



ASIA JUSTICE
COALITION

▶ **TOOLKIT ON**

JUSTICE AVENUES

FOR INTERNATIONAL CRIMES

TOOLKIT ON JUSTICE AVENUES FOR INTERNATIONAL CRIMES

Introduction	1
Fact-Finding Missions and International Investigative Mechanisms	2
Key Takeaways	2
Understanding Fact-Finding Missions/Commissions Of Inquiry And International Investigative Mechanisms	3-6
What Could Civil Society Consider Before Engaging To Fact-Finding Missions/Commissions Of Inquiry Or Investigative Mechanisms?	7-8
Where Can We Find Out More?	8-9
International Criminal Court (ICC)	10
Key Takeaways	10
Understanding The ICC	11
How Does The ICC Address Victims?	12
How Can Civil Society Engage With The ICC?	13
What Could Civil Society Consider Before Engaging with the ICC?	14-16
Where Can We Find Out More?	16
International Court of Justice (ICJ)	17
Key Takeaways	17
Understanding the ICJ	18-20
Can Civil Society Engage With The ICJ Directly?	21-22
Why Engage With, Or Support, The ICJ?	23
Where Can We Find Out More?	24
Universal Jurisdiction	25
Key Takeaways	25-26
Understanding 'Universal Jurisdiction'	26
What Kind Of Outcomes Might A Universal Jurisdiction Case Bring?	27
What Should Civil Society Consider In Pursuing Universal Jurisdiction?	28-31
Where Can We Find Out More?	32

This paper has been produced by the Asia Justice Coalition secretariat. It should not be taken to reflect the views or positions of all members.

INTRODUCTION

Civil society organizations (CSOs) and other interested parties play a vital role in assisting victims and survivors to seek justice and accountability for serious violations of international human rights and humanitarian law.

In the international sphere, domestic and international CSOs may provide information and technical assistance to victims in order to access international courts. CSOs might also provide an understanding of the conflict in which the alleged violations took place. Likewise, CSOs play a role in advocating for fairer and more efficient avenues to justice or in monitoring existent avenues to justice. International justice benefits from the critiques and support by CSOs to make processes more accessible and more equitable.

This Toolkit is a result of training conducted by the Asia Justice Coalition (AJC) secretariat for CSO representatives across Asia. In this multi-week training, it was realised that such a one-stop guide on the functions and operations of international justice mechanisms would be useful. **While it focuses on CSOs, this Toolkit is intended to be useful for anyone interested in international justice and accountability. It uses the term ‘civil society’ to include all interested parties including lawyers, activists, and organizations.**

This Toolkit has been designed to provide an overview of some available avenues to justice within the international legal sphere and how to engage with these avenues. It aims to provide information in the simplest form, which can be built upon subsequently. This information is provided to help interested parties assess if they are able and have the expertise to utilize the available mechanisms discussed here. It is for each interested party to decide with which avenues it may best engage.

This Toolkit includes the work of **United Nations Fact-Finding Missions (FFMs)** and **International Investigative Mechanisms (Investigative Mechanisms)**, the operation of the **International Criminal Court (ICC)**, the operation of the **International Court of Justice (ICJ)**, and the potential to bring cases under **Universal Jurisdiction**. Each of these avenues fit together like pieces in a puzzle to fill gaps in achieving justice for victims. They each represent a different way affected communities may be heard.

It is hoped that where all interested parties have adequate and accurate information, this will spark conversations on how to most appropriately pursue justice and accountability and to assist victims and survivors to make informed decisions with the necessary support.

▶ **FACT-FINDING MISSIONS AND INTERNATIONAL INVESTIGATIVE MECHANISMS**

Although not courts, fact-finding missions/commissions of inquiry and investigative mechanisms are increasingly being used to provide a pathway for accountability. Such mechanisms are smaller than the international courts. Therefore, they may be able to mobilize and deploy investigators quicker than courts. Their purpose is to document, gather or store information on international human rights and humanitarian law violations as soon as possible after the violation takes place.

This information may be used to: make findings regarding the type or prevalence of violations; make recommendations to address their findings; raise international attention regarding the violations; and, in the case of investigative mechanisms, provide information to courts for use in prosecutions.

KEY TAKEAWAYS



Fact-finding missions/commissions of inquiry contribute to accountability by investigating serious violations of international human rights and humanitarian law, reporting publicly on their findings, and making recommendations to relevant stakeholders.

Investigative mechanisms contribute to accountability by investigating and collecting information in order to preserve and organize evidence specifically for domestic or international courts to prosecute such violations.



Neither fact-finding missions/commissions of inquiry nor investigative mechanisms are courts—their work alone will not result in criminal convictions. However, both can contribute to accountability by identifying serious violations and those responsible for such violations.



Civil society that wishes to provide information must consider risks to anyone providing information to the civil society actor and to their own staff members. They must also ensure they provide information to the mechanism on terms that they understand.

FACT-FINDING MISSIONS/COMMISSIONS OF INQUIRY

International fact-finding missions and commissions of inquiry are temporary, non-judicial bodies with mandates to investigate, arrive at findings, and make recommendations regarding alleged international human rights and humanitarian law violations. They may be established by bodies of the United Nations such as the General Assembly, the Security Council, or the Human Rights Council. Their mandates differ from one another in temporal and geographic scope, as well as in subject matter and actors at the centre of the investigation, as decided by the mandating authority.

Mandates may also utilize different 'standards of proof' upon which they make their findings. In this way, they may serve as a precursor to trials under domestic or international law or may lay the groundwork for broader truth-telling processes.

They are often led by a committee of international experts, or 'members,' who have substantial experience in international human rights and humanitarian law. Members are expected to be independent and impartial, as well as of high moral standing. However, it is not always required by the mission or commission's mandate that its members have experience in the relevant state, nor are they often required to have relevant local language skills.

Examples of recent 'fact-finding missions' include: [Myanmar](#) (established in 2017), [Venezuela](#) (2019) and [Libya](#) (2020).

Examples of recent 'commissions of inquiry' include: [Syria](#) (established in 2011), [DPRK](#) (2013), [Burundi](#) (2016), and [South Sudan](#) (2016).

Case Study: Independent International Fact-Finding Mission on Myanmar (IIFMM)

Context: The IIFMM was established by the UN Human Rights Council in March 2017. This followed a June 2016 [High Commissioner for Human Rights](#) report alleging widespread and systematic attacks on ethnic Rohingya in Myanmar. Its members included [Marzuki Darusman](#) (Chair, Indonesia), [Radhika Coomaraswamy](#) (Sri Lanka), and [Christopher Sidoti](#) (Australia).

Mandate: The IIFMM's [mandate](#) tasked its three members and secretariat to: "establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar...". This included investigating potential: "arbitrary detention, torture and inhuman treatment, rape and other forms of sexual violence, extrajudicial, summary or arbitrary killings, enforced disappearances, forced displacement and unlawful destruction of property...". The IIFMM focused on Kachin, Rakhine, and Shan states within Myanmar from 2011 onwards.

Continue Reading →

Process: The IFFMM conducted 875 interviews and held over 250 consultations, including with non-governmental organizations. It also published a public call and received written submissions. The Myanmar government did not cooperate with the mission despite repeated appeals. Because of this, the IFFMM was unable to undertake any field missions within Myanmar.

Findings: The IFFMM's reports [found](#) "consistent patterns of serious human rights violations and abuses... in addition to serious violations of international humanitarian law," that were "principally committed by the Myanmar security forces, particularly the military." This included "patterns of gravest crimes" and "factors allowing the inference of genocidal intent."

Outcomes: In September 2019, the IFFMM [announced](#) it had handed over its evidence to the Independent Investigative Mechanism for Myanmar (discussed below). Its findings were cited extensively in [The Gambia's application instituting proceedings](#) in the International Court of Justice against Myanmar and the Court's January 2020 [Order of Provisional Measures](#) to require Myanmar to "take all measures within its power" to prevent the commission of further harm to the Rohingya.

INVESTIGATIVE MECHANISMS

Like fact-finding missions and commissions of inquiry, international investigative mechanisms are temporary, non-judicial bodies tasked collect and preserve information regarding serious violations of human rights and humanitarian law. Investigative mechanisms are also mandated by UN bodies such as the Security Council, the General Assembly, and the Human Rights Council, and are staffed by internationally recognized experts with requirements much the same as fact-finding missions/commissions of inquiry.

However, investigative mechanisms represent a progression from fact-finding towards criminal prosecution. This is because investigative mechanisms are mandated to analyze the information collected in order to compile 'case files' that can be given, pre-prepared, to national, regional, or international courts for future prosecution. In this way, investigative mechanisms can be extremely important for the prosecution of international crimes under universal jurisdiction.

Examples of investigative mechanisms include: [Syria](#) (established in 2016), [Iraq](#) (2017), and [Myanmar](#) (2018).

Case Study: Independent Investigative Mechanism for Myanmar (IIMM)

Context: The IIMM was established by the UN Human Rights Council in September 2018. The [resolution](#) establishing the IIMM explicitly references the findings of the IIFFMM in its first paragraphs.

Mandate: The IIMM's [mandate](#) requires it to “collect, consolidate, preserve, and analyze evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011...”. This scope mirrors that of the IIFFMM and, by focusing on crimes committed within Myanmar, fills a gap not covered by International Criminal Court jurisdiction, as Myanmar is not a member of the Court. Because the mandate establishes the IIMM as “ongoing”—and therefore not temporally limited—the Mechanism’s Head [stated](#) that the IIMM could build case files regarding violations committed following the Myanmar military’s seizure of power in February 2021.

Process: The IIMM’s January 2019 [Terms of Reference](#) includes both collecting information from external actors, such as civil society, and collecting its own information through conducting interviews or taking witness/victim statements and collecting physical and electronic evidence. Analysis of evidence is based on “reliability and probative value”—in other words, whether the evidence could be sufficiently useful in a criminal trial. The evidence is then stored until such time as a case file is requested.

Relationship with other accountability avenues: In a [September 2020 address](#) to the Human Rights Council, the Head of the IIMM Nicholas Koumjian stated that, “in response to requests, the Mechanism had been sharing appropriate information with The Gambia and Myanmar, Parties to the ongoing proceedings before the International Court of Justice.”

UNDERSTANDING FACT-FINDING MISSIONS/COMMISSIONS OF INQUIRY AND INTERNATIONAL INVESTIGATIVE MECHANISMS

	Fact Finding Missions / Commissions of Inquiry	International Investigative Mechanisms
Mandate	By UN Bodies	By UN Bodies
Staff	Internationally-recognized experts as members; investigators; advisors; and a secretariat	Internationally-recognized expert as Head, Deputy Head; investigators, advisors; and a secretariat
Standard of Proof	Generally finite; defined in mandate with a reporting period	Defined in mandate but with longer expected operating timeline
Outcomes	Reports, findings, recommendations	Casefiles to be shared only with prosecuting authorities
Involvement of CSOs	Dependent on the mandate, may have open calls for information or initiate consultations between CSOs and members	Dependent on the mandate, creates dedicated channel of communication; develops memoranda of understanding with CSOs to clarify CSO/mechanism expectations

WHAT COULD CIVIL SOCIETY CONSIDER BEFORE ENGAGING WITH FACT-FINDING MISSIONS/COMMISSIONS OF INQUIRY OR INVESTIGATIVE MECHANISMS?

Civil society engagement with fact-finding missions/commissions of inquiry or investigative mechanisms can be very valuable. CSOs, and particularly local CSOs, may have: direct access to affected communities; access to information collected prior to the establishment of the mission or mechanism; or contextual understanding that may improve the mission or mechanism's processes or procedures.

However, all civil society actors must have a clear understanding of how their work will be used by a mission or mechanism; civil society may be unable to control how that information is used once it is shared. Moreover, it is unlikely that missions or mechanisms will have any funding available to pay civil society engaged in collecting information. It is also unlikely that missions or mechanisms can provide security for anyone providing or collecting information.

In considering whether and how to engage, civil society can ask the mission or mechanism:

What kind of information are you collecting? Do you have protocols you can share with us regarding the collecting of information?

How will you use information that we provide to you? Will you provide feedback regarding information that we provide?

How long will you store the information that we provide to you?

Will you notify us when you are using or acting on the information that we provide?

Will you update us on your progress? If so, how often?

Will you be publicly reporting? If so, when?

(If providing victim/witness statements) Will you be contacting us if you intend to contact the victims or witnesses from whom we have taken statements?

What protections do you have in place to protect the data and/or identities of those whose information we are providing? Of our staff/volunteers?

How can we provide feedback/recommendations to you?

Civil society that collects information potentially for the purpose of providing such information to a mission or mechanism should 'do no harm,' meaning recognizing and mitigating risks to those providing information, to the information itself, and to those collecting information.

This [includes](#):



Keeping confidential the identity of those who provide information, storing that information securely, and, as far as possible, being able to trace the information back to the information provider.



Ensuring that you do not coach or tutor victims or witnesses in information that they provide.



Recognizing that missions or mechanisms will likely need to re-interview victims or witnesses and considering ways to minimize the risk of re-traumatization and reducing the possibility of conflicting statements.



Receiving informed consent from anyone that provides information notifying the individual that it may be provided to a mechanism, which then may provide it to a court. This includes the potential for such information to eventually be disclosed to the defense in a trial.



Considering the physical safety and psychological wellbeing of CSO staff or volunteers collecting information.

It is also extremely important to manage the expectations of those providing information regarding the outcomes of a mission or mechanism. As noted above, neither missions nor mechanisms are themselves courts, and therefore they will not result themselves in criminal trials.

WHERE CAN WE FIND OUT MORE?

For a full list of fact-finding missions and commissions of inquiry, including regional breakdowns and descriptions of investigations, see:

- United Nations Library Research Guide, "International Commissions of Inquiry, Fact-finding Missions: Home," <https://libraryresources.unog.ch/c.php?g=462695&p=3162764>
- United Nations Human Rights Council, "International Commissions of Inquiry, Commissions on Human Rights, Fact-Finding missions and other Investigations," <https://www.ohchr.org/EN/HRBodies/HRC/Pages/COIs.aspx>

For a more in-depth description of the practice of fact-finding missions and commissions of inquiry, see:

- Office of the High Commissioner of Human Rights, “Commissions of Inquiry and Fact-finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice,” (2015),
https://www.ohchr.org/Documents/Publications/Col_Guidance_and_Practice.pdf

On CSO engagement with investigative mechanisms, see:

- United States Holocaust Museum, “Lessons Learned from the First Generation of UN Investigative Mechanisms for Future Criminal Accountability: Considerations for CSO engagement with the United Nations Independent Investigative Mechanism for Myanmar,” (2019),
https://www.ushmm.org/m/pdfs/19.09.17_Considerations_for_CS-Engagement_with_UN_Investigative_Mechanisms.pdf

- Syria Justice and Accountability Centre, “Civil Society & International Criminal Justice Mechanism Engagement: Roundtable Readout,” (2018)
<https://syriaaccountability.org/library/civil-society-international-criminal-justice-mechanism-engagement-roundtable-readout/>

Note: resources are up-to-date as of November 2021.

▶ INTERNATIONAL CRIMINAL COURT (ICC)

The International Criminal Court (ICC) is the only permanent international court established to investigate, prosecute, and try individuals accused of committing the most serious international crimes. The [Rome Statute of the International Criminal Court \(Rome Statute\)](#) both established the ICC and sets out the ICC's jurisdiction. The [principle of complementarity](#) means that national courts retain the primary jurisdiction to investigate and prosecute, but that the ICC has jurisdiction where a State Party to the Rome Statute is 'genuinely unwilling or unable' to investigate or prosecute. The ICC has special offices dedicated to providing support to victims and assisting victims to participate in cases.

KEY TAKEAWAYS



The ICC contributes to accountability by being the only fully international court to hear criminal cases regarding serious violations of international human rights and humanitarian law. It holds individuals, rather than States, accountable for international crimes.



The ICC's jurisdiction is limited to crimes that happen within the territory of a State that signs on to the Rome Statute, is committed by an individual of a State that has signed the Statute, or in cases that the UN Security Council refers to the ICC. However, the ICC can have jurisdiction in cases where the crimes take place in part in the territory of a Rome Statute signatory. The ICC's jurisdiction also complements the jurisdiction of the ICJ and other avenues for international justice.



Civil society that wishes to provide engage with the ICC have opportunities throughout the ICC's process, including engaging directly with the Office of the Prosecutor or assisting victims to contact the Legal Representatives of Victims. However, the ICC does not assist with funds to provide this assistance.

UNDERSTANDING THE ICC

The ICC is [composed](#) of four organs: the Presidency, the Chambers, the Office of the Prosecutor, and the Registry.

The Presidency is responsible for the administration of the ICC. The Chambers (Pre-Trial, Trial, and Appeals) includes 18 judges who fulfil the judicial functions of the Court. The Office of the Prosecutor (OTP): analyses information on situations or alleged crimes within the jurisdiction of the ICC; determines whether to initiate an investigation; and litigates cases before the various Chambers of the Court. Finally, the Registry provides administrative and operational support to the Court and is responsible for activities in relation to defense, victims, communication and security matters. Civil society is most likely to engage most with the OTP and the Registry.

The ICC can hear cases that concern crimes that allegedly took place after 1 July 2002. Defined in the Rome Statute, these crimes include:

- [‘Genocide’](#), or certain acts with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group;
- [‘Crimes against humanity’](#), or certain acts defined in the Rome Statute as a part of a widespread or systematic attack directed against any civilian population;
- [‘War crimes’](#), or certain acts that amount to grave breaches of the [Geneva Conventions](#) and other serious violations of the laws of war; and
- [‘Aggression’](#), or acts including invasion, military occupation, annexation by the use of force, and blockade of the ports or coasts.

However, the ICC is limited in investigating and prosecuting these crimes by its territorial jurisdiction. The ICC can only hear cases where: the alleged crimes were committed within the territory of a member of the Rome Statute; the alleged perpetrators are nationals of a member of the Rome Statute; or where the case is referred to the ICC by the United Nations Security Council.

Cases can be initiated in three ways:

- By a member state self-referring (e.g., [Uganda](#), [Democratic Republic of Congo](#), [Central African Republic](#) and [Mali](#))
- By referral by the UN Security Council under [UN Charter Chapter VII](#) (e.g., [Darfur, Sudan](#) and [Libya](#))
- By the Prosecutor through her/his own motivation (or ‘proprio motu’) (e.g., [Kenya](#), [Bangladesh/Myanmar](#), and [Afghanistan](#))

Cases progress through several phases. These phases are generally very lengthy. They include:



HOW DOES THE ICC ADDRESS VICTIMS?

The ICC [emphasizes](#) the importance of giving victims a voice in proceedings that is independent of the Prosecutor. Furthermore, victims have a right to be heard under the Rome Statute articles 61 and 68(3). This, in part, helps the Judges to have an understanding of the victims' experiences which Judges may take into consideration.

The following offices within the ICC have mandates to address the needs of victims:

- The Victims Participation and Reparations Section (VPRS),
- The Victims and Witnesses Section (VWS) and
- Two independent offices, the Office of Public Counsel for Victims (OPCV) and the Trust Fund for Victims (TFV).

The VPRS informs victims of their rights relating to [participation](#) and reparations at the ICC, and enables them to submit applications to the Court if they wish to do so. The VPRS also assists victims to organize their legal representation. It also keeps the Chamber informed and provides advice.

The VWS has been established to provide support and protection to witnesses and to victims who appear before the ICC. They may also assist others, such as family members, who are in danger as a result of a witness' testimony. When victims testify as witnesses, the VWS provides administrative and logistical support to enable them to appear before the ICC. The VWS also provides psycho-social care and other appropriate assistance as required.

When conducting their activities, the VPRS and VWS pay special attention to the particular needs of children, women, the elderly, persons with disabilities and victims of sexual violence.

The OPCV assists victims as required in their legal representation in court. The OPCV may provide logistical and/or research support or act as legal representative of victims in court.

The TFV is separate from the ICC but was established by the ICC's Assembly of States Parties under the Rome Statute. The TFV has a two-fold mandate: (i) to implement Court-Ordered reparations and (ii) to provide physical, psychological, and material support to victims and their families.

HOW CAN CIVIL SOCIETY ENGAGE WITH THE ICC?

There are several ways in which civil society may engage with the ICC.

Civil society may provide information to the OTP [at any time](#). There is no specific format for communications. While, in theory, the OTP will respond to indicate receipt of information, in practice the OTP may not have the capacity. There is no guarantee the OTP will take this information into consideration.

In cases where the Prosecutor declares her/his intention to [commence](#) an investigation, victims can make representations to the Court through the Legal Representatives of Victims (LRVs) under Rome Statute Article 15(3). This provides an opportunity for victims to make submissions based on the violations they have experienced and the broader impact those violations have had. To be able to make representations, individuals must meet the criteria defined in [Rule 85](#) of the ICC Rules of Procedure and Evidence. To participate, victims can apply using a standard [application form](#).

Additionally, under Article 44 of the Rome Statute, the ICC can ask for assistance from civil society. However, no funding for this assistance is provided by the ICC or the OTP.

Finally, if the investigation leads to criminal proceedings, civil society can ask the court for permission to provide legal analysis in formal submissions called amicus curiae, or 'friend of the Court' briefs.

WHAT COULD CIVIL SOCIETY CONSIDER BEFORE ENGAGING WITH THE ICC?

Before engaging with the ICC it may be useful to ask:



What are our goals in engaging with the ICC? Is it to assist victims to connect with the Court? Is it to provide information to the OTP? Is it to give a legal opinion as an amicus curiae?



Which organ or office with the Court will help us to assist that goal?

Situations in Asia Before the ICC: Bangladesh/Myanmar

Relevance: This case may be of interest for civil society concerned with barriers to international justice. Here, Myanmar is not a signatory to the Rome Statute, but an investigation is able to proceed because the alleged crimes crossed the border into Bangladesh—a State that has acceded to the Court’s jurisdiction. Likewise, this case shows how different international justice mechanisms can work together, with concurrent proceedings regarding Myanmar in the [International Court of Justice](#) and with the existence of the [Independent Investigative Mechanism for Myanmar](#).

Focus of the [Investigation](#): Alleged crimes of deportation, persecution, and any other crime within the ICC jurisdiction committed, against the Rohingya people or others, violence which occurred in Rakhine State, Myanmar, and any other crimes under the ICC’s jurisdiction sufficiently linked to these events.

The investigation looks into alleged crimes within the jurisdiction of the Court in which at least one element occurred on the territory of Bangladesh – a State Party to the Rome Statute – and within the context of two recent waves of violence in Rakhine State on the territory of Myanmar, as well as any other crimes which are sufficiently linked to these events. This follows a ruling by the Court which confirmed that the Court may assert jurisdiction pursuant to article 12(2)(a) of the Statute, “if at least one element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party to the Statute.”

It is important to highlight that as Myanmar is not a State Party to the Rome Statute, but Bangladesh is. As a result, the authorisation to investigate, will not extend to all crimes potentially committed in Myanmar, but will focus on crimes allegedly committed in part on the territory of Bangladesh e.g. deportation and persecution.

Continue Reading →

Procedural history: On 14 November 2019, Pre-Trial Chamber III authorized the Prosecutor to proceed with an investigation for the alleged crimes within the ICC's jurisdiction in the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar. The [authorisation](#) followed the request to open an investigation submitted on 4 July 2019 by the Prosecutor. The Chamber also received the views on this request by or on behalf of hundreds of thousands of alleged victims. Victims filings representations were made as provided in article 15(3). Victims [expressed](#) their views on: (i) whether an investigation should be authorized; (ii) the appropriate scope of the investigation; (ii) whether the jurisdiction and admissibility requirements are met for an investigation of that scope; and (iii) whether such investigation is in the interests of justice.

Notably, victims in this matter [collectively petitioned](#) the ICC to hold proceedings in Bangladesh, rather than the Hague. Although the Court [rejected](#) this petition, this represents an important avenue for advocacy that victims groups may pursue to have greater access to relevant proceedings.

Situations in Asia Before the ICC: Afghanistan

Relevance: This case may be of interest for civil society interested in victim participation, particularly considering the significant work of the ICC Victims Participation and Reparations Section (VPRS) prior to authorisation by the Appeals Chamber.

Focus of the [Investigation](#): Alleged crimes against humanity and war crimes committed in Afghanistan since 1 May 2003 (Afghanistan deposited its instrument of accession to the Rome Statute in February 2003).

Procedural History: The preliminary examination focused on crimes listed in the Rome Statute allegedly committed in the context of the armed conflict between pro-Government forces and anti-Government forces, including: the crimes against humanity of murder and imprisonment or other severe deprivation of physical liberty; and the war crimes of murder, cruel treatment, outrages upon personal dignity, the passing of sentences and carrying out of executions without proper judicial authority, intentional attacks against civilians, civilian objects and humanitarian assistance missions, and treacherously killing or wounding an enemy combatant. The preliminary examination also focuses on the existence and genuineness of national proceedings in relation to these crimes.

Continue Reading →

Further Information: On 5 March 2020, the Appeals Chamber of the International Criminal Court decided unanimously to authorize the Prosecutor to commence an investigation into alleged crimes under the jurisdiction of the Court in relation to the situation in the Islamic Republic of Afghanistan. Between 7 December 2017 and 9 February 2018, the ICC VPRS transmitted to the Pre-Trial Chamber a total number of 699 victims representations. On 20 February 2018, the VPRS transmitted to the Judges a final consolidated report on victims' representations, containing an overview of the victim representations process, as well as details and statistics of the transmitted representations.

WHERE CAN WE FIND OUT MORE?

For sources of information directly from the Court, see:

- "Understanding the ICC":
<https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>
- "Civil Society and the ICC":
<https://www.icc-cpi.int/get-involved/Pages/ngos.aspx>
- Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries (March 2014)
<https://www.icc-cpi.int/iccdocs/LT/GRCI-Eng.pdf>
- Code of conduct for intermediaries (March 2014)
<https://www.icc-cpi.int/iccdocs/LT/CCI-Eng.pdf>
- Model contract for intermediaries (March 2014)
<https://www.icc-cpi.int/iccdocs/LT/MCI-Eng.pdf>

For an external view, see:

- Coalition for the ICC: [Civil Society and the ICC.](#)

Note: resources are up-to-date as of November 2021.

► INTERNATIONAL COURT OF JUSTICE (ICJ)

The International Court of Justice (ICJ or the Court) resolves disputes between States and provides opinions and decisions on the implementation of international obligations, notably in relation to treaty obligations.

The ICJ may not be the court that first comes to mind when considering international accountability; instead the ICC, with its focus on criminal responsibility, may seem more apt. However, the ICJ has increasingly become an important avenue challenging breaches of obligations under the Convention against Torture and the Genocide Convention. The ICJ has also [increasingly ordered](#) provisional measures—interim orders made to protect the rights of the parties—that can be requested by parties to a matter or on its own motion. Additionally, it has recently [established a new ad hoc committee](#) of judges to monitor compliance with provisional measures.

All members of the United Nations are parties to the Statute of the International Court of Justice (ICJ Statute). While the ICJ is only open to States to bring a case, civil society can advocate for accountability by supporting the work of the Court and providing information to States participating in its proceedings.

KEY TAKEAWAYS



The ICJ is the United Nation's (UN) international 'Court' in which States may bring a case, or international organizations, such as arms of the UN, may ask for an advisory opinion.



While there are limited opportunities for civil society to engage directly with the Court, there are several ways in which the cases before the Court may be supported.



The ICJ provides the potential for accountability by highlighting State violations of treaty obligations. Failure to abide by an ICJ judgment may result in referral to the UN Security Council.

UNDERSTANDING THE ICJ

The ICJ is the judicial organ of the UN, established under [Chapter XIV of the UN Charter](#). The ICJ has jurisdiction under its Statute to hear disputes referred to it by States regarding international obligations, such as obligations that a State accepts when it becomes a party to a treaty.

There are two types of matters before the ICJ: advisory proceedings and contentious cases.

Advisory proceedings are opportunities for the other UN organs and agencies to request an opinion of the Court on a legal issue. Advisory opinions are not binding, but they may indicate how the Court would interpret particular international legal obligations including those in treaties.

Contentious cases are between States; under [Article 34\(1\) of the ICJ Statute](#), only States may be parties in cases before the Court. Such cases include boundary disputes, maritime delimitation, and interpretation of treaties. Although ICJ decisions do not have precedential value (meaning they do not become binding authority for future ICJ decisions), they are binding on the parties to the case. States agreed to be bound if a party to a case by signing the [UN Charter](#).

Only States may initiate a case and initiating the case requires a legal “hook”. For example, if a treaty makes the ICJ the Court in which disputes may be heard, and two States are parties to that treaty, State A may initiate proceedings in the ICJ if it believes State B is not abiding by the treaty. One example of this is the [case brought by The Gambia against Myanmar](#) regarding Myanmar’s obligations under the [Genocide Convention](#).

Case Study: The Gambia v Myanmar

Context: [In November 2019](#), the Republic of the Gambia filed an application to institute proceedings in the ICJ arguing that Myanmar’s “clearance operations” against the Rohingya in 2016 onwards constituted a violation of the [Genocide Convention](#), which the ICJ had jurisdiction to review. The Genocide Convention’s Article IX provides that disputes related to the Convention between parties are to be taken to the ICJ. Both The Gambia and Myanmar are parties to the Genocide Convention. In March 2020, the [Maldives](#) announced its intention to intervene in support of The Gambia; in September 2020, [Canada and the Netherlands](#) announced their intent to do the same.

Continue Reading →

Provisional Measures: The ICJ can order 'provisional measures,' or make an interim order, on the request of a Party to a case or on its own motion. The Gambia requested in its application that the ICJ make such orders against Myanmar. On 23 January 2020, the ICJ [ordered](#) positive provisional measures, requiring the Myanmar government to: prevent genocidal acts within its territory, including ensuring police and military forces under its control do not commit genocidal acts; preserve evidence of genocidal acts; and report to the Court regarding compliance with these measures. These orders are [binding](#) on Myanmar and failure to comply can result in referral to the UN Security Council.

Relationship with other accountability avenues: The Gambia's [November 2019](#) application repeatedly cited the findings of the United Nations Independent International Fact-Finding Mission on Myanmar. It also noted that the ICC lacked jurisdiction for prosecuting genocidal crimes within Myanmar, because Myanmar is not a signatory to the [Rome Statute](#). This complements the ICC [investigation](#) (mentioned above) which focuses on crimes of which at least one element occurred on the territory of Bangladesh, a State Party to the Rome Statute.

Like other complex judicial bodies, proceedings before the ICJ are lengthy. Cases progress through several stages:

PROCESS FOR CONTENTIOUS CASES



CAN CIVIL SOCIETY ENGAGE WITH THE ICJ DIRECTLY?

The ICJ's mandate does not require it to engage with civil society. Furthermore, its [Statute, Rules,](#) and [Practice Directions](#) provide only limited opportunities for civil society engagement.

The type of proceedings dictates how civil society may engage with the ICJ.

In advisory proceedings, the Court has only granted the opportunity for civil society to engage in the proceedings once in its case on the International Status of South-West Africa. Civil society's submissions were not included, however, because they were [provided outside the time limit](#) given.

The Court's own [Practice Direction XII](#) states that:

- 1 Where an international non-governmental organization submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered as part of the case file.*
- 2 Such statements and/or documents shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain.*
- 3 Written statements and/or documents submitted by international non-governmental organizations will be placed in a designated location in the Peace Palace. All States as well as intergovernmental organizations presenting written or oral statements under Article 66 of the Statute will be informed as to the location where statements and/or documents submitted by international non-governmental organizations may be consulted.*

In other words, while written statements or documents given to the Court will not become an official part of the proceedings or part of Court record, they will still be available for States, UN bodies, or other interveners to use. This suggests that it may be prudent for a civil society organization wishing to provide information to both provide the document to the [Court Registrar](#) and the directly to the relevant State or body.

In contentious cases, the opportunity for civil society to engage is equally indirect.

[Article 50](#) of the ICJ Statute states that the:

Court may, at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

This permits the Court, on its own decision, to potentially request a specialized civil society organization to give information related that specialization. However, civil society organizations should note that the Court does not provide funding for entities it deems as 'experts.' Furthermore, the Court retains the ability to accept or deny the offer of assistance.

The ICJ has wide discretion as a fact-finder. Regarding providing information, in [Nicaragua v United States](#), the Court acknowledged that: "in principle [it] is not bound to confine consideration to material formerly submitted by parties" [at paragraph 30]. There, the ICJ took into consideration a report by the United States Department of State, "not submitted to the Court in any formal manner..." but given to the Registry "to be made available to anyone at the Court interested in the subject" [at paragraph 73]. Thus, the Court's judges have the discretion to take into consideration information outside of what has formally been provided by the parties.

While not all judges will exercise this discretion, it is also interesting to note that judges may take into account advocacy papers and reports not specifically submitted to the Registry. In her dissent in [Arrest Warrant of 11 April 2000](#), Judge Van Den Wyngaert made reference to reports by Amnesty International, Avocats sans Frontières, Human Rights Watch, the International Federation of Human rights Leagues (FIDH) and the International Commission of Jurists stating: "This may be seen as opinion of civil society, an opinion that cannot be completely discounted in the formation of customary international law today... [t]he Court fails to acknowledge this development, and does not discuss the relevant sources" (emphasis in the original) [at page 155].

Thus, in the absence of direct participation, civil society organizations may be able to provide information to the Registry or make available public reports that address the subject matter of a case.

Civil society organizations can also attempt to engage directly with the parties. Information provided to, and advocacy of, parties to a case may assist in influencing the initiation of a case or parties' pleadings.

WHY ENGAGE WITH, OR SUPPORT, THE ICJ?

Although the ICJ does not present multiple opportunities for civil society engagement, civil society can still be key in encouraging the work of the ICJ.

This may include, as noted above, engaging with parties directly, advocating for and monitoring the enforcement of provisional measures and Court judgments, and engaging with treaty bodies monitoring compliance with treaty obligations.

This advocacy for the work of the ICJ is important in international accountability because it provides a legal forum in which:

- its decisions are binding on parties;
- its decisions and opinions clarify treaty obligations;
- it is possible to address grave violations of international human rights and humanitarian law where there may not be enough evidence to reach a finding for individual criminal responsibility; and
- it is possible to address grave violations by States that aren't yet a party to the International Criminal Court.

WHERE CAN WE FIND OUT MORE?

For cases based on treaties relating to international justice and accountability, see:

Cases related to the Genocide Convention

- [1951 Advisory Opinion on Reservations](#) (via UN General Assembly resolution)
- [Bosnia and Herzegovina v Serbia and Montenegro](#) (1993 – 2007)
- [Croatia v Serbia and Montenegro](#) (1999 – 2015)
- [The Gambia v Myanmar](#) (2019 – ongoing)

Cases related to the Convention against Torture

- [Obligation to Prosecute or Extradite \(Belgium v Senegal\)](#) (2009 – 2012) (Includes “special interest” and universal jurisdiction, *erga omnes partes* obligations)

Cases related to the Geneva Conventions/Humanitarian Law

- [Pakistan v India \(Trial of Prisoners of War case\)](#) (1973, discontinued)
- [Military and Paramilitary Activities \(Nicaragua v US\)](#) (1986)
- [Advisory Opinion on the Legality of the threat or use of Nuclear Weapons](#) (1996)

Note: resources are up-to-date as of November 2021

► UNIVERSAL JURISDICTION

When a court exercises universal jurisdiction, this means that the court is using a legal ability to hear a case of (1) non-nationals committing crimes that took place (2) outside of the territorial state in which the court sits and where those crimes were (3) against other non-nationals. It takes its legitimacy from the notion that some crimes are [so heinous](#) that they should be able to be tried anywhere. Such crimes include [genocide](#), [war crimes](#), and [crimes against humanity](#).

The exercise of universal jurisdiction is a way to seek criminal accountability for international crimes in domestic courts. It is also increasing in use—the [Universal Jurisdiction Annual Review \(UJAR\) 2020](#), a report by TRIAL International and several NGOs focusing on universal jurisdiction matters, found that there were 40% more named suspects in universal jurisdiction matters in 2019 than there were in 2018. In the [UJAR 2021](#), there were 30 ongoing trials utilizing universal jurisdiction with 18 different countries prosecuting.

This increasing use of universal jurisdiction is important because it provides an additional forum for legal accountability. National jurisdictions exercising universal jurisdiction over international crimes can assist in preventing impunity by prosecuting in instances where the relevant state is unwilling or unable to prosecute and the international system is not engaged. This connects with the Rome Statute’s [principle of complementarity](#), where national jurisdictions retain primary responsibility to prosecute international crimes and the international system, namely the ICC, is a ‘last resort.’

KEY TAKEAWAYS



When choosing a Forum State, civil society seeking to bring a matter under universal jurisdiction should consider: (1) whether and how international crimes and universal jurisdiction is incorporated into the State’s domestic laws; (2) the availability of evidence and the expertise of legal and judicial staff handling such evidence; and (3) the relationship between the Forum State and the victims and survivors.



As ever, it is important to centre for victim and survivor participation and manage expectations regarding the length and potential outcomes of a matter heard under universal jurisdiction. ‘Success’ in a universal jurisdiction matter may not mean imprisonment for perpetrators.



Information and best practice sharing amongst civil society and seeking legal support in the Forum State can help to improve chances that a universal jurisdiction is heard.

UNDERSTANDING UNIVERSAL JURISDICTION

What Is 'Jurisdiction?'

Is the capacity and competence (i.e., legal ability) of a court to hear a case. It can be thought of as a 'link' between the matter and the courts' authority. A forum is a place where a case is heard.

A domestic court's jurisdiction is defined by domestic law. Under that law, a court might have the legal ability to hear a case because of the territory in which the crime was committed; the nationality of the alleged perpetrator; the nationality of the victim; and/or, amongst others, if it accepts universal jurisdiction.

What Might 'Universal Jurisdiction' Look Like In A Hypothetical 'State A'?

A court in 'State A' would be exercising universal jurisdiction in cases where:

- Neither the accused nor the victims are nationals of State A, but the accused is found within its territory;
- Neither the accused nor the victims are nationals of the State A, but the victims are found within its territory; or
- Neither the accused nor the victims are nationals of the State A and neither are found within its territory (or 'pure' universal jurisdiction).

The exercise of universal jurisdiction is most common where the accused is present within the State's territory—'present' may mean transiting through. Some States do not allow prosecution without the accused present (or where the accused is *in absentia*) but may still permit an investigation to begin or an arrest warrant to be issued.

WHAT KIND OF OUTCOMES MIGHT A UNIVERSAL JURISDICTION CASE BRING?

Like all court cases, success is not guaranteed when bringing a matter under universal jurisdiction. It is important to be clear with survivors that pursuing a matter under universal jurisdiction can take a very long time and may not result in a guilty verdict—or even a prosecution at all.

Nevertheless, simply pursuing universal jurisdiction matters may result in a range of outcomes.

Organizations should seriously weigh both the benefits and the risks in pursuing universal jurisdiction.

RANGE OF POTENTIAL OUTCOMES

FURTHER ALONG PROCESS PURSUING UNIVERSAL JURISDICTION



IF THE ACCUSED IS FOUND GUILTY:

- And the accused is in state custody, punishment of the accused
- Compensation for victims, depending on state law, its capacity, and the location of victims

IF SUCCESSFUL IN BRINGING THE CASE, BUT NO GUILTY VERDICT

- Fair trial conducted, facts have been heard and litigated
- Ideally provides opportunity for victim-participation

IF NO TRIAL CONDUCTED

- If there is an investigation, results in additional fact-finding; this may complement other investigations
- May result in international arrest warrant, which hinders the accused from travel to Forum State
- Communicates/raises awareness of violations

WHAT SHOULD CIVIL SOCIETY CONSIDER WHEN PURSUING UNIVERSAL JURISDICTION?

There are several factors that may be useful when choosing a forum in which to pursue the exercise of universal jurisdiction.

These may include finding a forum in which:

- The domestic law allows for universal jurisdiction and incorporates international crimes.** For example, Germany's national [Code of Crimes Against International Law](#) enables prosecution for grave breaches of the Geneva Conventions, terrorism, torture, genocide, and trafficking of persons, amongst other offences. There is no requirement of a link to Germany whatsoever; however, the accused must be found to be voluntarily in Germany. This National Code is unique in its far-reaching jurisdiction.
- The state has recognized certain treaties, such as the [Geneva Conventions](#), their [Additional Protocols](#), and the [Convention against Torture](#).** This is because these treaties incorporate the principle of *aut dedere aut judicare*, or the obligation to 'extradite or prosecute' an alleged perpetrator of certain treaty-based crimes. Be aware that this obligation does not create the jurisdiction through which a court may be permitted to prosecute but may make it more likely that prosecution is possible.
- The courts and prosecutors have familiarity or experience with international criminal matters and the courts, prosecutors, or police have investigative capacity for complex cases.** For example, States such as France, Germany, and the Netherlands have [specialized units](#) to assist in preparing cases and prosecuting war crimes.
- There is a mechanism for victim complaint, as well as the ability to include victims in court or investigative processes.** In civil law countries, victims' organizations may be able to act as 'civil parties' to petition a court directly—rather than through the initiation of a prosecutor—to instigate an investigation. In many common law countries, private prosecution—or prosecution initiated by a private individual rather than the state prosecutor—may also be available. There, a lawyer stands in as the listed party, but may be representing victims' groups.
- There is domestic political/legislative will for the exercise of universal jurisdiction.** Although a legal concept, establishing the legal framework for universal jurisdiction requires political or legislative will to have created the necessary laws in the first place. Moreover, as some legislation requires the approval of the State's highest law officer, such as the Attorney-General, to begin prosecution, bringing a case under universal jurisdiction may become a question of what may be most diplomatically expedient.

There are also several factors that may be favourable in bringing a matter under universal jurisdiction. These include:

- **Access to potential evidence through an international investigatory mechanism.** The existence of a United Nations fact-finding mission can assist in laying the groundwork for domestic investigators and prosecutorial teams. It can also lend legitimacy to requests for prosecution. Likewise, an international mechanism dedicated to compiling case files for prosecution can ease the complex information-collection needs in universal jurisdiction cases. Examples of such mechanisms include the [International, Impartial and Independent Mechanism for Syria](#), the [United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL](#), and the [Independent Investigative Mechanism for Myanmar](#) (see elsewhere in this Toolkit).
- **There is no other active prosecution elsewhere.** Courts are unlikely to exercise universal jurisdiction if the same acts or crimes and circumstances are being tried elsewhere. It is important to be clear what legal 'gap' a matter under universal jurisdiction is filling.
- **The accused may be present, or plans to be present, in the Forum State's territory.** State opinion and practice is divided regarding whether universal jurisdiction may be exercised if the accused is not physically within the Forum State's territory. While some States permit the exercise of universal jurisdiction when the accused is absent, more restrictive enabling legislation requires that an accused is in its territory 'voluntarily' for universal jurisdiction to be exercised. 'Voluntarily' excludes presence because of extradition.

Case Study: Universal Jurisdiction for Genocide – A Comparison

Pursuing universal jurisdiction can be difficult, lengthy, costly, and may not result in a trial, let alone a conviction. The following two cases sit in contrast to illustrate the many factors that may be present in pursuing a prosecution for genocide under universal jurisdiction.

Context: Between April and July 1994 in Rwanda, extremist in the ethnic/social Hutu group targeted the Tutsi ethnic social group and moderate Hutus. In November 1994, the UN Security Council adopted a resolution to establish the International Criminal Tribunal for Rwanda (ICTR). The ICTR finished operations in 2015, handing over to the International Residual Mechanism for Criminal Tribunals.

Theodore Tabaro: [Theodore Tabaro](#), born as Theodore Rukertabaro, was alleged to have contributed to a massacre of Tutsi on 9 April 1994, and an attack on a school and a church on 13 April 1994. He moved to Sweden in 1998, and became a Swedish citizen in 2006. In October 2016, he was arrested in Sweden on suspicion of involvement in genocide. In September 2017, he was charged with murder, attempted murder, kidnappings, and rapes. The Swedish war crimes unit, a unit dedicated to investigation and prosecution of such crimes, to charge of investigations and the unit was able to visit Rwanda to collect evidence. Tabaro was tried before a special chamber in a Stockholm court. In June 2018, he was found guilty and sentenced to life imprisonment for genocide through murder, attempted murder, and abduction. He was acquitted of rape. He was also ordered to pay compensation to victims. Although he appealed, his sentence and verdict were upheld in April 2019.

Wenceslas Munyeshyaka: [Father Wenceslas Munyeshyaka](#) was alleged to have participated in the genocide by selecting Tutsis to be murdered, leaving Tutsis to die of thirst, reporting anyone attempting to help Tutsis to authorities, and raping women. Alleged mass executions occurred between 17–24 April 1994 in Munyeshyaka's parish. Munyeshyaka remained a Rwandan citizen. French proceedings were first introduced on behalf of victims in July 1995, but in March 1996, investigation chamber of the Court of Appeal in Nîmes found it could not exercise universal jurisdiction. In January 1998, the French Supreme Court ordered proceedings to be reopened, after French domestic law incorporated the ICTR Statute. In September and October 2000, an investigating judge requested permission to investigate in Rwanda. By 2004, this investigation had not taken place. The European Court of Human Rights found the delay in the matter unacceptable.

Continue Reading →

In December 2005, Rwanda announced an international arrest warrant be issued for Munyeshaka and in October 2006, he was tried *in absentia* (or in his absence) by a military court for complicity in genocide with a Hutu General. He was convicted and sentenced in absentia to life imprisonment in November 2006.

In June 2007, the ICTR issued an arrest warrant for Munyeshyaka, who was exiled in France. In July 2007, he was arrested and brought to the French State Prosecutor and the Investigation Chamber of the Court of Appeal in Paris. The Court ordered Munyeshyaka's release because the ICTR's arrest warrant was sufficiently imprecise. In August 2007, the ICTR revised and re-issued the arrest warrant and Munyeshyaka was arrested by the French authorities. In November 2007, the ICTR declined jurisdiction in favour of French procedures. In February 2008, French authorities re-opened matters regarding Munyeshyaka. He was released under judicial supervision during the investigation. At this time, France did not yet have a special unit for tracking international crimes.

In October 2015, the investigating judge dismissed the case against Munyeshyaka at the request of the Prosecutor for lack of evidence. Despite petitions from civil parties, the Investigation Chamber of the Court of Appeal confirmed the dismissal in June 2018. Civil parties appealed to the French Supreme Court. This was rejected in October 2019, clearing Munyeshyaka of all charges.

These two cases, brought in jurisdictions with sufficient resources and experience with international crimes, indicate that no two universal jurisdiction matters will be the same. They also indicate that the outcome can be unpredictable and the process protracted.

WHERE CAN WE FIND OUT MORE?

For examples of universal jurisdiction in practice, see:

- Dr Sarah Finnin (FIDH/ECCHR/Redress) September 2020 report: “Breaking Down Barriers: Access to Justice in Europe for Victims of International Crimes”
<https://www.fidh.org/en/issues/international-justice/report-eu-must-eliminate-barriers-to-justice-for-victims-of-serious>
- Universal Jurisdiction ‘guides’ for Belgium, France, Germany, the Netherlands, Sweden, and the UK, produced by the Syria Justice and Accountability Centre:
<https://syriaaccountability.org/resources/universal-jurisdiction/>
- TRIAL’s Universal Jurisdiction Database where cases and countries can be compared:
<https://trialinternational.org/resources/universal-jurisdiction-database/>

Note: resources are up-to-date as of November 2021.

**This paper has been produced by the Asia Justice Coalition secretariat.
It should not be taken to reflect the views or positions of all members.**

ABOUT THE ASIA JUSTICE COALITION

The Asia Justice Coalition is a network of organizations whose purpose is to promote justice and accountability for gross violations of international human rights law and serious violations of international humanitarian law in Asia, and to contribute to the fulfillment of the rights of victims and their families.

More about the Asia Justice Coalition at www.asiajusticecoalition.org

