

**INTERNATIONAL COURT OF JUSTICE**

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**CASE CONCERNING  
APPLICATION OF THE CONVENTION ON  
THE PREVENTION AND PUNISHMENT OF  
THE CRIME OF GENOCIDE**

**THE GAMBIA**

**v.**

**MYANMAR**

**PAGES ERRONEOUSLY OMITTED FROM THE  
ANNEXES TO THE COUNTER-MEMORIAL AND  
REJOINDER OF THE REPUBLIC OF THE UNION OF  
MYANMAR**

**SUBMITTED PURSUANT TO ARTICLE 52,  
PARAGRAPH 3, OF THE RULES OF COURT**

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**8 September 2025**



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# **CMM Annex 31**

M. C. Bassiouni, “Appraising UN Justice-Related Fact-Finding Missions”,  
*Washington University Journal of Law & Policy*, vol. 5 (2001), pp. 35-50

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On a more practical level, extraordinarily, the UN has not yet developed a system, despite the experience of the Commission and what followed in the area of fact-finding. Thus, every new Commission, fact-finding body, or mandate for individual fact-finding is ad hoc. There is no institutional memory, and there is no system by which the experiences of the past can be used to benefit the future. It is beyond logical explanation to find that the UN has established no model or standard database and that no model or standard process for field investigations exist, including no protocols for mass grave exhumations or reconstruction of events, and no large-scale interviews of victims and witnesses.

The Commission had established all of that, and while it surely could have been improved, it was simply overlooked and nothing of any systematic nature was ever done. One explanation, of course, is that the lack of existing systems and processes, as well as standardized methods of operation, are certain to delay the work of any fact-finding body or individual, except when there is a political will to give such fact-finding greater momentum. In these cases, interested governments provide the resources, the evidence, and contribute personnel. Thus, fact-finding is held hostage to the political will of major governments. The means to accomplish that end are financial and bureaucratic. The absence of systems, procedures, methods of operation, and funding all contribute not only to delay, but to the inability to achieve the purposes of justice-related fact-finding.

One of the fundamental struggles of civilization is to put an end to these crimes. One way of accomplishing this is to put an end to impunity. But to do so we must ensure that the processes of discovering truth and achieving justice, albeit relative, is not politically compromised as to its impartiality, fairness, and effectiveness. Suffice it to recall that the Former Republic of Yugoslavia was recently reinstated by the General Assembly, ignoring that its new government formally announced that it regarded the ICTY as illegitimate and that it would not surrender its indicted

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REV. 409 (2000) [hereinafter Bassiouni, *Combating Impunity*]; M. Cherif Bassiouni, *Searching for Justice in the World of Realpolitik*, 12 PACE INT'L L. REV. 213 (2000) [hereinafter Bassiouni, *Searching for Justice*].



## CMM Annex 68

C. Tomuschat, “Reparation in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law”, in M. G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law, Liber Amicorum Lucius Caflisch* (2005)

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permitted an in-depth study of all the difficult issues related to the draft instrument. It was on the basis of these fertile antecedents that eventually the text, as it stood after the third consultative meeting,<sup>14</sup> was adopted.

## 2 THE LEGAL SIGNIFICANCE OF THE TEXT

It is obvious at first glance that the adoption of the BPG could not, as such, produce binding international law. The Commission on Human Rights enjoys no decision-making power. But the legal significance of the text could be greatly increased by contending that all of the 27 Principles could be characterized as codifying positive international law; the source of which was to be found either in treaty stipulations or in rules of customary law. This was and is one of the controversial features of the BPG. The Preamble states (para. 7) that the BPG “do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations”. However, this affirmation is neither true and nor does it provide a conclusive answer to the question raised. It is not true because the BPG are not limited to procedural issues, setting forth, instead, propositions which, in their great majority, are of a genuinely substantive nature. On the other hand, an attempt had been made to make clear, through the choice of language, the Principles that were deemed to be mandatory and those, by contrast, that had to be characterized as being purely recommendatory.<sup>15</sup> Progressively, in the course of the many rounds of the deliberation process, many formulations were changed from “shall” to “should” or other language formulations that replaced former pretorian-style assertions. In his two drafts, under the heading of “Forms of reparation”, Van Boven had generally suggested wording according to which restitution, compensation, rehabilitation as well as satisfaction and guarantees of non-satisfaction “shall be provided”; Bassiouni abandoned that position, preferring to use “should be provided”. This formulation found its consecration in the text as adopted on 18 April 2005. Principles 18 to 24, which deal with the four categories of reparation recognized in the BPG, consistently use the phrase: “should be provided”. On the other hand, in some other places, the former entitlement of the victim has been replaced by references to unspecified measures of care in favour of the victims. Thus, while Bassiouni spoke of “Victims’ right to access justice” (section VIII.) and “Victims’ right to reparation” (section IX.), the text

<sup>14</sup> Of 1 October 2004, *ibid.*, Annex 1.

<sup>15</sup> Report on the third consultative meeting, *supra* (note 12), para. 11.



# CMM Annex 175

UN ECOSOC, Ad Hoc Committee on Genocide, Report of the Committee and draft Convention drawn up by the Committee, UN Doc. E/794, 24 May 1948

English version available at:

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E/794  
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penalties for the culprits of such crimes, was an elementary condition, without which, in the opinion of these representatives, there can be no talk about any suppression of the above-mentioned crimes.

As regards the argument that such an obligation would be an obstacle to the ratification of the convention by some States, the representative of the Union of Soviet Socialist Republics stated to this effect that in this case, the legislation required for the punishment of culprits of genocide should be evidently enacted first and only then the Convention ratified in conformity with the constitutional procedure. In other cases this can be obviously done simultaneously, for in his opinion one cannot imagine a situation when a state would join the Convention but would not enact in its legislation the laws for punishment of crimes, provided for by the Convention. This would be tantamount to refusal to become a party to the Convention.

During the discussion on the particular purpose of the measures under consideration, it was debated whether the text should read "for the prevention and repression of genocide" or "to give effect to the provisions of the Convention". The second wording was deemed preferable because it dealt with all the obligations of the States under the Convention and not merely with penal measures. The amendment was adopted by four votes against three.

The Article as a whole was adopted by five votes to one with one abstention.

The representative of the Union of Soviet Socialist Republics made a statement in support of his votes against the Article.\*

The representative of Poland made a statement with regard to this Article.\*\*

\* Statement by the representative of the Union of Soviet Socialist Republics

"The text adopted by the majority of the Committee for Article VI is not satisfactory as regards the organisation of a genuine campaign against genocide since it does not include an obligation for the signatories of the Convention to introduce in their legislation measures for the prevention and suppression of genocide and the prevention and suppression of incitement to racial, national and religious hatred and the obligation to provide criminal penalties for the authors of such crimes. The expression "necessary legislative measures" may in fact be interpreted in various ways because of its vagueness."

\*\* Statement by the representative of Poland:

"The Polish delegation is of the opinion that the present text of Article VI is ambiguous and insufficient.

The text should at least be amended to read "The High Contracting Parties undertake to enact in accordance with their constitutional procedures the legislation necessary to give effect to the provision of this Convention" and be supplemented with a provision concerning the prevention of genocide as well as combatting any propaganda to racial, national and religious hatred."

/ARTICLE VII

# CMM Annex 204

International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), adopted on 3 August 2001, *Yearbook of the International Law Commission 2001*, vol. II, Part Two, as corrected

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<https://legal.un.org/ilc/publications/yearbooks/english/ilc=2001=v2=p2.pdf>



taken.<sup>447</sup> But assurances and guarantees of non-repetition will not always be appropriate, even if demanded. Much will depend on the circumstances of the case, including the nature of the obligation and of the breach. The rather exceptional character of the measures is indicated by the words “if circumstances so require” at the end of subparagraph (b). The obligation of the responsible State with respect to assurances and guarantees of non-repetition is formulated in flexible terms in order to prevent the kinds of abusive or excessive claims which characterized some demands for assurances and guarantees by States in the past.

### Article 31. Reparation

**1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.**

**2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.**

#### Commentary

(1) The obligation to make full reparation is the second general obligation of the responsible State consequent upon the commission of an internationally wrongful act. The general principle of the consequences of the commission of an internationally wrongful act was stated by PCIJ in the *Factory at Chorzów* case:

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.<sup>448</sup>

In this passage, which has been cited and applied on many occasions,<sup>449</sup> the Court was using the term “reparation” in its most general sense. It was rejecting a Polish argument that jurisdiction to interpret and apply a treaty did not entail jurisdiction to deal with disputes over the form and quantum of reparation to be made. By that stage of the dispute, Germany was no longer seeking for its national the return of the factory in question or of the property seized with it.

to the British Naval Commanders to molest no German merchantmen in places not in the vicinity of the seat of war”, Martens, *op. cit.* (footnote 441 above), vol. XXIX, p. 456 at p. 486.

<sup>447</sup> In the *Trail Smelter* case (see footnote 253 above), the arbitral tribunal specified measures to be adopted by the Trail Smelter, including measures designed to “prevent future significant fumigations in the United States” (p. 1934). Requests to modify or repeal legislation are frequently made by international bodies. See, e.g., the decisions of the Human Rights Committee: *Torres Ramirez v. Uruguay*, decision of 23 July 1980, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 40 (A/35/40)*, p. 126, para. 19; *Lanza v. Uruguay*, decision of 3 April 1980, *ibid.*, p. 119, para. 17; and *Dermitt Barbato v. Uruguay*, decision of 21 October 1982, *ibid.*, *Thirty-eighth Session, Supplement No. 40 (A/38/40)*, p. 133, para. 11.

<sup>448</sup> *Factory at Chorzów, Jurisdiction* (see footnote 34 above).

<sup>449</sup> Cf. the ICJ reference to this decision in *LaGrand, Judgment* (footnote 119 above), p. 485, para. 48.

(2) In a subsequent phase of the same case, the Court went on to specify in more detail the content of the obligation of reparation. It said:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.<sup>450</sup>

In the first sentence, the Court gave a general definition of reparation, emphasizing that its function was the re-establishment of the situation affected by the breach.<sup>451</sup> In the second sentence, it dealt with that aspect of reparation encompassed by “compensation” for an unlawful act—that is, restitution or its value, and in addition damages for loss sustained as a result of the wrongful act.

(3) The obligation placed on the responsible State by article 31 is to make “full reparation” in the *Factory at Chorzów* sense. In other words, the responsible State must endeavour to “wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed”<sup>452</sup> through the provision of one or more of the forms of reparation set out in chapter II of this part.

(4) The general obligation of reparation is formulated in article 31 as the immediate corollary of a State’s responsibility, i.e. as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States. This formulation avoids the difficulties that might arise where the same obligation is owed simultaneously to several, many or all States, only a few of which are specially affected by the breach. But quite apart from the questions raised when there is more than one State entitled to invoke responsibility,<sup>453</sup> the general obligation of reparation arises automatically upon commission of an internationally wrongful act and is not, as such, contingent upon a demand or protest by any State, even if the form which reparation should take in the circumstances may depend on the response of the injured State or States.

(5) The responsible State’s obligation to make full reparation relates to the “injury caused by the internationally wrongful act”. The notion of “injury”, defined in *paragraph 2*, is to be understood as including any damage caused by that act. In particular, in accordance with *paragraph 2*, “injury” includes any material or moral damage caused thereby. This formulation is intended both as inclusive, covering both material and moral damage broadly understood, and as limitative, excluding merely abstract concerns or general interests of a State which is individu-

<sup>450</sup> *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

<sup>451</sup> Cf. P.-M. Dupuy, “Le fait générateur de la responsabilité internationale des États”, *Collected Courses ... 1984–V* (Dordrecht, Martinus Nijhoff, 1986), vol. 188, p. 9, at p. 94, who uses the term *restoration*.

<sup>452</sup> *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

<sup>453</sup> For the States entitled to invoke responsibility, see articles 42 and 48 and commentaries. For the situation where there is a plurality of injured States, see article 46 and commentary.



# CMM Annex 212

UN GA, 60<sup>th</sup> Session, Official Records, Third Committee, Summary record of the 39<sup>th</sup> meeting, 10 November 2005, UN Doc. A/C.3/60/SR.39, 8 December 2005

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A/C.3/60/SR.39

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*The meeting was called to order at 3.10 p.m.*

**Agenda item 71: Human rights questions (continued)**

**(a) Implementation of human rights instruments  
(continued) (A/C.3/60/L.24 and L.26)**

*Draft resolution A/C.3/60/L.26: International  
Covenants on human rights*

1. **Mr. Makarowski** (Sweden) introduced the draft resolution on behalf of the original sponsors, including the Nordic countries, and said that the text was very similar to the one adopted on the same subject two years before but contained some new elements. Paragraph 2 now contained a reference to the new States parties to the International Covenants and Protocols; paragraph 5 referred to the mandate of the new Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; paragraph 6, dealing with the derogation from human rights obligations, had been modified to bring the language into line with recent developments in the Commission on Human Rights; paragraph 23 referred to the open-ended working group of the Commission on Human Rights and, as in the previous resolution, encouraged all parties to participate actively in its work; and paragraph 27 no longer asked the Secretary-General for a report of the status of the Covenants and Optional Protocols, but requested him to keep the General Assembly informed of the status of the relevant instruments, including all reservations and declarations, through the United Nations websites.

2. Despite all efforts, a small number of issues remained outstanding, but discussions would continue with the delegations that had expressed concerns about the current text in order to find solutions satisfactory to everyone. He hoped that the draft resolution would be adopted by consensus.

3. **Mr. Khane** (Secretary of the Committee) announced that El Salvador and the Republic of Moldova had become sponsors of the draft resolution.

*Draft resolution A/C.3/60/L.24: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*

4. **The Chairman** said that the draft resolution contained no programme-budget implications.

5. **Mr. Muñoz** (Chile), speaking on behalf of the original sponsors and those announced at the 29th meeting, said that the Basic Principles and Guidelines were not legally binding but rather identified mechanisms and procedures for the effective implementation of existing legal obligations under international human rights law and international humanitarian law. They would serve as a guide and useful tool for victims and their representatives, as well as for States in the design and implementation of their own public policies on reparations. They were sufficiently flexible to leave a wide margin for manoeuvre in their implementation by States.

6. In the past, the main focus of the international community had tended to be on those who committed violations, and victims had been overlooked. The Basic Principles and Guidelines specifically provided that the resources to which the victims were entitled included not only access to justice but also to reparations, which could take various forms. The primary objective of reparation was to restore dignity to the victims, which was the only sound basis for building a just and democratic society. The sponsors were confident that the adoption of the Basic Principles and Guidelines would constitute a milestone in the fight against impunity by stressing the principle of accountability for violations of international human rights law and international humanitarian law. They hoped that the draft resolution would be adopted by consensus.

7. **Mr. Khane** (Secretary of the Committee) announced that Albania, Armenia, Croatia, the Dominican Republic, Haiti, Iceland, Japan, Kenya, Liechtenstein, Luxembourg, Monaco, Sierra Leone, the former Yugoslav Republic of Macedonia and Venezuela (Bolivarian Republic of) had also joined the sponsors.

8. **The Chairman** invited delegations that wished to explain their position on the draft resolution to do so.

9. **Mr. Manhotra** (India) said that his country was considering the introduction of provisions pertaining to

the right of remedy and the right to reparations for victims of human rights violations.

10. **Ms. Kohli** (Switzerland) said that the Basic Principles and Guidelines marked a step forward in the area of human rights and were the culmination of long and difficult work.

11. **Mr. Bertoux** (France) said that the issue of impunity of human rights violators had long been of interest to his delegation. The Basic Principles and Guidelines were the result of 15 years' work and made a clear distinction between human rights and humanitarian law while respecting the specific nature of each category of law. Although they took account of international law, including the International Criminal Court, they did not go beyond the obligations of each State to the treaties it had freely ratified, and they gave States a wide margin of manoeuvre to attain the stated objectives. From a legal standpoint, the principles broke new ground because they gave a concise list of the obligations of the actors concerned in the event of human rights and humanitarian law violations. They also reflected a change in perspective, concentrating rather on the victims than the State.

12. **Mr. Artucio** (Uruguay), speaking on behalf of the Southern Common Market (MERCOSUR), said that the Basic Principles and Guidelines allowed Member States to clarify the scope of the right of victims to reparations and to identify the mechanisms to facilitate implementation of their current international obligations. They did not create new obligations and many States in the region had already used them as a guide for initiatives and policies.

13. **Ms. Hart** (Canada) said that her country welcomed the fact that the Basic Principles and Guidelines had incorporated a victim-oriented perspective. Without creating new international or domestic legal obligations, they provided a helpful guide to States regarding existing modalities for the implementation of existing legal obligations under international human rights and humanitarian law. Changes had been made to the text in order to clarify that there was no right to a remedy for acts that had not been violations of international law at the time they occurred.

14. **Ms. Zack** (United States of America) said that the non-binding instrument in question embodied respect for the rule of law and the principle of accountability for gross human rights violations and

serious violations of the law of armed conflict. The document was an important statement condemning impunity and underscoring the importance of righting legal wrongs, and it therefore merited support. With respect to the fifth preambular paragraph of the Basic Principles and Guidelines, the United States would have preferred language highlighting that non-States parties to the Rome Statute of the International Criminal Court had no legal obligations in connection with that treaty, unless otherwise directed by the Security Council. That said, her delegation noted the important provision recognizing that international human rights law and international humanitarian law were separate bodies of law and the provision stating that the Basic Principles and Guidelines were without prejudice to special rules of international law (para. 26). Her delegation also wished to underscore that the Basic Principles and Guidelines created no legal obligations and were phrased in such a way as to provide States with wide flexibility regarding modalities and mechanisms for implementing existing international law obligations applicable to each State.

15. **Mr. Montwedi** (South Africa) welcomed the Basic Principles and Guidelines, which were long overdue. His delegation recognized that international human rights law was premised on the principle of protection and on the notion that where violations did occur there must be adequate remedies for the victims. Most of the provisions contained in the Basic Principles and Guidelines had already been incorporated into South Africa's domestic legislation; his Government would work hard to assimilate the rest. The Basic Principles and Guidelines would greatly contribute to combating impunity for grave human rights violations, and it was therefore gratifying that the draft resolution was very likely to be adopted by consensus.

16. **Ms. Dempster** (New Zealand) emphasized that the Basic Principles and Guidelines did not create any new international or domestic legal obligations, were non-binding and would not introduce any new principles of international law. Her delegation was nonetheless convinced that they would be a valuable reference for States and therefore welcomed their adoption.

17. *Draft resolution A/C.3/60/L.24 was adopted.*

18. **Ms. Beinhoff** (Germany) said that her Government continued to attach the highest political

# CMM Annex 225

UN Office of the High Commissioner for Human Rights, *Commissions of Inquiry and Fact-finding Missions on International Human Rights and Humanitarian Law—Guidance and Practice* (2015)

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## D. Commencement of the commission's/mission's work

Commissions/missions are usually set up in response to allegations of serious violations of international human rights law or international humanitarian law that require urgent reaction, and in most cases they work under very tight timelines to complete their assessments and report back to the mandating authority. However, there is usually a temporal gap between agreement on the mandate (for example, in the form of a United Nations resolution), the appointment of the members, the establishment of the commission/mission and the actual commencement of its work. Appointing members and securing their availability over the required period is a process that may stretch over weeks or even months in the most difficult cases.

At the same time, and often while this appointment process is still under way, OHCHR needs to set up a secretariat and make all the administrative arrangements required for the operation of the commission/mission. These activities are carried out under considerable time pressure, and at times uncertainty about the final financial allocations, and require effective coordination and quick action by several parts of OHCHR. It is essential that the coordinator and key secretariat staff be identified, appointed and/or recruited as soon as possible so as to be able to start preparations for the work of the commission/mission. It has been OHCHR practice for **the secretariat to be in place at least two weeks before the commission/mission convenes**.

Commissions/missions have been based variously in Geneva, in the country concerned, or in both. The decision of where the commission/mission will be based depends on a number of factors, including security, access, cooperation afforded by the country concerned, logistics, costs and United Nations presence in the country. If the commission/mission is based in Geneva, field missions to the country concerned or other countries where information relevant to its mandate may be available are a normal part of its work.

The mandate (as set out in resolutions or, for commissions/missions established by the Secretary-General or the High Commissioner, in terms of reference) specifies the time frame within which the commission/mission must complete its work and submit its report to the mandating authority. The official date of commencement of the work of the commission/mission may be different from the date at which the establishment of the body is announced, and is usually the date on which the members first convene, usually in Geneva, to discuss and agree on the commission's/mission's programme, terms of reference and methods of work.



# CMM Annex 229

UN GA, 71<sup>st</sup> Session, Official Records, Sixth Committee, Summary record of the 9<sup>th</sup> meeting, 7 October 2016, UN Doc. A/C.6/71/SR.9, 7 November 2016

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*Extradite (Belgium v. Senegal)*, where he had noted that State practice in that regard was absent and that there was no precedent in which a State had instituted proceedings before the Court or any other international judicial body in respect of alleged violations of an *erga omnes partes* obligation simply on the basis of it being a party to an instrument similar to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In its judgment, the Court did not refer to the articles on State responsibility adopted by the International Law Commission. Article 48 therefore needed to be further clarified in light of State practice.

66. With regard to future action, the only way of ensuring that the rules of State responsibility were clear and known to all subjects of international law was by crystallizing the articles in the form of a legally binding treaty. A convention could contribute to legal certainty and better application and promotion of international law. The time was ripe to convene a diplomatic conference to negotiate and adopt such an instrument. A dispute settlement mechanism should also be included in the future convention, to bring certainty and predictability to the application of the convention and prevent abuse in the form of excessive or unjustified invocation of countermeasures against other countries.

67. **Mr. Horna** (Peru) said that State responsibility was a fundamental principle of international law stemming from the sovereign equality of States. States were equal in both their rights and their obligations. The articles on State responsibility reflected the relevant work of codification and progressive development carried out by the International Law Commission over many years. They had acquired considerable authority, as reflected in the growing number of decisions by international courts, tribunals and other bodies in which they had been cited. In fact, it could be said that some of the articles even reflected customary international law. His delegation would participate constructively in the efforts of the working group to decide whether to adopt a convention based on the articles or to take another measure.

68. **Mr. Harun** (Malaysia) said that his delegation was concerned about some of the provisions of the articles on State responsibility, such as article 7 on *ultra vires* conduct. There did not seem to be any

reference to the articles in any of the international cases to which Malaysia was a party. Nonetheless, opening up the text to negotiation at the current time might unravel the fragile balance in the wording of the articles. Such a convention was unlikely to attract universal participation, thus defeating the very purpose of such an instrument. The articles had proved to be useful in their current, non-binding form as a guide for States and international courts and tribunals, and they needed to be carefully examined before a decision was taken on whether to negotiate a convention.

69. As they stood, the articles could only be considered as guidelines, because the current formulation of their central provisions, such as article 2 (Elements of an internationally wrongful act of a State), article 28 (Legal consequences of an internationally wrongful act) and article 31 (Reparation), lacked the clarity and precision needed for them to be interpreted accurately. States should therefore continue to acquire wider experience with the application of the articles in practice.

70. **Ms. Pierce** (United States of America) said that her delegation continued to believe that the articles were most valuable in their current form and that the General Assembly should not take further action at the current time. The negotiation of a convention based on the articles would not bring additional authority or clarity. Although the Secretary General's report (A/71/80) demonstrated that the articles had already become a helpful guide for international courts and tribunals, States and legal experts on both the state of the law and how it might be progressively developed, the negotiation of a convention risked undermining the very important work undertaken by the International Law Commission in crafting the articles. Particularly worrisome was the prospect that such an instrument might deviate from important existing rules or ultimately not enjoy widespread acceptance by States. Consequently, the best option was to allow the articles to guide and settle the continuing development of the customary international law of State responsibility.

71. **Mr. Arrocha Olabuenaga** (Mexico) said that some of the provisions of the articles on State responsibility codified norms of customary international law and that their development as international custom should continue. However, given the shortcomings inherent in that process, including



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UN GA, Human Rights Council, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2, 17 September 2018

Available at:

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/277/04/pdf/G1827704.pdf?OpenElement>



### 3. Restrictions on access to food, livelihoods, health care and education

#### (a) Restrictions on access to food and livelihood

##### *Overview and legal framework*

531. The human right to adequate food is firmly entrenched in international human rights law, including article 25 of the UDHR, article 11 of the ICESCR, articles 24 and 27 of the CRC, and article 28 of the ASEAN Human Rights Declaration. To realize the right to food, States must ensure that food is available, economically and physically accessible, and adequate.<sup>1145</sup> The right is realized when “every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.”<sup>1146</sup> The right to food is closely linked with the right to life: “without food there is no life, and with the wrong food, life is shorter and more prone to ill-health”.<sup>1147</sup> The right to life requires States to take measures to increase life expectancy, especially in adopting measures to eliminate malnutrition.<sup>1148</sup>

532. While the right to food is to be progressively realised, the United Nations Committee on Economic, Social and Cultural Rights has established that States have immediate core obligations, regardless of resources and/or level of development, to ensure freedom from hunger; non-discrimination; and the protection of vulnerable populations. This includes the provision of access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone.<sup>1149</sup>

533. In Rakhine State, the Rohingya have long relied on fishing, farming and trading to provide for themselves and their families. However, movement restrictions generally, as well as specific restrictions on access to fishing, agricultural lands and forests, impede their access to food and livelihoods. The fear of crossing checkpoints – due to the harassment and extortion it entails – has had a similarly negative impact.

##### *Access to food and malnutrition*

534. According to a survey by the Myanmar Government in 2015, Rakhine State had the highest rates of global acute malnutrition, at 13.9 per cent, and severe acute malnutrition, at 3.7 per cent, in the country.<sup>1150</sup> However, in northern Rakhine, where most Rohingya live, rates were four to five times higher – for severe acute malnutrition, 19 per cent in Maungdaw Township and 15.1 per cent in Buthidaung Township – above the World Health Organization emergency threshold of 15 per cent.<sup>1151</sup> The health impacts of malnutrition may include heightened risk of preventable deaths and deterioration of pre-existing conditions, especially for children. A World Food Programme report on northern Rakhine State in mid-2017 highlighted limited access to livelihoods, due largely to freedom of movement restrictions and the increased security presence, as being a main contributory cause of malnutrition. It summarised the situation at that time:

*In line with the previous remote emergency assessments, the survey confirmed a worsening of the food security situation in already highly vulnerable areas after the October 2016 incidents and subsequent security operations. Nearly one third of the*

<sup>1145</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The right to adequate food (Art. 11)*, 12 May 1999, E/C.12/1999/5.

<sup>1146</sup> Ibid, para. 6.

<sup>1147</sup> A. Eide, “Adequate Standard of Living”, in *International Human Rights Law*, 2<sup>nd</sup> ed., D. Moeckli, S. Shah and S. Sivakumaran (Oxford University Press, Oxford, 2014), p. 199.

<sup>1148</sup> United Nations Human Rights Committee, *General Comment No. 6: Right to life (Art. 6)*, 30 April 1982, HRI/GEN/1/Rev.1, para. 5.

<sup>1149</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (Art. 12)*, 11 August 2000, E/C.12/2000/4, para 43(b).

<sup>1150</sup> Ministry of Health and Sports, *Myanmar - 2015-2016 Demographic and Health Survey - Key Findings* (2017); see also: The UN Network, “Nutrition Situation Analysis”, abridged version (June 2017).

<sup>1151</sup> K-076.44.

*population was severely food-insecure and in need of humanitarian assistance. Only 14 per cent of women achieved minimum dietary diversity and none of the children met the minimum adequate diet. Income opportunities were scarce and households could not access sufficient food to cover their needs. About half of the markets were not functioning or were only partially operational, food prices were highly volatile and supply of affordable foods in many markets was scarce.*<sup>1152</sup>

535. The report further stated that poor child feeding practices may have increased wasting (low weight-for-height) and stunting (low height-for-age) in children, both symptoms of acute undernutrition. Of greatest concern, the report estimated that 80,500 children under the age of five were expected to be in need of treatment for acute malnutrition over the subsequent 12 months.<sup>1153</sup> This preceded the “clearance operations” that began on 25 August 2017.

536. The various waves of violence in Rakhine State have had a serious adverse impact on the enjoyment of the right to food. Interviewees from northern Rakhine reported increased hunger following the 2012 violence due to further movement restrictions and fear.<sup>1154</sup> One interviewee explained how they would only eat one meal a day out of fear to leave the house.<sup>1155</sup> The following account was also provided regarding the impact of the violence on access to food:

*People couldn't go to work and couldn't earn money. At one point, there was no food. People were trying to help each other, but it was particularly difficult for very poor people. Initially, nobody dared going outside. Then hunger was such that people started to take risks and go out to work. They thought: “better to die by a bullet than to die of hunger”.*<sup>1156</sup>

537. The 2016 and 2017 “clearance operations” have had a devastating impact.<sup>1157</sup> On 9 January and 23 August 2017, a group of United Nations Special Rapporteurs addressed two urgent appeals to the Government of Myanmar to raise the issue.<sup>1158</sup> The August 2017 communication highlighted information regarding “evident deterioration of the food security situation in northern Rakhine” and raised concern about the “long term, chronic lack of access to adequate food in the context of prolonged security operations in the area”. The Special Rapporteurs highlighted allegations that one-third of homes in northern Rakhine were already experiencing extreme food deprivation, and that children were especially vulnerable, as reflected in their high malnutrition rates. It should be noted that this urgent appeal preceded the commencement of the August 2017 “clearance operations” by two days, after which access to food and its consequences further deteriorated significantly.

#### *Restrictions on access to livelihoods*

538. Rohingya have faced severe restrictions on their access to livelihoods for decades. Already in the 1990s, strict enforcement of movement restrictions against the Rohingya in northern Rakhine had reportedly led to severe impoverishment, to the extent that many people were in need of humanitarian assistance.<sup>1159</sup> Movement has been further restricted

<sup>1152</sup> World Food Programme, *Food security assessment in the northern part of Rakhine State - Final report* (July 2017).

<sup>1153</sup> Ibid.

<sup>1154</sup> DI-009, DI-053, DI-054.

<sup>1155</sup> DI-009.

<sup>1156</sup> DI-054.

<sup>1157</sup> World Food Programme, *Food security assessment in the northern part of Rakhine State - Final report* (July 2017); V-047.

<sup>1158</sup> UA MMR 6/2016 available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=22927> and UA MMR 8/2017 available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23297>

<sup>1159</sup> Irish Centre for Human Rights, *Crimes against Humanity in Western Burma: The Situation of the Rohingya* (2010), p. 99; International Federation of Human Rights Leagues, *Burma – Repression, discrimination and ethnic cleansing in Arakan* (April 2000), p. 20.

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*Amnesty International, “We Will Destroy Everything”: Military responsibility for crimes against humanity in Rakhine State, 27 June 2018*

Available at:

<https://www.amnesty.org/en/documents/asa16/8630/2018/en/>



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having their genitalia burned until it blistered. A farmer from a village in Rathedaung Township told Amnesty International, *"I was standing with my hands tied behind my head, then they pulled off my longyi and put a [lit] candle under my penis. [A BGP officer] was holding the candle and [his superior] was giving orders... They were saying, 'Tell the truth or you will die.'"*

In most cases, only those who were able to pay huge bribes to the security forces were released, leaving people from poor families at greater risk of prolonged detention and further torture. To secure their release, detainees were made to sign a document stating they had never been abused. As of June 2018, the Myanmar authorities have yet to provide information on who remains in detention, where they are being held, and under what charges or criminal proceedings they are being held, if any. These detentions amount to arbitrary detention under international law.

For its part, ARSA seems to have been regrouping in the months following its October 2016 attacks and the violent military response. In an apparent effort to keep details of their activities quiet, from late 2016 members of the group abducted or unlawfully killed Rohingya men who were suspected to be providing information about ARSA to the Myanmar authorities. Amnesty International documented 11 such incidents of murder or abduction. In nearly all instances, the victim was a Rohingya village leader known to be close to the authorities; the victims were typically stabbed or abducted and never seen or heard from again.

The targeted killings appear to have been part of a much effort by ARSA to intimidate and persuade the Rohingya community to cease any cooperation with the Myanmar authorities and to reduce interaction with other ethnic and religious communities—interaction which was already limited, given the entrenched system of segregation and discrimination in Rakhine State.

During the same period, ethnic Rakhine, Mro, and Daingnet villagers were killed or seriously injured in a string of incidents that fit a pattern: villagers went into the mountains or to a forested area to forage for food and never returned. In some cases, their bodies were later discovered with knife wounds. In several incidents that Amnesty International documented, one or more individuals escaped and said that the attackers spoke the Rohingya dialect; the survivors described having stumbled across what appeared to be a "camp" with supplies. In several incidents with no survivors, people who were part of search parties claim, as have the Myanmar authorities, to have discovered ARSA "camps". While Amnesty International has not been able to determine that each such incident was linked to ARSA, the circumstances of many of them suggest that the villagers were killed for having chanced across members of the group.

In the weeks leading up to 25 August 2017, the Myanmar Army reinforced its presence in northern Rakhine State, bringing in battalions from the 33<sup>rd</sup> and 99<sup>th</sup> Light Infantry Divisions (LIDs). In June 2017, Amnesty International had provided evidence that implicated each of these combat divisions in war crimes in northern Shan State between late 2016 and mid-2017, as part of the Myanmar military's operations during the ongoing internal armed conflicts there. The deployment of those troops—equipped for combat with an opposing armed group and with a track record of punishing ethnic minorities collectively for their perceived support to an armed group—signalled a shift to an even more aggressive strategy, honed over decades by the Myanmar military, in which entire villages and ethnic groups are cast as the enemy during security operations. The authorities' particular animus towards the Rohingya made that all the more lethal.

Threats of violence were delivered in certain Rohingya villages. Around 20 August 2017, a field commander from the 33<sup>rd</sup> LID met in Chut Pyin with Rohingya leaders from nearby villages in Rathedaung Township. According to seven people present at the meeting who were interviewed separately by Amnesty International, the commander threatened that if there was ARSA activity, or if they did any "wrong," his soldiers would shoot at the Rohingya directly without distinction. Amnesty International likewise obtained a late August 2017 audio recording, which it believes to be authentic, of a telephone call in Burmese between a Rohingya resident of Inn Din and a Myanmar military officer based in the area. In the recording, the officer says, *"We got an order to burn down the entire village if there is any disturbance. If you villagers aren't living peacefully, we will destroy everything... We are starting the operation... If you just stay quiet, there will be no problems. If not, you will all be in danger."*

### **CAMPAIGN OF VIOLENCE**

The military's threats became reality almost immediately after the 25 August attacks by ARSA. In certain villages, often near where major ARSA activity appears to have occurred, the Myanmar military meted out particularly harsh punishments, massacring Rohingya villagers and raping and committing other sexual violence against Rohingya women and girls.

On 27 August in Maung Nu village, Buthidaung Township, soldiers from the 564<sup>th</sup> Light Infantry Battalion (LIB), commanded by a combat division known as Military Operation Command (MOC) No. 15, headquartered in northern Rakhine State under Western Command, rounded up Rohingya from the village

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But Amnesty International's analysis of satellite imagery, combined with interviews with people on both sides of the border, strongly suggests something far less benevolent. Dozens of Rohingya villages have been wiped off the map through bulldozing, including structures that had survived village burning. Evidence related to the military's crimes against humanity has potentially been cleared away as well.

In place of many of these villages, often in the exact location where the Rohingya used to live and farm, the authorities are building new security force bases and other security infrastructure; roads and other civilian infrastructure; and "model villages" for other ethnic and religious communities. The authorities are also, at minimum, tacitly supporting a much more ambitious effort by some ethnic Rakhine community leaders to resettle people from other parts of the state—and even people from predominantly Buddhist ethnic groups who have resided across the border in Bangladesh—to areas where the Rohingya used to live.

While the construction remains ongoing and the picture incomplete, the situation raises urgent concerns. Northern Rakhine State was already heavily militarized. The addition of further security infrastructure, especially after the crimes against humanity that drove hundreds of thousands of Rohingya away, undermines the likelihood that they will be able to return to their places of origin in a way that is safe, voluntary, and dignified. The building of security bases and homes for other communities directly on Rohingya homes and farmland also appears to contradict the November 2017 "arrangement" on safe and voluntary repatriation signed between the governments of Myanmar and Bangladesh. The whole process has been undertaken without consulting the Rohingya.

In early June 2018, the Government of Myanmar signed a Memorandum of Understanding with the UN Development Programme (UNDP) and the UN High Commissioner for Refugees (UNHCR), to *"establish a framework for cooperation... aimed at creating conducive conditions for the voluntary, safe, dignified and sustainable repatriation of refugees."* If the Myanmar authorities are serious, they will need to undo or reorient many of their actions undertaken across northern Rakhine State over the last six months, and also dismantle the system of apartheid that has deprived the Rohingya of their rights and dignity for so long.

### ARSA ABUSES

During their initial attacks on security posts and in the days that followed, ARSA mostly targeted the Myanmar security forces. However, in several incidents, ARSA also attacked villagers from other ethnic and religious communities, building on the abuses it had committed prior to 25 August, when it unlawfully killed suspected Rohingya informants and people from other ethnic groups who happened across its "camps". The attacks fuelled fear among other ethnic and religious communities in the region, and an estimated 30,000 people were internally displaced or evacuated by the Myanmar authorities. Most have returned home, but some remain displaced, fearful of further ARSA attacks and violence.

In its single worst atrocity, ARSA attackers massacred the Hindu community in Kha Maung Seik village tract. At around 8 a.m. on 25 August, men dressed in black with their faces covered, joined by Rohingya in ordinary dress who were recognized as from the area, rounded up all 69 Hindu women, men, and children present in Ah Nauk Kha Maung Seik village. Several hours later, those attackers killed 53 of the captured Hindus. Many, if not most, were killed by having their throats slit. The attackers left eight Hindu women and eight of their children alive on condition that the women "convert" to Islam and marry men selected by the attackers.

The overwhelming evidence is that the attackers of the Hindu community in Kha Maung Seik were ARSA fighters and Rohingya villagers who joined them, voluntarily or by force. The group attacked a BGP post in the village tract that same day. The descriptions of those who attacked the BGP post and those who attacked the Hindu community were similar, and also similar to descriptions of ARSA attackers in villages across northern Rakhine State, including villages close to Kha Maung Seik. Some of the same attackers who carried out the massacre took the Hindu survivors to Bangladesh. It took the intervention of the Hindu community in Cox's Bazar and of the Bangladeshi police to get them to safety.

ARSA also attacked and burned at least two ethnic Rakhine and Mro villages. On 28 August, ARSA fighters and other Rohingya entered the ethnic Mro village of Khu Daing, in northern Maungdaw Township, with swords, knives, and other bladed weapons. They murdered six ethnic Mro villagers, injured seven more, and burned the village. That attack, along with several other incidents from before 25 August in which ethnic Mro were killed, has affected the entire way of life of the Mro community in northern Rakhine State. The Mro have historically lived in small, remote villages in mountainous areas largely inaccessible by road. Many now fear venturing too far from their villages to farm, forage, or chop wood, and so have begun to move down to flat areas closer to roads and to the presence of the security forces.

Much remains unknown about ARSA, including its overall size and its precise command structure. It is unclear whether some of the abuses involving ARSA fighters happened outside the group's command

after a major military crackdown on “illegal immigration” codenamed “Operation *Nagamin*” (Dragon King).<sup>25</sup> In Rakhine State, the crackdown was accompanied by a wide range of other human rights violations against the Rohingya, including unlawful killings, rape, and destruction of property.<sup>26</sup> Most Rohingya returned the following year, many of them forced back after the Bangladeshi government reduced food rations in the camps, leading to the death of over 12,000 refugees.<sup>27</sup>

A further 250,000 Rohingya are estimated to have fled in 1991 and 1992 after another campaign of violence by the Myanmar security forces.<sup>28</sup> This operation was marked by reports of forced labour, summary executions, rape and other forms of torture, and arbitrary detention by Myanmar security forces targeting Rohingya.<sup>29</sup> By 1996, most had been repatriated to Myanmar, however there were serious concerns about the repatriation process and to what extent it was voluntary. Bangladeshi security forces at the time used violence and other abuse to coerce Rohingya to return.<sup>30</sup>

More recently, tens of thousands of Rohingya were forced to flee Rakhine State starting in October 2016, after the Myanmar security forces launched a brutal campaign of violence following attacks on police posts by a Rohingya armed group that referred to itself as Harakah al-Yaqin, or “the faith movement,” and now is more commonly known as the Arakan Rohingya Salvation Army (ARSA).<sup>31</sup> Nine police officers were killed in the attacks, during which members of the group seized weapons and ammunition. The military responded by carrying out so-called clearance operations, marked by widespread and systematic human rights violations, including unlawful killings, rape and other forms of torture, enforced disappearances, and arbitrary detentions, which Amnesty International and the UN Office of the High Commissioner on Human Rights (OHCHR) concluded at the time may have amounted to crimes against humanity.<sup>32</sup> The violence forced around 87,000 Rohingya to flee to Bangladesh, where most have remained since.<sup>33</sup>

## 1.2 THE ARAKAN ROHINGYA SALVATION ARMY

While deeply entrenched, state-sponsored discrimination and segregation of Rohingya formed the backdrop of the recent crisis, a series of coordinated attacks on security force posts by the Arakan Rohingya Salvation Army (ARSA) on 25 August 2017 is the reason the authorities cite for initiating “military operations,” also often described as “area clearance operations,” in northern Rakhine State.<sup>34</sup> ARSA’s attacks—described by the group as “defensive actions”<sup>35</sup>—left 15 state officials dead, according to Myanmar authorities.<sup>36</sup>

ARSA emerged in the aftermath of the 2012 violence in Rakhine State. According to the International Crisis Group, it is directed by a group of Rohingya in Saudi Arabia, with a rank and file of mainly Rohingya villagers living in northern Rakhine State. Recruitment began in 2013, and from 2014 some villagers were trained in small groups in the Mayu mountain range<sup>37</sup> that runs through northern Rakhine State, dividing Maungdaw Township from Buthidaung Township and, further south, part of Rathedaung Township. In the mountains,

<sup>25</sup> Human Rights Watch, *Burma: The Rohingya Muslims: Ending a Cycle of Exodus?*, pp. 10, 12.

<sup>26</sup> Martin Smith, *The Muslim “Rohingyas” of Burma*, Paper delivered at Conference of Burma Centrum Nederland, 11 December 1995, p. 9.

<sup>27</sup> Ian Lindquist (Head of UNHCR Sub-office Cox’s Bazar, Bangladesh, 1978), *Report on the 1978-1979 Bangladesh Refugee Relief Operation*, June 1979, [www.ibiblio.org/obl/docs/LINDQUIST\\_REPORT.htm](http://www.ibiblio.org/obl/docs/LINDQUIST_REPORT.htm).

<sup>28</sup> Human Rights Watch, *Burma: The Rohingya Muslims: Ending a Cycle of Exodus?*.

<sup>29</sup> Amnesty International, *Union of Myanmar (Burma): Human Rights Abuses against Muslims in the Rakhine (Arakan) State*, May 1992.

<sup>30</sup> Human Rights Watch, *Burma: The Rohingya Muslims: Ending a Cycle of Exodus?*.

<sup>31</sup> On 29 March 2017, a statement from the group announced that it had changed its name to the Arakan Rohingya Salvation Army (ARSA). See Joe Freeman, “Myanmar’s Rohingya Insurgency Strikes Pragmatic Note,” *Voice of America*, 30 March 2017, [www.voanews.com/a/myanmar-rohingya-insurgency-strikes-pragmatic-note/3788483.html](http://www.voanews.com/a/myanmar-rohingya-insurgency-strikes-pragmatic-note/3788483.html).

<sup>32</sup> Amnesty International, “*We Are at Breaking Point*”; and Office of the High Commissioner for Human Rights (OHCHR), *Flash Report: Report of OHCHR mission to Bangladesh, Interviews with Rohingyas fleeing from Myanmar since 9 October 2016*, 3 February 2017, [www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf](http://www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf).

<sup>33</sup> International Organization for Migration (IOM), *Bangladesh: Needs and Population Monitoring Undocumented Myanmar Nationals in Teknaf and Ukhiya*, Cox’s Bazar, July 2017, [reliefweb.int/sites/reliefweb.int/files/resources/170814\\_NPM\\_RIV\\_Final.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/170814_NPM_RIV_Final.pdf).

<sup>34</sup> See, for example, Commander-in-Chief of the Defense Services (CINCDs) Facebook Post, *Information released by the Tatmadaw True News Information Team on the findings of the Investigation Team in connection with the performances of the security troops during the terrorist attacks in Maungdaw region*, Rakhine State, 13 November 2017, [www.facebook.com/Cincds/posts/1511217488999111](http://www.facebook.com/Cincds/posts/1511217488999111); and The Republic of the Union of Myanmar President Office, *Tatmadaw ends area clearance operations in northern Rakhine*, [www.president-office.gov.mm/en/?q=issues/rakhine-state-affairs/id-7288](http://www.president-office.gov.mm/en/?q=issues/rakhine-state-affairs/id-7288).

<sup>35</sup> @ARSA\_Official on Twitter, *Urgent statement on the Arakan State situation*, 25 August 2017, [twitter.com/ARSA\\_Official/status/900878438856359937](https://twitter.com/ARSA_Official/status/900878438856359937).

<sup>36</sup> See, for example, CINCDs Facebook Post, *The stance on the terrorist attacks of the extremist Bengalis in Buthidaung-Maungdaw region in Rakhine State*, 24 October 2017, [www.facebook.com/Cincds/posts/1492836477503879](http://www.facebook.com/Cincds/posts/1492836477503879) (citing the death of 13 members of the security forces and two civil servants).

<sup>37</sup> Mike Winchester, “Birth of an ethnic insurgency in Myanmar,” *Asia Times*, 28 August 2017, [www.atimes.com/article/birth-ethnic-insurgency-myanmar/](http://www.atimes.com/article/birth-ethnic-insurgency-myanmar/); International Crisis Group, *Myanmar: A New Muslim Insurgency in Rakhine State*, Crisis Group Asia Report No. 283, 15 December 2016.

# **CMM Annex 278**

Fortify Rights, *“First-hand Testimonies from August-September ‘Clearance Operations’ in Myanmar”*, August-September 2017



ENDS

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Name:

Age:

Gender: Male

Family:

Ethnicity: Rohingya

Religion: Islam

Occupation: [REDACTED]

Village: Kun Thee Pin, northern Maungdaw Township

Date: September 3, 2017

Note: [REDACTED]

I am from Kun Thee Pin in Maungdaw Township, northern. I am a farmer. I am a mullah as well. I have four kids. When we are suffering many abuses, we fled our place and arrived to Balukhali now. I left on the 27th. On the night of the 25th the violence started. The next day around 50 people from my village were taken by the military including men, women, and children. They were taken to the military camp in Taung Myo area—they were taken there.

The women were beaten and they made the children stand in the sun. The women were brought away. I saw them taken by the military. After the women were released, I saw them.

After 12 midnight [August 25] the violence took place. Nothing happened in the night. We just heard gunfire. The people were taken the next day. The military and the BGP were together, mixed up in the camp.

I could see the houses were being burned down. It was said that the Burmese military was burning the houses. They were accompanied by the Buddhist Rakhine.

They [Lon Tein] wore camouflage uniforms. The military wore green color. Most of the Rakhine people wore longyis. I just heard there were Rakhine accompanying them.

When we saw the military coming to the village, we organized the women and some others to gather together in a house. It was because of safety. If they are alone, then they would be tortured. I was with the group that ran away. I was watching from my hiding place. I saw them taking them out in a line. There were around 50 women and children. They took them to Taung Pyo camp. The camp is maybe 3 miles away. After three hours, they were released from the camp. They were detained there for just two hours. They came back to the village. I met them in the village. They said they were threatened and when the children asked for water and weren't provided water. They used bad language. No, no one was harmed.

When we arrived, we asked about the situation. We saw the burning of houses and just came here.



# CMM Annex 296

International Crisis Group, *Myanmar: A New Muslim Insurgency in Rakhine State*, Asia Report No. 283, 15 December 2016

Available at:

<https://icg-prod.s3.amazonaws.com/283-myanmar-a-new-muslim-insurgency-in-rakhine-state.pdf>



## VII. Conclusion

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The violent attacks on BGP bases on 9 October 2016, and further clashes in the next days and on 12 November, when a senior army officer was killed, represent the emergence of a new Muslim insurgency in northern Rakhine State. The HaY group is led by a committee of Rohingya émigrés in Saudi Arabia and commanded on the ground by other Rohingya, who have international training and experience in modern guerrilla tactics, the legitimacy of supportive local and international *fatwas* and considerable sympathy and backing from the local Muslim population, including several hundred locally trained recruits.

The emergence of this organised, well-funded group is a game changer in the Myanmar government's efforts to address Rakhine State's complex challenges, including longstanding discrimination against its Muslim population, with denial of rights and citizenship status. The government's response to the attacks – injudicious use of military force that fails to adequately distinguish militants from civilians, denial of humanitarian aid to an extremely vulnerable population and lack of an overarching political strategy that offers it some hope – is unlikely to dislodge the group and risks generating a spiral of violence.

Though there are indications of some training and support links, HaY does not appear to have a transnational jihadist or terrorist agenda. If the government mishandles the situation, however, including by continued use of disproportionate military force that has driven thousands across the border to Bangladesh, it could create conditions for radicalising sections of the Rohingya population that jihadist groups might exploit for their own agendas. To avoid that risk requires a moderated military response, well-crafted political strategy and closer cooperation and intelligence sharing with Myanmar's neighbours and the ASEAN bloc.

**Yangon/Brussels, 15 December 2016**



# CMM Annex 297

International Crisis Group, *Myanmar's Rohingya Crisis Enters a Dangerous New Phase*, Asia Report No. 292, 7 December 2017

Available at:

<https://icg-prod.s3.amazonaws.com/292-myanmar-s-rohingya-crisis-enters-a-dangerous-new-phase.pdf>



rights office report found the “very likely commission of crimes against humanity”.<sup>5</sup> A retired senior army officer noted that it would have been more effective to use the police to achieve the operation’s stated purpose of recovering the looted weapons and ammunition (most were not found).<sup>6</sup>

In the months following the October 2016 attacks, ARSA set about consolidating its authority in Rohingya villages in northern Rakhine and preparing for the next round of attacks. It did this through the targeted killings of dozens of Rohingya men with links to the authorities (such as village heads, other local administrators and suspected informers), ramped up training in the hills as well as IED production in safe houses. The authorities were aware of these developments, with the state media reporting many of the killings as well as the discovery of IED factories. For them, the next ARSA attacks were seen as a matter of when, not if.<sup>7</sup>

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<sup>5</sup> “Interviews with Rohingyas fleeing from Myanmar since 9 October 2016”, Flash Report, UN Office of the High Commissioner for Human Rights (OHCHR) mission to Bangladesh, 3 February 2017.

<sup>6</sup> Crisis Group interview, Yangon, March 2017.

<sup>7</sup> Crisis Group interviews, government officials and military officers, Yangon, Naypyitaw and Sittwe, November 2016–August 2017; “Rakhine slayings by insurgents”, *Global New Light of Myanmar (GNLM)*, 22 July 2017. GNLM is the state-owned English-language daily. For details on discovery of IED production sites, see section II below.



# CMM Annex 414

S. Lewis, Z. Siddiqui and T. Wilkes, “Desperate for news, Rohingya refugees tune in to ‘WhatsApp radio’”, *Reuters*, 26 October 2017

Available at:

<https://www.reuters.com/article/myanmar-rohingya-whatsapp-idINKBN1CV04O>





TOP NEWS

OCTOBER 26, 2017 / 2:36 AM / UPDATED 5 YEARS AGO

## Desperate for news, Rohingya refugees tune in to 'WhatsApp radio'

By Simon Lewis, Zeba Siddiqui, Tommy Wilkes



COX'S BAZAR, Bangladesh (Reuters) - Sitting in his hillside grocery shop in a Bangladesh refugee camp, Rohingya Muslim Momtaz-ul-Hoque takes a break to listen to an audio recording on his mobile phone, while children and passers-by gather round to hear the latest news from Myanmar.

In Rohingya camps, news travels by WhatsApp

02:16

"I listen because I get some information on my motherland," said Hoque, 30, as he plays a message on WhatsApp explaining the Myanmar government's proposals for repatriating refugees.

## CMM Annex 414

3/27/23, 7:02 PM

Desperate for news, Rohingya refugees tune in to 'WhatsApp radio' | Reuters

Hoque has been in Bangladesh since an earlier bout of violence in Myanmar's Rakhine state in 1992, but the number of refugees in the camps has swelled dramatically to more than 800,000 in recent weeks, after a massive Myanmar military operation sent around 600,000 people fleeing across the border.

Tens of thousands of exhausted refugees have arrived with little more than a sack of rice, a few pots and pans and a mobile phone powered by a cheap solar battery, and many are desperate for news of what is going on back home.

With few news sources in their own language and low levels of literacy, audio and video messages distributed on apps such as WhatsApp, Facebook and YouTube have become a community radio of sorts for the Muslim minority.

Dozens of WhatsApp groups have sprung up to fill the information gap. Their offerings range from grainy footage of violence, to listings of the names and numbers of people missing in the chaos of the exodus, or even an explainer from educated Rohingya on how to adjust to life in the camps.

### ADVERTISEMENT

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## 100 PERCENT TRUST

At a shop selling cold drinks in the Leda refugee camp, two men played "WhatsApp news" through a loudspeaker.

Out of breath, a man narrated a scene purportedly from a village in Myanmar's Buthidaung region, according to Mohammed Zubair, a refugee who translated the broadcasts for Reuters.

"They are surrounding the village. We are under attack from the military and the mogs...some people are seriously injured," Zubair translates the speaker as saying, using a derogatory term common in Bangladesh to refer to ethnic Rakhine Buddhists.

"I trust it 100 percent," Zubair said of the information.

# RM Annex 155

Danish Refugee Council and UNHCR, *Sittwe Camp Profiling Report*, June 2017 (extract)

Other extracts are also included at CMM, Vol. VI, Annex 253

Available at:

[https://www.jips.org/uploads/2018/11/Sittwe Camp Profiling Report LQ.pdf](https://www.jips.org/uploads/2018/11/Sittwe_Camp_Profiling_Report_LQ.pdf)



## RM Annex 155

Health services in the Sittwe rural camp area are provided by the Government and humanitarian partners. The highest-level healthcare facility is the Government-run Thet Kae Pyin Observation Centre which operates 24 hours per day and seven days per week. The Observation Centre provides primary healthcare including reproductive healthcare and delivery services and has the only trained auxiliary midwife available permanently in the Sittwe rural camps. Doctors also give emergency referrals for the camp ambulance service (operating 24 hours per day, seven days per week) for cases that need to be taken to Sittwe General Hospital. In addition, it is the usual base used by State Public Health Department outreach teams such as for HIV and tuberculosis. Since 2012, the facility at Thet Kae Pyin has been upgraded by the Government from a sub-rural health centre. The Government is considering further upgrading this facility to a station hospital.

The Government runs two other health facilities in the Sittwe rural camp area: Dar Paing Rural Health Centre and Thae Chaung sub-rural health centre. Both provide primary health care services. The Dar Paing Rural Health Centre also provides reproductive healthcare, hosts visiting specialists from Sittwe General Hospital (including for obstetrics, gynecology and pediatrics), and functions as an intermediary between the Muslim camps and Sittwe General Hospital for non-emergency ambulance cases, outpatient services and specialty service clinic consultations. The Thae Chaung sub-rural health service refers cases to Dar Paing and Thet Kae Pyin facilities as required.

The humanitarian community runs mobile clinics, which provide primary healthcare services at the camp-level. At the time of writing there were 12 mobile clinics run by non-government organisations in the Sittwe rural camp area. In addition to primary healthcare, some mobile clinics provide complementary health services such as family planning and nutrition referrals. Cases that require a higher-level of healthcare are referred to Dar Paing Rural Health Centre or Thet Kae Pyin Observation Centre. Humanitarian partners were piloting the provision of additional reproductive health services (including prenatal checkups, family planning and sexually transmitted disease consultations) at the time of writing in mid-2017.

Nutrition programmes run by Government and humanitarian partners in the Sittwe rural camps include: the treatment of Severe and Moderate Acute Malnutrition; malnutrition prevention through food distributions and micronutrient supplements for at risk children under 5 years old, and pregnant and lactating women; infant and young child feeding practices support; and monitoring of breast milk substitute distributions. In the Sittwe rural camps there are six out-patient therapeutic centres, 10 supplementary feeding spaces, and 20 facilities providing infant and young child feeding promotion and ante-natal care services.

Emergency cases and cases requiring a higher level of healthcare than is available in the Sittwe rural camp area are referred to Sittwe General Hospital. In addition to a referral from either Dar Paing or Thet Kae Pyin health facility, if the person requiring medical attention is an active police case they must have a police escort as is the case across Myanmar. For non-police cases, the ambulance service from Thet Kae Pyin to Sittwe General Hospital does not require a police escort. Muslim patients at Sittwe General Hospital are regularly accompanied by someone who can translate from Myanmar or Rakhine language into the local Muslim language; Sittwe General Hospital staff also assist with translation. The process of accessing Sittwe General Hospital is often time consuming and expensive leading to delays in treatment, this is particularly problematic in emergency cases.<sup>2</sup> Malnourished children requiring inpatient feeding care can also be referred to Sittwe General Hospital through the same process.

# RM Annex 167

F. D'Alessandra *et al.*, “Anchoring Accountability for Mass Atrocities” (Oxford Institute for Law, Ethics and Armed Conflict, 2022) (extract)

Available at:

<https://www.elac.ox.ac.uk/wp-content/uploads/2023/04/Oxford-ELAC-Anchoring-Accountability-for-Mass-Atrocities.pdf>



**Summary:** The initial phase of a UN mandated investigation can be determinative to its success. The *ad hoc* and urgent origins of UN mandates have, in the past, generated problems with the specifications of the mandate, the investigation's time frame, the stability of financing, and the adequacy of staffing. A permanent centralised institution would provide critical early advising in the establishment of mandates and their investigations. It also could develop standard operating procedures, investigations policies, and operational guidance to investigations once underway.

Supporting UN mandated investigations is a multifaceted process that demands early attention in order to improve their contributions to justice and accountability. Our data reveal that the manner in which UN investigations are created and conferred – i.e. their sources, budgets, and regulatory frameworks – have enormous implications not only on these inquiries' subject-matter competence, but also on their operational realities and thus their ability to deliver their mandates. The mere establishment of a mandate cannot itself ensure functionality or success; without the political will to enable proper access or provide the necessary infrastructure, mandates will be severely hamstrung. An example comes from Yasmin Sooka, Chair of the Commission on Human Rights for South Sudan (CoHRSS), which was mandated by the Human Rights Council in March 2016 to collect and analyse evidence for use in transitional justice processes in South Sudan: one of the biggest limitations in its work stemmed from not being provided with the appropriate digital tools to analyse tens of thousands of pages of documents until over three years after recovery.<sup>59</sup>

Similarly, without the provision of secure, adequate, and consistent funding, mandates will be unable to provide for staffing and resources, which will have ripple effects on their deployment and investigative capacity. An example of the potentially severe and adverse impacts of funding gaps can be seen in the second phase of the 2011-2012 Commission of Inquiry for Libya. First established by the Human Rights Council in February 2011, its mandate was extended in June 2011.<sup>60</sup> However, as a budget was not immediately in place for the second mandate, it was not possible to extend the contracts of existing staff. Arranging funding took several months, requiring recruitment of an entirely new team, most of whom had not worked on Libya before. The team was fully in place only in November 2011 – six months after the mandate had been extended – leaving little time to investigate and analyse the violations of international law being committed ahead of the deadline to file the Commission's report in time for the March 2012 Human Rights Council session.<sup>61</sup>

Thus, as we discuss below, supporting UN mandated investigations primarily requires early and better attention to a range of factors, including the provisions contained in mandates' establishing resolutions (and, where relevant, their terms of reference), the Programme Budget Implications (PBIs), as well as how mandates are institutionally set up. All these elements will determine the conditions under which UN investigations will be able to operate and what they will be able to accomplish.

### Part A: Source of Mandates

When it comes to the sources of mandates, it is important to acknowledge at the outset that *ad hoc* UN investigations are generally set up on an urgent basis in response to unfolding violence. In most cases, they are directed to complete their investigations and report back to the mandating body within a relatively short period of time (ie six to twelve months from establishment). Consequently, the timeframe to set up, deploy to conduct field operations, analyse the collected data, and write and edit a report is

<sup>59</sup> Interview with Yasmin Sooka, 15 October 2020.

<sup>60</sup> UNHRC, A/HRC/RES/S-15/1; Report of the International Commission of Inquiry on Libya, A/HRC/19/68, paras 1 to 4.

<sup>61</sup> Interview with expert SA.