICC was established.

Special tribunals to prosecute international crimes are not a new or novel phenomenon. Over the last century, when situations demanded justice that could not be delivered through regular means, tribunals were created to prosecute alleged crimes under international law.

³² Security Council Resolution 827 (1993), UN Doc. S/RES/827 (1993), 25 May 1993, [https://undocs.org/Home/Mobile?FinalSymbol=S%2FRES%2F827\(1993\)&Language=E&DeviceType=Desktop&LangRequested=False](https://undocs.org/Home/Mobile?FinalSymbol=S%2FRES%2F827(1993)&Language=E&DeviceType=Desktop&LangRequested=False).

³³ Security Council Resolution 955 (1994), UN Doc. S/RES/955 (1994), 8 November 1994, [https://undocs.org/Home/Mobile?FinalSymbol=S%2FRES%2F955\(1994\)&Language=E&DeviceType=Desktop&LangRequested=False](https://undocs.org/Home/Mobile?FinalSymbol=S%2FRES%2F955(1994)&Language=E&DeviceType=Desktop&LangRequested=False).

³⁴ See https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

4.2 Hybrid Tribunals Established by Treaty Between the UN and the State Concerned

Both 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.

In the case of Sierra Leone, the Security Council was pushed to establish a tribunal like the ICTY and ICTR.³⁵ However, it instead requested the UN Secretary-General to negotiate an agreement with the government of Sierra Leone to establish a court.³⁶ The Special Court for Sierra Leone (SCSL) that was ultimately established was international, in that it was outside the Sierra Leone legal system, but it had jurisdiction to prosecute some crimes under Sierra Leone law as well as war crimes and crimes against humanity under international law.³⁷ Its judges were both international and national, it was located in Sierra Leone, and among those it prosecuted was the first head of State to be prosecuted since World War Two, Charles Taylor, the President of Liberia.

Similarly, Cambodia requested the “assistance of the United Nations and the international community in bringing to justice those persons responsible for the genocide and crimes against humanity committed during the rule of the Khmer Rouge”.³⁸ Following negotiations, the Extraordinary Chambers in the Courts of Cambodia (ECCC) was established within the Cambodian legal system.³⁹ The General Assembly then requested the Secretary-General to negotiate an agreement with Cambodia about UN cooperation with respect to the court.⁴⁰ The court then operated with UN support. The ECCC’s jurisdiction included genocide, crimes against humanity and war crimes under international law and crimes under Cambodian law.⁴¹ Its judges were both international and national, it was located in Cambodia and it prosecuted several members of the Khmer Rouge.

³⁵ Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, annex to S/2000/786 (10 August 2000).

³⁶ Security Council Resolution 1315 (2000), UN Doc. S/RES/1315 (2000), 14 August 2000, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/605/32/PDF/N0060532.pdf?OpenElement>.

³⁷ See the Agreement between the United Nations and the Government of Sierra Leone and the Statute of the Special Court of Sierra Leone.

³⁸ Annex of the letters dated 23 June 1997 from the UN Secretary-General to the President of the General Assembly A/51/930 and to the President of the Security Council S/1997/488 (24 June 1997).

³⁹ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (2001), https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

⁴⁰ Khmer Rouge trials, General Assembly Resolution 57/228, UN Doc. A/RES/57/228 (2003), 22 May 2003, <https://www.securitycouncilreport.org/un-documents/document/cam-ares-57-228b.php>.

⁴¹ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (2001) Articles 3-8.



The courtroom of the Khmer Rouge tribunal.

4.3 Treaty-Based Tribunals

The ICC itself is a treaty-based tribunal. It was established by the Rome Statute 1998, which entered into force on 1 July 2002. Like other treaty-based tribunals, its jurisdiction covers States that are parties to the treaty, although there are provisions for the ICC’s jurisdiction to be extended to non-State parties by decision of the Security Council. Unlike most other treaty-based tribunals, its jurisdiction is not limited to a specific period or a specific situation. It is not time limited.

The tribunals created following both the First and Second World Wars were established by treaty between the winning States. In the case of Germany after World War Two, the United States, the Soviet Union, France and the United Kingdom agreed as occupying powers to establish a tribunal for the prosecution and punishment of the major war criminals of the European Axis,⁴² which became known as the Nuremberg International Military Tribunal. Its jurisdiction comprised war crimes, crimes against humanity and crimes against peace.⁴³

⁴² Agreement by the government of the United Kingdom of Great Britain and Northern Ireland, the government of the United States of America, the provisional government of the French Republic, and the government of the Union of Soviet Social Republics for the prosecution and punishment of the major war criminals of the European Axis (8 August 1945).

⁴³ Charter of the International Military Tribunal Article 6.

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.⁴⁴ The EAC is part of Senegal's own court system and has jurisdiction to prosecute genocide, crimes against humanity, war crimes and torture.⁴⁵ The EAC prosecuted the former President of Chad, Hissene Habre.

Similarly, most regions of the world except for the Asia-Pacific have a human rights court that has been established by treaty of a regional group of States. These are the:

- European Court of Human Rights, established by the European Convention on Human Rights;
- Inter-American Court of Human Rights, established by the American Convention on Human Rights;
- African Court on Human and Peoples' Rights, established by Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights; and
- Arab Court of Human Rights, established by resolution of the Council of the League of Arab States.



The judges' bench at the time of the International Military Tribunal.

Photo credit: Nuremberg Municipal Archives

⁴⁴ Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990.

⁴⁵ Statute of the Extraordinary African Chambers Articles 4-8.

4.4 Tribunals Established by the General Assembly or the Human Rights Council

Though not a criminal tribunal, the General Assembly created a court in 1949, the UN Administrative Tribunal (UNAT). That tribunal was tasked with adjudicating disputes relating to UN staff employment contracts, appointments and the pension fund.⁴⁶ At the request of the General Assembly, the International Court of Justice issued an Advisory Opinion relating to the UNAT. It considered, first, the nature of the UNAT. It found that the Tribunal:

“...was an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions and not merely an advisory or subordinate organ. Its judgments were therefore binding on the United Nations Organization and thus also on the General Assembly.”⁴⁷

The ICJ then had to consider the General Assembly’s power to establish a judicial tribunal. It held,

“There is no express provision for the establishment of judicial bodies or organs and no indication to the contrary. However, in its Opinion - Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion: I.C. J. Reports 1949, p. 182 - the Court said: “Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”⁴⁸

The ICJ found that the General Assembly had a power to regulate staff relations.⁴⁹ Accordingly, the ICJ held that the General Assembly had validly established the UNAT as a judicial body able to make decisions binding on the General Assembly itself.

The UN body that is generally expected to take such action as creating a special international criminal tribunal is the Security Council. Taking action on accountability would be consistent with the Council’s mandate to maintain international peace and security and its own emphasis on “the importance of accountability” in Myanmar. However, its one and only resolution on Myanmar (2669 in 2022) did not demand accountability⁵⁰ and it has been consistently unwilling to refer the situation to the ICC.

⁴⁶ Establishment of a United Nations Administrative Tribunal, General Assembly resolution 351(IV)A, A/RES/351(IV) (1949), <https://digitallibrary.un.org/record/666782?ln=en>.

⁴⁷ Effect of Awards of Compensation by the United Nations Administrative Tribunal, Advisory opinion, ICJ Reports (1954), <https://www.icj-cij.org/case/21#~:text=In%20its%20Advisory%20Opinion%20of,been%20terminated%20without%20his%20assent>.

⁴⁸ Effect of Awards of Compensation by the United Nations Administrative Tribunal, Advisory opinion, ICJ Reports (1954).

⁴⁹ *Ibid.*

⁵⁰ Security Council Resolution 2669 (2022) [Myanmar].

Calls on the Security Council must be maintained, as it remains the only international body that has enforcement powers, but it is necessary to simultaneously look elsewhere for an accountability mechanism.

Where a situation demands action to maintain international security and peace, and the Security Council fails to act due to lack of unanimity between its members, the General Assembly can activate a procedure called “Uniting for Peace”. Under this procedure, the General Assembly may recommend that UN member States take collective measures to maintain or restore international peace and security. It is possible that the General Assembly could create a tribunal under this procedure,⁵¹ using the precedent of the establishment of the UNAT. The decision would be related to the General Assembly’s duties under the Charter to “recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter”.⁵² It may therefore establish a tribunal to prosecute crimes against international law that were committed in Myanmar, which is arguably consistent with its mandate as well as its own resolutions on Myanmar.

Similarly, the Human Rights Council, as a subsidiary body of the General Assembly, does not have judicial powers. However, the Human Rights Council is mandated to “address situations of violations of human rights, including gross and systematic violations” and so, based again on the UNAT Advisory Opinion, it could create an international criminal tribunal in order to execute that mandate in respect of Myanmar. There are two ways that this could be done. First, it could create a new special tribunal for Myanmar or, second, it could expand the mandate of the existing IIMM. The IIMM is already collecting evidence and case files for prosecution of persons accused of committing crimes in Myanmar. If a tribunal were to be established, it would be natural for it to sit within an already-established and operating body that is conducting pre-prosecutorial work.

It should be noted that, unlike the Security Council, neither the General Assembly nor the Human Rights Council can adopt legally binding resolutions, and so cooperation with a tribunal that either body establishes would be voluntary. In practice, this may be little different from the experience with Security Council established international criminal tribunals. Although legally the resolutions establishing these tribunals are binding on all UN member States, in practice cooperation is voluntary.

⁵¹ Uniting For Peace, General Assembly resolution 337(V), UN Doc. A/RES/377(V), 3 November 1950.

⁵² UN Charter Article 14.



5. A Proposal for Myanmar

International law is constantly evolving and adapting to new circumstances. None of the tribunals listed above represents a perfect model to be followed for Myanmar. However, they are useful in presenting options and charting a way forward to promote accountability for crimes under international law committed in Myanmar.

Taking into account prior special tribunals as well as the unique context presented by Myanmar, an international criminal tribunal for Myanmar 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 negotiation of a bilateral treaty between the UN and Myanmar to 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 a special 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. While many international tribunals have included some domestic crimes as part of their jurisdiction, that is not suggested for Myanmar as so much of Myanmar's domestic criminal law does not comply with international standards.
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 appropriate or in accordance with the norms of justice and the rule of law for Myanmar judges to be part of the special 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 special tribunal is able to operate independently and impartially and in accordance with international standards of justice and the rule of law, away from possible interference by the Myanmar military.

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

6. Challenges and Opportunities

Establishing an international criminal tribunal for Myanmar is but another step on the path towards accountability. Various challenges would continue to exist that must be addressed. These challenges include:

- **Location of the special tribunal:** Despite the NUG and allied EROs having effective control of much of the territory of Myanmar, it would not be possible for the tribunal to be located in Myanmar. It would be likely subjected to attacks by junta forces and individuals that cooperate with the tribunal, including victims and witnesses, would be at high risk of reprisals. Another State would therefore need to agree to host the physical premises of the tribunal. The IIMM is located in Geneva, Switzerland, and Switzerland might also agree to host the tribunal. Alternatively, it could be based in The Hague in the Netherlands, where many other international tribunals are located, or elsewhere.
- **Collection of evidence:** With the cooperation of the NUG, the tribunal would have access to significant territory and people from whom evidence could be collected.⁵³ However, with the continuing violence being perpetrated by junta forces, security concerns would make safe access for investigators extremely difficult.
- **Arrest of perpetrators:** To prosecute alleged perpetrators, it is necessary to apprehend, arrest and transport individuals to the tribunal for trial. With the assistance of the NUG and its allies, this could be possible. The NUG and its allies are actively fighting with junta forces and are able to take as prisoners low and mid-level soldiers. The NUG would also be able to comply with arrest warrants issued by the tribunal. What would be most difficult, however, is apprehension of senior military figures who are not present on the battlefield but have the highest levels of command responsibility for alleged crimes.⁵⁴ The NUG would also need cooperation and assistance from neighbouring and other States to transport alleged perpetrators to the location of the tribunal.
- **Enforceability:** The Security Council is the only international body that is able to make enforceable decisions, therefore States are compelled to cooperate with a special court or tribunal that it establishes. If either the General Assembly or Human Rights Council were to establish a tribunal,

⁵³ See SAC-M, "Effective Control in Myanmar," 5 September 2022.

⁵⁴ See Security Force Monitor, "Under Whose Command? Human rights abuses under Myanmar's military rule".

States would not be legally required to cooperate with it. However, this issue is minimised as the NUG is itself seeking to hold perpetrators of international crimes responsible. The cooperation and support of other States would also be necessary, though, including to bring about the arrest of alleged perpetrators, which may be more difficult where they are not legally obligated to do so. If the special tribunal were created by treaty, all parties to the treaty would be bound to uphold and implement the treaty and therefore cooperate with the tribunal and its actions.

- **Funding:** International courts are expensive and are funded by international donors. If the tribunal were established by treaty, the States who are party to the treaty would be primarily responsible for funding its operations or raising the funds to do so from other donors. In circumstances where there are vast needs in Myanmar for international humanitarian assistance, and there are already multiple international donor-funded mandates for Myanmar, it may be difficult to obtain the necessary financial support. However, accountability is critical to ending the perpetual cycles of violence plaguing Myanmar. Once perpetrators are held accountable, and there is an end to the violence, the humanitarian and other needs will diminish, therefore lessening the need for donor support in other areas.
- **Political will:** Support for the establishment of a tribunal is also a question of political will. For decades, there have been calls for justice for the people of Myanmar. Establishing an international criminal tribunal is an action that requires the international community to put words into actions.

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/>
