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Q&A on accountability for crimes in Myanmar

Cover photo: A large group of Rohingya who fled from military operations in Myanmar's Rakhine State, try to cross the border at Palongkhali in Cox's Bazar, Bangladesh, on 17 October 2017. ©Anadolu Agency

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The release of the report by the Independent International Fact-Finding Mission (IFFM) on Myanmar on 27 August 2018 marked a pivotal moment in the establishment of the facts concerning crimes committed in recent years in Myanmar's Rakhine, Shan, and Kachin States. Overwhelming evidence collected by the IFFM points to the commission of "the gravest crimes" against civilians by Myanmar's military ('Tatmadaw') and police forces.

It is now of crucial importance that the process of ensuring accountability for these crimes moves forward through the pursuit of the following key steps: 1) consolidating evidence; 2) carrying out prosecutions; and 3) supporting any established international accountability mechanism and enabling it to deliver justice to the victims.

These three steps must be pursued without delay through simultaneous actions taken by three key United Nations (UN) bodies, namely the Human Rights Council, the General Assembly, and the Security Council, as well as by the international community as a whole.

The Human Rights Council and the General Assembly should promptly set up an International, Impartial and Independent Mechanism (IIIM). The IIIM is a dedicated body responsible for collecting, preserving, and analyzing evidence that will be used by prosecutors in national and international tribunals that will assert their jurisdiction over crimes committed in Myanmar.

At the same time, the Security Council should refer the situation of Myanmar to the International Criminal Court (ICC) and commit to providing concrete support to, and cooperation with, the ICC in order to ensure that prosecutions are carried out without delay in relation to all crimes within the ICC's jurisdiction and in all parts of the country.

In addition, the international community should fully support the possible ICC investigations and prosecutions following the court's decision on 6 September 2018. ICC Pre-Trial judges ruled that the ICC may exercise its jurisdiction over the alleged deportation of Rohingya from Myanmar to Bangladesh and other international crimes, provided part of these crimes occurred on the territory of Bangladesh, a State Party to the Rome Statute of the ICC.

Only with the political will, financial support, and cooperation of the international community will international accountability mechanisms be able to effectively deliver justice to the victims and ensure that those who bear the greatest responsibility are held accountable.

In addition, in States that recognize the principle of extra-territorial jurisdiction and in which the legal system allows its implementation, national authorities should open investigations and initiate prosecutions of Myanmar individuals accused of committing international crimes in Myanmar.

This document provides answers to the most pressing questions concerning the issue of accountability for crimes in Myanmar and seeks to help understand the intricacies of international justice mechanisms and how they can be applied to the situation in Myanmar.

1. Why is accountability important for victims of crimes committed in Myanmar, and is accountability attainable in Myanmar?

Victims have the right to truth, justice, and reparation under international law and holding perpetrators accountable is also an important factor in the deterrence of future crimes. The Myanmar government has an obligation to effectively ensure the right to truth, justice, and reparation. However, the country's deeply entrenched culture of impunity, which has not changed despite the political transition that began in 2011, has resulted in a consistent failure to hold perpetrators to account.

With regard to crimes allegedly committed against Rohingya in Rakhine State, the Myanmar government has repeatedly failed to adequately investigate and address such allegations [See below, *Question #4*]. The Independent International Fact-Finding Mission (FFM) on Myanmar has concluded that the Myanmar government is unable and unwilling to investigate and prosecute crimes under international law, and that “the impetus for accountability must come from the international community.”¹

2. What crimes have been allegedly committed in Rakhine State, in particular against Muslim Rohingya?

A ‘flash report’ released by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in February 2017 documented a number of human rights violations committed by Myanmar security forces and Rakhine villagers against Rohingya in northern Rakhine State during their first wave of attacks in response to the killing of nine Myanmar police officers by armed Muslim militants at several police outposts on 9 October 2016.

These included: extrajudicial and summary executions or other killings; enforced disappearance; rape and other forms of sexual violence; physical assault including torture, and cruel, inhuman or degrading treatment; arbitrary detention, inhuman conditions and ill-treatment in detention; lack of emergency medical care; destruction of property; looting and occupation of property; and ethnic and religious discrimination.²

A second OHCHR report released in October 2017 found that serious human rights violations committed in the aftermath of the killing of 12 Myanmar security officers in northern Rakhine State on 25 August 2017 by armed Muslim militants were executed in a well-organized, coordinated, and systematic manner, with the intent of driving the Rohingya population out of Myanmar and preventing them from returning to their homes. Reports indicated that security forces scorched dwellings and entire villages, and were responsible for extrajudicial and summary executions, rape and other forms of sexual violence, torture, and attacks on places of worship.³

On 27 August 2018, the Independent International Fact-Finding Mission (FFM) on Myanmar released the report of their main findings and recommendations. The report indicated that crimes against humanity had been committed in Rakhine State, principally by the Myanmar military, but also by other security forces. These crimes included: murder; imprisonment; enforced disappearance; torture; rape, sexual slavery and other forms of sexual violence; and persecution and enslavement, as well as elements of the crimes against humanity of extermination and deportation.⁴

While the majority of these crimes were committed against Rohingya, there were also reports of abuses committed in Rakhine State, in which Rakhine and members of other ethnic or religious groups, including Mro and Hindus, were killed.⁵

1. UN Human Rights Council, 39th session, *Report of the Independent International Fact-Finding Mission on Myanmar*, 24 August 2018, UN Doc. A/HRC/39/64, Para. 98

2. OHCHR, *Report of OHCHR mission to Bangladesh, Interviews with Rohingyas fleeing from Myanmar since 9 October 2016, Flash Report*, 3 February 2017

3. OHCHR, *Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh, 13-24 September 2017*, 11 October 2017

4. UN Human Rights Council, 39th session, *Report of the Independent International Fact-Finding Mission on Myanmar*, 24 August 2018, UN Doc. A/HRC/39/64, Para. 88

5. UN Human Rights Council, 39th session, *Report of the Independent International Fact-Finding Mission on Myanmar*, 24 August 2018, UN Doc. A/HRC/39/64, Para. 54

3. Under which national laws could perpetrators of crimes committed in Myanmar be held accountable?

Myanmar's Criminal Code lists criminal offenses that cover many of the serious crimes committed by security forces. These include: injuring or defiling places of worship, with intent to insult the religion of any class (Article 295); murder (Article 300); and rape (Articles 375 and 376). Torture is punished under Articles 330 and 331 ('voluntarily causing hurt to extort confession, or to compel restoration of property' and 'voluntarily causing grievous hurt to extort confession, or to compel restoration of property'); wrongful imprisonment is punished under Articles 339 and 340 ('wrongful restraint' and 'wrongful confinement'); and arson and destruction of homes and other buildings are punished under Articles 435 and 436 ('mischief by fire or explosive substance with intent to cause damage' and 'mischief by fire or explosive substance with intent to destroy [a] house').

The 1959 Defense Services Act and the 1960 Defense Services Rules contain rules that govern the conduct of Myanmar military personnel. However, under Article 72 of the 1959 Defense Services Act, military service personnel who commit serious crimes (such as murder, culpable homicide, and rape) while on active service are to be tried by military courts, instead of civilian courts. Rulings by military courts are final and are not subject to appeal.⁶

The 1995 Myanmar Police Force Maintenance of Discipline Law contains rules on the discipline of the police force. In instances where police officers have committed human rights violations, they are generally prosecuted under procedures of this law, rather than under criminal law. Under the 1995 Myanmar Police Force Maintenance of Discipline Law, police officers may be prosecuted in a police court, which is adjudicated by 'gazetted officers' of the police force, rather than ordinary judicial officers. As a result, the prosecution of police officers under this law is neither independent nor impartial.⁷

4. Has the Myanmar government genuinely investigated allegations of crimes against Rohingya and other ethnic groups in the country?

The Myanmar government has repeatedly failed to adequately investigate and address the allegations of human rights violations committed against the Rohingya population. Since October 2016, at least five government-appointed bodies have failed to hold perpetrators of atrocities committed against Rohingya accountable.⁸ These were in addition to two other government-appointed commissions that equally failed to ascertain facts, identify perpetrators, and hold them accountable for two previous waves of attacks against Rohingya, the first from June to October 2012, and the second in January 2014.

On 30 July 2018, Myanmar's President's Office established a four-member Independent Commission of Enquiry (CoE), chaired by senior Filipino diplomat Rosario Manalo.⁹ The body has

6. International Commission of Jurists, *Achieving Justice for Gross Human Rights Violations in Myanmar - A Baseline Study*, January 2018

7. International Commission of Jurists, *Achieving Justice for Gross Human Rights Violations in Myanmar - A Baseline Study*, January 2018

8. Since October 2016, five commissions have been appointed by the Myanmar government to investigate the violence in northern Rakhine State:

1. Investigation Commission on violence in Maungdaw ('Myint Swe Commission') (formed on 1 December 2016), tasked with probing "the truth" in relation to violent attacks that occurred on 9 October and 12-13 November 2016 in Maungdaw Township. The Commission concluded it could not confirm cases of rape, torture, and killings by security forces in the villages it visited.

2. State-level Commission (formed on 24 October 2016), tasked with investigating the 9 October 2016 attacks. The investigation excluded any probe into human rights violations against the Rohingya population. The final report denied human rights violations, blamed violence exclusively on Rohingya, and recommended increasing security.

3. Military Inquiry Board (formed on 9 February 2017), tasked with investigating whether security forces committed unlawful acts during clearance operations.

4. Police Departmental Inquiry (formed on 11 February 2017), tasked with investigating whether police forces committed human rights violations during 'clearance operations.' Policemen caught beating villagers sentenced to two months' imprisonment under the Myanmar Police Force Maintenance of Discipline Law.

5. Aye Win Committee (formed on 9 February 2017). After its investigation into the behavior of military personnel following the 25 August 2017 attacks, the Army issued a statement exonerating itself of any human rights abuses.

9. President Office, *Government of the Republic of the Union of Myanmar Establishes the Independent Commission of Enquiry*, 30 July 2018

been tasked with investigating allegations of human rights violations and related issues following the attacks by the Arakan Rohingya Salvation Army (ARSA) on 9 October 2016 and 25 August 2017, with a view to seeking accountability and formulating recommendations on steps to be taken to ensure peace and sustainability in Rakhine State.¹⁰ However, the Commission's terms of reference have yet to be made public and the Commission has not elaborated on its proposed plan of action.¹¹ Ms. Manalo's statements that there would be "no blaming of anybody, no finger pointing of anybody" and that it was "a very bad approach [...] to say 'you are accountable!'" casted serious doubts on the body's willingness to identify perpetrators of crimes and hold them accountable.¹² Earlier, in March 2018, Aung Tun Thet, another member appointed to the CoE, declared that "no ethnic cleansing or genocide" had occurred in Myanmar.¹³ A final report, with recommendations, is to be delivered by the CoE to the President within 12 months.¹⁴

In an apparent response to Ms. Manalo's statements that the Commission would not seek to hold any perpetrators accountable, former Thai diplomat Kobsak Chutikul, who was a secretary of the 'Advisory Board to the Committee for the Implementation of the Recommendations on Rakhine State' before resigning in July 2018 [See below, *Question #5*],¹⁵ commented, "This just goes on and on. Next year, it will be another commission, another board. [...] It's all for show – there is nothing real. It is a hoax."¹⁶

5. How many people have been prosecuted and held accountable for crimes committed against Rohingya?

Fifteen people are known to have been prosecuted or sanctioned for crimes committed against Rohingya.

On 13 February 2017, a police official announced that five police officers had been sentenced to two months in police prison each and three senior police officers demoted after a video had been circulated online a month before, showing the police officers beating Rohingya villagers during a 'clearance operation' aimed at rooting out suspected militants in Kotankauk Village, Rathedaung Township, Rakhine State.¹⁷

In another instance, on 10 April 2018, the Myanmar Army announced that a military court had sentenced seven soldiers to 10 years in prison each with hard labor for "contributing and participating in [the] murder" of 10 Rohingya men in September 2017.¹⁸ The prosecution of the soldiers happened only after the publication of a Reuters news report containing incontrovertible evidence about the Inn Din massacre, during which the 10 Rohingya men were shot at point blank range by Army soldiers or hacked to death by Buddhist villagers in Maungdaw Township.¹⁹ It is notable that the Reuters journalists who exposed the massacre, Wa Lone and Kyaw Soe Oo, were subsequently convicted and sentenced to seven years in prison each under Article 3.1(c) of the 1923 Official Secrets Act in an apparent act of reprisal.²⁰

10. Ministry of Information, *Independent Commission on Enquiry holds press conference*, 17 August 2018

11. Frontier Myanmar, *Rakhine Commission of Enquiry to report back in a year*, 17 August 2018

12. Coconuts Yangon, *Suu Kyi's Rakhine enquiry commission says it will not seek accountability for rights abuses*, 17 August 2018

13. New York Times, *Myanmar Rejects U.N. Findings: 'No Ethnic Cleansing or Genocide in Our Country'*, 14 March 2018

14. Frontier Myanmar, *Rakhine Commission of Enquiry to report back in a year*, 17 August 2018

15. Nation, *Another blow for Surakiart's Rohingya panel*, 24 July 2018

16. Washington Post, *A year after the assault on the Rohingya, Myanmar's generals are unapologetic*, 21 August 2018

17. Reuters, *Myanmar to probe police over allegations of crimes against Rohingya*, 13 February 2017; Guardian, *Myanmar to investigate video of police beating Rohingya villagers*, 2 January 2017

18. Reuters, *Seven Myanmar soldiers sentenced to 10 years for Rohingya massacre*, 11 April 2018; BBC, *Myanmar soldiers jailed for 10 years for Rohingya killings*, 11 April 2018

19. Reuters, *How Myanmar forces burned, looted and killed in a remote village*, 8 February 2018

20. Reuters, *Myanmar prosecutor seeks Official Secrets Act charges against two Reuters reporters*, 10 January 2018; Reuters, *Myanmar court files secrets act charges against Reuters reporters*, 9 July 2018; Reuters, *Myanmar court jails Reuters reporters for seven years in landmark secrets case*, 3 September 2018

6. What is the 'Kofi Annan Commission' and what has it achieved?

The Advisory Commission on Rakhine State (the 'Kofi Annan Commission'), chaired by the late United Nations (UN) Secretary-General Kofi Annan, was a nine-member body formed in September 2016 at the behest of Myanmar's State Counselor's Office.²¹ The Commission's mandate did not include the investigation of human rights abuses.²² Instead, the body's goal was to find the "best possible solutions to prevailing problems" and propose recommendations to the government related to "conflict prevention, humanitarian assistance, rights and reconciliation, institution building, and [the] promotion of development" in Rakhine State.²³ No Rohingya were appointed to the Commission. Other Commission members included one Yangon-based Muslim and two Buddhist Rakhine, including Myanmar National Human Rights Commission (MNHRC) Chairman Win Mra, who is well-known for his harsh anti-Rohingya rhetoric.²⁴

On 24 August 2017, the Kofi Annan Commission issued its final report to the Myanmar government recommending sustainable solutions for Rakhine State. The report included a number of recommendations specific to Rohingya, including on citizenship, freedom of movement, internally displaced persons (IDPs), humanitarian access, media access, inter-communal tension, the security sector, access to justice, and border issues with Bangladesh.²⁵

The government committed to giving the report its full consideration "with a view to carrying out the recommendations to the fullest extent, and within the shortest timeframe possible."²⁶ However, recommendations included in the report, such as the revision of the 1982 Citizenship Law and to allow all living in Rakhine to move about freely, regardless of their religion, ethnicity, or citizenship status,²⁷ echo similar suggestions that have been consistently made by rights groups long before the current crisis.

The Myanmar government has admitted that the Kofi Annan Commission served as a shield against criticism from the international community. In an interview published on 10 July 2017, government spokesperson Zaw Htay said, "Whenever there is an accusation from the international community, we say we are taking action in line with the recommendations of the Kofi Annan Commission. The Commission is serving as a shield for us. Were it not for the Kofi Annan Commission, the allegations would be much worse, I think."²⁸

On 21 August 2018, State Counselor Aung San Suu Kyi claimed that the government had implemented 81 of the 88 recommendations put forward by the Kofi Annan Commission.²⁹ In an apparent abandonment of its commitment to adequately implement key recommendations made by the Commission, the government abruptly dissolved the 'Advisory Board to the Committee for the Implementation of the Recommendations on Rakhine State' headed by former Thai Foreign Minister Surakiart Sathirathai, when it submitted its final report on 16 August 2018.³⁰ In an interview published on 21 August 2018, former United States Ambassador Bill Richardson – who resigned from the advisory board within weeks of its first meeting in January 2018 over his

21. Advisory Commission on Rakhine State, *About the Commission*, available at: <http://www.rakhinecommission.org>

22. Irrawaddy, *Kofi Annan: Commission Will Not Do 'Human Rights Investigation' in Arakan State*, 8 September 2016; Advisory Commission on Rakhine State, *Mandate of the Commission*, available at: <http://www.rakhinecommission.org/mandate-of-the-commission/>

23. Office of the State Counsellor, *Establishment of the Advisory Commission on Rakhine State*, 23 August 2016

24. Advisory Commission on Rakhine State, *Members of the Commission*, available at: <http://www.rakhinecommission.org/members-commission-secretariat/>

25. Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine. Final Report of the Advisory Commission on Rakhine State*, August 2017

26. Office of the State Counsellor, *Statement by the Office of the State Counsellor on the Final Report of the Advisory Commission on Rakhine*, 24 August 2017

27. Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine. Final Report of the Advisory Commission on Rakhine State*, August 2017, Recommendations No. 17 and 18

28. Irrawaddy, *U Zaw Htay: Kofi Annan Commission is Govt 'Shield'*, 10 July 2017

29. Straits Times, *Aung San Suu Kyi outlines Myanmar's efforts to resolve Rohingya crisis, help refugees return*, 21 August 2018

30. Nation, *Myanmar ditches Surakiart's Rohingya probe*, 17 August 2018; Global New Light of Myanmar, *Rakhine Advisory Board submits Final Report*, 17 August 2018; Washington Post, *A year after the assault on the Rohingya, Myanmar's generals are unapologetic*, 21 August 2018

belief that the body was a “whitewash”³¹ – said Aung San Suu Kyi was “not serious about dealing with the issue. [...] Anything that involved taking on the military, she won’t do. She’ll just do some PR [public relations] moves like these commissions.”³²

7. What is the Independent International Fact-Finding Mission (IFFM) on Myanmar and what has it accomplished so far?

Appointed by the United Nations (UN) Human Rights Council in March 2017,³³ the IFFM on Myanmar is a three-member team of experts with a mandate to “establish the facts and circumstances of alleged human rights violations by military and security forces, and abuses, in Myanmar.” While the IFFM has been asked to focus “in particular” on the situation in Rakhine State, its mandate also allows it to look into all “recent” allegations of human rights abuses committed in Myanmar.³⁴

The IFFM began its work in August 2017, but has been refused access to Myanmar by the government.³⁵ On 27 August 2018, the IFFM released a report containing its main findings and recommendations. The report documented crimes against humanity committed in Rakhine State [See above, *Question #1*], as well as in Kachin and Shan States since 2011.³⁶ The IFFM’s report also concluded that there was sufficient information to “warrant the investigation and prosecution of senior officials in the Myanmar military chain of command, so that a competent court can determine their liability for genocide in relation to the situation in Rakhine State.”³⁷

8. What is genocide and do crimes allegedly committed against Rohingya in Myanmar amount to it?

The actions and policies of the Myanmar government as well as the crimes of which its security forces are accused may fulfill most of the elements of the crime of genocide.

Genocide entails “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group [...] (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”³⁸

The repeated mass violence against Rohingya in northern Rakhine State for reasons related to their membership or perceived membership of an ethnic and/or religious group, including the execution of civilians, sexual crimes, the destruction of villages, and other abuses designed to engender terror and effect the forcible transfer of nearly 725,000 Rohingya to Bangladesh (since August 2017)³⁹ combined with the government’s revocation and/or restriction of basic rights, including citizenship rights, the right to freedom of movement, reproductive rights, and the right to marry, all point to an intention to eliminate the Rohingya population from Myanmar.

31. Reuters, *Exclusive: Richardson quits Myanmar’s ‘whitewash’ Rohingya crisis panel*, 25 January 2018

32. Washington Post, *A year after the assault on the Rohingya, Myanmar’s generals are unapologetic*, 21 August 2018

33. UN Human Rights Council, 34th session, *Resolution adopted by the Human Rights Council on 24 March 2017, Resolution 34/22*, 3 April 2017, UN Doc. A/HRC/RES/34/22

34. UN Human Rights Council, 34th session, *Resolution adopted by the Human Rights Council on 24 March 2017, Resolution 34/22*, 3 April 2017, UN Doc. A/HRC/RES/34/22, Para. 11

35. UN Human Rights Council, *Fact-finding Mission on Myanmar: concrete and overwhelming information points to international crimes*, 12 March 2018

36. UN Human Rights Council, 39th session, *Report of the Independent International Fact-Finding Mission on Myanmar*, 24 August 2018, UN Doc. A/HRC/39/64, Paras. 5 and 88

37. UN Human Rights Council, 39th session, *Report of the Independent International Fact-Finding Mission on Myanmar*, 24 August 2018, UN Doc. A/HRC/39/64, Para. 87

38. Convention on the Prevention and Punishment of the Crime of Genocide, Article II

39. UN Human Rights Council, 39th session, *Report of the Independent International Fact-Finding Mission on Myanmar*, 24 August 2018, UN Doc. A/HRC/39/64, Para. 33

In its report containing its main findings and recommendations, the Independent International Fact-Finding Mission (FFM) on Myanmar noted that the security forces' response to the killing of 12 Myanmar police officers by armed Muslim militants in August 2017 "was immediate, brutal and grossly disproportionate" and suggested "a level of preplanning and design" consistent with Myanmar military Commander-in-Chief Senior General Min Aung Hlaing's stated vision to finish "the unfinished job" of solving "the long-standing Bengali problem."⁴⁰ The FFM also concluded that the manner in which the crimes in Rakhine State were perpetrated were "similar in nature, gravity and scope to those that have allowed genocidal intent to be established in other contexts," and that the factors pointing at intent included "the broader oppressive context and hate rhetoric; specific utterances of commanders and direct perpetrators; exclusionary policies, including to alter the demographic composition of Rakhine State; the level of organization indicating a plan for destruction; and the extreme scale and brutality of the violence."⁴¹

9. What are crimes against humanity and do crimes allegedly committed in Myanmar amount to it?

Crimes against humanity involve any of a set of acts "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack," including murder, extermination, enslavement, deportation, imprisonment, torture, rape and other sexual and gender-based crimes, group-based persecution, enforced disappearance, apartheid, and other inhumane acts of a similar character.⁴²

Attacks committed by the Myanmar Army against the civilian Rohingya population have been documented as widespread and systematic and appear to be consistent with the definition of 'crimes against humanity.' An Office of the United Nations (UN) High Commissioner for Human Rights (OHCHR) 'flash report', released in February 2017, found that the attacks against the Rohingya population in northern Rakhine State "seem to have been widespread as well as systematic, indicating the very likely commission of crimes against humanity."⁴³ An earlier report of the UN High Commissioner for Human Rights also stated that "[m]any of the acts described [in Rakhine State] would suggest a widespread or systematic attack against the Rohingya, in turn suggesting the possible commission of crimes against humanity, if established by a court of law."⁴⁴

Crimes that may amount to crimes against humanity appear to have been committed in other parts of Myanmar, including in Kachin and Shan States, where torture, and rape and sexual violence have been allegedly committed in a widespread and systematic manner. In its August 2018 report, the Independent International Fact-Finding Mission (FFM) on Myanmar found evidence that crimes against humanity had been committed in Rakhine State, as well as in Kachin and Shan States, principally by the Myanmar military. These crimes included murder; imprisonment; enforced disappearance; torture; rape, sexual slavery and other forms of sexual violence; persecution and enslavement. The FFM also found that in Rakhine State, elements of the crimes against humanity of extermination and deportation were also present and that the systematic oppression and discrimination may also amount to the crime of apartheid.⁴⁵

40. UN Human Rights Council, 39th session, *Report of the Independent International Fact-Finding Mission on Myanmar*, 24 August 2018, UN Doc. A/HRC/39/64, Paras. 33, 35, and 86

41. UN Human Rights Council, 39th session, *Report of the Independent International Fact-Finding Mission on Myanmar*, 24 August 2018, UN Doc. A/HRC/39/64, Para. 85

42. Rome Statute of the International Criminal Court, Article 7(1)

43. OHCHR, *Report of OHCHR mission to Bangladesh, Interviews with Rohingyas fleeing from Myanmar since 9 October 2016, Flash Report*, 3 February 2017

44. UN Human Rights Council, 32nd session, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar, Report of the United Nations High Commissioner for Human Rights*, 29 June 2016, UN Doc. A/HRC/32/18, Para. 55

45. UN Human Rights Council, 39th session, *Report of the Independent International Fact-Finding Mission on Myanmar*, 24 August 2018, UN Doc. A/HRC/39/64, Para. 88

10. Does the International Criminal Court (ICC) have jurisdiction over crimes committed in Myanmar?

At the moment, the International Criminal Court (ICC) does not have jurisdiction over all international crimes committed in Myanmar.

In principle, the ICC does not have jurisdiction over crimes committed in Myanmar, as Myanmar is not a State Party to the Rome Statute.

However, the ICC could exercise its jurisdiction over all crimes committed in Myanmar after 1 July 2002 (the date of entry into force of the Rome Statute of the ICC), in two scenarios:

- 1) The United Nations Security Council (UNSC) refers the situation of Myanmar to the ICC Prosecutor under Chapter VII of the United Nations Charter (Article 13(b) of the Rome Statute); or
- 2) Myanmar expressly accepts the ICC's jurisdiction by lodging a declaration with the ICC (Article 12(3) of the Rome Statute).

However, an ICC referral of the Myanmar situation through a UNSC resolution is highly unlikely due to the probable veto by UNSC permanent members China and/or Russia.

In addition, the Myanmar government's interactions with the ICC thus far indicate a clear rejection of any engagement with the court, let alone the acceptance of its jurisdiction. On 9 August 2018, Myanmar's State Counselor's Office issued a statement in response to the Office of the Prosecutor (OTP) of the ICC's request for a ruling on the ICC's jurisdiction over Myanmar under Article 19(3) of the Rome Statute [See below, *Question #11*]. The statement asserted that the government "declined to engage with the ICC by way of a formal reply" and rejected the OTP's request for a ruling on jurisdiction as "meritless."⁴⁶

Nevertheless, following a decision by the ICC Pre-Trial Chamber I on 6 September 2018, the ICC has jurisdiction over the alleged crime of deportation of Rohingya from Myanmar to Bangladesh [See below, *Question #11*].

11. Why can the International Criminal Court (ICC) exercise its jurisdiction over particular crimes, such as the alleged deportation of Rohingya from Myanmar to Bangladesh?

The ICC can exercise its jurisdiction over the alleged crime of deportation of Rohingya from Myanmar to Bangladesh because part of this crime occurred on the territory of a State that grants the ICC jurisdiction, namely Bangladesh, which became a State Party to the Rome Statute of the ICC on 23 March 2010.

On 9 April 2018, the ICC Prosecutor sought a ruling from the ICC Pre-Trial Chamber on whether the court could exercise its jurisdiction, specifically over the alleged deportation of Rohingya from Myanmar to Bangladesh. Deportation (a conduct that can amount to a crime against humanity under Article 7(1)(d) of the Rome Statute of the ICC) entails the enforced displacement of individuals across an international border.

The ICC Prosecutor argued that even if the acts relevant to the alleged deportation occurred on the territory of Myanmar (which is not a State Party to the Rome Statute), an essential element of the crime – the crossing of an international border – occurred on the territory of Bangladesh.

On 6 September 2018, ICC judges in the Pre-Trial Chamber I granted the Prosecutor's request.⁴⁷ The judges reached their conclusion after reviewing the reasoning of the Office of the Prosecutor (OTP), the observations submitted confidentially by Bangladesh, the statement publicly made by

46. Office of the State Counsellor, *Press Release*, 9 August 2018, available at: <http://www.statecounsellor.gov.mm/en/node/2084>

47. ICC, *ICC Pre-Trial Chamber I rules that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh*, 6 September 2018

Myanmar (in which it refused to directly interact with the court), observations by law experts and non-governmental organizations (NGOs), and submissions on behalf of victims of the alleged crime. Not only did the judges assert that the ICC has jurisdiction over the alleged deportation of Rohingya from Myanmar to Bangladesh, but further added that the court may exercise its jurisdiction over other crimes if an element or part of these crimes occurred on the territory of Bangladesh.

In addition, the judges of the ICC Pre-Trial Chamber I argued that the Prosecutor should proceed without delay with the opening of a public preliminary examination and the initiation of an ICC investigation. It is now up to the Prosecutor to take these steps.

12. Would a United Nations Security Council (UNSC) referral of the situation of Myanmar to the International Criminal Court (ICC) ensure justice for the victims?

It greatly depends on the UNSC's political will to support the ICC's mandate and work.

Once an ICC investigation is open, the ICC's Office of the Prosecutor (OTP) may encounter difficulties similar to those faced in the UNSC referrals of Sudan (Darfur) and Libya, neither of which, to date, have achieved the commencement of a single trial despite several outstanding arrest warrants in both cases. The ICC Prosecutor has repeatedly called on the UNSC to increase its engagement with her office on the situations it has referred, particularly by lending her office concrete support in the arrest and surrender of individuals indicted by the ICC, as well as to provide financial support for these investigations.

Along with an ICC referral of the situation of Myanmar, the UNSC should also provide the needed support for the court to fulfill its mandate. Failure to do so would contribute to undermining the ICC's legitimacy and credibility, all while achieving little justice and accountability for the most serious crimes.

13. Could international *ad hoc* or mixed tribunals prosecute crimes committed in Myanmar?

The probability of this happening is very low.

Ad hoc tribunals are established through a United Nations Security Council (UNSC) resolution, which, in the case of Myanmar, would likely not be adopted due to the probable veto by permanent members China and/or Russia.

A mixed tribunal (such as the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, or the Special Court in the African Chamber) composed of Myanmar officials and foreigners, applying Myanmar law and international law, could only be established through a memorandum between the UN and the Myanmar government. As of now, the Myanmar government has not manifested any interest in the establishment of such a tribunal.

14. Could there be investigations and prosecutions of those responsible for crimes committed in Myanmar before national tribunals in other countries?

Yes.

Prosecutions could be initiated in countries whose legal systems allow courts to exercise extra-territorial jurisdiction over crimes under international law (such as genocide, crimes against humanity, war crimes, torture, and enforced disappearance). In countries that recognize the principle of extra-territorial jurisdiction and in which the legal system provides criteria that allow for the exercise of such jurisdiction, authorities could prosecute Myanmar citizens accused of committing crimes in Myanmar.

15. What is the proposed International, Impartial and Independent Mechanism (IIIM) on Myanmar and what can it do?

The International, Impartial and Independent Mechanism (IIIM or 'Triple-I-M') is an interim body tasked with making preparations ahead of potential prosecutions for crimes allegedly committed in Myanmar. Such prosecutions could take place before national or international courts. National courts may include both those within Myanmar's justice system and those located in third countries that may exercise extra-territorial jurisdiction over crimes committed in Myanmar. International courts may include the International Criminal Court (ICC) and special international *ad hoc* or mixed tribunals [See above, *Questions #11 and #13*].

The IIIM would transfer the evidence it has collected to the prosecutor of the national or international tribunals that may assume jurisdiction over the relevant crimes allegedly committed in Myanmar.

The IIIM on Myanmar could be established by either the United Nations General Assembly (UNGA) or the UN Human Rights Council.

So far, the only precedent for such a mechanism is the IIIM on Syria, which was established by a UNGA resolution in December 2016. The IIIM on Syria has a mandate to "collect, consolidate, preserve and analyze evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes."⁴⁸

In order to avoid delays and duplication of tasks, the Independent International Fact-Finding Mission (IFFM) on Myanmar recommended the possibility of attaching an IIIM on Myanmar to the existing IIIM on Syria so that it could benefit from the structures and processes already in place. Whether separated from or attached to the IIIM on Syria, the IIIM on Myanmar would require the allocation of dedicated and sufficient resources to address the crimes committed in Myanmar, without undermining the efforts of the IIIM on Syria.

16. Why is it important to create an International, Impartial and Independent Mechanism (IIIM) now?

The IIIM should be created as a priority to fill the gap between the end of the mandate of the Independent International Fact-Finding Mission (IFFM) on Myanmar and the moment in which an international justice mechanism for criminal accountability (as well as possible national justice mechanisms) takes up cases related to international crimes allegedly committed in Myanmar. As an interim mechanism, the IIIM would immediately begin to prepare files for prosecutions. The creation of such a mechanism would also serve to reaffirm the international community's message to Myanmar that atrocity crimes should end and that those responsible should be held accountable.

17. How is the proposed International, Impartial and Independent Mechanism (IIIM) different from the Independent International Fact-Finding Mission (IFFM) on Myanmar?

The mandate of the proposed IIIM will complement that of the IFFM on Myanmar. While the IFFM is mandated with establishing "the facts and circumstances of alleged human rights violations by military and security forces, and abuses, in Myanmar," the proposed mandate of the IIIM is to collect, consolidate, preserve, and analyze evidence of violations in order to facilitate future criminal prosecutions, focusing thus on linkage evidence and on specific modes of criminal liability. This information will be stored, analyzed, and eventually shared with national or international jurisdictions that will prosecute individuals responsible for international crimes allegedly committed in Myanmar.

48. For more information, see the official website of the IIIM on Syria: <https://iiim.un.org/>

18. Could the International Court of Justice (ICJ) examine Myanmar's potential breach of its international obligations to prevent and punish genocide?

Yes, it could, if a State asked it to.

The International Court of Justice (ICJ) does not prosecute individuals over crimes they allegedly committed. Instead, the ICJ settles disputes between two or more States. Accordingly, the ICJ does not accept cases lodged by individuals, non-governmental organizations (NGOs), corporations or other private entities, but only cases initiated by States, under what is known as contentious jurisdiction.

Among the disputes that the ICJ can examine are disputes between two or more State Parties to a Convention, and relating to the interpretation or application of that Convention. Such disputes include the application of human rights treaties⁴⁹ or a fundamental treaty, such as the Convention on the Prevention and Punishment of the Crime of Genocide (the 'Genocide Convention').⁵⁰

Myanmar is a State Party to the Genocide Convention, and has not made any reservation to the clause that would deprive the ICJ of its jurisdiction. As a result, there are no obstacles to one or more State Parties to the Genocide Convention bringing a case against Myanmar for its alleged breach of its obligations to prevent and/or punish genocide. In fact, some scholars argue that State Parties to the Genocide Convention have an obligation to take action against Myanmar for breaching its obligation to prevent and punish genocide under the Convention.

If contentious jurisdiction is not a viable option for admissibility reasons (the ICJ has recently set strict standards concerning the existence of a dispute), there is the possibility for the court to issue an advisory opinion, requested by an organization. Among the 15 organizations with the power to request an advisory opinion from the ICJ is the United Nations General Assembly (UNGA). Regional bodies, including the Organization of Islamic Cooperation (OIC), can request an advisory opinion from the ICJ through the UNGA.

The ICJ advisory opinion would not be binding, and Myanmar could disregard it. However, it would still constitute an authoritative pronouncement that could be used as a springboard for further action.

49. For example, see *Qatar v. the United Arab Emirates* (2018), and *Georgia v. Russian Federation* (2008), with regard to alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination.

50. For example, see *Bosnia and Herzegovina v. Federal Republic of Yugoslavia (Serbia and Montenegro)* (2007), with regard to a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, available at: <https://www.icj-cij.org/en/case/91>

United Nations (UN) concern over crimes in Myanmar

The UN has voiced concern over reports of crimes committed in Myanmar since 2016:

20 June 2016: In his report to the UN Human Rights Council, UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein highlighted the "possible commission of crimes against humanity" against Rohingya in Myanmar.⁵¹

3 February 2017: A 'flash report' by the Office of the UN High Commissioner for Human Rights (OHCHR) documented serious human rights violations against the Rohingya population in northern Rakhine State and concluded that the attacks against Rohingya during the prolonged crackdown could "very likely" amount to crimes against humanity.⁵²

11 September 2017: UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein declared that the situation in Rakhine State seemed to be "a textbook example of ethnic cleansing."⁵³

13 September 2017: UN Secretary-General António Guterres said "When one third of the Rohingya population had to flee the country, can you find a better word to describe it?" when asked if he believed the situation in Rakhine State amounted to ethnic cleansing.⁵⁴

4 October 2017: The UN Committee on the Elimination of Discrimination against Women (CEDAW) and the UN Committee on the Rights of the Child (CRC) said that the violations against Rohingya women and children "may amount to crimes against humanity."⁵⁵

11 October 2017: OHCHR stated that "[b]rutal attacks against Rohingya in northern Rakhine State have been well-organized, coordinated and systematic, with the intent of not only driving the population out of Myanmar but preventing them from returning to their homes."⁵⁶

18 October 2017: UN Special Adviser on the Prevention of Genocide Adama Dieng and UN Special Adviser on the Responsibility to Protect Ivan Šimonović called on the Myanmar government to "take immediate action to stop and address the commission of atrocity crimes" [genocide, crimes against humanity, and war crimes] in northern Rakhine State.⁵⁷

12 November 2017: UN Special Representative of the Secretary-General on Sexual Violence in Conflict Pramila Patten said the Myanmar Army's "widespread threat and use of sexual violence was [...] a calculated tool of terror aimed at the extermination and removal of the Rohingya as a group."⁵⁸

28 November 2017: The CEDAW called on Myanmar to report on cases of sexual violence against Rohingya women and girls by its security forces in northern Rakhine State, as well as measures taken to hold perpetrators accountable, within six months. The panel had previously requested such an "exceptional report" from a country only three times since 1982.⁵⁹ Myanmar did not meet the 28 May 2018 deadline for the submission of the report.

51. UN Human Rights Council, 32nd session, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, Report of the United Nations High Commissioner for Human Rights, 29 June 2016, UN Doc. A/HRC/32/18, Para. 55

52. OHCHR, *Report of OHCHR mission to Bangladesh, Interviews with Rohingyas fleeing from Myanmar since 9 October 2016*, Flash Report, 3 February 2017

53. UN News Centre, *UN human rights chief points to 'textbook example of ethnic cleansing' in Myanmar*, 11 September 2017

54. UN Meetings Coverage, *Press Conference by Secretary-General António Guterres at United Nations Headquarters*, 13 September 2017

55. OHCHR, *Myanmar Rohingya abuses may be crimes against humanity, UN rights experts warn*, 4 October 2017

56. OHCHR, *Brutal attacks on Rohingya meant to make their return almost impossible – UN human rights report*, 11 October 2017

57. UN Secretary-General, *Note to Correspondents: Statement by Adama Dieng, UN Special Adviser on the Prevention of Genocide and Ivan Šimonović, UN Special Adviser on the Responsibility to Protect, on the situation in northern Rakhine state, Myanmar*, 18 October 2017

58. Reuters, *UN official says will raise sexual violence against Rohingya with ICC*, 12 November 2017

59. OHCHR, *Myanmar: UN experts request exceptional report on situation of women and girls from northern Rakhine State*, 28 November 2017

5 December 2017: In a statement to a Special Session of the UN Human Rights Council, UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein, while referring to attacks against Rohingya in Rakhine State asked, "given all of this, can anyone rule out that elements of genocide may be present?"⁶⁰

1 February 2018: UN Special Rapporteur on the situation of human rights in Myanmar Yanghee Lee said the Myanmar Army's operations against Rohingya were "amounting to crimes against humanity" and bore "the hallmarks of a genocide."⁶¹

12 March 2018: UN Special Rapporteur on the situation of human rights in Myanmar Yanghee Lee said she was "becoming more convinced that the crimes committed" following the 9 October 2016 and 25 August 2017 attacks bore "the hallmarks of genocide."⁶²

12 March 2018: UN Special Adviser on the Prevention of Genocide Adama Dieng said international crimes had been committed in Myanmar and that all of the information he had received indicated that "the intent of the perpetrators was to cleanse northern Rakhine State of their [Rohingya's] existence, possibly even to destroy the Rohingya as such, which, if proven, would constitute the crime of genocide."⁶³

4 July 2018: UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein urged the UN Security Council (UNSC) to refer Myanmar to the International Criminal Court (ICC) so that "all allegations of crimes against humanity and genocide perpetrated against the Rohingya can be investigated," as well as allegations of war crimes against other ethnic groups, such as Kachin and Shan.⁶⁴

60. UN Human Rights Council, *Special Session of the Human Rights Council on the human rights situation of the minority Rohingya Muslim population and other minorities in the Rakhine State of Myanmar*, Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein, 5 December 2017

61. AP, *UN Official Says Rohingya Crisis Has 'Hallmarks of Genocide'*, 1 February 2018

62. OHCHR, *Statement by Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 37th session of the Human Rights Council*, 12 March 2018

63. UN Secretary-General, *Note to Correspondents: Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide, on his visit to Bangladesh to assess the situation of Rohingya refugees from Myanmar*, 12 March 2018

64. OHCHR, *Thousands of Rohingya refugees continue to flee violence, 38th session of the Human Rights Council Oral Update on the situation of human rights of Rohingya people* Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein, 4 July 2018



Founded in 1996, **ALTSEAN-Burma** (Alternative ASEAN Network on Burma) is a network of organizations and individuals based in ASEAN member states working towards strengthening human rights and democracy in Southeast Asia, with a particular focus on Burma. Operating from Bangkok, Thailand, the network is comprised of human rights and social justice NGOs, think tanks, academics, journalists, and student activists.



Odhikar is a human rights organization based in Dhaka, Bangladesh. A group of human rights defenders established the organization on 10 October 1994, to create a wider monitoring and awareness raising system on the abuse of civil and political rights in Bangladesh. It holds special consultative status with the ECOSOC of the United Nations.

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