

ICJ senior legal adviser Kingsley Abbott explains the International Criminal Court process in an interview for BBC Burmese

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Saw Yan Naing, BBC Burmese: Myanmar government is very confident that no action against Myanmar can be taken because Myanmar is not a state party of Rome Statute. What do you think of that?

Kingsley Abbott, senior legal adviser for the International Commission of Jurists (ICJ): I think first of all it is important to clarify that the International Criminal Court investigates and prosecutes individuals. They do not prosecute States. So it will not be concerned with investigating Myanmar as country, but with investigating individuals within Myanmar. The second point is that the ICC is a court of last resort, meaning that it only gets involved in investigations and prosecutions when international crimes have been committed, and the State itself is not taking action. If the State concerned was to conduct investigations that are high standard and high quality, and conduct appropriate prosecutions, then the International Criminal Court has no interest to getting involved.

And it's also at a very early stage at the moment. The international criminal court is still at a very early stage where it is assessing whether this is the kind of case that should be investigated by the international criminal court. And the prosecutors are in the process of asking the court whether it can proceed to a full investigation. As to whether or not something can happen at the ICC concerning Myanmar, it is possible. Because while Myanmar is not a member of ICC, its neighbour Bangladesh is. And there is allegation at the moment that some crimes took place inside Myanmar, but carried over into Bangladesh. And because part of the crime was committed in Bangladesh, which is a party of the ICC, it means legally that the ICC can look into the Myanmar situation.

I think the basic analogy to help explain that is this example: if somebody in one country fired a gun and the bullet travelled across the border into another country where someone else was hit by the bullet and died, it means that although the person died in the second country, the person who fired the gun in the first country can be investigated.

BBC: So do you mean that the crime happens in Burma, border with the Bangladesh. So this is something that Myanmar could be responsible and could be taken action somehow? How do you clarify?

ICJ: That's right. There is allegation at the moment that some crimes, particularly crimes against humanity, may have occurred inside Myanmar and continued over into Bangladesh. And because part of the crime occurred inside Bangladesh, which is a member

of the International Criminal Court, it means that the ICC can look at the situation as the whole and see whether or not any individuals are responsible for those crime.

BBC: So which crime do you think Myanmar can be responsible in the Rakhine crisis?

ICJ: The International Criminal Court has said so far that they would like to look at whether certain crimes against humanity were committed. And one of those crimes is the crime of deportation. What the crime of deportation means is that people were forcibly moved away from their homes, away from their communities against their will. And not only they were forcibly moved but also they were moved from one country into another country. So one of the reasons that the International Criminal Court might look at deportation, is because they are saying people may have been forcibly moved outside of Myanmar and into Bangladesh. And that means that part of the crime was committed inside Bangladesh, because that is where the people arrived, and that is where they are still living. And because Bangladesh is a member of the International Criminal Court, it means that the international criminal court can look at that group of people and say "maybe they are victims of the crime that started in Myanmar but continued and it is continuing now in Bangladesh."

BBC: How long it takes to investigate and to get solid evidences to prosecute those who are responsible on these human rights violations?

ICJ: Myanmar has the primary responsibility (the first responsibility to conduct an investigation. If Myanmar would tomorrow start conducting independent, open, transparent investigations itself, then the international criminal court and the international community is likely to be happy and satisfied and feel that they don't need to get involved. But because the assessment at the moment that this is not taking place, the ICC prosecutor has asked the court for authorization to conduct an investigation. Now if the ICC agrees and says "yes, go ahead and investigate the situation in Myanmar and Bangladesh," then it is difficult to say how long the investigation will take. It could potentially takes several years because we will be looking at a quite complex situation. And this is always the case when you are talking about international crimes, as these often involve many victims, and a quite complicated assessment and legal analysis has to be done. So the investigation always takes a long time. So at this point is difficult to say how long it will take if the the ICC does proceed with an investigation.

BBC: Recently, a delegation of ICC visited Bangladesh. What are the improvement?

ICJ: The ICC visited Bangladesh really at the very very beginning of the process. They were there to do several preliminary things, taking some first steps. One step was just to help the people in Bangladesh understand what the ICC is. And why the ICC is looking at the situation of Myanmar and Bangladesh. And also, that was also part of its efforts to gather enough information to decide whether or not this is the kind of situation that the ICC should conduct a full investigation of. Now they have gathered that information together from Bangladesh, from Myanmar, and from other sources... the prosecutors have said they think this is the kind of case that the ICC should investigate. So they have asked the court to authorize them – to give them permission – to conduct a full investigation. But we don't know yet what is the answer of the court will be. So as of today, a full investigation has not yet commenced.

BBC: So what are the advantages and disadvantages for Myanmar by ignoring its cooperation with the international communities including the ICC prospectors?

ICJ: Well, as I've said, the first thing that Myanmar should do is to conduct a full independent impartial and transparent investigation itself. That's the first thing that Myanmar should do. And if it identifies any perpetrators as part of that investigation, then those perpetrators should be prosecuted.

But, if the ICC does proceed to a full investigation, then Myanmar should cooperate with that investigation. We have to remember that Myanmar itself is not the one being investigated. What is being investigated is: firstly, whether any crimes were committed in the country; and then, if it has determined that some crimes were committed, whether anybody is responsible for those crimes. So it is very much, I think, part of Myanmar obligations and in Myanmar's interests to assist those investigations.

All states should be concerned if any crimes have been committed within their territory, particularly if crimes that are this serious have allegedly committed.

I also think it is in Myanmar's interests to cooperate because it's important to show that they have nothing to hide, and maybe Myanmar has information which will assist the court. And Myanmar may feel that as part of any investigation they would like to provide some information, and their side of the story. But, keep in mind is that Myanmar is not being investigated. What is being investigated is whether any crimes being committed and whether any individuals are responsible for those crimes.

I think if Myanmar does not cooperate with the international criminal court, and continues not to cooperate with other international bodies and the United Nations that are looking at these alleged violations, then I think the international pressure will continue. And so at some point it's very much in Myanmar's interests to conduct it's own investigations which meet international standards. And if they are not conducting those investigations themselves, they should to cooperate and assist those who are.

BBC: So the UN Fact-finding mission's report is very strong. It looks at human rights violations in Myanmar. What do you think of that?

ICJ: I think it is important to note that the Fact Finding Mission's report was not the result of the criminal inquiry that made findings that crimes were committed and that people will be sentenced for committing those crimes. It was an investigation into a wide range of issues that occurred throughout Myanmar and not only in Rakhine State.

The Fact Finding Mission itself deliberately chose to look at the situation in Rakhine, the situation in Shan, the situation in Kachin. And it noted many similarities between these three different situations, and made recommendations on all those three parts of Myanmar. It also went on to say that there are many other similar patterns around the country that should also be looked, at even beyond Rakhine, Kachin and Shan. The report then concluded by making recommendations on many different kinds of issues: recommendations to the Myanmar Govt calling for investigations into what allegedly happened in Rakhine and other parts of the country including Kachin and Shan; recommendations also to international community (to states), suggesting that they take certain action; and recommendations to the United Nations as well. So what now needs to happen is that those recommendations need to be studied carefully — by Myanmar, by international community, by the United Nations — and serious efforts need to be taken to be ensure they are implemented.

BBC: I just want to highlight about the UN effort. So, in the worst case, can the UN peacekeeping troops come into the territories of Bangladesh and Myanmar?

ICJ: As we know there is precedent around the world for a UN peacekeeping force to sometimes intervene in certain situations. But, I think that the general assessment at the moment is that the situation in Myanmar has not yet reached that level of gravity or that threshold. So, I think for the time being a peacekeeping force intervention is unlikely.

[End.]