

## Jubilee Campaign



### **Written Contribution for Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence Regarding Myanmar and the Rohingya Genocide**

#### **I. Introduction**

In August 2017, following a sequence of attacks coordinated by the self-named Rohingya insurgent group Arakan Rohingya Salvation Army (ARSA) against Burmese police and military personnel – which led to the deaths of 12 Burmese officials – the military of Myanmar initiated a mass revenge campaign of extrajudicial killings, sexual violence and rape, torture, and village arson against Rohingya communities.<sup>1</sup> In addition to the thousands of deaths as a result of what is now termed the Rohingya Genocide, approximately 700,000 Rohingya were forced to flee to neighboring Bangladesh in order to escape the brutality.<sup>2</sup> Within just weeks of the start of the genocide, United Nations High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, referred to the violence in Myanmar as a “pattern of gross violations of human rights”, “possibly amounting to crimes against humanity”, and “a textbook example of ethnic cleansing.”<sup>3</sup>

With information gathered by some 120 Rohingya men and women who had escaped Myanmar, Amnesty International presented just how horrifying the picture was in the days after 25 August 2017: disabled and elderly Rohingya were left to burn in their homes after the military set fire to the communities; fleeing Rohingya were shot at indiscriminately; entire families were wiped out; teenage girls and women were raped in succession; and children were beaten with sticks and killed in landmine explosions. As a result of these sinister violence, it is estimated that upwards of 700,000 Burmese Rohingya citizens have fled into neighboring Bangladesh to seek refuge.<sup>4</sup>

The international human rights community has recognized that the situation in Myanmar has met the standards of genocide, according to the corroborated findings of the UN Fact-Finding Mission on Myanmar, and the concluding decision of the International Court of Justice which called upon Myanmar to cease all genocidal acts.<sup>5</sup>

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<sup>1</sup> Amnesty International, “Myanmar: Crimes against humanity terrorize and drive Rohingya out”, 18 October 2017.

<sup>2</sup> The Guardian, “Myanmar’s genocide against Rohingya not over, says rights group”, 23 November 2020.

<sup>3</sup> United Nations Office of the High Commissioner for Human Rights, *Opening Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights*, 11 September 2017.

<sup>4</sup> Amnesty International, “Myanmar: Crimes against humanity terrorize and drive Rohingya out”, 18 October 2017.

<sup>5</sup> *Summary 2020/1 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, *International Court of Justice*, 23 January 2020.

## II. Addressing the Special Rapporteur’s Questions

***(1) Please indicate which mechanisms have been established in your country, or country where you work, to hold accountable persons accused of committing gross violations of human rights and serious violations of international law and whether there is a prosecutorial prioritization strategy to strengthen accountability for such violations.***

Myanmar, in addition to being one of the first signatories of the United Nations Convention on the 1948 Prevention and Punishment of the Crime of Genocide, ratified the accord in 1956. However, Myanmar has yet to sign or ratify the UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, which would apply to the retaliation-sparked Rohingya Genocide, as it classifies acts of torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as...punishing him for an act he or a third person has committed or is suspected of having committed...”<sup>6</sup>

Put plainly, “transitional justice is not a feature of Myanmar’s democratization process”, due primarily to the fact that, in instances of transition from authoritarian rule to democracy – as is the case in Myanmar – the only guarantee of a harmonious and “peaceful” transition is that non-prosecution and amnesty would be offered to “address crimes committed by officials of the predecessor regime.”<sup>7</sup> In fact, Article 445 of the 2008 Constitution of the Union of Myanmar states “no proceeding shall be institute against” former “Councils” or “any member of the Government.”<sup>8</sup>

“There is a strong argument that in transitional conditions where former oppressors still hold a significant degree of power, it is not only pragmatic to delay or defer the establishment of institutions and processes to address historical wrongs because they might threaten the interests of transitional elites, it is also the correct moral response. This is because societies need a period of time to adjust to new circumstances of freedom from oppression, conflict, and terror; only after a period of adjustment are they able to articulate how they would like to respond to the past.”<sup>9</sup>

Regardless, there were a few mechanisms established to address human rights violations, namely the Myanmar National Human Rights Commission [established September 2011] and the Committee for the Rule of Law and Tranquility. Only four major investigations were carried out in the wake of the Rohingya Genocide, none of which “made findings that accorded with UN investigations or reports from credible human rights non-governmental organisations.”<sup>10</sup> Therefore, “the conclusion is that the transitional strategy of ending impunity and embedding the rule of law through the low-level prosecution of members of the military, and through the establishment of new independent institutions to promote accountability, was a failure.”<sup>11</sup>

Another important perspective is that Myanmar focuses on establishing “ad hoc”, temporary, and specific commissions of inquiry into human rights abuses rather than improving and subsequently utilizing the

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<sup>6</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations Treaty Series, vo. 1465.

<sup>7</sup> Catherine Renshaw, “Myanmar’s Transition without Justice”, *Journal of Current Southeast Asian Affairs*, 38(3), 2020.

<sup>8</sup> *Myanmar’s Constitution of 2008*.

<sup>9</sup> *ibid.*

<sup>10</sup> *ibid.*

<sup>11</sup> *ibid.*

already-existing institutions. However, due to these commissions' impromptu nature, there is never enough funding, organization, or investigative protocol to address massive violations of human rights such as genocide and crimes against humanity.<sup>12</sup>

In light of the reluctance and inability of Myanmar to develop formal mechanisms to address accountability for gross violations of human rights, numerous international initiatives have had to take up the mantle, including the UN Human Rights Council's Independent International Fact-Finding Mission for Myanmar (2017), Rome-based Permanent People's Tribunal of Myanmar (PPT), the UN Human Rights Council's Independent Investigative Mechanism for Myanmar (2018), the International Criminal Court's investigation (2019), the International Court of Justice's investigation initiated by the Gambia (2019), the proceedings of the Argentinian Universal Jurisdiction Case (2019), and the investigation and report of the United States Department of State (2018).<sup>13</sup>

***(3) Please indicate if your country, or country where you work, limits or obstacles have been imposed on the criminal prosecution and/or sanction of perpetrators of those violations....”***

One of the predominant obstacles to transitional justice for the perpetrators of the Rohingya Genocide is the government's and the army's reluctance to admit to engaging or abetting genocidal acts and crimes against humanity. In November 2017, just a few months after the bloody campaign, Myanmar's army released a report in which they outright denied accusations of mass rape and murder by troops and officers. In this report, they refer to the genocide as a “clearance operation [that] was necessary for national security” and they made the claim that individuals from Rohingya villages they interviewed confirmed that they did not engage in rape, acts of sexual violence, extrajudicial killings, physical assault, or “excessive violence.”<sup>14</sup>

During Aung San Suu Kyi's public defense of Myanmar at the International Court of Justice in 2019, she refused to recognize that the violence perpetrated against the Rohingya amounted to genocide, ethnic cleansing, and crimes against humanity; rather, she insisted in calling it “intercommunal violence”, with the “possibility” that “disproportionate force” was implemented. She refused to condemn the generals of the army, and only begrudgingly conceded that “if war crimes have been committed, they will be prosecuted within our military justice system.”<sup>15</sup>

The July 2018 establishment of a Myanmar Commission of Inquiry drew some concerns that justice would not be reached, especially considering that one of the commissioners, Burmese economist Aung Tun Thet, had previously stated “there is no such thing in our country, in our society, as ethnic cleansing, and no genocide.”<sup>16</sup> Moreover, chairwoman of the commission, Ambassador Rosario Manalo from the Philippines,

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<sup>12</sup> Jenny Domino, “Rohingya Symposium: Is Justice for the Rohingya Possible Within Myanmar?”, *OpinioJuris*, 24 August 2020.

<sup>13</sup> Katherine Southwick, “Leveraging International Justice for Lasting Peace in Myanmar”, *Just Security*, 4 August 2020.

<sup>14</sup> Wa Lone, “Myanmar military denies atrocities against Rohingya, replaces general”, *Reuters*, 13 November 2017.

<sup>15</sup> Marlise Simons & Hannah Beech, “Aung San Suu Kyi Defends Myanmar Against Rohingya Genocide Accusations”, *The New York Times*, 11 December 2019.

<sup>16</sup> Human Rights Watch, “Don't Expect Much from Latest Myanmar Commission”, 17 August 2018.

Thu Thu Aung & Shoon Naing, “Myanmar says it has verified fewer than 400 Rohingya for repatriation”, *Reuters*, 14 March 2018.

claimed that despite the goal being accountability, “there will be no blaming of anybody, no finger pointing....”

The recent January 2020 Executive Summary Of Independent Commission of Enquiry-ICOE' Final Report, though being the most exhaustive domestic report on the situation, (1) vastly underreports the number of Rohingya casualties as a result of the violence perpetrated by military forces; (2) denies the myriad allegations of sexual violence and gang rape; (3) and even reveals that, though Myanmar's Defense Services conducted an investigation into the violence and sentenced only “several” officials to imprisonment, military pardons were proffered to these perpetrators. In this report, the government once again attempts to invalidate the reports of local organizations and the United Nations, whose witnesses “must necessarily be scrutinized and evaluated...”<sup>17</sup>

Another obstacle to transitional justice is Myanmar's impunity towards the perpetrators of heinous crimes against the Rohingya. In September 2020, a video was circulated of two Burmese soldiers outlining the various atrocities – rape and murder – they committed during the Genocide, and it was revealed that neither of the officers have been charged.<sup>18</sup> In May 2019, Myanmar granted early release to seven soldiers charged with the murder of 10 Rohingya individuals, including men and boys, during the 2017 crackdown. Two current prisoners revealed that each of the seven perpetrators had served less than one year of their original 10-year sentences before they were released.<sup>19</sup> Contrastingly, two Burmese journalists that reported on the violence against Rohingya individuals, Wa Lone and Kyaw Soe Oo, actually spent longer in prison – 16 months each – on charges of “obtaining state secrets” before they were granted amnesty.

Attorney Elliot Higgins in 2018 assessed the likelihood – or lack thereof – of transitional justice for the Rohingya Genocide. With regards to how the nation's view of the Rohingya as well as the leader's refusal to engage in dialogues about the crisis affects transitional justice he reflects:

“Accordingly, the most likely scenario would be for the government of Myanmar to do nothing at all to address the crimes against the Rohingyas. Sometimes called de facto amnesty, not doing anything is arguably in the best interest of both of the two key political authorities of Myanmar. For the military, not acting is the obvious choice because they are the ones who would likely be held primarily accountable for the crimes. For the NLD [National League for Democracy], not acting offers three benefits: (1) ensuring that its leadership would not be held liable for an implicit endorsement of the crimes; (2) warding off a coup from an angry military; and (3) avoiding political backlash from an anti-Rohingya electorate.”<sup>20</sup>

***(4) Please indicate the impact that the political context in your country, or country where you work, (internal stability, security, democratic governance, etc) has had on the mechanisms of accountability or impunity adopted in response to gross violations of human rights or serious violations of international humanitarian law.”***

<sup>17</sup> *Executive Summary of Independent Commission of Enquiry-ICOE' Final Report*, The Republic of the Union of Myanmar President Office, January 2020.

<sup>18</sup> Arafatul Islam, “Does Myanmar soldiers' murder confession prove Rohingya genocide?”, *DW News*, 15 September 2020.

<sup>19</sup> Shoon Naing & Simon Lewis, “Exclusive: Myanmar soldiers jailed for Rohingya killings freed after less than a year”, *Reuters*, 26 May 2019.

<sup>20</sup> Elliot Higgins, “Transitional Justice for the Persecution of the Rohingya”, *Fordham International Law Journal*, 42(1), 2018.

It is our deduction that Myanmar's culture of impunity for perpetrators of genocide and human rights violations against the Rohingya community is a direct result of the country's rejection and persecution of the entire Rohingya identity, including their status as religious minorities in a predominantly Buddhist culture. A USCIRF visit to Myanmar revealed that they face state-sanctioned limitations in gaining citizenship, finding employment, accessing health care and education, and engaging in politics, all in addition to the overwhelming restrictions on religious practice. USCIRF described the obstacles as "institutionalized discrimination", "increasing anti-Muslim sentiment and the related ruse of Buddhist nationalism," and "a culture of impunity and lack of accountability for human rights abuses."<sup>21</sup> During Aung San Suu Kyi's 2019 statement, she "did not even use the word 'Rohingya', adhering to her government's stance that no such ethnic group exists."<sup>22</sup> Even the January 2020 Executive Summary of Independent Commission of Enquiry-ICOE' Final Report of the President's Office of the Republic of the Union of Myanmar, though admitting that there were casualties of innocent citizens, refuses to use the term 'Rohingya' to refer to the largest victim demographic.<sup>23</sup>

In September 2017, following the genocidal campaign against the Rohingya, the United Nations aid outlets were prevented from delivering food, water, and medical supplies to the thousands of civilians in Rakhine State "because the security situation and government field-visit restrictions rendered us unable to distribute assistance."<sup>24</sup> Organizations who reported being unable to offer local assistance include the UN Refugee Agency (UNHCR), United Nations Population Fund, UNICEF, UN World Food Programme, Oxfam, and Save the Children.

Another major determinant of the negligible accountability for perpetrators in the Rohingya Genocide is the corruption of Myanmar's justice system. Political and other high-ranking or influential officials have been reported to receive bribes "at all stages of the legal process for purposes ranging from influencing routine matters, such as to a detainee in police custody, to substantive decisions, such as fixing the outcome of the case." Moreover, the US State Department reports that military and government officials in Myanmar have "directly and indirectly exerted influence over the outcome of cases, often through overly broad or arbitrary application of legislation on speech or association." In September 2019, a former military captain, U Nay Myo Zin, was charged for his condemnation of Myanmar's military leadership and sentenced to one year in prison.<sup>25</sup>

Recognition and admission of crimes against humanity and genocide was also made more difficult due to the world's inability to reconcile that this tragedy occurred in the midst of the nation's transition to democracy under the leadership of 1991 Nobel Peace Prize winner Aung San Suu Kyi:

"For most of this time, international observers who had been familiar with Aung San Suu Kyi's pro-democracy efforts were reluctant to place the responsibility for what was happening in Rakhine state on her. And there were grounds to give her benefit of the doubt. For example, Myanmar had not transitioned to a full democracy but rather to a hybrid system where the old military establishment maintained full control over the country's

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<sup>21</sup> USCIRF, *Burma Country Report*, April 2018.

<sup>22</sup> *supra*. note 5

<sup>23</sup> *Executive Summary of Independent Commission of Enquiry-ICOE' Final Report*, The Republic of the Union of Myanmar President Office, January 2020.

<sup>24</sup> Oliver Holmes, "Myanmar blocks all UN aid to civilians at heart of Rohingya crisis", *The Guardian*, 4 September 2017.

<sup>25</sup> United States Department of State, *Burma 2019 Human Rights Report*, 11 March 2020.

security concerns, foreign policy, and the areas of the country directly ruled by the military, as well as the central pillars of the resource economy. Aung San Suu Kyi could not have ordered the military to stop their operations against the Rohingya, and it was legitimate to fear that the military would reverse the transition towards democracy if the democratically elected government challenged its authority” [or at any point condemned the crimes against humanity that were perpetrated at the hands of the military].<sup>26</sup>

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<sup>26</sup> Azeem Ibrahim, “Myanmar Has Blazed a Path to Democracy Without Rights”, *Foreign Policy*, 16 January 2020.