



**Global
Justice Center**

Human Rights Through Rule of Law



SEPTEMBER 2018

DISCRIMINATION TO DESTRUCTION:

A Legal Analysis of Gender Crimes Against the Rohingya



ABOUT GLOBAL JUSTICE CENTER

The Global Justice Center (GJC) is an international human rights organization dedicated to advancing gender equality through the rule of law. We combine advocacy with legal analysis, working to expose and root out the patriarchy inscribed in so many international laws. Our projects forge legal precedents in venues that have the greatest potential for global impact, such as the United Nations Security Council, and in places with the most potential for systemic change, like conflict and post-conflict situations and transitional democracies. We believe that enforcing treaties and international human rights laws can be a catalyst for radical change, moving these hard-won rights from paper to practice.

GJC has worked on issues related to justice and accountability in Burma, particularly for sexual violence against ethnic women, since 2005. GJC also has a project focused on Gender & Genocide, which seeks to ensure that women and girls' experiences of genocide informs efforts to prevent, suppress and punish genocide.

For more information, please visit our website: www.globaljusticecenter.net

ACKNOWLEDGEMENTS

This brief was drafted by Grant Shubin, Elena Sarver and Kristin Smith, with drafting and editing support by Akila Radhakrishnan. Design and layout by Liz Olson.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
METHODOLOGY	2
INTRODUCTION	3
BACKGROUND & CONTEXT.....	6
CRIMES AGAINST HUMANITY	9
1. Attacks against the Rohingya are Widespread, Systematic and Directed at a Civilian Population	9
2. Persecution of Rohingya Women on Girls on the Basis of their Gender	13
3. Sexual and Gender-Based Violence Against Rohingya Women and Girls: Rape.....	21
4. Other Sexual Violence Crimes of Comparable Gravity Against Rohingya Women and Girls.....	24
5. Deportation & Forcible Transfer of Rohingya Women and Girls.....	26
6. Torture of Rohingya Women and Girls.....	33
7. Murder of Rohingya Women and Girls	36
GENOCIDE	38
1. Intent to Destroy the Rohingya Religious and Ethnic Minority as a Group, in Whole or in Part.....	38
2. Killing of Rohingya Women and Girls.....	50
3. Causing Serious Bodily and Mental Harm to Rohingya Women and Girls	51
4. Deliberately Inflicting on Rohingya Women and Girls Conditions of Life Intended to Bring About their Physical Destruction	55
5. Imposing Measures to Prevent Births in the Rohingya Population.....	59
CONCLUSION AND RECOMMENDATIONS	62

EXECUTIVE SUMMARY

Since August 2016, the Burmese military (Tatmadaw), Border Guard, and police forces have conducted a systematic campaign of brutal violence against Rohingya Muslims in Burma's northern Rakhine State. These attacks come in the midst of a decades-long campaign of persecution of the Rohingya through discriminatory measures to police and control the group, including denying citizenship rights, restricting movement and access to healthcare, and limiting marriage and the number of children in families. While all members of the Rohingya population were targeted for violence, gender was integral to how the atrocities were perpetrated.

This brief seeks to bring to light the international crimes—crimes against humanity and genocide—committed against Rohingya women and girls since 2016 by Burmese Security Forces and highlight the role gender played in the design and commission of these atrocities. The military has long used rape as a weapon of war and oppression in its conflicts with ethnic groups, and in the recent attacks, Rohingya women and girls were targeted for particularly brutal manners of killing, rape and sexual violence, and torture.

Rape and sexual violence were widespread, pervasive, and often conducted in public. The acts resulted in serious bodily and mental harm to women, including in some circumstances, death. Many women reported being gang raped, some by as many as eight perpetrators. The rapes were accompanied by other acts of violence, humiliation, and cruelty. Women were beaten, punched, kicked, and subjected to invasive body searches. Their bodies were mutilated, their breasts and nipples cut off and vaginas slashed. Women and girls were not spared by age or condition—with girls as young as five and pregnant women among the victims.

Gendered crimes and consequences were not limited to sexual violence and rape. Rohingya women and girls were often murdered by being burned alive or butchered by knives used for slaughtering animals—methods of killing that mirror the destruction of objects and property, demonstrating the Security Forces' misogyny and deeply gendered conceptions of power.

When these acts are compared against the elements of international crimes, they reveal a series of criminal conduct informed and defined by the gender of the victim. These include, as analyzed in this brief, the crimes against humanity of murder, persecution, forcible transfer or deportation, rape and other sexual violence of comparable gravity, and torture, as well as the genocidal crimes of killing, causing serious bodily or mental harm, inflicting conditions of life calculated to bring about physical destruction and imposing measures intended to prevent births within the group.

The international community has, at long-last, begun to recognize the imperative to ensure justice and accountability for the crimes committed by Burmese Security Forces and the impossibility for justice in Burma's domestic system. As the international community begins to develop mechanisms for justice and accountability—whether through international investigations and evidence collection, at the International Criminal Court, or in third-party states—it is essential that a strong gender perspective and analysis is incorporated at all levels of these processes, from investigation to prosecution to redress and reparations.



METHODOLOGY

This brief seeks to bring to light the international crimes—crimes against humanity and genocide—committed against Rohingya women and girls since 2016 by the Burmese military, Border Guard and police (variously referred to herein as “Burmese Security Forces,” “Security Forces,” “Burmese Forces,” or just “Forces”). Specifically, we seek to highlight the role gender played in the design and commission of atrocities against the Rohingya and to underscore the strict necessity that any and all accountability mechanisms integrate a strong gender perspective and analysis at all levels, from investigation to prosecution to redress and reparations.

The brief’s analysis is based upon the extensive documentation of human rights abuses by international and regional NGOs, UN experts and agencies, and the media. This documentation has been applied to the framework of crimes codified in the Rome Statute of the International Criminal Court (ICC) and international criminal law jurisprudence to elucidate the sexual and gender-based crimes that may have occurred. Our purpose is not to analyze all violence or every crime; instead we only look into that conduct and those crimes that have particularly accented gender motivations, purposes, and consequences. This brief also does not aim to prove a criminal case against a particular perpetrator, or the Burmese Security Forces generally. Instead, its goal is to direct the attention of international stakeholders to the specific gender harms suffered by Rohingya women and girls, and to situate those harms in the broader context of international criminal law.

Rohingya women in Balukhali refugee camp wait for the distribution of “dignity kits” including menstrual hygiene products and other necessities.

PHOTO
Allison Joyce/UN Women/CC BY 2.0



INTRODUCTION

Burmese Security Forces have conducted a brutal campaign of violence against Rohingya Muslims in Burma's northern Rakhine State.¹ Since August 2016, scores of reports have documented the breadth and ruthlessness with which the Burmese military, Border Guard, and police forces targeted the Rohingya. This brief turns to the oft-overlooked female victims of international atrocity crimes by evaluating the legal bases for concluding that the violence committed by the Burmese Forces against Rohingya women and girls arises to genocide and crimes against humanity. It should be noted that such crimes go beyond rape and sexual violence—women have been targeted and subject to a variety of crimes that are informed by their gender.

Rohingya women wait at an aid distribution point in Balukhali refugee camp in Cox's Bazar.

PHOTO
Allison Joyce/UN Women/CC BY 2.0

The international response to these atrocities has been consistent in its conclusions, if ineffectual in its consequences. Since October 2016, the UN Office of the High Commissioner for Human Rights (OHCHR), the UN Special Rapporteur on the situation of human rights in Myanmar, the UN's Independent International Fact-Finding Mission on Myanmar (Myanmar FFM), the Special Representative of the UN Secretary-General (SRSG) on Sexual Violence in Conflict, and the UN Office on Genocide Prevention and the Responsibility to Protect have all noted the international crimes committed by Burmese Forces.² In August 2018, the Myanmar FFM called for Burma's senior military leadership, including Commander-in-Chief Min Aung Hlaing, to be investigated and prosecuted for crimes against humanity and genocide for their actions in Rakhine State.³ These calls have been

1. Burma was renamed Myanmar by the military junta in 1989. Because this decision was made "without consulting any public opinion" we continue to refer to the country as Burma throughout this brief. See Gwen Robinson, "Suu Kyi refuses to use 'Myanmar' name," Financial Times, July 3, 2012.
2. UN Office of the High Commissioner for Human Rights (OHCHR), "Myanmar: Tatmadaw leaders must be investigated for genocide, crimes against humanity, war crimes – UN Report," Aug. 27, 2018; "Rep. of the Special Rapporteur on the situation of human rights in Myanmar," paras. 43-49, UN Doc. A/HRC/37/70, Mar. 9, 2018; "Rep. of the Ind. Int'l Fact-Finding Mission on Myanmar," UN Doc. A/HRC/39/64, paras. 82, 93, Aug. 24, 2018; "Statement by Special Representative of the Secretary General on Sexual Violence in Conflict at Security Council Open Debate on Sexual Violence in Conflict," Apr. 16, 2018; "Statement by Adama Dieng, United Nations Special Advisor on the Prevention of Genocide on his visit to Bangladesh to assess the situation of Rohingya refugees from Myanmar," Mar. 13, 2018.
3. UN Office of the High Commissioner for Human Rights (OHCHR), "Myanmar: Tatmadaw leaders must be investigated for genocide, crimes against humanity, war crimes – UN Report," Aug. 27, 2018.

bolstered by extensive documentation of human rights abuses against the Rohingya by international, regional, and domestic NGOs.

Still, Burmese authorities have variously denied any wrongdoing, ignored the problem, or referred to the matter as a domestic issue. In addition, the government has failed to conduct genuine investigations or impose sanction and accountability on perpetrators of these crimes.⁴ While eight adhoc commissions and boards have been set up by the Burmese authorities since 2012 with regards to the situation in Rakhine State, the Myanmar FFM determined that none have met the standards of an “impartial, independent, effective and thorough human rights investigation.”⁵ In early September 2018, a senior government spokesperson dismissed the Myanmar FFM’s report, stating that the country has “zero tolerance for human rights violations” and that Burma has an “accountability and responsibility framework regarding human rights issues.”⁶ These comments are not surprising. The government has long demonstrated that it is both unwilling and unable to hold the military accountable for its abuses, whether committed against the Rohingya, or in the long-standing and ongoing conflicts with Burma’s other ethnic minorities (see below Background & Context section). In Burma, impunity has long been the rule, not the exception. The impunity and consistent denial of these atrocity crimes has “contributed to the[ir] commission,”⁷ and can potentially function to condone the crimes.⁸

The international community has, at long last, begun to recognize the imperative to ensure justice and accountability for the crimes committed by Burmese Security Forces and the impossibility of justice in Burma’s domestic system. In a Security Council briefing in August 2018 following the publication of the Myanmar FFM’s initial report, Council Member States called for the pursuit of accountability at the international level,⁹ including the potential of the referral of the situation in Myanmar to the ICC. In September 2018, the ICC ruled that the Court could exercise limited jurisdiction over crimes against the Rohingya—specifically those crimes where one of the elements or part of the crime took place in Bangladesh, a State Party to the Rome Statute accepting the jurisdiction of the Court.¹⁰ This includes, in the Court’s view, the crimes against humanity of deportation, persecution, and other inhumane acts,¹¹ but under the Court’s ruling could extend to other crimes against humanity, war crimes, and genocide where all the requisite elements are met.¹² The creation of a mechanism,

4. “Rep. of the Special Rapporteur on the situation of human rights in Myanmar,” para. 73, U.N. Doc. A/HRC/34/67, Mar. 14, 2017; “Statement by Marzuki Darusman, Chairperson of the Independent International Fact-Finding Mission on Myanmar at the 37th session of the Human Rights Council,” Mar. 12, 2018.

5. UN Doc. A/HRC/39/64, para. 96.

6. “Myanmar rejects UN findings in Rohingya genocide report,” Al Jazeera News, Aug. 29, 2018.

7. UN Doc. A/HRC/39/64, paras. 82, 93.

8. Nyiramasuhuko et al. (Butare), Case No. ICTR-98-42, Trial Judgment, para. 5747, June 24, 2011; Prosecutor v. Katanga, ICC-01/04-01/07, Trial Judgment, para. 1108, Mar. 7, 2014; Prosecutor v. Karemera and Ndirumpatse, Case No. ICTR-98-44-T, Trial Judgment, paras. 1597-98, Feb. 2, 2012.

9. United Nations Press Release, “Myanmar’s Refugee Problem among the World’s Worst Humanitarian, Human Rights Crises, Secretary-General Says in Briefing to Security Council,” Aug. 28, 2018.

10. Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the [Rome] Statute,’ Case. No. ICC-ROC46(3)-01/18, para. 74, Sept. 6, 2018.

11. Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the [Rome] Statute,’ Case. No. ICC-ROC46(3)-01/18, paras. 73, 75-78, Sept. 6, 2018.

12. While the decision from Pre-Trial Chamber I only discusses the crimes against humanity of deportation, persecution and other inhumane acts in name, the Court appears to open a door for other crimes to be considered by the Office of the Prosecutor, in particular where the element of a cross-border crime is met. Paragraphs 74 through 79 go beyond the Prosecutor’s initial request to the Court, which was limited to the crime of deportation, and extend the rationale behind the grant of jurisdiction to “other crimes within the jurisdiction of the Court” where “at least one element”

modeled on the International, Impartial and Independent Mechanism (IIIM) for Syria established by the General Assembly or the Iraqi Investigative Team established by the Security Council, has also been suggested.¹³ And as the evidence of genocide against the Rohingya mounts, the call for justice is not just a moral imperative, but a legal one for the international community. Under the Convention on the Prevention and Punishment of the Crime of Genocide, all states are obligated to prevent, suppress and punish genocide, wherever it occurs.¹⁴

Gender, as this brief demonstrates, was integral to how the Security Forces committed crimes against humanity and genocide. Burma's military has long used rape as a weapon of war in its conflicts with ethnic groups, and in the context of the attacks on the Rohingya, women and girls were singled out for particularly vicious manners of killing, brutal rape and sexual violence, including gang rape, and attacks that continued throughout their displacement. In March 2018, the UN Secretary-General listed the Tatmadaw as a "part[y] credibly suspected of committing or being responsible for patterns of rape or other forms of sexual violence" for the first time.¹⁵ As one survivor testified, "I was lucky, I was only raped by three men."¹⁶ In light of these gender dynamics, gender must be at the center of accountability.

of those crimes occurs on the territory of a State Party to the Rome Statute. The Court provides two "examples" of other crimes that may satisfy this requirement in the case of the Rohingya—persecution and other inhumane acts—but does not limit any potential investigation to just these crimes. This broader view of crimes that may fall within the ambit of this decision is also supported by the press release from the Court that accompanied the decision, which states that "the Chamber further found that the Court may also exercise its jurisdiction with regards to any other crime set out in article 5 of the Statute." Article 5 of the Rome Statute broadly sets out the categories of crimes that fall under the Court's jurisdiction—genocide, war crimes, crimes against humanity and aggression. (Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the [Rome] Statute,' Case. No. ICC-RoC46(3)-01/18, paras. 74-79.)

13. UN Office of the High Commissioner for Human Rights (OHCHR), "Concept Note: Accountability mechanism for Myanmar," undated, <https://www.ohchr.org/Documents/Countries/MM/ConceptNoteAccountabilityFramework.pdf>.

14. Convention on the Prevention and Punishment of the Crime of Genocide, art 1, 78 UNTS 277, Dec. 9, 1948.

15. "Rep. of the Secretary General on Conflict-related sexual violence," at Annex p. 34, UN Doc. S/2018/250, Mar. 23, 2018.

16. UN Office of the High Commissioner for Human Rights (OHCHR), "Myanmar: Tatmadaw leaders must be investigated for genocide, crimes against humanity, war crimes – UN Report," Aug. 27, 2018.



BACKGROUND & CONTEXT

Burma's military has a long history of violence, systematic discrimination, and policies of exclusion and marginalization against all of Burma's ethnic minorities. Violence in Rakhine State has occurred alongside continued conflict between Burma's military and various armed ethnic groups and escalating violence in Shan and Kachin States. In the words of the Special Rapporteur on the situation of human rights in Myanmar, "While reports from Rakhine State have rightly provoked international outrage; for many in [Burma], they have elicited a tragic feeling of déjà vu."¹⁷

From 1962 to 2011, Burma was ruled by a military junta that brutally repressed citizens' rights and crushed dissent, especially in ethnic areas. The military junta committed rampant human rights abuses and denied basic human rights and political freedoms, while relying on indiscriminate and open-ended detention to punish dissent. The imposition of killings, rapes, forced labor, forced relocation, extortion, land and food requisitions, and restrictions on access to fields and markets had a devastating and destabilizing impact on ethnic populations.¹⁸ Women and girls in ethnic areas were subjected to sexual violence by the military and rape was used as a tactic of war and oppression.¹⁹

In 2011, the military installed a "civilian" government and instituted a process of reform as part of a carefully-orchestrated plan to continue military rule under the guise of democracy. Certain reforms have marginally improved the lives of people in Burma but none have addressed or dismantled the legal and structural barriers that guarantee military autonomy and impunity. For example, the military, Border Guard, and police forces all remain under the control of the army's Commander-in-Chief, not the civilian government.²⁰ As a result, the Burmese Military bear primary responsibility for

A Rohingya woman and child walk together in Balukhali refugee camp, Cox's Bazar.

PHOTO
Allison Joyce/UN Women/CC BY 2.0

17. "End of Mission Statement by Special Rapporteur on the situation of human rights in Myanmar," at 3, Feb 1, 2018.

18. United Nations Press Release, "UN Human Rights experts call on Myanmar to end counter-insurgency operations targeting civilians in Northern Karen State and Eastern Pegu Division," May 16, 2006.

19. "Rep. of the Secretary General on Conflict-related Sexual Violence," at 11, UN Doc. S/2014/181, Mar. 13, 2014; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the Comm'n on Human Rights, "Addendum: Summary of Information, including individual cases, transmitted to Governments and replies received," paras. 157-174, UN Doc. E/CN.4/2006/6/Add.1, Mar. 21, 2006; Women's League of Burma, "Same Impunity, Same Patterns," at 3, Jan. 2014; Burma Campaign UK, "Burma Briefing: Rape and Sexual Violence by the Burmese Army," at 6, Jul. 2014.

20. See Global Justice Center, Submission to the Ind. Int'l Fact-Finding Mission on Myanmar, Feb. 15, 2018.

the crimes described in this brief.²¹ Furthermore, the military-drafted 2008 Constitution guarantees the military immunity from prosecution,²² grants the Commander-in-Chief the ability to adjudicate and administer all affairs related to the Tatmadaw, and deems his judgment in such matters as “final and conclusive.”²³ Also under the Constitution, the President may grant amnesty “in accord with the recommendations of the National Defence and Security Council,” which is under military control.²⁴ These provisions prevent civilians and the civilian government from holding the military or its members accountable for human rights abuses or sexual violence.

Against this backdrop, the Rohingya, like many of Burma’s ethnic minorities, have suffered widespread discriminatory policies and practices. Effectively deprived of nationality under the 1982 Citizenship Law, the Rohingya, a predominantly Muslim ethnic minority living in Rakhine State in northern and western Burma, are one of the largest stateless populations in the world.²⁵ This stateless status exposes them to exploitation, detention, and abuse.²⁶ The Rohingya live with heavily restricted rights, including their freedom of movement, marriage, access to education and health care, and even their ability to have children.²⁷

In addition to discriminatory policies and restricted human rights, the Rohingya have been subject to waves of state violence, including unlawful killings, arbitrary detentions, torture and other ill-treatment, forced labor, land confiscations, forced evictions, and various forms of extortion and arbitrary taxation.²⁸ Episodes of massive scale systematic violence date back at least to 1978, and were repeated in 1991, 1992, 2001, and 2012.²⁹

In October 2016, Burmese Security Forces initiated a wave of violence against the Rohingya. The crackdown came after an attack by an armed group now known as the Arakan Rohingya Salvation Army (“ARSA”) on three security posts in northern Rakhine State resulting in the deaths of nine officers.³⁰ While clearly capable of deadly force, reports indicate that ARSA is not well organized, funded, or trained.³¹ Security Forces responded to this attack by carrying out “clearance operations” on all Rohingya in northern Rakhine State, comprising of unlawful killings, rape and other forms of torture, enforced disappearances, and arbitrary detentions.³² These operations affected the entire Rohingya population of Rakhine State, the majority of whom are not armed, nor have they ever engaged in violence against Security Forces.³³ Access to the area has since been heavily restricted

21. See Global Justice Center, Submission to the Ind. Int’l Fact-Finding Mission on Myanmar, Feb. 15, 2018.

22. 2008 Constitution of the Republic of the Union of Myanmar, art. 445

23. 2008 Constitution of the Republic of the Union of Myanmar, arts. 20(b), 343(b).

24. 2008 Constitution of the Republic of the Union of Myanmar, art. 204(b).

25. Amnesty Int’l, “‘Caged Without a Roof,’ Apartheid in Myanmar’s Rakhine State,” at 20, 2017.

26. Refugees Int’l, “Field Report, Reluctant Refugee: Rohingya safe but not secure in Bangladesh,” at 4, Jul. 2017.

27. Refugees Int’l, “Reluctant Refugee,” at 4, Jul. 2017; Amnesty Int’l, “Caged Without a Roof,” at 20.

28. Amnesty Int’l, “Caged Without a Roof,” at 20.

29. Amnesty Int’l, “Caged Without a Roof,” at 20; “Rep. of the Special Rapporteur on the situation in human rights in Myanmar,” paras. 56–58, UN Doc. A/67/383, Sept. 25, 2012; “Rep. of the Special Rapporteur on the situation of human rights in Myanmar,” paras. 47–48, UN Doc. A/HRC/22/58, Apr. 17, 2013; UN 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,” at 6, Feb. 3, 2017.

30. For a detailed description of ARSA and its activities, see Int’l Crisis Group, “Myanmar’s Rohingya Crisis Enters a Dangerous New Phase,” Asia Report no. 292, Dec. 7, 2017. Amnesty Int’l, “Caged Without a Roof,” at 24; Refugees Int’l, “Reluctant Refugee,” at 4, Jul. 2017.

31. US Holocaust Museum & Fortify Rights, “Atrocity Crimes Against Rohingya Muslims,” at 6, Nov. 2017.

32. OHCHR, “Report of OHCHR mission to Bangladesh,” at 42, Feb. 3, 2017; UN Doc. A/HRC/37/70, paras. 42–49.

33. Refugees Int’l, “Reluctant Refugee,” at 4.

both to humanitarian aid and outside journalists and officials.³⁴

In August 2017, ARSA carried out a second wave of larger and more coordinated attacks.³⁵ Again, Burmese Security Forces responded with violence on a mass scale which was characterized by increased ferocity and horror.³⁶ Survivors report indiscriminate killings, rape and sexual violence, arbitrary detention, torture, beatings, and forced displacement.³⁷ Reports have also shown that Security Forces were systematically planning for such an operation against the Rohingya even before ARSA's August attacks.³⁸ The gender-based international crimes committed during the 2016 and 2017 campaigns are the basis of this brief.

ARSA, for its own part, has also committed international crimes.³⁹ In addition to the October 2016 and August 2017 attacks on military outposts, Amnesty International reports ARSA has attacked villagers from other ethnic and religious communities.⁴⁰ In the worst attack, ARSA murdered 53 of the 69 Hindu women, men, and children present in Ah Nauk Kha Maung Seik village.⁴¹ The eight female survivors were kept alive on condition the women "convert" to Islam and marry men selected by the attackers.⁴² While this brief focuses on crimes committed by Burmese Forces, any accountability efforts should ensure accountability for actors on all sides who have committed international crimes.

To date, over 700,000 Rohingya have fled to Bangladesh following the waves of violence since 2016,⁴³ in what the UN High Commissioner for Human Rights has described as a "textbook example of ethnic cleansing."⁴⁴ Many victims describe being taunted by their attackers with statements that Islam is not the religion of Burma, that Rohingyas are Muslim "Bengalis", and that Rohingyas will be eliminated from Burma.⁴⁵ Overwhelming evidence supports the fact that the Rohingya are targeted based on their belonging to a particular ethnicity and religion.⁴⁶ The Myanmar FFM found in August 2018 that "the crimes in Rakhine State, and the manner in which they were perpetrated, are similar in nature, gravity and scope to those that have allowed genocidal intent to be established in other contexts."⁴⁷

In sum, the contents of this brief, as well as the reports from which this brief draws, must be understood in the context of the Burmese military's decades of brutal oppression and violence. Tragically, the crimes described herein are commonplace, both as carried out against the Rohingya and Burma's other ethnic minorities. Long-overlooked women's experiences must be accounted for, and access to justice for the crimes committed against them ensured.

34. Refugees Int'l, "Reluctant Refugee," at 4.

35. Amnesty Int'l, "Caged Without a Roof," at 24.

36. Amnesty Int'l, "Caged Without a Roof," at 24.

37. OHCHR, "Report of OHCHR mission to Bangladesh," at 42, Feb. 3, 2017; UN Doc. A/HRC/37/70, paras. 42-49.

38. Fortify Rights, "'They Gave Them Long Swords,' Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar," Jul. 2018.

39. Amnesty Int'l, "Caged Without a Roof," at 24.

40. Amnesty Int'l, "'We will destroy everything,' Military responsibility for crimes against humanity in Rakhine State, Myanmar," at 13, 2018.

41. Amnesty Int'l, "We will destroy everything," at 13.

42. Amnesty Int'l, "We will destroy everything," at 13.

43. UN Doc. A/HRC/39/64, para. 33.

44. Statement by UN High Commissioner for Human Rights at Human Rights Council 36th Session, "Darker and more dangerous: High Commissioner updates the Human Rights Council on human rights issues in 40 countries," Sept. 11, 2017.

45. OHCHR, "Report of OHCHR mission to Bangladesh," at 43, Feb. 3, 2017.

46. OHCHR, "Report of OHCHR mission to Bangladesh," at 43, Feb. 3, 2017; UN Doc. A/HRC/37/70, paras. 42-49.

47. UN Doc. A/HRC/39/64, para. 85.



CRIMES AGAINST HUMANITY

THERE IS STRONG EVIDENCE THAT BURMESE FORCES ARE COMMITTING CRIMES AGAINST HUMANITY AGAINST ROHINGYA WOMEN AND GIRLS

The gender-based atrocities committed by Burmese Security Forces likely constitute numerous crimes against humanity.

Crimes against humanity occur when certain acts are “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁴⁸ Courts have found that “the requirements of ‘widespread’ and ‘systematic’ should be read disjunctively.”⁴⁹ Further, the perpetrator must participate in and have knowledge of the widespread or systematic attack.⁵⁰

International law recognizes a myriad of different crimes against humanity, and, as discussed below, Burmese Security Forces targeted Rohingya women and girls for crimes including rape, sexual violence, forced displacement, torture, persecution, and killing. Each of these crimes was generally perpetrated in accordance with the requisite chapeau elements of crimes against humanity, including that the attacks be “widespread” and “systematic.”

1. Attacks Against the Rohingya are Widespread, Systematic and Directed at a Civilian Population

The Burmese Security Forces’ acts against the Rohingya meet each of the general requirements for crimes against humanity: the attacks have been widespread, systematic, and directed against civilians.

Noor lost her 10-year-old daughter when they fled their village as it was being burned to the ground. She says she has no hope of seeing her alive again.

PHOTO
Anna Dubuis/DFID
CC BY 2.0

48. Rome Statute, art. 7(1).

49. Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment, para. 328, May 15, 2003. See also Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-T, Judgment, para. 178, Feb. 26, 2001.

50. ICC, Elements of Crimes, art. 7(2), ISBN No. 92-9227-232-2, 2011.

Widespread

“Widespread” is defined by a number of different factors including the number of victims, the consequences of the attack upon the targeted populations, and the scale of the attack.⁵¹

The Burmese Security Forces’ attacks have impacted a massive number of victims. Recent estimates indicate nearly 6,700 Rohingya were killed in the first month of violence alone following the start of the attacks on August 25, 2017.⁵² In November 2017, one organization documented over a thousand incidents of sexual violence after the August 2017 attacks, and this number is likely much lower than the actual number of incidents due to underreporting by women and girls as a result of stigma, fear of medical fees, and distrust of the criminal system.⁵³ Indeed, a March 2018 report indicates that there have been 6,097 gender-based violence incidents reported between August 2017 and March 2018, which include, but are not limited to, sexual violence.⁵⁴ In the village of Tula Toli alone, it is estimated that over 100 women and girls were raped and many killed.⁵⁵

In addition to high numbers of victims, the consequences of the attacks on the Rohingya have created one of the worst humanitarian emergencies in memory. Since 2016, over 700,000 Rohingya have fled Burma and are currently living in vast and poorly resourced refugee camps in Bangladesh.⁵⁶ The “clearance operations” burned, bulldozed, and utterly destroyed hundreds of Rohingya villages and structures.⁵⁷ At the individual level, victims are deeply traumatized by their own experience of violence, as well as from being forced to witness atrocities committed against their families and community members.⁵⁸

The attacks have also been carried out on a large scale. In both the October 2016 and August 2017 attacks, human rights organizations documented the mass movement of Security Forces in which hundreds of villages and tens of thousands of structures were destroyed. Additionally, satellite imagery has confirmed that “thousands of homes burned in hundreds of Rohingya villages,”⁵⁹ as well as “schools, marketplaces and mosques.”⁶⁰ The Myanmar FFM found that of the 392 villages that were partially or totally destroyed, nearly 80% were burned in the first three weeks of the

51. Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Judgment, paras. 94-95, June 12, 2002; Prosecutor v. Nindiliyimana et al., Case No. ICTR-00-56-A, Judgment, para. 260, Feb. 11, 2014; Prosecutor v. Stanišić & Simatović, Case No. IT-03-69-T, Judgment - Vol. I of II, para. 963, May 30, 2013.

52. UN Doc. A/HRC/37/70, para. 46.

53. Human Rights Watch (HRW), “All of My Body Was Pain: Sexual Violence against Rohingya Women and Girls in Burma,” at 21, Nov. 2017.

54. Inter Sector Coordination Group, “Situation Report: Rohingya Refugee Crisis - Cox’s Bazar,” at 12, Mar. 25, 2018.

55. Kaladan Press Network, “Rape by Command: Sexual violence as a weapon against the Rohingya,” at 9-10, Feb. 2018.

56. UN Doc. A/HRC/39/64, para. 33.

57. Amnesty Int’l, *We Will Destroy Everything*, at 112-123, 135, 167.

58. See OHCHR, “Report of OHCHR mission to Bangladesh,” at 17, Feb. 3, 2017 (detailing an incident where the military publicly set an elderly couple on fire).

59. UN Doc. A/HRC/37/70, para. 45 (post-2017 attacks). Satellite imagery also confirmed massive numbers of homes burned as a result of the attacks in 2016. OHCHR, “Report of OHCHR mission to Bangladesh,” at 32, Feb. 3, 2017. “Satellite images demonstrate widespread destruction of homes and other civilian properties—in some cases, entire villages have been destroyed. Amnesty International analysed satellite images of northern Maungdaw Township and confirmed the destruction of over 1,262 buildings in 12 villages in October and November Analysis of near red band confirmed burning by fire. These findings are consistent with those of Human Rights Watch, which conducted a similar review of satellite imagery and found that 1,500 buildings in Rohingya villages had been destroyed between 10 October and 23 November.” Amnesty Int’l, “We are at Breaking Point: Rohingya: Persecuted in Myanmar, Neglected in Bangladesh,” at 26, 2016.

60. UN Doc. A/HRC/39/64, para. 42.

clearance operations.⁶¹ Each time the Burmese Security Forces destroy a town, so too do they commit an unknown, but inherently large, number of crimes, including killing, rape, and sexual violence. Taken together, these statistics indicate the massive, large-scale nature of the Forces' attacks on the Rohingya.

Systematic

The requirement of “systematic” has been interpreted to mean the “organized nature of the acts of violence and the improbability of their random occurrence,” as well as the indications of patterns in the crimes.⁶²

The Burmese Security Forces' individual attacks on Rohingya villages and townships each follow similar patterns, indicating an organized, systematic plan rather than random, spontaneous action (see below, Systemic Patterns of Attack section). Human rights reports indicate a “clear pattern of violence” whereby: the military, Border Guard or police force arrived in villages and called citizens to come out of their homes, men and boys were separated and taken away or killed, women and girls were subjected to sexual violence, and homes were burned.⁶³ These patterns were repeated time and time again after both the October 2016 and August 2017 waves of violence.⁶⁴ Women from different villages have provided consistent testimony about their experiences.⁶⁵

Evidence and witness testimony suggest that these attacks could not have been carried out at random.⁶⁶ For example, reporting that hundreds of troops raped hundreds of women in over a dozen remote locations in just a two-month span, with each rape having a similar set of characteristics and circumstances, tends to show that high-level instruction and authorization were present.⁶⁷ Similarly, the scale and sophistication of attacks evince their systematic nature. For instance, during the Tula Toli massacre in August 2017, “[t]he large deployment of troops as well as the use of [rocket propelled grenades] would have required detailed planning and coordination and the strategic allocation of significant financial resources and arms.”⁶⁸

Additionally, analysis of satellite images has also revealed consistencies in how buildings were burned in totality and other areas were left unharmed—corroborating witness statements that

61. UN Doc. A/HRC/39/64, para. 42.

62. Prosecutor v. Kunarac et al., Case No. IT-96-23-T & IT-96-23/1-T, Judgment, para. 429, Feb. 22, 2001; Prosecutor v. Ndindiliyimana et al., Case No. ICTR-00-56-A, Judgment, para. 260, Feb. 11, 2014; Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment, para. 1123, Mar. 7, 2014.

63. UN Doc. A/HRC/39/64, para. 36; Physicians for Human Rights, “Documenting Violence Against the Rohingyas Firsthand: Evidence That Can’t Be Ignored,” Medium, Dec. 22, 2017; HRW, “Massacre by the River: Burmese Army Crimes against Humanity in Tula Toli,” at 7, 2017; UN Doc. A/HRC/37/70, para. 46.

64. HRW, “All of My Body Was Pain,” at 12.

65. HRW, “All of My Body Was Pain,” at 2, 15; Fortify Rights & US Holocaust Memorial Museum, “‘They Tried to Kill Us All’ Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar,” at 10, Nov. 2017.

66. In fact, Fortify Rights recently released a report detailing the Burmese Forces' deliberate preparations for the crimes carried out since October 2016, including “disarm[ing] Rohingya civilians,” “systematically [tearing] down fencing and other structures around Rohingya homes,” “train[ing] and arm[ing] local non-Rohingya citizens in northern Rakhine State,” “depriv[ing] Rohingya civilians of food and other aid,” “buil[d]ing up state security forces in northern Rakhine State,” and “committ[ing] human rights violations against Rohingya civilians, including imposing discriminatory curfews.” Fortify Rights, “They Gave Them Long Swords,” at 41.

67. Kaladan Press Network, “Rape by Command,” at 34.

68. Fortify Rights & US Holocaust Memorial Museum, “They Tried to Kill Us All,” at 14.

Rohingya villages were specifically targeted.⁶⁹ Further, the destruction of villages and buildings within a relatively short time period “indicates a systematic rather than random attack.”⁷⁰

Finally, multiple reports suggest Rohingya villagers were given notice ahead of the Burmese Security Forces entering certain villages. These advance warnings, often provided by military personnel or village administrators, signal that attacks against civilians were planned, intentional, and occurred pursuant to a broader system organized by Burmese Security Forces.⁷¹

Attacks directed against a civilian population

“Attacks directed against any civilian population” generally refer to a course of conduct “against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”⁷²

Burmese Security Forces have referred to their actions as “clearance operations,” which they have justified as a response to the “‘terrorist threat’ posed by ARSA.”⁷³ However, the “grossly disproportionate”⁷⁴ military response did not target only armed actors; rather, it was primarily Rohingya civilians, including men, women, children, and the elderly, who suffered most as a result of the mass attacks.

Acts qualifying as such attacks are not limited to the use of armed force, but instead encompass “any mistreatment of the civilian population.”⁷⁵ A single act or limited number of acts could qualify as long as they are not isolated or random.⁷⁶ The organization committing the attack—in this case the Burmese Security Forces (all acting under the control of the Commander-in-Chief)—must have acted in line with a policy to commit such an attack.⁷⁷ In other words, attacks constituting crimes against humanity are composed of any acts of mistreatment against the civilian population that are “planned, directed or organized,” as opposed to “spontaneous or [consisting of] isolated acts.”⁷⁸

As already detailed, the campaigns of violence carried out by the Burmese Forces against the Rohingya population since October 2016 and August 2017 clearly constitute attacks on civilians. The multiple crimes detailed throughout this brief indicate the mistreatment of the Rohingya population—a mild description for the killings, rape, and other crimes of sexual violence repeatedly perpetrated against the targeted group of civilians. Indeed, evidence indicates the violence was not isolated or random but rather committed in planned, systematic ways.

69. Amnesty Int’l, “‘My World is Finished:’ Rohingya Targeted in Crimes Against Humanity in Myanmar,” at 27, 29, 31, 32, 35, 2017; HRW, “Burma: New Satellite Images Confirm Mass Destruction,” Oct. 17, 2017.

70. Amnesty Int’l, ‘We are at Breaking Point,’ at 27.

71. Amnesty Int’l, ‘My World is Finished,’ at 38. See also Physicians for Human Rights, “‘Please Tell the World What They Have Done to Us:’ The Chut Pyin Massacre: Forensic Evidence of Violence against the Rohingya in Myanmar,” at 12, July 2018.

72. Rome Statute, art. 7(2)(a).

73. UN Doc. A/HRC/39/64, para. 33.

74. UN Doc. A/HRC/39/64, para. 33.

75. Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Judgment, para. 86, June 12, 2002.

76. Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Judgment, para. 96, June 12, 2002.

77. Prosecutor v. Ruto et al., Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges, para. 211, Jan. 23, 2012.

78. Prosecutor v. Ruto et al., Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges, para. 210, Jan. 23, 2012.

Conclusion

As shown above, there is significant support for the claim that the Burmese Security Forces' violence against the Rohingya population constitutes widespread, systematic attacks directed against a civilian population sufficient to constitute crimes against humanity.

2. Persecution of Rohingya Women and Girls on the Basis of their Gender

Persecution is a crime against humanity comprised of a multitude of acts committed against “any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender...or other grounds that are universally recognized as impermissible under international law.”⁷⁹ Although victims of persecution are targeted on the basis of their identity with a group or collectively, a single act against a single victim can potentially constitute persecution when committed with the necessary discriminatory intent.⁸⁰

Targeting persons by reason of identity of the group or collectivity and discriminatory intent

Grounds for persecution are based on the perpetrator's perception rather than whether a victim factually belongs to a certain group, and bases for persecution are often conflated and intersectional,⁸¹ with group identities converging in the eyes of perpetrators. Thus, types of discrimination should be examined in totality rather than in isolation.⁸² Discrimination against women, even when based on their sex and gender, is also “inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class.”⁸³ As described by the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), “women experience varying and intersecting forms of discrimination, which have an aggravating negative impact.”⁸⁴

The discriminatory intent that underlies persecution can be inferred from expressed hostility,⁸⁵ the behavior of perpetrators, the continued or systematic targeting of specific groups,⁸⁶ and from knowing participation in a campaign/system of abuse or against a backdrop of widespread abuse.⁸⁷ Moreover, although “the existence of a discriminatory policy is not a requirement for proving persecution... persecutory acts may form a part of a discriminatory policy or practice.”⁸⁸

79. Rome Statute, art. 7(1)(h).

80. Elements of Crimes, art. 7(1)(h)(1); Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, para. 649, May 7, 1997 (“[e]ven an isolated act can constitute a crime against humanity if it is the product of a political system based on terror and persecution.”); Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Judgment, para. 624, Jan. 14, 2000.

81. ICC Office of the Prosecutor, “Policy Paper on Sexual and Gender-Based Crimes,” para. 27, June 2014; CEDAW Comm., General Recommendation No. 28 on the Core Obligations of State Parties Under Article 2 of the Convention, para. 18, UN Doc. CEDAW/C/GC/28, Dec. 16, 2010; Prosecutor v. Blé Goudé, Case No. ICC-02/11-02/11, Decision on the Confirmation of Charges, paras. 122-23, 190, Dec. 11, 2014; Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges, para. 205, June 12, 2014.

82. ICC Office of the Prosecutor, “Policy Paper on Sexual and Gender-Based Crimes,” para. 27.

83. UN Doc. CEDAW/C/GC/28, para. 18.

84. CEDAW Comm., General Recommendation No. 35 on Gender-Based Violence Against Women, para. 12, UN Doc. CEDAW/C/GC/35, July 26, 2017.

85. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, para. 126, June 9, 2014.

86. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, para. 148, June 9, 2014; Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment (Volume I), para. 500, Mar. 24, 2016.

87. Prosecutor v. Kvočka et al., Case No. IT-98-30/01-T, Judgment, para. 201, Nov. 2, 2001.

88. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment (Volume I), para. 500, Mar. 24, 2016.

Targeting on the basis of gender

Persecution based on gender is expressly envisioned in the Rome Statute,⁸⁹ and was acknowledged by the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the former Yugoslavia (ICTY). The ICTR, for example, held that:

acts of rape and sexual violence...were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation...These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.⁹⁰

Similarly, the 2018 Report of the Secretary-General on Sexual Violence in Conflict described sexual violence as a “vehicle of persecution, directed in particular towards women and girls of reproductive age, as the perceived transmitters of cultural and ethnic identity and the symbolic repositories of familial and national ‘honour.’”⁹¹ The report also noted that “patterns of violence are embedded in the underlying structural conditions, including inequality, discrimination on the basis of gender and the neglect of the rights of minority groups,” which are then “exacerbated by militarization.”⁹²

Thus, gender plays a multifarious role in the crime of persecution, as both grounds for persecutory violence and a factor adding to the persecutory suffering of women and girls (as well as lesbian, gay, bisexual, trans and other gender non-conforming individuals).

Persecution via sexual violence

The Burmese military has consistently used sexual violence “as an expression of ethnic hatred” in conflicts and has “employed [it] as a tactic of war, terrorism, torture and repression.”⁹³ International courts have repeatedly acknowledged that rape can be used for purposes of, amongst other things, degradation, humiliation, and discrimination.⁹⁴ The pervasiveness of discrimination within a society does not normalize it to a point where it is not persecution or is rendered irrelevant, and the gender-based persecution manifested through sexual violence and other human rights violations during the 2016 and 2017 clearance operations reached new levels and compounded existing gender inequalities. As described below, gender-based persecution and persecution that disproportionately affects women go beyond sexual violence, though sexual violence is “assaulting to women’s dignity and the most obvious result of Burma’s patriarchal culture that subjects women to violence.”⁹⁵

The threat and use of sexual violence were central to the Burmese Forces’ strategy to terrorize, collectively punish, and destroy the Rohingya as a group. That violence was specifically directed at women and girls who “are seen as custodians and propagators of ethnic identity” and “represent the

89. Elements of Crimes, art. 7(1)(h)(3).

90. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 731, Sept. 2, 1998.

91. UN Doc. S/2018/250, para. 13.

92. UN Doc. S/2018/250, para. 13.

93. UN Doc. S/2018/250, para. 12.

94. Kunarac et al., Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, para. 150, June 12, 2002; Prosecutor v. Delalić & Delić, Case No. IT-96-21-T, Judgment, paras. 493, 495 & 511, Nov. 16, 1998; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, paras. 597, 731, Sept. 2, 1998; Siobhan K. Fisher, “Occupation of the Womb: Forced Impregnation as Genocide,” 46 Duke L.J. 91, at 122, 1996; Anne-Marie L.M. de Brouwer, “Supranational Criminal Prosecution of Sexual Violence: the ICC and the Practice of the ICTY and the ICTR,” at 189, 196, 2005.

95. Women’s League of Burma, “Same Impunity, Same Patterns,” at 11.

future of the group.”⁹⁶ In some villages, women were threatened with rape as a way to coerce village leaders into claiming that they had destroyed property themselves.⁹⁷

Separating civilians by gender during attacks is one signal of the Security Forces’ gender-based discrimination and plan of attack, and shows their intent to subject individuals of different genders to different harm. Whereas men in these situations were killed or abducted, women were raped, sexually assaulted in front of others, or humiliated through forced nudity and other harassment.⁹⁸ Assaults were also directed against women’s reproductive organs.⁹⁹ Women were also abducted under pretenses of performing assigned gender roles such as cooking and cleaning.¹⁰⁰

Impunity for sexual violence crimes is another indicator of discriminatory intent towards women.¹⁰¹ In denying accusations of sexual violence committed during clearance operations,¹⁰² Burmese officials have used derogatory phrases directed specifically against Rohingya women, including that they are “dirty” and are “not attractive” to either soldiers or civilians of other ethnic groups, language that mimics language used in Rwanda by Hutus to describe Tutsi women.¹⁰³ Crimes against Rohingya women, including where there was evidence of rape, have not been investigated.¹⁰⁴ Women also face danger of reprisals for reporting crimes, including arrest, coercion, and lack of privacy protections.¹⁰⁵

96. UN Doc. S/2018/250, para. 55.

97. “Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict, UN Security Council Briefing on Myanmar,” Dec. 12, 2017.

98. See, e.g., OHCHR, “Report of OHCHR mission to Bangladesh,” at 28, 39, Feb. 3, 2017; Kaladan Press Network, “Rape by Command,” at 27, 36-37.

99. Human Rights Watch, “Massacre by the River,” at 26.

100. Amnesty Int’l, “Briefing: Myanmar Forces Starve, Abduct and Rob Rohingya, as Ethnic Cleansing Continues,” at 5, Feb. 8, 2017; Kaladan Press Network, “Rape by Command,” at 30.

101. Convention on the Elimination of All Forms of Discrimination Against Women arts. 2, 15, Dec. 17, 1989, 1249 U.N.T.S. 13; CEDAW Comm., General Recommendation No. 33 on Women’s Access to Justice, para. 23, UN Doc. CEDAW/C/CG/33, Aug. 23, 2015; UN Doc. CEDAW/C/CG/35, para. 26(b).

102. See, e.g., Antoni Slodkowski et al., “How a Two-Week Army Crackdown Reignited Myanmar’s Rohingya Crisis,” Reuters, Apr. 25, 2017, (“We find it really difficult to believe that the Myanmar military would use (sexual violence) as a tool, sex slaves or rape as a weapon. In Myanmar this is repulsive, it’s not acceptable,” [National Security Adviser Thauung Tun] said.”); Tatmadaw True News Information Team, “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,” para. 9, Nov. 13, 2017, (“According to the answers of 2,817 villagers from 54 Bengali villages in interviews and confessions of 362 villagers from 105 Bengali villages, security forces did not commit shooting at innocent villagers and sexual violence and rape cases against women.”); State Counsellor Office Information Comm., “Information Committee Refutes Rumours of Rape,” Dec. 26, 2016. But see, UN Doc. S/2018/250, para. 55 (“paragraph 6 of the arrangement on the return of displaced persons from Rakhine state, agreed upon between the Governments of Myanmar and Bangladesh on 23 November, refers to ‘children born of unwarranted incidents’, which implies children conceived through rape.”).

103. Amnesty Int’l, “We are at a Breaking Point,” at 26 (“In November, Aung Win, a Rakhine State Member of Parliament, who was part of an investigation commission which went to Maungdaw to investigate the October attacks, also dismissed allegations of rape. He told the BBC that Rohingya women are ‘very dirty’ and said that they ‘have a very low standard of living and poor hygiene. They are not attractive so neither the local Buddhist men nor the soldiers are interested in them’.”). See also, Jonathan Head, “Rohingya Crisis: Seeing Through the Official Story in Myanmar,” BBC News, Sept. 11, 2017 (“Responding to a question about military atrocities, [Colonel Phone Tint] waved it away. ‘Where is the proof?’ he asked. ‘Look at those women,’ he meant the Rohingya refugees, ‘who are making these claims - would anyone want to rape them?’”).

104. See generally, ALTSEAN Burma, “Burma/ Myanmar: Flawed Domestic Investigations Necessitate U.N. Commission of Inquiry on Serious Crimes,” Mar. 7, 2017; U.S. Dep’t of State, “Country Reports on Human Rights Practices for 2016: Burma,” at 6, 2017.

105. UN Doc. S/2018/250, para. 56; “Report of the Special Rapporteur on the Situation of Human Rights in Myanmar,” paras. 48, 50, UN Doc. A/HRC/31/71, Mar. 18, 2016; Human Rights Watch, “Burma: Security Forces Raped Rohingya

The fact that sexual violence was committed by groups of soldiers,¹⁰⁶ in public, in military camps,¹⁰⁷ and by or with the knowledge of leaders¹⁰⁸ signals a belief among perpetrators that they will not be punished and that sexual violence is an accepted practice or part of military policy. Scarcely few sexual violence cases against military members are prosecuted.¹⁰⁹ Policy and practice are both ways to determine discriminatory intent and the targeting of specific groups.

In Burma, the military has consistently used sexual violence to intimidate and terrorize female members of other minority ethnic groups as well, including well-documented patterns of conflict-related sexual violence in Kachin, Shan, and other states.¹¹⁰ The military therefore uses sexual violence to persecute women and girls based on their gender, rather than only based on ethnicity (since certain acts occur across ethnicities but overwhelmingly to women). Furthermore, there is very limited evidence of sexual violence committed against men and boys in the clearance campaigns against the Rohingya,¹¹¹ and that exclusivity further highlights the dimension of gender-based persecution inherent in the kind of sexual violence inflicted on Rohingya women by the Burmese Security Forces.

Persecution via discriminatory laws and policies

Laws and legal structures that deprive a protected group of fundamental rights and are discriminatory can potentially constitute persecution. The fact that discrimination is legal under national laws does not justify the violation of fundamental rights under international law.¹¹² Courts have recognized

Women, Girls,” Feb. 6, 2017 (describing the “Fake Rape” interview as “confrontational, and out of keeping with accepted guidelines on how to conduct interviews with victims of sexual violence”); ALTSEAN Burma, “Rohingya Targeted by Ethnic Cleansing in Arakan/ Rakhine State,” 2017. See also, Amnesty Int’l, “Myanmar: Four Years On, Impunity is the Kachin Conflict’s Hallmark,” June 9, 2015 (father who filed a complaint about his daughter’s death “was charged and found guilty of making ‘false allegations’ against the Myanmar Army and ordered to pay a fine”).

106. Human Rights Watch, “All of My Body Was Pain,” at 2, 17, 19.

107. “Statement by Marzuki Darusman, Chairperson of the Independent International Fact-Finding Mission on Myanmar, at the 37th session of the Human Rights Council,” Mar. 12, 2018; “Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict, UN Security Council Briefing on Myanmar,” Dec. 12, 2017; Kaladan Press Network, “Rape by Command” at 34.

108. See, e.g., Amnesty Int’l, “We Will Destroy Everything,” at 155-166 (describing potential responsibility for sexual violence and other crimes through command responsibility and direct perpetration).

109. CEDAW Comm., “List of issues and questions in relation to the combined fourth and fifth periodic reports of Myanmar,” Addendum, Replies of Myanmar, para. 35, UN Doc. CEDAW/C/MMR/Q/4-5/Add.1, May 3, 2016.

110. UN Office of the High Comm’r for Human Rights (OHCHR), “Report on the Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar,” para. 60, UN Doc. A/HRC/32/18, June 28, 2016; “Statement by Marzuki Darusman, Chairperson of the Independent International Fact-Finding Mission on Myanmar, at the 37th session of the Human Rights Council,” Mar. 12, 2018; “End of Mission Statement by Special Rapporteur on the Situation of Human Rights in Myanmar, Feb. 1, 2018 (“What the Myanmar government claims to be the conduct of military or security operations is actually an established pattern of domination, aggression and violations against ethnic groups...While reports from Rakhine State have rightly provoked international outrage; for many in Myanmar, they have elicited a tragic feeling of déjà vu.”); U.S. Dep’t of State, “Country Reports on Human Rights Practices for 2016: Burma,” at 14; Women’s League of Burma, “Same Impunity, Same Patterns,” at 1; U.S. Holocaust Mem’l Museum, “They Want Us All to Go Away: Early Warning Signs of Genocide in Burma” at 4, 2015; UNDP et al., “Situational Analysis: Gender Equality and Women’s Rights in Myanmar,” at 143, 2016.

111. Human Rights Watch, “All of My Body Was Pain,” at 17 (“This is the only case of male rape Human Rights Watch documented, but because of deep stigma regarding such violence, it may be underreported.”). But see, UN Doc. A/HRC/39/64, paras. 38, 62 (“There are credible reports of men and boys also being subjected to rape, genital mutilation and sexualised torture.”); “SRSRG Patten remarks for the event on ‘Addressing Sexual and Gender-based Violence against Rohingya Refugees,’” July 3, 2018 (noting that recent arrivals in Bangladesh reported the targeted killing and mutilation of sexual organs of male babies, allegedly related to pressure to accept national verification cards).

112. Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Judgment, para. 614, Jan. 14, 2000.

the “passing of discriminatory laws; the exclusion of members of an ethnic or religious group from aspects of social, political, and economic life; and the creation of ghettos” as persecution.¹¹³ Laws in this way are “rendered serious not by their apparent cruelty but by the discrimination they seek to instill within humankind,”¹¹⁴ and may therefore reach the level of persecution.

There are several laws that blatantly discriminate against the Rohingya, either on their face or in practice. These laws form part of a larger policy and strategy to strip the Rohingya of fundamental rights in order to control their behavior, population size, and to make life intolerable.¹¹⁵ Burma’s “institutionalized regime of systematic oppression and domination of the Rohingya,” including the written laws, regulations, orders, and practices enforced by local officials—implicating both Burma’s Security Forces and its civilian government—has been described as apartheid.¹¹⁶ Many of these practices existed before the 2016 and 2017 operations, although some such as movement restrictions (and their consequences for healthcare access) have since been tightened.

Of particular note are the longstanding laws, policies, and practices controlling citizenship, marriage, and reproductive choice, as well as those restricting movement and healthcare access. These laws and policies seek to legitimize discrimination, on grounds of gender, religion, and ethnicity, feeding into popular narratives of stereotypes, fears, and racism that can prime the country for violence.¹¹⁷

Citizenship

The 1982 Citizenship Law precludes most Rohingya from qualifying for citizenship, and excludes them as one of Burma’s “national races.”¹¹⁸ The Special Rapporteur for the Situation of Human Rights in Myanmar, as well as others, has determined that “the Citizenship Law (1982) is not in line with international standards...particularly regarding discriminatory provisions for granting of citizenship on the basis of ethnicity or race.”¹¹⁹ The Rohingya’s lack of citizenship is one of the main obstacles to their safe existence in, or return to, Burma.¹²⁰ Without access to citizenship, the Rohingya are vulnerable to violations of their fundamental rights, of the types described in this brief, and are unable to access social services or economic opportunities.¹²¹

The refusal to resolve the Rohingya’s citizenship status is discriminatory, constitutes persecution, and enables a range of additional human rights deprivations described below.

113. Mohamed Elewa Badar, “From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity,” 5 San Diego Int’l L.J. 73, at 128, 2004; Gregory S. Gordon, “Hate Speech and Persecution: A Contextual Approach,” 46 Vand. J. Transnt’l L. 303, at 313-20, 2013.

114. Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, para. 227, Mar. 3, 2000.

115. See, e.g., Fortify Rights, “They Gave Them Long Swords,” at 91-95; see generally, Fortify Rights, “Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar,” 2014.

116. Amnesty Int’l, “Caged Without a Roof,” at 96.

117. U.S. Holocaust Mem’l Museum, “They Want Us All to Go Away,” at 4, 6. The International Military Tribunal convicted Julius Streicher of persecution stemming from hate speech, not all of which included incitement to violence, but which “infected the German mind with the virus of anti-Semitism, and incited the German people to active persecution” and “injected [poison] into the minds of thousands of Germans which caused them to follow the National Socialist policy of Jewish persecution and extermination.” United States v. Goering et al., Judgment, Int’l Mil. Trib., Oct. 1, 1946.

118. Burma Citizenship Law of 1982, Pyithu Hluttaw Law No. 4 of 1982, ch. II, § 3.

119. UN Doc. A/HRC/34/67, para. 12; see also Advisory Comm’n on Rakhine State, “Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State,” at 29, Aug. 2017.

120. Advisory Comm’n on Rakhine State, “Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine,” at 26. See also, section below on “Longstanding Discrimination.”

121. UN Doc. A/HRC/32/18, para. 26.

In 2015, Burma adopted four laws ostensibly created to “protect race and religion,”¹²² but which instead sought to limit the Rohingya’s freedom to marry and have families of the size and timing of their choosing, including through the Population Control Health-care Law. These laws discriminate against minorities and women, in violation of human rights obligations.¹²³

Other such policies also exist. For example, a decade-old local order imposes a two-child policy on Rohingya in certain townships of northern Rakhine State, bars Rohingya from having children out of wedlock, and requires couples to “limit the number of children, in order to control the birth rate so that there is enough food and shelter.”¹²⁴ The policy imposes criminal penalties, instructs officials to enforce the policy through forced breast-feeding, at times has been enforced through pregnancy tests (to obtain a marriage permit), and has reportedly caused women to seek illegal abortions.¹²⁵

These laws have been enacted with discriminatory intent. The two-child policy, for example, is only imposed on the Rohingya, and has been described as necessary “only for certain groups” and “beneficial” by lawmakers.¹²⁶ These policies have serious consequences for women and that impact is relevant for determining persecution.¹²⁷

Segregation and movement restrictions

There are several ways the Rohingya have been systematically segregated from other populations in Burma. For example, as a result of violence in 2012 when Security Forces separated communities by ethnicity, about 120,000 people remain confined to internal displacement camps.¹²⁸ The government has in the past attempted to cement segregation of internally displaced Rohingya by transitioning displacement camps into villages.¹²⁹ Social tensions surrounding the “erosion of livelihoods, food insecurity, and increased anxiety related to prolonged displacement” can increase rates of domestic violence—in particular because camp leaders and protection structures “tend to downplay incidents of sexual violence,” adding to existing safety and accountability challenges.¹³⁰

Additionally, movement restrictions requiring Rohingya to go through burdensome procedures to secure authorization to travel, severely limit their “ability to access healthcare, markets, farming land, areas for fishing, and employment of almost any kind.”¹³¹ These restrictions are “largely used to

122. For a brief description of the Religious Conversion Law (2015), Population Control Health-care Law (2015), Buddhist Women’s Special Marriage Law (2015), and Monogamy Law (2015), see UN Doc. A/HRC/31/71, Annex; see also ALTSEAN Burma, “Rohingya Targeted by Ethnic Cleansing in Arakan/ Rakhine State,” at 15.

123. UN Doc. A/HRC/31/71, para. 33; UN Doc. A/HRC/32/18, para. 20.

124. Fortify Rights, “Policies of Persecution,” at 10, 24.

125. Fortify Rights, “Policies of Persecution,” at 10, 24, 28.

126. U.S. Holocaust Mem’l Museum, “They Want Us All to Go Away,” at 6; Jason Szep & Andrew R.C. Marshall, “Myanmar Minister Backs Two-Child Policy for Rohingya Minority,” Reuters, June 11, 2013; Fortify Rights, “Policies of Persecution,” at 26, 46-47.

127. Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, Judgment and Sentence, paras. 1072-73, Dec. 3, 2003 (“Unlike the crime of incitement, which is defined in terms of intent, the crime of persecution is defined also in terms of impact. It is not a provocation to cause harm. It is itself the harm. . .”)

128. Amnesty Int’l, “Caged Without a Roof,” at 22.

129. “Report of the Special Rapporteur on the Situation of Human Rights in Myanmar,” para. 70, UN Doc. A/72/382, Sept. 8, 2017.

130. UNDP et al., “Situational Analysis: Gender Equality and Women’s Rights in Myanmar,” at 198.

131. “Statement by High Commissioner for Human Rights Zeid Ra’ad al Hussein at the Special Session of the Human Rights Council on the human rights situation of the minority Rohingya Muslim population and other minorities in the

control the Rohingya population,” and to “segregate them from other communities,”¹³² and have been characterized as a “severe deprivation of physical liberty,” and as part of a system of apartheid.¹³³ Considering the systematic, long-term nature and the cumulative effect of these deprivations, the denial of rights to freedom of movement can constitute persecution.¹³⁴

Access to health care

The movement restrictions imposed on the Rohingya community are among “the main obstacle[s] for Rohingya in accessing health care.”¹³⁵ More than half the Rohingya surveyed by Physicians for Human Rights in 2016 said movement restrictions “affected their ability to travel to a health clinic,” including trouble obtaining necessary permits, lack of access to local hospitals, and fear of passing through checkpoints en route to facilities.¹³⁶ The government-imposed permission requirements, lack of access to local hospitals, and curfews delay access to care, almost completely preventing it at night, including in emergencies.¹³⁷

The government also limited healthcare access through revoking humanitarian aid access in Rakhine State, which included healthcare.¹³⁸

For victims of sexual violence, both inside and outside of areas of military campaigns, access to care and life-saving services is limited by local capacity “and restrictions upon women’s freedom of movement due to increased militarization.”¹³⁹ During the Burmese Forces’ “clearance operations,” one organization noted that “[n]one of the rape survivors [they] interviewed received post rape care in Burma,” and therefore missed necessary and time-limited interventions for emergency contraception and HIV infection.¹⁴⁰ Women arrived in Bangladesh with serious and untreated injuries from sexual violence.¹⁴¹ Rohingya women also suffer from a “particularly high” unmet family planning need and have limited access to abortion services in refugee camps in Bangladesh.¹⁴²

As noted by the Special Rapporteur on the situation of human rights in Myanmar, delays and the referral process used in emergencies can result in preventable deaths.¹⁴³ For women with pregnancy complications and for babies, “delays in seeking or receiving emergency obstetric treatment can have

Rakhine State of Myanmar,” Dec. 5, 2017.

132. UN Doc. A/HRC/31/71, para. 39; Amnesty Int’l, “Caged Without a Roof,” at 11. See also, Fortify Rights, “Policies of Persecution,” at 34.

133. Amnesty Int’l, “Caged Without a Roof,” at 13.

134. Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, para. 1049, Sept. 1, 2004.

135. Amnesty Int’l, “Caged Without a Roof,” at 60.

136. Physicians for Human Rights, “Where There is Police, There is Persecution: Government Security Forces and Human Rights Abuses in Myanmar’s Northern Rakhine State,” at 18, 2016; UN Doc. A/HRC/32/18, para. 39.

137. Amnesty Int’l, “Caged Without a Roof,” at 12, 60.

138. Human Rights Watch, “Burma: Security Forces Raped Rohingya Women, Girls.” See also section below on “Preventing Healthcare Access.”

139. UN Doc. A/HRC/34/67, para. 56.

140. Human Rights Watch, “All of My Body Was Pain,” at 3; Human Rights Watch, “Burma: Security Forces Raped Rohingya Women, Girls.”

141. See, e.g., Antoni Slodkowski et al., “How a Two-Week Army Crackdown Reignited Myanmar’s Rohingya Crisis,” Reuters, Apr. 25, 2017.

142. Kristen Gelineau, “AP: Rohingya Methodically Raped by Myanmar’s Armed Forces,” Assoc. Press, Dec. 11, 2017; Inter-Agency Working Grp. on Reproductive Health in Crises, “Women and Girls Critically Underserved in the Rohingya Humanitarian Response,” Feb. 22, 2018; U.S. Dep’t of State, “Country Reports on Human Rights Practices for 2016: Burma,” at 39-40.

143. UN Doc. A/HRC/31/71, para. 40.

particularly devastating consequences and are a major cause of death.”¹⁴⁴ The High Commissioner for Human Rights recently explained that the “[i]nability to access healthcare is a direct cause of the very high incidence of maternal mortality and child mortality among Rohingya families,” and that the effects of movement restrictions are “clear violations of these individuals’ economic, social and cultural rights.”¹⁴⁵

The government has completely denied the grave disparities in healthcare for the Rohingya in Rakhine State, and the discriminatory movement restrictions that result in serious harm and human rights violations.¹⁴⁶ The denial of proper medical care can potentially constitute persecution and has a particularly harsh impact on women’s access to healthcare, including pregnancy and reproductive health services.¹⁴⁷

All persecutory conduct was committed in connection with a crime against humanity and genocide

The Rome Statute requires that conduct amounting to persecution be “committed in connection with” another crime against humanity, war crime, or act of genocide.¹⁴⁸ The ICC recently indicated that the Court may exercise limited jurisdiction over persecution against the Rohingya, at least in connection to the crime against humanity of deportation.¹⁴⁹ Other crimes against humanity or acts of genocide where an element occurred in Bangladesh may also be subject to the Court’s jurisdiction under this theory.¹⁵⁰

Gender-based crimes, including those that constitute persecution, were an integral part of the atrocities committed against the Rohingya in 2016 and 2017. Sexual violence, for example, was “a driver and ‘push factor’ for forced displacement,”¹⁵¹ and was committed within the context of an attack against the civilian population that constitutes crimes against humanity and genocide. The discriminatory laws detailed here are part of the background of discrimination implemented against the Rohingya, and are connected to acts described in this brief that amount to crimes against humanity and genocide.

144. UN Doc. A/HRC/32/18, para. 39.

145. “Statement by High Commissioner for Human Rights Zeid Ra’ad al Hussein at the Special Session of the Human Rights Council on the human rights situation of the minority Rohingya Muslim population and other minorities in the Rakhine State of Myanmar,” Dec. 5, 2017.

146. See, e.g., Rebecca Wright et al., “Aung San Suu Kyi Breaks Silence on Rohingya, Sparks Storm of Criticism,” CNN, Sept. 19, 2017, (“In her speech, Suu Kyi claimed that ‘all people living in Rakhine state have access to education and health care services without discrimination.’”).

147. Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, para. 1049, Sept. 1, 2004 (“Accounting for the cumulative effect and gravity of their denial, the ICTY Trial Chamber in Brđanin found the denial of rights to employment, freedom of movement, proper judicial process, and proper medical care to amount to persecution.”).

148. Elements of Crimes, art. 7(1)(h)(4). This “nexus” requirement is included in some legal agreements enacted post-Rome Statute but not others (law establishing the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia as examples of the latter). Jessie Chella, Thesis, “Persecution: A Crime Against Humanity in the Rome Statute of the International Criminal Court,” at 161-62, Aug. 2004.

149. Case No. ICC-RoC46(3)-01/18, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,” paras. 75-76, Sept. 6, 2018.

150. Case No. ICC-RoC46(3)-01/18, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,” paras. 74, Sept. 6, 2018; Int’l Criminal Court, “Press Release: ICC Pre-Trial Chamber I rules that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh,” Sept. 6, 2018.

151. “Press Release, UN Special Representative on Sexual Violence in Conflict Pramila Patten concludes visit to Cox’s Bazar, Bangladesh, and calls for enhanced measures to protect and assist Rohingya survivors of sexual violence,” Nov. 16, 2017.

3. Sexual and Gender-Based Violence Against Rohingya Women and Girls: Rape

The sexual and gender-based violence committed by Burmese Security Forces against Rohingya women and girls constitutes the crime against humanity of rape and other forms of sexual violence of comparable gravity.

Acts constituting rape

The crime against humanity of rape is defined as an invasion by the perpetrator of “the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.”¹⁵² The invasion must be committed by force, threat of force or coercion, by taking advantage of a coercive environment, or against someone incapable of giving consent.¹⁵³

Extensive, thorough reporting by UN offices, human rights organizations, and the media substantiate numerous cases of rape by Burmese Security Forces against Rohingya women and girls. The accounts of survivors and witnesses have been corroborated by doctors providing care in Bangladesh, including reports of “wounds from ... forced penetrations and vaginal lacerations.”¹⁵⁴

While it is challenging to determine the exact number of incidents of rape that have occurred, and there is very likely extensive underreporting,¹⁵⁵ humanitarian organizations have indicated that they have received hundreds of rape cases.¹⁵⁶ In March 2018, for example, Medecins Sans Frontieres (MSF) reported treating “113 survivors of sexual and gender-based violence since 25 August, aged from nine to 50 years old,” with “[t]he majority [being] rape survivors.”¹⁵⁷ Furthermore, of the 101 women interviewed by the UN Office of the High Commissioner for Human Rights (OHCHR), 52% said they had been raped or subject to sexual violence.¹⁵⁸

One report documented rape survivors from 19 different villages in Rakhine State with many describing similar experiences,¹⁵⁹ indicia of the fact that rapes were carried out systematically across multiple locations. The rapes were also perpetrated in a variety of situations – during the “clearance operations” of villages, as women and girls fled their villages for the Bangladesh border, and while they were detained in military camps.¹⁶⁰ Gang rapes were common as many victims report being

152. Elements of Crimes, art. 7(1)(g)-1.

153. Elements of Crimes, art. 7(1)(g)-1.

154. UN Doc. A/HRC/37/70, para. 48.

155. See UN Doc. A/HRC/34/67, para. 73. “Others do not report rape because of the deep stigma that makes survivors reluctant to seek assistance. Fear of having to pay medical fees that they cannot afford, or the lack of confidence in ever obtaining redress, also are factors. Of the survivors that Human Rights [Watch] interviewed, almost two-thirds had not reported their rape to authorities or humanitarian organizations.” HRW, ‘All of My Body Was Pain,’ at 2.

156. HRW, ‘All of My Body Was Pain,’ at 2.

157. Medecins Sans Frontieres, “‘No one was left’ Death and Violence Against the Rohingya in Rakhine State, Myanmar,” at 18, Mar. 2018.

158. OHCHR, “Report of OHCHR mission to Bangladesh,” at 10, Feb. 3, 2017.

159. HRW, ‘All of My Body Was Pain,’ at 1-2.

160. HRW, ‘All of My Body Was Pain,’ at 8; Kaladan Press Network, “Rape by Command,” at 10, 31. “In five locations—including Maungdaw town itself—women and girls were forcibly detained and raped in military camps, for periods of up to two weeks.” Kaladan Press Network, “Rape by Command,” at 10. “One survivor described being held in captivity by members of the Myanmar Armed Forces (the Tatmadaw) for 45 days, during which time she was reportedly raped over and over again.” Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict, Ms. Pramila Patten – Security Council Briefing on Myanmar, Dec. 12, 2017.

raped by more than one perpetrator,¹⁶¹ and in some cases by as many as eight perpetrators.¹⁶² Six cases of “mass rape” by the Burmese Forces, where soldiers grouped victims and proceeded to gang rape or rape them, have also been reported.¹⁶³ Rape victims were not spared by age – with some as young as five to seven years old.¹⁶⁴ Pregnant women were also raped.¹⁶⁵

Months after the waves of violence, Rohingya women and girls are now faced with the reality of pregnancies as a result of their rapes. MSF has recorded 160 cases of pregnancies resulting from rape between August 2017 and February 2018 in Bangladesh’s refugee camps.¹⁶⁶ However, the exact number of pregnancies resulting from rape is unknown as “about 80 percent of pregnant Rohingya women give birth at home.”¹⁶⁷

Coercive Circumstances

Courts have interpreted “coercive environment,” in the context of force and consent, to include “military presence of hostile forces among the civilian population.”¹⁶⁸ Factors creating a coercive environment include “the number of people involved in the commission of the crime, or whether the rape is committed during or immediately following a combat situation, or is committed together with other crimes.”¹⁶⁹ Additionally, “[t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion.”¹⁷⁰

In almost all reports, the perpetrators of nearly all rapes were described as “uniformed members of security forces, almost all military personnel.”¹⁷¹ One report identified that “[a]t least 27 Myanmar Army battalions—including 22 Light Infantry Battalions and five Infantry Battalions—comprising up to 11,000 soldiers were involved in the attacks in northern Rakhine State beginning in August 2017, and at least three combat police battalions were also involved, comprising an estimated 900 police.”¹⁷² Eyewitnesses, Bangladeshi officials, and local and international aid workers also all noted an increase in the Burmese Forces’ presence and military activity before August 25, 2017.¹⁷³ Such “military presence of hostile forces among the civilian population” is sufficient to establish the presence of a coercive environment.

The Burmese Security Forces routinely committed rapes with force and threats of force. Perpetrators often “held rifles against the victim’s face, chest or belly or a knife to their *[sic]* neck and threatened

161. UN Doc. A/HRC/37/70, para. 48; HRW, ‘All of My Body Was Pain,’ at 2.

162. OHCHR, “Report of OHCHR mission to Bangladesh,” at 21, Feb. 3, 2017.

163. HRW, ‘All of My Body Was Pain,’ at 19.

164. OHCHR, “Mission report of OHCHR rapid response mission to Cox’s Bazar, Bangladesh: 13-24 Sept. 2017,” at 7, Oct. 11, 2017.

165. OHCHR, “Mission report of OHCHR rapid response mission: 13-24 Sept. 2017,” at 8; HRW, ‘All of My Body Was Pain,’ at 18.

166. Susannah Savage, “‘A lot of shame’: Rohingya camps brace for wave of babies conceived in rape,” Washington Post, May 22, 2018.

167. Susannah Savage, “‘A lot of shame’: Rohingya camps brace for wave of babies conceived in rape,” Washington Post, May 22, 2018.

168. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Judgment, para. 104, Mar. 21, 2016.

169. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Judgment, para. 104, Mar. 21, 2016.

170. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 688, Sept. 2, 1998.

171. HRW, ‘All of My Body Was Pain,’ at 2.

172. Fortify Rights, ‘They Gave Them Long Swords,’ at 14.

173. Fortify Rights, ‘They Gave Them Long Swords,’ at 49-50.

to stab or kill her, while the others raped her.”¹⁷⁴ Moreover, the gang rapes committed by multiple perpetrators and the commission of additional crimes in conjunction with the rapes, many detailed in this brief, support the argument that a coercive environment was established in the attacks by the Burmese Forces on the Rohingya population.

Consent

Regarding consent, “[i]t is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.”¹⁷⁵ Further, “[f]orce or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape,”¹⁷⁶ and “any form of captivity vitiates consent.”¹⁷⁷

As discussed above, Security Forces raped women and girls as young as five years old – a clear example of “age-related incapacity” as they are far too young to be able or expected to provide consent. Similarly, the use of force, threats of force, and detention of Rohingya women and girls is also clear evidence of non-consent.

Conclusion

The extensive documentation of cases of rape, the presence of a coercive environment, and lack of consent among victims, among other factors, substantially demonstrates that the Burmese Forces’ sexual violence against Rohingya women and girls likely constitutes the crime against humanity of rape.

4. Other Sexual Violence Crimes of Comparable Gravity Against Rohingya Women and Girls

Acts that do not meet the elements of rape may still constitute a crime against humanity if the act perpetrated is “sexual violence of comparable gravity”¹⁷⁸ to crimes like rape, forced pregnancy and forced sterilization.¹⁷⁹ Specifically, the crime of sexual violence is defined in international law as:

an act of a sexual nature against one or more persons or caus[ing] such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.¹⁸⁰

This definition has generally been understood to embrace all “serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat or force or intimidation in a way that is degrading and humiliating for the victim’s dignity.”¹⁸¹ Thus, the crime against humanity of sexual violence may be committed in situations where there is “no physical

174. OHCHR, “Report of OHCHR mission to Bangladesh,” at 22, Feb. 3, 2017.

175. Elements of Crimes, art. 7(1)(g)-1. See also Prosecutor v. Sesay et al., Case No. SCSL-04-15-T, Judgment, para. 148, Mar. 2, 2009 (with respect to age and consent).

176. Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Judgment, para. 129, June 12, 2002.

177. Prosecutor v. Furundžija, Case No. IT-97-17/1-T, Judgment, para. 271, Dec. 10, 1998.

178. Rome Statute, arts. 7(1)(g), 8(2)(b)(xxii).

179. Elements of Crimes, art. 7(1)(g)-6.

180. Elements of Crimes, art. 7(1)(g)-(6).

181. Prosecutor v. Furundžija, Case No. IT-97-17/1-T, Trial Judgment, para. 186, Dec. 10, 1998.

contact between the perpetrator and the victim, if the actions of the perpetrator nonetheless serve to humiliate and degrade the victim in a sexual manner.”¹⁸² For example, the ICTR held that the forcible undressing of a woman constituted sexual violence.¹⁸³ Further, “atmospheres of violence” have been found to *de facto* amount to coercive circumstances.¹⁸⁴

Sexual violence has long been used as a weapon by the Burmese military and the current campaign of violence against the Rohingya is no exception.

The rapes detailed above were accompanied by other acts of violence, humiliation, and cruelty. Burmese Security Forces beat women and girls with fists, boots, or guns.¹⁸⁵ Several victims had bite marks all over their bodies.¹⁸⁶ Reports show an intense and deliberate targeting of women’s breasts and genitalia—with numerous reports of mutilations. One account provided to the OHCHR referred to a pregnant woman whose stomach was slit open after she was raped.¹⁸⁷ Her “unborn baby” was then killed by the alleged perpetrator with a knife and the victim’s nipples were cut off.¹⁸⁸ Often when resisting rape, victims were slashed near their vaginas and/or burned with pieces of plastic.¹⁸⁹ Men also reported having their penises burned with candles or otherwise mutilated during interrogations.¹⁹⁰ Attackers further threatened women and girls verbally and through taunts—such as placing the ends of guns to their heads. In some cases, women and girls were forcibly brought back to military barracks, kept in confinement, and repeatedly raped for periods of time extending beyond initial attacks on villages and townships.¹⁹¹

Beyond the violence occurring during rapes, victims also report “having been grabbed by their throats, having their hair pulled, being punched, including on the lips and face, being kicked, and being severely beaten with rifle butts on their breasts, stomachs, lower abdomen and on their vaginas as well as other parts of the body, including eyes.”¹⁹²

Burmese Security Forces also conducted invasive body searches during round-ups or house checks. During these searches, sometimes performed publicly, women and girls of all ages had their private body parts touched and/or exposed.¹⁹³ Victims report that the Forces “would press their breasts very hard, pinch their nipples, press on their nipples with rifle butts, beat or slap those who did not want to remove their clothes, and in some cases even put hands inside their vaginas to search for

182. Prosecutor v. Milutinović et al., Case No. IT-05-87-T, Trial Judgment, para. 199, Feb. 26, 2009.

183. Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Trial Judgment, para. 933, Dec. 18, 2008.

184. Prosecutor v. Sesay et al, Case No. SCSL-04-15-T, Trial Judgment, para. 1287, Mar. 2, 2009.

185. HRW, ‘All of My Body Was Pain,’ at 16.

186. Fortify Rights, ‘They gave them long swords,’ at 152; Amnesty Int’l, ‘We will destroy everything,’ at 94; HRW, ‘All of My Body Was Pain,’ at 16.

187. OHCHR, “Mission report of OHCHR rapid response mission: 13-24 Sept. 2017,” at 7.

188. OHCHR, “Mission report of OHCHR rapid response mission: 13-24 Sept. 2017,” at 7.

189. OHCHR, “Report of OHCHR mission to Bangladesh,” at 22, Feb. 3, 2017.

190. Amnesty Int’l, ‘We will destroy everything,’ at 33.

191. See HRW, “Massacre by the River,” at 7; Kristen Gelineau, “Rohingya Methodically Raped by Myanmar’s Armed Forces,” Assoc. Press, Dec. 11, 2017.

192. OHCHR, “Report of OHCHR mission to Bangladesh,” at 22, Feb. 3, 2017.

193. OHCHR, “Report of OHCHR mission to Bangladesh,” at 22, Feb. 3, 2017; Human Rights Watch, “Burma: Military Massacres Dozens in Rohingya Village – Soldiers Shot, Stabbed Men and Boys in Maung Nu, Rakhine State,” at 5, Oct. 4, 2017; HRW, “Massacre by the River,”; Human Rights Watch, “Burma: Security Forces Raped Rohingya Women, Girls – New Eyewitness Accounts Show Systematic Attacks Based on Ethnicity, Religion,” at 3, Feb. 6, 2017; US Holocaust Museum & Fortify Rights, “Atrocity Crimes Against Rohingya Muslims,” at 10, Nov. 2017.

any objects they may be hiding.”¹⁹⁴ A 22-year-old woman explained: “They came to me and asked, ‘Where is your husband?’ and ordered me to give them my gold. They touched my body, including the sex parts. I was beaten.”¹⁹⁵ As with rapes, protest by victims to these invasions was often met with beatings.¹⁹⁶

Many of these assaults took place with extreme brutality and in front of relatives or the wider community.¹⁹⁷ Rape victims were left without clothes or with torn clothes, conscious or unconscious, in schools, mosques, yards, or the jungle.¹⁹⁸ Many women had to flee to nearby villages in search of clothes or return naked from the place to which they were taken.¹⁹⁹ At least one victim reported that Burmese Security Forces took photos of a group of naked women with their mobile phones before raping them.²⁰⁰ The women not targeted for rape or other physical violence were nonetheless rounded up and often made to sit in the direct sun for up to a day.²⁰¹ Witnessing the massacre of their community in combination with the physical discomfort of being forced to sit in the sun was highly traumatizing for these victims.²⁰²

Conclusion

Each of these acts individually, and taken together, amount to the crime against humanity of sexual violence of comparable gravity through physical sexual abuse, threats of violence, mutilation, sexual slavery in military captivity, forced public nudity, and humiliation.

5. Deportation & Forcible Transfer of Rohingya Women and Girls

The deportation or forcible transfer of a population are crimes against humanity under international law.²⁰³ While sharing substantially similar elements, deportation and forcible transfer are two separate crimes;²⁰⁴ deportation requires forced displacement to another State, while forcible transfer is to another location in the same State.²⁰⁵ For the crime to be completed, the perpetrator must have deported or forcibly transferred one or more persons, without grounds permitted in international law, from a place in which they are lawfully present.²⁰⁶ The “force” required includes both physical force and coercion, such as threats, “fear of violence, duress, detention, psychological oppression

194. OHCHR, “Report of OHCHR mission to Bangladesh,” at 22, Feb. 3, 2017.

195. Amnesty Int’l, ‘We are at a breaking point,’ at 25.

196. OHCHR, “Report of OHCHR mission to Bangladesh,” at 22, Feb. 3, 2017.

197. Institute for International Criminal Investigations & Redress, “Supplement to the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Myanmar-Specific Guidance for Practitioners,” at 9, Mar. 2018. Elements of Crimes, art. 7(1)(g)-6 & 8(2)(b)(xxii)-6.

198. OHCHR, “Report of OHCHR mission to Bangladesh,” at 22, Feb. 3, 2017.

199. OHCHR, “Report of OHCHR mission to Bangladesh,” at 22, Feb. 3, 2017.

200. OHCHR, “Report of OHCHR mission to Bangladesh,” at 22, Feb. 3, 2017.

201. OHCHR, “Report of OHCHR mission to Bangladesh,” at 21, Feb. 3, 2017; HRW, “Burma: Security Forces Raped Rohingya Women, Girls – New Eyewitness Accounts,” at 3.

202. OHCHR, “Report of OHCHR mission to Bangladesh,” at 21, Feb. 3, 2017.

203. Rome Statute, art. 7(1)(d).

204. Case No. ICC-RoC46(3)-01/18, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,” para. 53, Sept. 6, 2018.

205. Case No. ICC-RoC46(3)-01/18, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,” para. 60, Sept. 6, 2018.

206. Elements of Crimes, art. 7(1)(d)(1).

or abuse of power... or by taking advantage of a coercive environment.”²⁰⁷ Such conduct may include the “deprivation of fundamental rights, killing, sexual violence, torture, enforced disappearance, destruction and looting.”²⁰⁸ Courts have further found that force or coercion is also determined by a lack of genuine consent from the individual transferred.²⁰⁹ Gender informs how these crimes were committed and effected. Forced displacement can also constitute an underlying act of persecution (discussed above) because it constitutes the discriminatory denial of a fundamental right in international law—the freedom of movement and residence.²¹⁰

Sexual Violence Used as Coercion

The broad act of forced displacement and the destruction of homes, villages, and food sources²¹¹ was not limited by gender. However, several of the terror-inspiring tactics²¹² the Burmese Security Forces used to coerce the Rohingya to leave were committed along gendered lines and in ways that targeted the integrity and social cohesion of the Rohingya as a group through attacks on women and girls.

Women, many of whom were subjected to sexual violence, were traumatized by having witnessed Security Forces and Rakhine villagers kill family members in front of them, including their children.²¹³

Subjecting women to rape and sexual violence is another manner in which Security Forces coerced Rohingya communities to leave Rakhine State. In many attacks, rape and sexual violence were committed in public, which can demonstrate the Forces’ intent to inflict harm on entire communities, not just individuals.²¹⁴ Security Forces raped women in groups or in front of others, raped them and then locked them in burning houses, and in some cases took them to military barracks or gathered

207. Elements of Crimes, art. 7(1)(d), fn. 12.

208. Case No. ICC-ROC46(3)-01/18, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,” para. 61, Sept. 6, 2018.

209. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment (Volume I), paras. 489-90, Mar. 24, 2016; see also Prosecutor v. Stanišić & Simatović, Case No. IT-03-69-T, Judgment, para. 993, May 30, 2013; Prosecutor v. Prlić et al., Case No. IT-04-74-T, Judgment, para. 54, May 29, 2013; Prosecutor v. Prlić et al., Case No. IT-04-74-A, Judgment, para. 491, Nov. 29, 2017.

210. Case No. ICC-ROC46(3)-01/18, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,” paras. 75-76, Sept. 6, 2018; Guido Acquaviva, “Forced Displacement and International Crimes,” UNHCR Legal and Protection Policy Research Series, at 16, June 2011. The ICTY found Krstić liable for inhumane acts and persecution as crimes against humanity due to his joint criminal enterprise’s involvement in creating a humanitarian catastrophe (lack of food, shelter, necessary services) as well as for his involvement in forcibly transferring people within this context and the “incidental murders, rapes, beatings and abuses committed in the execution of this criminal enterprise.” Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, paras. 616-18, Aug. 2, 2001; Prosecutor v. Krstić, Case No. IT-98-3-A, Judgment, para. 149, Apr. 19, 2004 (“The Trial Chamber reasonably found that the creation of a humanitarian crisis in Potočari fell within the scope of the intended joint criminal enterprise to forcibly transfer the civilian population... Further, given Krstić’s role in causing the humanitarian crisis in Potočari, the issuance of orders directing that civilians not be harmed is not sufficient to establish that the crimes which occurred were not a natural and foreseeable consequence of the plan to forcibly transfer the civilians.”).

211. Amnesty Int’l, “We are at a Breaking Point,” at 29; Amnesty Int’l, “Briefing: Myanmar Forces Starve, Abduct and Rob Rohingya,” at 3.

212. See, e.g., OHCHR, “Report of OHCHR mission to Bangladesh,” at 41, Feb. 3, 2017.

213. Kristen Gelineau, “AP: Rohingya Methodically Raped by Myanmar’s Armed Forces,” Assoc. Press, Dec. 11, 2017; OHCHR, “Report of OHCHR mission to Bangladesh,” at 28, Feb. 3, 2017; Human Rights Watch, “Massacre by the River,” at 21; Human Rights Watch, “All of My Body was Pain,” at 23-28.

214. See, e.g., OHCHR, “Report of OHCHR mission to Bangladesh,” at 28, Feb. 3, 2017 (“A 54 year old inhabitant of Laung Don explained: “After rounding-up villagers, the army and Rakhine civilians separated 14 girls, who were beautiful and healthy. These girls were left naked for three hours. We were asked to look at them. The soldiers were playing with the girls’ sexual organs and mocking them. I could not tolerate this situation.”).

them in schools to be raped for prolonged periods of time.²¹⁵ Even for those who were not subjected to sexual violence, the terror of witnessing others be raped was traumatizing.²¹⁶

Over half the women the OHCHR interviewed in the wake of the 2016 violence had personally experienced rape or sexual violence.²¹⁷ Rape and sexual violence were widespread across the 2017 operations as well, and drove people to leave throughout 2017 and 2018.²¹⁸ Sexual violence was so pervasive that “almost every woman and girl in the Balukhali makeshift settlements in Cox’s Bazar is either a survivor of or a witness to multiple incidences of sexual assault, rape, gang-rape, murder through mutilation or burning alive of a close family member or neighbour.”²¹⁹ Burmese Security Forces also abducted Rohingya women and girls, and this threat was a “motivating factor in fleeing” for survivors of initial violence.²²⁰ The SRSG on Sexual Violence in Conflict has noted that the “threat and use of sexual violence” has been a “driver” and “push factor” for displacement, and a “tool of dehumanization and collective punishment.”²²¹

Rohingya women and girls were also subjected to other forms of sexual violence during attacks or “house checks.”²²² The OHCHR noted that the purpose of these assaults appeared to be “to intimidate and humiliate the women” as well as to loot valuables.²²³

Sexual violence has a multidimensional relationship with displacement: it “may have been part of the violent acts that caused the forced displacement; threats and fear of sexual violence may have been direct causes of displacement; and sexual violence may continue as one of the particular vulnerabilities of women during and after displacement.”²²⁴ It is therefore both a cause and effect. Burmese Security Forces took advantage of this fact in the extensive, brutal, and public rape and sexual violence used to effectively coerce the Rohingya to flee Rakhine State as part of the crime of forcible transfer and deportation.

215. See, e.g., Human Rights Watch, “Massacre by the River,” at 7; Kristen Gelineau, “AP: Rohingya Methodically Raped by Myanmar’s Armed Forces,” *Assoc. Press*, Dec. 11, 2017.

216. OHCHR, “Report of OHCHR mission to Bangladesh,” at 21-22, Feb. 3, 2017; Human Rights Watch, “Massacre by the River,” at 21.

217. OHCHR, “Report of OHCHR mission to Bangladesh,” at 9-10, 20, Feb. 3, 2017.

218. “Statement by the Special Representative of the Secretary-General on Violence, UN Security Council Briefing on Myanmar,” Dec. 12, 2017; Human Rights Watch, “All of My Body was Pain,” at 21; “Statement, SRSG Patten remarks for the event on ‘Addressing Sexual and Gender-based Violence against Rohingya Refugees,’” July 3, 2018.

219. UN Women, “Gender Brief on Rohingya Refugee Crisis Response in Bangladesh,” at 1, Jan. 2018 (based on interviews with survivors and community leaders).

220. Amnesty Int’l, “Briefing: Myanmar Forces Starve, Abduct and Rob Rohingya,” at 4-5.

221. “Press Release, UN Special Representative on Sexual Violence in Conflict Pramila Patten concludes visit to Cox’s Bazar, Bangladesh, and calls for enhanced measures to protect and assist Rohingya survivors of sexual violence,” Nov. 16, 2017; “Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict, UN Security Council Briefing on Myanmar,” Dec. 12, 2017 (“Women and girls recounted how, upon the arrival of soldiers in their village, they were forced to strip naked and threatened with rape in front of their husbands and fathers while their homes were set ablaze. They related how, in some cases, village leaders were compelled to sign documents stating that they had set fire to their own homes, in order to save the women of their community from rape.”).

222. OHCHR, “Report of OHCHR mission to Bangladesh,” at 24, Feb. 3, 2017.

223. OHCHR, “Report of OHCHR mission to Bangladesh,” at 24, Feb. 3, 2017.

224. Donny Meertens, “Forced Displacement and Gender Justice and Colombia: Between Disproportional Effects of Violence and Historical Injustice,” at 9, July 2012.

Deportation and forcible transfer are international crimes where they are committed “without grounds permitted in international law.”²²⁵ This element recognizes that international law permits certain military and humanitarian reasons for forced removal, such as evacuating civilians for their own protection or security, for “imperative military reasons,” or to transfer prisoners of war to detention facilities.²²⁶ In these circumstances, measures must be taken to provide for the safety, shelter, health and other rights of the displaced population, and evacuation should be made in a manner that ensures the population’s ability to return to their homes.²²⁷ Under no circumstances would the Burmese Security Forces’ rape and sexual violence campaigns be considered permissible grounds for displacing civilians.

Further, rather than making preparations to provide for the safety of the civilian Rohingya population during “clearance operations,” the Burmese Security Forces intimidated and harassed Rohingya civilians, including requiring them to remove fences that were essential privacy protections and left women increasingly vulnerable to attack. These practices also accelerated the ease of attacks during clearance operations.²²⁸ During the 2016 operations, Burmese governmental authorities helped to evacuate and provide shelter for non-Rohingya civilians displaced by the violence, but did not extend that assistance to displaced Rohingya civilians, and blocked humanitarian agencies from access to the region.²²⁹ Authorities also reportedly conducted headcounts and de-listed absent and displaced Rohingyas, which had the effect of removing their residency status and further complicating the ability of displaced populations to return to Burma.²³⁰

Displacement is never lawful when it is caused by a humanitarian crisis that “is itself the result of the perpetrator’s own unlawful activity.”²³¹ Instead, the forced displacement of the Rohingya is the result of terror inflicted on them by Security Forces.²³² It is part of the Forces’ plan to assert “control” of the Rakhine region with “national races,” which General Min Aung Hlaing stated in September 2017 was “their rightful place.”²³³

225. Elements of Crimes, art. 7(1)(d)(1).

226. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment (Volume I), para. 492, Mar. 24, 2016; Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 17(1), June 8, 1977, 1125 U.N.T.S. 609.

227. Prosecutor v. Stanišić & Simatović, Case No. IT-03-69-T, Judgment, para. 994, May 30, 2013; Prosecutor v. Prlić, Case No. IT-04-74-T, Judgment, para. 52, May 29, 2013; *see also* Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 49, Aug. 12, 1949, 75 U.N.T.S. 287; Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 17(1), June 8, 1977, 1125 U.N.T.S. 609; Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, para. 68, June 9, 2014 (finding “no indication of any precautionary measures having been taken before these acts of displacement were carried out or any reasons linked to the conduct of military operations.”); Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-T, Judgment, para. 599, Jan. 17, 2005 (noting that Additional Protocol II also requires that family not be separated).

228. UN Doc. A/HRC/34/67, para. 75.

229. UN Doc. A/HRC/34/67, para. 67; Amnesty Int’l, “We are at a Breaking Point,” at 32.

230. OHCHR, “Report of OHCHR mission to Bangladesh,” at 36, Feb. 3, 2017.

231. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment (Volume I), para. 492, Mar. 24, 2016; *see also*, Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 17(2), June 8, 1977, 1125 U.N.T.S. 609 (“Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.”).

232. *See* Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, paras. 284-85, 287, Mar. 22, 2006.

233. Richard C. Paddock, “Myanmar General’s Purge of Rohingya Lifts his Popular Support,” N.Y. Times, Nov. 26, 2017.

Courts have clarified that lawful presence should not be equated with requiring lawful residence as a legal standard when examining forced displacement.²³⁴ Despite continued assertions by officials that the Rohingya are not legal citizens of Burma, the Rohingya have lived in Rakhine State for generations, and their lack of recognized status does not bring into doubt the lawfulness of the presence of Rohingya communities attacked by Security Forces throughout 2016 and 2017.²³⁵ Due to the lack of citizenship status available to many Rohingya in Burma,²³⁶ the legal status and documentation of Rohingya in Rakhine State depend on household lists, which are updated periodically by crossing off or adding names after births, deaths, and marriages to reflect the permanent residents of households.²³⁷ Officials reportedly conducted the annual household list update in some areas of Rakhine State during the 2016 operations, which threatened the status of Rohingya individuals that had fled who would be “unable to prove that they are legal residents of Burma upon their return” if they were “delisted” from family lists.²³⁸ During the 2017 operations, Burmese officials stated that refugees must provide “proof of nationality” to return to Burma, and have also reportedly pressured remaining Rohingya communities to accept identification cards.²³⁹ These actions make clear the consequences of measures to remove Rohingyas’ status, and are a “cynical ploy to forcibly transfer large numbers of people without possibility of return.”²⁴⁰

Gendered Effects of Displacement

The effects of displacement are also relevant considerations in international criminal law, as international courts have ruled that perpetrators can potentially be held liable for crimes that are the “natural and foreseeable consequence”²⁴¹ of other violations. The ICTY held a perpetrator liable for inhumane acts and persecution as crimes against humanity due to his involvement in creating a humanitarian catastrophe (lack of food, shelter, necessary services) as well as for his involvement in forcibly transferring people within this context and the “incidental murders, rapes, beatings

234. According to ICTY jurisprudence, “the terms ‘lawfully present’ should be given their common meaning and should not be equated to the legal concept of lawful residence.” *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgment (Volume I), para. 491, Mar. 24, 2016; *Prosecutor v. Popović et al.*, Case No. IT-05-88 -T, Judgment, para. 900, June 10, 2010 (“In the view of the Trial Chamber, the requirement for lawful presence is intended to exclude only those situations where the individuals are occupying houses or premises unlawfully or illegally and not to impose a requirement for ‘residency’ to be demonstrated as a legal standard.”).

235. *Prosecutor v. Muthaura et al.*, Case No. ICC-01/09-02/11, Decision on Confirmation of Charges, para. 253, Jan. 23, 2012; *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, para. 125, June 9, 2014. See also sections above and below on “Citizenship” and “Longstanding Discrimination.”

236. Burma Citizenship Law of 1982, Pyithu Hluttaw Law No. 4 of 1982, ch. II.

237. Amnesty Int’l, “Caged Without a Roof,” at 34. The household lists are used to register for identity documents, travel, and school enrollment because Myanmar stopped issuing Rohingya birth certificates in the 1990s. Amnesty Int’l, “Caged Without a Roof,” at 34.

238. UN Doc. A/HRC/34/67, para. 76; OHCHR, “Report of OHCHR mission to Bangladesh,” at 36, Feb. 3, 2017; Simon Lewis & Wa Lone, “With a Stroke of Red Pen, Myanmar’s Rohingya Fear Losing Right to Return,” Reuters, Mar. 15, 2017.

239. “Human Rights Council 36th Session, Opening Statement by Zeid Ra’ad Al Hussein, United Nations High Commissioner for Human Rights,” Sept. 11, 2017; Amnesty Int’l, “Caged Without a Roof,” at 33; Amnesty Int’l, “Briefing: Myanmar Forces Starve, Abduct and Rob Rohingya,” at 3. Rohingya also reported pressure from their own communities to reject the citizenship “verification process” and NVC cards due to its underlying assumptions of their non-citizen status and fears of being labeled so officially. Amnesty Int’l, “Caged Without a Roof,” at 33.

240. “Human Rights Council 36th Session, Opening Statement by Zeid Ra’ad Al Hussein, United Nations High Commissioner for Human Rights,” Sept. 11, 2017.

241. *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, para. 149, Apr. 19, 2004.

and abuses committed in the execution of this criminal enterprise.”²⁴² The ICTY in a separate case similarly held that:

[A]ny crimes that were natural or foreseeable consequences of the joint criminal enterprise of the Omarska camp, including sexual violence, can be attributable to participants in the criminal enterprise if committed during the time he participated in the enterprise. In Omarska camp, approximately 36 women were held in detention, guarded by men who were often drunk, violent, and physically and mentally abusive and who were allowed to act with virtual impunity. Indeed, it would be unrealistic and contrary to all rational logic to expect that none of the women held in Omarska, placed in circumstances rendering them especially vulnerable, would be subjected to rape or other forms of sexual violence. This is particularly true in light of the clear intent of the criminal enterprise to subject the targeted group to persecution through such means as violence and humiliation. Liability for foreseeable crimes flows to aiders and abettors as well as coperpetrators of the criminal enterprise.²⁴³

These cases are notable for challenging the narrative of sexual violence as an inevitable consequence of war, and clarified the obligation to address “persistent sexual violence” that “evolves out of other criminal conduct.”²⁴⁴

Rohingya women and girls also faced particular difficulty in fleeing violence in Burma (including trauma and physical injuries resulting from sexual violence) and as refugees in displacement camps (including female-headed households, risk of sexual violence, and access to healthcare). While there are no differentiated grounds for displacement (such as gender), women are disproportionately impacted by forced displacement and are deprived of their fundamental rights in the process.

Rohingya women and girls continued to suffer unique consequences of the crimes committed against them as they fled to Bangladesh, as well as being subjected to new violations along the way. Once civilians fled, journeys to the Bangladesh border could take anywhere from two to 16 days.²⁴⁵ Women bartered jewelry to pay for their river crossing or had to walk on foot.²⁴⁶ In addition to the grueling walks and lack of food and care endured by all Rohingya, Rohingya women suffered severe physical pain during their journey due to injuries from rape and other sexual violence,²⁴⁷ including enduring pain from vaginal tears, bleeding, infections, and other injuries.²⁴⁸ Pregnant women faced particular

242. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, paras. 616-18, Aug. 2, 2001; Prosecutor v. Krstić, Case No. IT-98-3-A, Judgment, para. 149, Apr. 19, 2004 (“The Trial Chamber expressly found that, given the circumstances at the time the plan was formed, Radislav Krstić must have been aware that an outbreak of these crimes would be inevitable given the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and sheer lack of sufficient numbers of UN soldiers to provide protection. The Appeals Chamber agrees with this finding.”)

243. Prosecutor v. Kvočka et al., Case No. IT-98-30/01-T, Judgment, para. 327, Nov. 2, 2001.

244. Patricia Viseur Sellers, “The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation,” at 16.

245. OHCHR, “Mission Report of OHCHR Rapid Response Mission: 13-24 September 2017,” at 8-9, Oct. 11, 2017 (estimated time).

246. OHCHR, “Mission Report of OHCHR Rapid Response Mission: 13-24 September 2017,” at 8-9, Oct. 11, 2017.

247. Human Rights Watch, “All of My Body was Pain,” at 29 (“Two women said that words could not adequately convey the minute-after-minute, hour-after-hour pain of walking up and down hills on severe injuries after being gang raped. Almost every rape victim said they experienced physical agony during their flight.”).

248. Human Rights Watch, “All of My Body was Pain,” at 32; Kristen Gelineau, “AP: Rohingya Methodically Raped by Myanmar’s Armed Forces,” Assoc. Press, Dec. 11, 2017.

hardship engaging in days-long walks.²⁴⁹ These journeys also ensured that women and girls were without healthcare, including support during childbirth²⁵⁰ and necessary interventions to limit chances of pregnancy or sexually-transmitted diseases.²⁵¹ In addition to physical pain, Rohingya women and girls endured psychological trauma during their journeys and displacement in Bangladesh, including post-traumatic stress disorder and other symptoms of psychological distress.²⁵²

Rohingya women and girls were also targeted for continued assaults on their journeys to Bangladesh as a result of forced displacement. Women were raped or sexually assaulted in villages to which they initially fled,²⁵³ and were “systematically robbed” and assaulted at checkpoints by the military.²⁵⁴ These robberies often included sexual assault, where soldiers touched women’s bodies in front of family members and other civilians ostensibly to search for hidden possessions.²⁵⁵

The majority of refugees who fled both waves of violence were women and children.²⁵⁶ Rohingya women and children make up 80% of the displaced population in Bangladesh. Female refugees are slightly disproportionately represented, with 52% of refugees female, and 20% of refugees are adult males versus 25.2% adult females.²⁵⁷ Nineteen percent of Rohingya households are headed by women, in part because the differentiated violence inflicted on different genders during the operations decimated entire families and upended traditional family structures and roles.²⁵⁸ These changes leave women with economic and social insecurity and can create “social friction.”²⁵⁹ Women and girls also often suffer when humanitarian relief services are scarce because cultural norms and limited freedom of movement may limit their ability to be present for aid distributions.²⁶⁰ These issues are exacerbated in female-headed households where adults “face numerous protection concerns, and are struggling to access life-saving assistance due to security and cultural constraints.”²⁶¹

Many factors contribute to an increased risk of gender-based violence in displacement environments, including the camps in Bangladesh.²⁶² The sanitation challenges created by lack of access to latrines, clean water, and electricity affect women and girls disproportionately and leave women more

249. Human Rights Watch, “All of My Body was Pain,” at 30.

250. Human Rights Watch, “All of My Body was Pain,” at 30-31.

251. “Rohingya Refugees: Still Searching for Safety,” Medecins Sans Frontieres, July 31, 2018.

252. Human Rights Watch, “All of My Body was Pain,” at 30, 32-33.

253. OHCHR, “Report of OHCHR mission to Bangladesh,” at 20, Feb. 3, 2017.

254. Amnesty Int’l, “Briefing: Myanmar Forces Starve, Abduct and Rob Rohingya,” at 1.

255. Amnesty Int’l, “Briefing: Myanmar Forces Starve, Abduct and Rob Rohingya,” at 6.

256. OHCHR, “Report of OHCHR mission to Bangladesh,” at 20, Feb. 3, 2017; Inter Sector Coordination Group, “Gender Profile No. 1 for Rohingya Refugee Crisis Response,” at 3, Dec. 3, 2017.

257. UN High Comm’r for Refugees, “Refugee Response in Bangladesh Fact Sheet- Family Counting,” Dec. 23, 2017.

258. UN Office for the Coordination of Humanitarian Affairs (OCHA), “Rohingya Refugee Crisis: 2017 Humanitarian Response Plan, September 2017- February 2018,” at 9, Oct. 2017; Human Rights Watch, “Massacre by the River,” at 19.

259. Inter Sector Coordination Group, “Gender Profile No. 1 for Rohingya Refugee Crisis Response,” at 1-2.

260. Susan McKay, “The Effects of Armed Conflict on Girls and Women,” 4 *Peace & Conflict* 381, at 389, 1998; Inter Sector Coordination Group, “Gender Profile No. 1 for Rohingya Refugee Crisis Response,” at 4 (“Women and girls are the most vulnerable and marginalized, and are among the first to experience additional access barriers to scarce and overstretched humanitarian relief services.”).

261. OCHA, “Rohingya Refugee Crisis: 2017 Humanitarian Response Plan, September 2017- February 2018,” at 10, Oct. 2017.

262. Refugees Int’l, “Policy Brief: Bearing Witness to Crimes Against Humanity: The Forced Expulsion of the Rohingya from Myanmar,” at 4, 2017; UNDP et al., “Situational Analysis: Gender Equality and Women’s Rights in Myanmar,” at 197-98.

susceptible to violence, sexual harassment, and disease as they are forced to walk farther to access latrines and other resources like water and firewood.²⁶³ The stress, chaos, and lack of educational and employment opportunities can also “perpetuat[e] and exacerbat[e] pre-existing, persistent gender and social inequalities, gender-based violence, [and] discrimination.”²⁶⁴ In addition, women and girls are at risk of sexual exploitation, human trafficking, and forced marriage, with unaccompanied minors and female-headed households at additional risk.²⁶⁵

Access to healthcare and treatment in displacement camps remains extremely limited. In 2018, nearly half of campsites lacked sexual and reproductive health care services, including for rape survivors.²⁶⁶ The UN noted that there was typically no health care access in Rakhine State for survivors of sexual violence and pregnant women, due to lack of professionals, affordable care, social stigma, and movement restrictions.²⁶⁷ During the 2016 attacks, an estimated 7,600 pregnant women were unable to access primary health care, at risk of incurring “grave consequences.”²⁶⁸ The UN estimated that 15% of pregnant women will require emergency obstetric care.²⁶⁹ Displacement environments also increase risks of maternal mortality.²⁷⁰

Women face additional cultural obstacles to seeking and receiving necessary medical and psychosocial care in displacement camps. Family members and male community leaders “sometimes prevent women and girls from talking openly about rape,” and women have also noted that the crowdedness and lack of privacy have prevented them from speaking to doctors.²⁷¹

Lastly, displacement creates barriers to proving land ownership, including through the destruction or confiscation of identity, marriage, and tax documents.²⁷² The Security Council has recognized that the tactics of coercion used to force displacement “[have] particularly severe effects on the physical and economic security of rural women; indeed, the percentage of women who hold legal title to land is halved in the aftermath of war.”²⁷³

Conclusion

Burmese Security Forces clearly engaged in the forcible displacement of the Rohingya, from places where they were lawfully present, through coercion, and without grounds permitted in international law. Documentation has clearly shown that the Rohingya were forcibly displaced to Bangladesh—with over 80% of the Rohingya population of northern Rakhine State displaced following the 2017

263. Mayesha Alam, “Women and Girls at Risk in the Rohingya Crisis,” Council on Foreign Relations, Sept. 27, 2017; UNDP et al., “Situational Analysis: Gender Equality and Women’s Rights in Myanmar,” at 197-98; Refugees Int’l, “Reluctant Refuge: Safe but not Secure in Bangladesh,” at 12.

264. Inter Sector Coordination Group, “Gender Profile No. 1 for Rohingya Refugee Crisis Response,” at 4; UNDP et al., Situational Analysis: Gender Equality and Women’s Rights in Myanmar,” at 197-98; UN Doc. S/2018/250, para. 57.

265. OHCHR, “Mission Report of OHCHR Rapid Response Mission: 13-24 September 2017,” at 11, Oct. 11, 2017; Refugees Int’l, “Reluctant Refuge: Safe but not Secure in Bangladesh,” at 12-13; UN Doc. S/2018/250, para. 57.

266. UN Doc. S/2018/250, para. 57.

267. OHCHR, “Report of OHCHR mission to Bangladesh,” at 23, Feb. 3, 2017; Human Rights Watch, “All of My Body was Pain,” at 33.

268. Amnesty Int’l, “We are at a Breaking Point,” at 33.

269. OCHA, “Rohingya Refugee Crisis: 2017 Humanitarian Response Plan, September 2017- February 2018,” at 10, Oct. 2017.

270. “Facts and Figures: Humanitarian Action,” UN Women, <http://www.unwomen.org/en/what-we-do/humanitarian-action/facts-and-figures>; “2016 World Humanitarian Data and Trends,” UN OCHA, at 38-39, 2016.

271. Human Rights Watch, “All of My Body was Pain,” at 34.

272. Amnesty Int’l, “We are at a Breaking Point,” at 30-31.

273. UN Doc. S/2018/250, para. 16.

attacks²⁷⁴—constituting the crime of deportation. With respect to the crime of forcible transfer, limited to no documentation exists of the situation of the Rohingya inside Rakhine State due to the Burmese government’s refusal to allow human rights experts and organizations access. However, it can be reasonably inferred from testimony and satellite evidence of the destruction of entire villages that the majority of those who did not make it over the border to Bangladesh were either killed or internally displaced. Furthermore, this displacement has clear gender elements in its conduct—in particular with how sexual violence and fear of it were used as coercion for the Rohingya to leave their homes, and the effects of that displacement are also gendered, in particular with respect to access to health care.

6. Torture of Rohingya Women and Girls

Torture is a crime against humanity occurring when a perpetrator inflicts “severe physical or mental pain or suffering.”²⁷⁵ Such pain or suffering must not “arise only from, [or be] inherent in or incidental to, lawful sanctions,”²⁷⁶ and the victim must be “in the custody or under the control” of the perpetrator.²⁷⁷

Human rights bodies and international and regional tribunals have repeatedly found that rape and sexual violence cause severe physical and mental pain and suffering and can constitute torture.²⁷⁸ Moreover, the threat of rape or other forms of sexual violence also meets the threshold for torture.²⁷⁹ Courts have further recognized that rape can be used for purposes of, among other things, degradation, humiliation, discrimination and punishment and is a “violation of personal dignity.”²⁸⁰

All of these forms of torture are reflected in the patterns of rape perpetrated against Rohingya women and girls by Burmese Security Forces.

Severe Physical Pain and Suffering

Rapes committed by Burmese Security Forces inflicted severe physical suffering on Rohingya women and girls. Reams of reports documenting the current crisis have found and described brutal rapes and sexual violence as an inherent and regular feature of the attacks. Patterns have emerged in the way the rapes were perpetrated—often, victims were held down by soldiers while others raped them and threatened them with guns.²⁸¹ Some women reported going unconscious as they were raped.²⁸² The rapes were also combined with other forms of brutal violence, including beatings, cutting and

274. Int’l Crisis Grp., “Myanmar’s Rohingya Crisis Enters a Dangerous New Phase,” at 8, 2017.

275. Elements of Crimes, art. 7(1)(f).

276. Elements of Crimes, art. 7(1)(f).

277. Elements of Crimes, art. 7(1)(f).

278. Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Judgment, para. 150, June 12, 2002; Prosecutor v. Delalić et al., Case No. IT-96-21-T, Judgment, paras. 493, 495, Nov. 16, 1998; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 731, Sept. 2, 1998; Anne-Marie L.M. de Brouwer, “Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR,” at 189, 2005.

279. Prosecutor v. Kvočka et al., Case No. IT-98-30/1-T, Judgment, para. 561, Nov. 2, 2001.

280. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 597, Sept. 2, 1998.

281. HRW, “Burma: Security Forces Raped Rohingya Women, Girls,” Feb. 6, 2017; Kaladan Press Network, “Rape by Command,” at 30-31, 36.

282. HRW, ‘All of My Body Was Pain,’ at 17.

mutilation of breasts and genitals, biting, dragging women across the ground, and burnings.²⁸³ As one victim stated, “[T]hey did what they wanted to my body.”²⁸⁴

Survivors have experienced a variety of painful physical consequences and injuries as a result of the rapes including vaginal tearing, swollen genitals, severe bleeding, infections, and difficulty moving or walking.²⁸⁵ Women reported avoiding liquids because it was so painful to urinate.²⁸⁶ A gynecologist interviewed by the Associated Press noted that she saw victims with “lacerations to their cervixes” caused by guns forced into their bodies.²⁸⁷ Some pregnant rape victims suffered miscarriages as a result of the trauma,²⁸⁸ while others died as a result of their injuries.²⁸⁹

Severe Mental Pain and Suffering

The ICTY has found that the mental suffering inflicted on a person forced to witness a relative or acquaintance severely mistreated constituted torture.²⁹⁰ Similarly, “the presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on the person being raped.”²⁹¹

The mental suffering caused by the Security Forces’ widespread and systematic rapes of Rohingya women and girls is profound. Indeed, the purpose of the Forces’ systematic sexual violence was to humiliate and terrorize the Rohingya community.²⁹² In numerous cases women and girls were raped in front of others,²⁹³ often family members, which, as stated earlier, has been found to cause mental suffering amounting to torture.²⁹⁴ Rapes were also perpetrated in public,²⁹⁵ and were often combined with threats against women and girls’ lives.²⁹⁶ In some cases soldiers beat and killed women’s children and husbands in front of them during the rape.²⁹⁷ Victims were forced to endure the particularly cruel sequencing of witnessing their children, including infants, thrown to the ground or into the river,

283. Kaladan Press Network, “Rape by Command,” at 11, 38, 39; Kaladan Press Network, “Witness to horror – Rohingya women speak out about Myanmar Army rape and other atrocities in Maungdaw,” at 1-2, Feb. 2017; John Sifton, “Submission to the US Senate Foreign Relations Committee on the Rohingya Crisis in Burma,” Human Rights Watch, at 3, Oct. 24, 2017; HRW, ‘All of My Body Was Pain,’ at 16, 17; Amnesty Int’l, ‘My World Is Finished,’ at 24; HRW, “Massacre by the River,” at 24, 26, 27, 29.

284. HRW, ‘All of My Body Was Pain,’ at 19.

285. OHCHR, “Report of OHCHR mission to Bangladesh,” at 23, Feb. 3, 2017; HRW, ‘All of My Body Was Pain,’ at 3, 30.

286. HRW, ‘All of My Body Was Pain,’ at 32.

287. Kristen Gelineau, “Rohingya methodically raped by Myanmar’s armed forces,” AP, at 8, Dec. 11, 2017.

288. HRW, ‘All of My Body Was Pain,’ at 17.

289. Kaladan Press Network, “Rape by Command,” at 11.

290. Prosecutor v. Kvočka et al., Case No. IT-98-30/1-T, Judgment, para. 149, Nov. 2, 2001; Prosecutor v. Furundžija, Case No. IT-97-17/1-T, Judgment, para. 267, Dec. 10, 1998.

291. Prosecutor v. Kvočka et al., Case No. IT-98-30/1-T, Judgment, para. 149, Nov. 2, 2001.

292. “Rep. of the Secretary General on conflict-related sexual violence,” UN Doc. S/2017/249, para. 51, Apr. 15, 2017.

293. OHCHR, “Mission report of OHCHR rapid response mission: 13-24 Sept. 2017,” at 7, 8; UN Doc. S/2017/249, para. 51; OHCHR, “Report of OHCHR mission to Bangladesh,” at 17, 24, 28, Feb. 3, 2017; HRW, “Burma: Security Forces Raped Rohingya Women, Girls,” Feb. 6, 2017; HRW, ‘All of My Body Was Pain,’ at 20; Kaladan Press Network, “Rape by Command,” at 11, 30-31, 36.

294. Prosecutor v. Kvočka et al., Case No. IT-98-30/1-T, Judgment, para. 149, Nov. 2, 2001.

295. HRW, ‘All of My Body Was Pain,’ at 17, 19, 20; Kaladan Press Network, “Rape by Command,” at 11.

296. HRW, “Burma: Security Forces Raped Rohingya Women, Girls,” Feb. 6, 2017; HRW, ‘All of My Body Was Pain,’ at 2-3.

297. HRW, ‘All of My Body Was Pain,’ at 3, 26; OHCHR, “Report of OHCHR mission to Bangladesh,” at 24, Feb. 3, 2017; HRW, “Burma: Security Forces Raped Rohingya Women, Girls,” Feb. 6, 2017.

beaten to death, and slaughtered by machete, and then being raped by soldiers.²⁹⁸ The beatings, rapes, and murders of victims carried out in front of family members were done with the “intention of inflicting severe mental torture, humiliating and instilling fear.”²⁹⁹

Survivors were often visibly impacted by the trauma they had endured and expressed feelings of distress and “severe mental consequences such as insomnia, depression, fainting, persistent fear, and getting startled at any noise.”³⁰⁰ One 25-year-old woman said, “I feel very nervous and scared all the time. Every noise startles me. I am afraid to even go to the bathroom by myself.”³⁰¹ As the OHCHR concluded, “psychological torture was also inflicted on Rohingyas.”³⁰²

In Custody or Under Control

The crime against humanity of torture requires that the victim be “in the custody or under the control” of the perpetrator.

There are multiple reports of rapes while women and girls have been held in detention by Burmese Security Forces. One organization reported that “[i]n five locations...women and girls were forcibly detained and raped in military camps, for periods of up to two weeks.”³⁰³ Thus, the additional element that victims be in the custody of the perpetrator is also clearly satisfied in these circumstances.

Furthermore, in most instances the perpetrators of rape—members of Burmese Security Forces—had effective control over villages, Rohingya civilians, and their victims. Also discussed above, there was a significant increase in the Security Forces’ presence and military activity leading up to August 2017.³⁰⁴ The patterns accompanying the Forces’ attacks of Rohingya villages highlight the effective control the Forces exercised over Rohingya women and girls: Forces would enter villages indiscriminately shooting and killing all civilians, men and women would be separated, and women were sexually assaulted and raped, sometimes at gunpoint.³⁰⁵ Given these circumstances, Rohingya women and girls were under the effective control of the Burmese Security Forces for the purposes of the control element of the crime against humanity of torture.

Not Incident to Lawful Sanctions

The requirement of the pain and suffering not being incident to lawful sanctions is ordinarily contemplated to cover pain and suffering created in circumstances of imprisonment. None of the Tatmadaw’s conduct directed toward the Rohingya can be considered “lawful sanctions”—international crimes committed by the Forces against civilians cannot function as justification for or as a lawful response to attacks by a limited group of armed actors (ARSA). The commission of crimes against humanity can never be justified.

298. HRW, “Massacre by the River,” at 22-23, 28-29.

299. OHCHR, “Report of OHCHR mission to Bangladesh,” at 28, Feb 3, 2017.

300. OHCHR, “Report of OHCHR mission to Bangladesh,” at 22, Feb 3, 2017. “Many of the women we spoke to reported symptoms of post-traumatic stress disorder (PTSD) or depression.” HRW, ‘All of My Body Was Pain,’ at 3, 33.

301. OHCHR, “Report of OHCHR mission to Bangladesh,” at 22, Feb 3, 2017.

302. OHCHR, “Report of OHCHR mission to Bangladesh,” at 28, Feb 3, 2017.

303. Kaladan Press Network, “Rape by Command,” at 10, 35.

304. Fortify Rights, ‘They Gave Them Long Swords,’ at 49-50.

305. Kaladan Press Network, “Rape by Command,” at 37; Fortify Rights & US Holocaust Memorial Museum, ‘They Tried to Kill Us All,’ at 10.

Conclusion

Burmese Security Forces unlawfully inflicted severe physical and mental pain and suffering by raping Rohingya women and girls effectively under their custody or control, and doing so in public or in view of relatives—clearly arising to the crime against humanity of torture.

7. Murder of Rohingya Women and Girls

Murder constitutes a crime against humanity when the perpetrator kills one or more persons.³⁰⁶ Similar to the perception of killing as a genocidal crime (described below), the crime against humanity of murder often skews towards favoring “fast” deaths, often of men and boys.

Killing and/or causing the death of one or more persons

Killing, or causing death,³⁰⁷ can be done directly or indirectly, by an act or by omission.³⁰⁸

Burmese Security Forces targeted all Rohingya for direct and indirect killings by both act and omission. Specifically, the Rohingya suffered deaths by gunfire, artillery explosions, rapes, stabbings, throat slittings, beatings, being burned alive, and being denied the necessities of life.³⁰⁹

Of note, the different methods employed for killing men and women reflect the specific sexism and objectification embedded in the psyches of the Burmese Security Forces. While Rohingya men were generally killed by gunshot, women and girls were stabbed/slashed and burned³¹⁰—means typically used when destroying objects and property. Choosing these means as fit for murdering women shows the perceived lower status of Rohingya women and girls in the eyes of their murderers, and evinces deeply gendered conceptions of dominance, power, and masculinity.

306. Elements of Crimes, art. 7(1)(a).

307. Elements of Crimes, art. 7(1)(a).

308. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Judgment, para. 199, Jul. 15, 1999; Prosecutor v. Krnojelac, Case No. IT-97-25-T, Trial Judgment, paras. 324-326, Mar. 15, 2002; Prosecutor v. Delatić et al., Case No. IT-96-21-T, para. 424, Nov. 16, 1998.

309. UN Doc. A/HRC/37/70, ¶ 46; OHCHR, “Mission report of OHCHR rapid response mission: 13-24 Sept. 2017,” at 6; US Holocaust Museum & Fortify Rights, “Atrocity Crimes Against Rohingya Muslims,” at 9, Nov. 2017.

310. OHCHR, “Report of OHCHR mission to Bangladesh,” at 16, 23, Feb. 3, 2017.



GENOCIDE

THERE IS STRONG EVIDENCE THAT BURMESE FORCES ARE COMMITTING GENOCIDE AGAINST THE ROHINGYA BY CARRYING OUT SPECIFICALLY DESIGNED GENDER CRIMES

The crime of genocide occurs when a person commits a prohibited act with the intent to destroy, in whole or in part, a protected group (a national, ethnic, racial, or religious group) as such.³¹¹ In August 2018, the Myanmar FFM found there to be sufficient information to support inferences of genocidal intent and called for investigations of genocide against Burma's Security Forces.³¹²

The prohibited constitutive acts of genocide are: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group. There is evidence that Burmese Security Forces have committed (a)-(d) in a gendered manner as part of the 2016 and 2017 violence against the Rohingya. It should be noted that many of the elements of the constitutive acts of genocide are based on ongoing effects and consequences on the Rohingya—effects and consequences that continue to occur as the majority of the population has been deported to Bangladesh.

Fatema, 35, fled when soldiers set fire to her home. Her 18-year-old son was shot and killed. She carried her four-month-old infant for ten days to reach the border of Bangladesh.

PHOTO
Russell Watkins/DFID
CC BY 2.0

1. Intent to Destroy the Rohingya Religious and Ethnic Minority as a Group, in Whole or in Part

For the occurrence of genocide to be established, the specific intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such must be identified. Genocidal intent can be inferred from a number of factors and circumstances, including the general context in which the acts took place, the nature of particular acts committed, systematic perpetration or “repetition of destructive and discriminatory acts,” systematic targeting of perceived group members, evidence of

311. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277; Rome Statute, art. 6, intro para.

312. UN Doc. A/HRC/39/64, paras. 85-87.

a plan or policy, attacks on religious property or symbols of the group, the sheer scale of atrocities, and statements by alleged perpetrators.³¹³

There is no numeric threshold necessary to demonstrate intent to destroy a group, though perpetrators must at least intend to destroy a “substantial part” of the group, which would impact the group as a whole.³¹⁴ The intent to destroy a certain gender or population within a limited geographic area may be a sufficient demonstration of intent to destroy a group “in part,”³¹⁵ and actual destruction of the group does not need to have been successful for intent to be demonstrated.³¹⁶ The requisite intent includes showing that perpetrators intended to destroy a “collection of people *because* of their particular group identity.”³¹⁷

The Burmese Security Forces’ attacks against Rohingya civilians since 2016 exhibit many factors that, when taken together,³¹⁸ support an inference of intent to destroy the Rohingya as an ethnic or religious group. As described below, the following support an inference of genocidal intent: the (1) scale of atrocities; (2) context of longstanding discrimination against the Rohingya, including in law; (3) systematic perpetration of attacks through similar patterns across Rakhine State; (4) brutal and often public perpetration of specific acts, and the targeting of Rohingya civilians because of their ethnicity or religious identity (and lack of attempt to distinguish civilians from potential terrorist suspects); (5) nature of crimes as aiming beyond mere displacement; and (6) statements by military and government officials.

Scale and Knowledge

Although the violence that commenced in August 2017 followed similar patterns to previous waves of violence in Rakhine State, the scale of the crimes was unprecedented. Reports estimate that 9,400 Rohingya died in the first month of violence alone, 6,700 of whom were killed—numbers that do not fully account for the scale as violence continued into 2018.³¹⁹

313. Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, para. 47, July 5, 2001; Prosecutor v. Krstić, Case No. IT-98-33-A, para. 41, Apr. 19, 2004; Prosecutor v. Bagosora et al., ICTR-98-41-T, Judgment and Sentence, para. 2116, Dec. 18, 2008; Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment (Volume I), paras. 550, 553, Mar. 24, 2016.

314. Prosecutor v. Bagosora et al., ICTR-98-41-T, Judgment and Sentence, para. 2115, Dec. 18, 2008; Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment (Volume I), paras. 552-55, Mar. 24, 2016; Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, para. 82, July 5, 2001 (“Genocidal intent may therefore be manifest in two forms. It may consist of desiring the extermination of a very large number of the members of the group, in which case it would constitute an intention to destroy a group *en masse*. However, it may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such. This would then constitute an intention to destroy the group ‘selectively.’”); Prosecutor v. Krstić, Case No. IT-98-33-A, para. 12, Apr. 19, 2004.

315. Popović et al., Case No. IT-05-88-A, Judgment, para. 493, Jan. 30, 2015 (upholding determination that thousands of murdered men were relevant to determining what could constitute a “substantial part,” as the determination was not merely a numerical issue); Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, para. 83, Dec. 14, 1999 (“international custom admits the characterisation of genocide even when the exterminatory intent only extends to a limited geographic zone.”); Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, paras. 590, 594, 598, Aug. 2, 2001; Prosecutor v. Krstić, Case No. IT-98-33-A, paras. 13, 17, Apr. 19, 2004 (“area of the perpetrators’ activity and control, as well as the possible extent of their reach” is relevant in examining intent and the substantialness of the targeted group).

316. Prosecutor v. Krstić, Case No. IT-98-33-A, para. 32, Apr. 19, 2004.

317. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment (Volume I), para. 551, Mar. 24, 2016 (emphasis added).

318. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment (Volume I), para. 550, Mar. 24, 2016.

319. Medecins Sans Frontieres, “No One Was Left,” at 23; UN Doc. A/HRC/39/64, para. 36. Over 43,000 Rohingya children who arrived since August 25, 2017 reportedly are missing one or both parents. ASEAN Parliamentarians for Human

Humanitarian actors recorded over 6,000 incidences of sexual violence,³²⁰ and at least 392 villages were partially or fully destroyed during the 2017 clearance operations.³²¹ This pervasive destruction displaced over 700,000 Rohingya, over 80% of the Rohingya population in northern Rakhine State.³²² As the UN Secretary-General noted, the vast majority (approximately 94%) of displaced persons in Bangladesh from Burma are Rohingya.³²³ The combination of killing and extensive forcible transfer of the population has allowed Burmese Security Forces to completely remove certain communities from an area, “eliminating even the residual possibility” that the Rohingya community “could reconstitute itself.”³²⁴ One witness said simply that “there was nothing left,” and that Burmese Security Forces “tried to kill [them] all.”³²⁵

The most recent wave of violence against the Rohingya was committed on a scale previously unseen in the attacks by Burmese Security Forces in Rakhine State. These crimes have been documented by prominent human rights groups and UN entities, and have been openly discussed with the Burmese government’s representatives in venues such as the Security Council, demonstrating that high-level officials are aware of their commission,³²⁶ even as the government continues to deny them and their characterization as international crimes.³²⁷ Participation in criminal acts, given knowledge of atrocities, and failure to act given that knowledge, are essential to establishing individual criminal responsibility and other modes of liability,³²⁸ which are outside the scope of this brief. It is also,

Rights, “The Rohingya Crisis: Past, Present, and Future, Summary Report of Findings from Fact-Finding Mission to Bangladesh 21-24 January 2018, at 3, 2018.

320. Inter Sector Coordination Grp., “Situation Report: Rohingya Refugee Crisis,” Mar. 25, 2018.

321. UN Doc. A/HRC/39/64, para. 42; UN Security Council, Meeting Minutes, “Amid ‘Humanitarian and Human Rights Nightmare’ in Myanmar, Secretary-General Urges Full Access for Aid, Safe Return of Displaced Rohingya, End to Military Operations,” SC/13012, Sept. 28, 2017 (the UN Secretary-General noted that “Myanmar authorities themselves had indicated that at least 176 of 471 Muslim villages in northern Rakhine had been totally abandoned. . . Elsewhere too, most of the abandoned villages were majority Muslim.”).

322. Int’l Crisis Grp., “Myanmar’s Rohingya Crisis Enters a Dangerous New Phase,” at 8. As of June 2018, there were 919,000 Rohingya refugees in Cox’s Bazar, Bangladesh, as there was an existing Rohingya refugee population before the influx after August 25, 2017. Because the Rohingya were not enumerated during Myanmar’s 2014 census (self-identification as Rohingya was not allowed), the total number of Rohingya in Rakhine State is not known with certainty, although the census included an estimate that 1,090,000 people were not enumerated (thus believed to be Rohingya) in Rakhine State. Inter Sector Coordination Grp., “Situation Report: Rohingya Refugee Crisis,” Aug. 16, 2018; Amnesty Int’l, “Caged Without a Roof,” at 19-20.

323. U.N. Security Council, Meeting Minutes, “Amid ‘Humanitarian and Human Rights Nightmare’ in Myanmar, Secretary-General Urges Full Access for Aid, Safe Return of Displaced Rohingya, End to Military Operations,” SC/13012.

324. Prosecutor v. Krstić, Case No. IT-98-33-A, paras. 28-31, Apr. 19, 2004; Trial Judgment, ¶ 595. The International Court of Justice has recognized that forced displacement and acts of “ethnic cleansing” “may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring” acts of genocide. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croat. v. Serb.*), 2015 I.C.J. 3, para. 161-63, Feb. 3, 2015.

325. U.S. Holocaust Mem’l Museum & Fortify Rights, “They Tried to Kill Us All,” at 1.

326. For investigations that highlight military knowledge of the atrocities, see, e.g., Simon Lewis et al., “Tip of the Spear: The Shock Troops that Expelled the Rohingya from Myanmar,” Reuters, June 26, 2018); Amnesty Int’l, “Military Responsibility for Crimes Against Humanity in Rakhine State,” 2018.

327. See, e.g., Antoni Slodkowski et al., “How a Two-Week Army Crackdown Reignited Myanmar’s Rohingya Crisis,” Reuters, Apr. 25, 2017; Tatmadaw True News Information Team, “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,” para. 9, Nov. 13, 2017; State Counsellor Office Information Comm., “Information Committee Refutes Rumours of Rape,” Dec. 26, 2016.

328. International criminal law allows for commanders and superiors to be held responsible for the actions of their subordinates, for example, where they “either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes” and “failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent

however, evidence of a larger genocidal campaign to destroy the Rohingya as a group “even where the individuals to whom the intent is attributable are not precisely defined,”³²⁹ and can form the foundation for examinations into whether individual perpetrators shared that genocidal intent.³³⁰ The sheer scale of atrocities as well as their continuation in light of high public exposure are factors that support an inference of the Burmese Security Forces’ intent to destroy the Rohingya as a group.³³¹

Longstanding Discrimination

The attacks against the Rohingya were committed in a context of longstanding persecution and discrimination against the group.³³² Significantly, the Rohingya have been subjected to several legal restrictions that affect their recognition, rights and survival as a group. As a starting point, the government refuses to recognize the Rohingya as one of the “national races” of Burma for the purposes of the 1982 Citizenship Law, encourages a narrative that the Rohingya are illegal immigrants from Bangladesh, and has made attempts to label them as foreigners on identity documents.³³³ As a result, the Citizenship Law and its implementation, having effectively rendered the Rohingya

authorities for investigation and prosecution.” Rome Statute, art. 28(a). Knowledge of genocidal intent and further participation might also potentially implicate liability under the Rome Statute such as aiding or otherwise contributing to the commission of crimes. Rome Statute, art. 25(3).

329. Prosecutor v. Krstić, Case No. IT-98-33-A, para. 34, Apr. 19, 2004.

330. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, para. 549, Aug. 2, 2001 (“The gravity and the scale of the crime of genocide ordinarily presume that several protagonists were involved in its perpetration. Although the motive of each participant may differ, the objective of the criminal enterprise remains the same. In such cases of joint participation, the intent to destroy, in whole or in part, a group as such must be discernible in the criminal act itself, apart from the intent of particular perpetrators. It is then necessary to establish whether the accused being prosecuted for genocide shared the intention that a genocide be carried out.”). See also, Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgment, para. 594, May 21, 1999 (finding that perpetrators of genocidal acts “were acting with a common plan and purpose” and that defendants “played pivotal roles in carrying out this common plan.”); Prosecutor v. Bagosora et al., ICTR-98-41-T, Judgment and Sentence, para. 2126, Dec. 18, 2008 (“The Chamber has considered, as the only reasonable inference, that Bagosora in the exercise of his authority between 6 and 9 April 1994 ordered the crimes at Kigali area roadblocks (III.2.6.2). In the context of the open and notorious targeting and slaughter of Tutsis at them, he was aware of the genocidal intent of the perpetrators and shared it.”); Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, para. 40, Mar. 22, 2006; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 523, Sept. 2, 1998; Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, paras. 704-07, Sept. 1, 2004; Prosecutor v. Tolimir, Case No. IT-05-88/2-T, Judgment, paras. 1166, 1172, Dec. 12, 2012.

331. Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgment, paras. 94, 289, May 21, 1999 (confirming that it is “unnecessary for an individual to have knowledge of all details of the genocidal plan or policy,” and that the “widespread nature of the attacks and the sheer number of those who perished” was “compelling evidence” of planning and coordination by government officials.).

332. “Statement by High Commissioner for Human Rights Zeid Ra’ad al Hussein at the Special Session of the Human Rights Council on the human rights situation of the minority Rohingya Muslim population and other minorities in the Rakhine State of Myanmar,” Dec. 5, 2017. For an explanation and analysis of Myanmar’s “political doctrine” or policy towards the Rohingya, including years of repressive policies, see Fortify Rights, “They Gave Them Long Swords,” at 91-95 (describing the “political doctrine” of discrimination as evidence of intent to destroy the group).

333. Compare Amnesty Int’l, “Caged Without a Roof,” at 31-32 (“Rohingya leaders explained to Amnesty International that, although information on ethnicity and religion is not recorded on the card, the sections requiring this information remain on the application form. Several expressed concerns that local authorities might fill in the empty space with ‘Bengali’ at a later date or that they may be forced to identify as such when they undergo the citizenship verification.”) with U.S. Dep’t of State, “Country Reports on Human Rights Practices for 2016: Burma,” at 32, 47 (“The government no longer requires all participants to identify as ‘Bengali’ as a condition of participating in the process, nor does it require applicants to list their race or religion on forms in the earliest phases of the process,” but the ethnic designation of some Muslims included a foreign qualifier (such as “Indian Bamar”)); U.S. Dep’t of State, “2016 Religious Freedom Report: Burma,” at 11-12, 2017 (“there appeared to be no consistent criteria governing whether a person’s religion was indicated on the card... Some Muslims reported that they were required to indicate a ‘foreign’ ethnicity if they self-identified as Muslim on applications for citizenship cards.”).

stateless, serve as an enabling premise for further discrimination and deny them their right to a nationality.³³⁴ Another aspect of discrimination is the confinement of Rohingya to certain geographic areas through severe movement restrictions and confinement in displacement camps that have persisted since the 2012 violence, despite calls for their closure.³³⁵ As detailed elsewhere in this brief, movement restrictions and confinement to internally displaced person (IDP) camps have had severe consequences for Rohingya in healthcare and food security, which are further manifestations of systemic discrimination.

Furthermore, in 2015, in a highly criticized move, Burma's parliament adopted four laws intended to "protect race and religion" that are blatantly discriminatory against women and minority groups. Politicians have publicly stated that these laws are intended to control the Rohingya population,³³⁶ and their existence and enforcement exemplify the deep-seeded discrimination against the Rohingya in Burma.³³⁷ For example, the Population Control Health-care Law provides for local officials to "organize" couples to practice 36-month birth spacing.³³⁸ While neutral on its face, the law is motivated by a belief that Muslims have too many children and therefore contribute to "overpopulation" and constitute a "threat" to the national character and identity of Burma.³³⁹

Many of these legal restrictions echo those found in an alleged "Rohingya extermination plan" adopted by the military regime in 1988 to suppress the Rohingya population while avoiding international attention by limiting more direct and apparent means of violence.³⁴⁰ Considering evidence that the laws described above were created to "control and limit" essential aspects of life for the Rohingya,³⁴¹ this broad and longstanding discrimination forms essential context for examinations of genocidal intent.

334. See, e.g., UN Doc. A/HRC/31/71/Add.1, Mar. 9, 2016 ("Freedom of movement is available for every citizen but those who citizenship status is not clear, they need to apply for travel permission."); Simon Lewis et al., "Tip of the Spear: The Shock Troops that Expelled the Rohingya from Myanmar," Reuters, June 26, 2018 (quoting a military officer as telling Rohingya community leaders that they "behaved very badly in Kachin—and they're citizens. You're not citizens, so you can only imagine how we'll be.").

335. Advisory Comm'n on Rakhine State, "Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine," at 35-37.

336. Fortify Rights, "Policies of Persecution," at 26-27, 34. Reports indicate that this policy was sporadically and inconsistently enforced. See, e.g., U.S. Dep't of State, "Country Reports for Human Rights Practices in 2017: Burma," at 33.

337. Amnesty Int'l, "Caged Without a Roof," at 13 ("Almost every institution of the state, at the township, district, state and even Myanmar-wide levels, is involved in the discrimination and segregation of the Rohingya community and Muslims generally in Rakhine State. The discriminatory and excluding regime described in this brief is created by numerous laws, regulations, policies and practices. It is impossible for officials in Rakhine State and in Myanmar generally to maintain and enforce such a system without being fully aware of, and therefore fully responsible for, the atrocious consequences it has for the life of the Rohingya population.")

338. UN Doc. A/HRC/31/71 (list of legislation provided in Annex).

339. Krithika Varagur, "The Muslim Overpopulation Myth that Just Won't Die," Atlantic, Nov. 14, 2017); Hannah Beech, "Across Myanmar, Denial of Ethnic Cleansing and Loathing of Rohingya," N.Y. Times, Oct. 24, 2017; UN Secretary-General, "Report on the Situation of Human Rights in Myanmar," para. 20, UN Doc. A/71/308, Aug. 5, 2016 (noting only a "marginal increase" in proportions of Christians and Muslims in Myanmar compared with 1983); UN Doc. S/2018/250, para. 55. See also section above on "Marriage and Family Planning." These beliefs are compounded by the lack of accurate census data and consistent birth registration of Rohingya in Myanmar. Amnesty Int'l, "Caged Without a Roof," at 37.

340. Penny Green et al., Int'l State Crime Initiative, "Countdown to Annihilation: Genocide in Myanmar," at 36, 2015.

341. Fortify Rights, "Policies of Persecution," at 11 (describing these motivations for laws in effect in 2012); Rep. Union of Myanmar, "Final Report of Inquiry Commission on Sectarian Violence in Rakhine State," at 26, 2013.

In the weeks leading up to August 25, 2017, Burma's Security Forces increased their troop presence near the Bangladesh border.³⁴² The Myanmar FFM perceived this buildup as "suggest[ing] considerable prior military planning and organization," noting that the additional presence allowed the Forces to begin attacking civilian communities within hours of the August 25, 2017 ARSA attacks.³⁴³ Before both the 2016 and 2017 attacks, villagers were ordered to remove fencing and barriers around their houses and other facilities for "security," which left Rohingya women particularly vulnerable to intimidation and harassment by security personnel.³⁴⁴ The OHCHR described the Burma Security Forces' strategy prior to August 25 as follows:

- Arrest and arbitrarily detain male Rohingyas between the ages of 15-40 years;
- Arrest and arbitrarily detain Rohingya opinion-makers, leaders, and cultural and religious personalities;
- Initiate acts to deprive Rohingya villagers of access to food, livelihoods, and other means of conducting daily activities and life;
- Commit repeated acts of humiliation and violence prior to, during, and after August 25, to drive out Rohingya villagers en masse through incitement to hatred, violence, and killings, including by declaring the Rohingyas as Bengalis and illegal settlers in Burma;
- Instill deep and widespread fear and trauma—physical, emotional, and psychological—in the Rohingya victims via acts of brutality, namely killings, disappearances, torture, and rape and other forms of sexual violence.³⁴⁵

In both 2016 and 2017, attacks were documented across Rakhine State (in over 40 and hundreds of villages, respectively) for several months in each wave of violence. These widespread attacks followed similar patterns, evidencing that they were conducted with coordination and direction.³⁴⁶ Comparing testimony from different villages, the UN High Commissioner for Human Rights described the 2016 "clearance operations" as typically involving large numbers of armed men (military, police, and sometimes Rakhine villagers) destroying houses, mosques, schools, and other buildings with rocket-propelled grenades and petrol/matches, burning fields, livestock and food crops, separating groups by gender, beating, killing, or detaining men and subjecting groups of women to rape, sexual violence, public humiliation and strip searches, as well as killing fleeing civilians and vulnerable individuals such as children and elderly.³⁴⁷ The "clearance operations" beginning in August 2017 included shelling or open fire in Rohingya villages, indiscriminate shooting, killing and targeting

342. U.N. Security Council, Meeting Minutes, "Amid 'Humanitarian and Human Rights Nightmare' in Myanmar, Secretary-General Urges Full Access for Aid, Safe Return of Displaced Rohingyas, End to Military Operations," SC/13012 (Statement of Masud Bin Momen, Ambassador and Permanent Rep. of Bangladesh to the United Nations).

343. "Statement by Marzuki Darusman, Chairperson of the Independent International Fact-Finding Mission on Myanmar, at the 37th session of the Human Rights Council," Mar. 12, 2018. See also, Fortify Rights, "They Gave Them Long Swords," at 49-50 (describing these buildups as "enabling circumstances or preparatory action" for atrocity crimes).

344. UN Doc. A/HRC/34/67; Fortify Rights, "They Gave Them Long Swords," at 42-43; Kaladan Press Network, "Rape by Command," at 20-21.

345. OHCHR, "Mission Report of OHCHR Rapid Response Mission: 13-24 September 2017," at 1, Oct. 11, 2017.

346. U.S. Holocaust Mem'l Museum & Fortify Rights, "They Tried to Kill Us All," at 14; "Statement by High Commissioner for Human Rights Zeid Ra'ad al Hussein at the Special Session of the Human Rights Council on the human rights situation of the minority Rohingya Muslim population and other minorities in the Rakhine State of Myanmar," Dec. 5, 2017).

347. OHCHR, "Report of OHCHR mission to Bangladesh," at 39, Feb. 3, 2017.

certain groups, coordinated burning of Rohingya houses and structures (leaving other ethnic areas untouched), disappearances, torture, rape and sexual violence.³⁴⁸ Rohingya witnesses in different villages describe similar separation of civilians by gender, and later gang rape of women and girls and burning of structures as part of attacks.³⁴⁹ In both sets of clearance operations, women and girls were sexually assaulted or raped both in their homes and in public, in front of their families and communities, as well as during confrontations with Security Forces during their journey to Bangladesh.³⁵⁰ In some villages, Buddhist/non-Rohingya villagers were sent in to burn villages and even kill survivors after the Security Forces had conducted their initial sweep.³⁵¹

The Forces conducted some attacks over hours or even days,³⁵² and their attempts to methodically remove all Rohingya within a village and erase any continued possibility of living there indicate a high level of intentionality to destroy the Rohingya in specific geographic areas. In some cases, the method of attack demonstrated this intent, as Security Forces cornered civilians and systematically killed or assaulted them throughout the day.³⁵³

Although many villages were attacked by surprise, especially in the early weeks of the operations, certain villages received prior warning of impending attacks, signaling that attacks against civilians were planned and intentional.³⁵⁴ Human rights groups have documented several instances where the Forces or village administrators told civilians to leave before attacks,³⁵⁵ and in some cases village administrators encouraged Rohingya civilians to gather outside villages in order to avoid violence, but they were then attacked by the Security Forces.³⁵⁶

The fact that persistent patterns exist across time and geography is evidence of higher orders capable of largely unifying Security Force conduct (a plan or policy), and in some cases planned attacks are evidenced by advance warning.³⁵⁷ Specific patterns such as prior warning of several attacks,

348. OHCHR, “Mission Report of OHCHR Rapid Response Mission: 13-24 September 2017,” at 3-4, 6-9, Oct. 11, 2017; UN Doc. A/HRC/37/70, para. 46.

349. Human Rights Watch, “Burma: Security Forces Raped Rohingya Women, Girls”; OHCHR, “Report of OHCHR mission to Bangladesh,” at 19, Feb. 3, 2017; U.S. Holocaust Mem’l Museum & Fortify Rights, “They Tried to Kill Us All,” at 10; Medecins Sans Frontieres, “No One Was Left,” at 16.

350. Amnesty Int’l, “We are at a Breaking Point,” at 24; “Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict, UN Security Council Briefing on Myanmar,” Dec. 12, 2017.

351. Wa Lone et al., “Massacre in Myanmar: One Grave for 10 Rohingya Men,” Reuters, Feb. 8, 2018; Foster Klug, “AP Finds Evidence for Graves, Rohingya Massacre in Myanmar,” Assoc. Press, Feb. 1, 2018; Michael Schwirtz, “For Rohingya, Years of Torture at the Hands of a Neighbor,” N.Y. Times, Aug. 24, 2018.

352. Int’l Crisis Group, “Myanmar: A New Muslim Insurgency in Rakhine State,” at 9, 2016; Amnesty Int’l, “My World is Finished,” at 31.

353. See generally, Human Rights Watch, “Massacre by the River,”; Human Rights Watch, “Burma: Military Massacres Dozens in Rohingya Village – Soldiers Shot, Stabbed Men and Boys in Maung Nu, Rakhine State”; Physicians for Human Rights, “Please Tell the World What They Have Done to Us”.

354. Amnesty Int’l, “My World is Finished,” at 38; Physicians for Human Rights, “Please Tell the World What They Have Done to Us,” at 12 (Rohingya leaders “were told to warn Rohingya villagers that they would die if they rejected the NVC registration.”).

355. Amnesty Int’l, “Myanmar: Scorched-earth campaign fuels ethnic cleansing of Rohingya from Rakhine State,” Sept. 14, 2017; Amnesty Int’l, “My World is Finished,” at 38; OHCHR, “Mission Report of OHCHR Rapid Response Mission: 13-24 September 2017,” at 9, Oct. 11, 2017.

356. Amnesty Int’l, “Myanmar: Scorched-earth campaign fuels ethnic cleansing of Rohingya from Rakhine State”; Human Rights Watch, “Massacre by the River,” at 12; Amnesty Int’l, “My World is Finished,” at 21.

357. U.S. Holocaust Mem’l Museum & Fortify Rights, “They Tried to Kill Us All,” at 13-14; Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, para. 48, July 5, 2001 (finding that although “the existence of a plan or policy is not a legal ingredient of the crime...in the context of proving specific intent, the existence of a plan or policy may become an important factor” and “may facilitate proof of the crime.”); Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment,

separating populations by gender, targeted burning of Rohingya areas and structures, and public sexual assault are all evidence of a coherent strategy employed by the Forces against Rohingya civilians during the 2016 and 2017 clearance operations.³⁵⁸ This strategy and the systematic way in which attacks were carried out are strong indications of the Security Forces' intent to destroy the Rohingya as a group.

Brutality and Public Nature of Sexual and Gender-Based Violence Crimes

The particularly brutal and public nature of sexual violence, mutilation and killing committed by Burmese Security Forces is a pattern that demonstrates their intent to instill terror in surviving Rohingya in order to destroy them as a group. Investigations reveal that sexual violence victims were raped and left in public spaces,³⁵⁹ were photographed by perpetrators,³⁶⁰ were raped in front of family members,³⁶¹ witnessed the murder of their children before abuses,³⁶² were laughed at during gang rapes,³⁶³ and were mutilated.³⁶⁴ Many acts of sexual violence in this context were committed with the intent to kill victims, as perpetrators simultaneously beat or mutilated victims and in many cases locked them in buildings before setting them on fire.³⁶⁵

This type of destruction: targets the social bonds between the Rohingya as a group by attacking symbols of purity and honor existing in cultural gender stereotypes,³⁶⁶ uses sexual violence as collective punishment and dehumanization,³⁶⁷ targets women and girls of reproductive age,³⁶⁸ and threatens the ability of Rohingya women to have future procreative relationships.³⁶⁹ The commission of crimes such as killing, sexual violence, mutilation, and other crimes against Rohingya in public, evidences a clear intent to affect the community as a whole rather than simply as individuals.³⁷⁰ The

para. 572, Aug. 2, 2001 (Finding that evidence that “has shown that the killings were planned: the number and nature of the forces involved, the standardised coded language used by the units in communicating information about the killings, the scale of the executions, the invariability of the killing methods applied, indicate that a decision was made to kill all the Bosnian Muslim military aged men.”).

358. UN Doc. A/HRC/39/64, para. 91.

359. Human Rights Watch, “Massacre by the River,” at 28; OHCHR, “Report of OHCHR mission to Bangladesh,” at 22, Feb. 3, 2017; Human Rights Watch, “All of My Body Was Pain,” at 17.

360. OHCHR, “Report of OHCHR mission to Bangladesh,” at 22, Feb. 3, 2017.

361. OHCHR, “Report of OHCHR mission to Bangladesh,” at 28, Feb. 3, 2017; Medecins Sans Frontieres, “No One Was Left,” at 19.

362. Human Rights Watch, “All of My Body Was Pain,” at 2.

363. Human Rights Watch, “All of My Body Was Pain,” at 16.

364. Human Rights Watch, “All of My Body Was Pain,” at 16; Kaladan Press Network, “Rape by Command,” at 38-39.

365. See, e.g., “Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict, UN Security Council Briefing on Myanmar,” Dec. 12, 2017.

366. UN Doc. S/2018/250, para. 9.

367. “Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict, UN Security Council Briefing on Myanmar,” Dec. 12, 2017; UN Doc. A/HRC/39/64, para. 38.

368. UN Doc. S/2018/250, para. 13; Human Rights Watch, “Massacre by the River,” at 26; UN Doc. A/HRC/39/64, para. 38; Medecins Sans Frontieres, “No One Was Left,” at 18-19.

369. UN Doc. S/2018/250, para. 55 (“Violence was visited upon women, including pregnant women, who are seen as custodians and propagators of ethnic identity, as well as on young children, who represent the future of the group.”); Kristen Gelineau, “AP: Rohingya Methodically Raped by Myanmar’s Armed Forces,” Assoc. Press, Dec. 11, 2017; Linah Alsaafin, “Bangladesh: Rohingya Rape Survivors Battle Stigma,” Al Jazeera, Aug. 8, 2018; Medecins Sans Frontieres, “No One Was Left,” at 13, 18. See also, Elise von Joeden-Forgey, “Gender and the Future of Genocide Studies and Prevention,” 7 Gender Stud. & Prevention 89, at 94-95, 2016.

370. See, e.g., Prosecutor v. Bagosora et al., ICTR-98-41-T, Judgment and Sentence, para. 1728, Dec. 18, 2008 (emphasizing the highly public nature of the genocidal rapes of Tutsi women and girls, many of which took place at road blocks);

existence of these tactics in both the 2016 and 2017 attacks is evidence of the Security Forces' intent to destroy the group through targeted gender-based crimes and harm.

Beyond Displacement

The Burmese Security Forces claim that “clearance operations” are intended to apprehend suspects involved in terrorist attacks, but those operations consistently targeted civilians who could not have been confused for insurgents (such as children and the elderly) in both the 2016 and 2017 attacks.³⁷¹ These acts had the effect of traumatizing surviving Rohingyas.³⁷² Survivors describe Security Forces shooting at fleeing civilians from helicopters and using rocket-propelled grenades.³⁷³ In October 2017, the UN described the “deliberate[] plant[ing] by the [Burmese] security forces after 23 August 2017” of landmines on the border “in an attempt to prevent the Rohingya refugees from returning to [Burma].”³⁷⁴

Burmese Security Forces also deliberately blocked humanitarian aid³⁷⁵ and took control of Rohingya crops,³⁷⁶ inflicting starvation conditions on remaining populations. The Forces' blockade of humanitarian aid in 2016³⁷⁷ and 2017 (beginning several weeks before August 25)³⁷⁸ is well documented by humanitarian organizations and in UN discussions, and is also consistent with the military's “Four Cuts” strategy (see below), which includes the targeting of civilian food sources as a way to challenge and eliminate perceived support for opposition groups.³⁷⁹ The blocking of humanitarian aid and food supplies demonstrates the Security Forces' intention to weaken Rohingya who survived initial attacks or remained in Burma as part of a larger destructive strategy.

Prosecutor v. Karemera & Ngirumpatse, Case No. ICTR-98-44-T, Judgment and Sentence, paras. 1667-68, Feb. 2, 2012 (finding that widespread and systematic rape, mutilation and sexual violence against Tutsi women “not only cause[d] serious bodily and mental harm to the women themselves, but also, by extension, to their families and communities.”); OHCHR, “Report of OHCHR mission to Bangladesh,” at 28, Feb. 3, 2017; Elise von Joeden-Forgey, “Gender and the Future of Genocide Studies and Prevention,” 7 *Gender Stud. & Prevention* 89, at 93, 2016.

371. See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 128, Sept. 2, 1998; Prosecutor v. Karemera & Ngirumpatse, Case No. ICTR-98-44-T, Judgment and Sentence, paras. 1626-27, Feb. 2, 2012 (“Following the speech [inciting to genocidal acts], Tutsis including women, children, and the elderly, who could not possibly have been suspected of being actual or potential combatants in the war between the Rwandan Armed Forces and the RPF, were being killed on a large scale in Butare prefecture. The Chamber has found that Karemera and Ngirumpatse were members of a JCE to destroy the Tutsi population in Rwanda by this point.”).

372. OHCHR, “Report of OHCHR mission to Bangladesh,” at 17, Feb. 3, 2017 (detailing an incident where military publicly set an elderly couple on fire).

373. OHCHR, “Report of OHCHR mission to Bangladesh,” at 39, Feb. 3, 2017; Amnesty Int'l, “We are at a Breaking Point,” at 19; Antoni Slodkowski et al., “How a Two-Week Army Crackdown Reignited Myanmar's Rohingya Crisis,” *Reuters*, Apr. 25, 2017.

374. OHCHR, “Mission Report of OHCHR Rapid Response Mission: 13-24 September 2017,” at 10, Oct. 11, 2017.

375. Many Rohingya communities have relied on humanitarian assistance because they are isolated in displacement camps since the 2012 violence, and the Myanmar authorities have allegedly used humanitarian assistance to attempt to induce compliance with citizenship “verification” processes in the past. Amnesty Int'l, “Caged Without a Roof,” at 30.

376. Amnesty Int'l, “Briefing: Myanmar Forces Starve, Abduct and Rob Rohingya,” at 2; Amnesty Int'l, “Remaking Rakhine State,” at 7, 9, 2018.

377. Amnesty Int'l, “Caged Without a Roof,” at 78.

378. Amnesty Int'l, “Caged Without a Roof,” at 79; Amnesty Int'l, “Briefing: Myanmar Forces Starve, Abduct and Rob Rohingya,” at 4.

379. See section below on “Statements that Support Inferences of Genocidal Intent,” for an explanation of the Four Cuts strategy.

Although mass and forced displacement was integral to the Forces' strategy to rid the region of Rohingya as a group,³⁸⁰ tactics that target vulnerable groups such as children and the elderly and fleeing civilians demonstrate intent to destroy, rather than simply remove, the population,³⁸¹ and to attack the future of the Rohingya as a group.³⁸²

Statements that Support Inferences of Genocidal Intent

Statements by Security Force and government officials, threats and insults reported by victims during attacks, and other instances of hate speech make clear that crimes committed against the Rohingya were committed in connection with their ethnic and religious identity.³⁸³ Burma's officials have used media to further the narrative of the Rohingya as "illegal immigrants" that are a "threat" to Burma's national character, with some public statements furthering the classification and dehumanization of Rohingyas as "others"³⁸⁴ and seeking to justify their removal from Burma.³⁸⁵ Although some reports note superficial government attempts to dissuade hate speech, many politicians and government officials have largely failed to condemn hate speech and failed to protect targeted populations.³⁸⁶ The Myanmar FFM determined that government and military rhetoric has condoned and mirrored inflammatory narratives, and has "fostered a climate in which hate speech thrives, human rights violations are legitimised, and incitement to discrimination and violence facilitated."³⁸⁷

Victim testimony includes instances of ethnic and religious references during attacks, and specifically during acts of sexual violence that make clear the connection between Security Forces' conduct and Rohingya ethnic and religious identity. Such statements include soldiers asserting Islam was not the "religion of Myanmar," calling the Rohingya "Bengalis", saying that Rohingyas would be "eliminated from Myanmar," and that "all Muslims" would be "vanish[ed]," and also indicated that attacks were collective punishment for alleged support for "insurgents."³⁸⁸ Other examples include :

-
- 380. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment (Volume I), para. 553, Mar. 24, 2016 ("Forcible transfer alone would not suffice to demonstrate the intent to 'destroy' a group but it is a relevant consideration as part of the Chamber's overall factual assessment."); Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, para. 568, Aug. 2, 2001; Prosecutor v. Krstić, Case No. IT-98-33-A, para. 31, Apr. 19, 2004 (both describing the combinations of killing and forced displacement of specific segments of the Bosnian Muslim population as purposeful and part of a plan to eliminate the possibility of the community reconstituting itself).
 - 381. OHCHR, "Mission Report of OHCHR Rapid Response Mission: 13-24 September 2017," at 6, Oct. 11, 2017; Kaladan Press Network, "Witness to Horror," at 33; Foster Klug, "AP Finds Evidence for Graves, Rohingya Massacre in Myanmar," Assoc. Press, Feb. 1, 2018. See also, Amnesty Int'l, "My World is Finished," at 20; Medecins Sans Frontieres, "No One Was Left," at 17.
 - 382. "Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict, UN Security Council Briefing on Myanmar," Dec. 12, 2017; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 121, Sept. 2, 1998.
 - 383. OHCHR, "Mission Report of OHCHR Rapid Response Mission: 13-24 September 2017," at 10, Oct. 11, 2017.
 - 384. United Nations, "Framework of Analysis for Atrocity Crimes," 19, 2014; Gregory H. Stanton, "The Ten Stages of Genocide," Genocide Watch, 2016 (describing othering and dehumanization).
 - 385. Hannah Beech, "Across Myanmar, Denial of Ethnic Cleansing and Loathing of Rohingya," N.Y. Times, Oct. 24, 2017; OHCHR, "Report of OHCHR mission to Bangladesh," at 5, Feb. 3, 2017; "Statement by High Commissioner for Human Rights Zeid Ra'ad al Hussein at the Special Session of the Human Rights Council on the human rights situation of the minority Rohingya Muslim population and other minorities in the Rakhine State of Myanmar," Dec. 5, 2017 ("There has been little, if any, action taken by the authorities to counter the prevailing vision, among many in Myanmar, of the Rohingya community as alien, barely human – undeserving of their human rights, and a threat to be destroyed.").
 - 386. Amnesty Int'l, "Caged Without a Roof," at 81; U.S. Holocaust Mem'l Museum & Fortify Rights, "They Tried to Kill Us All," at 16; but see, Human Rights Watch, "World Report 2018: Burma," at 5, 2018 (describing some government measures "against Buddhist monks and organizations that used extremist and ultranationalist rhetoric," though orders have been "violated without consequence").
 - 387. UN Doc. A/HRC/39/64, para. 73.
 - 388. OHCHR, "Report of OHCHR mission to Bangladesh," at 21, 42, Feb. 3, 2017; "Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict, UN Security Council Briefing on Myanmar," Dec. 12, 2017;

- “Call your Allah to come and save you.” “What can your Allah do for you? See what we can do?”³⁸⁹
- “The day of the big attack, the [Burmese] army came and surrounded our house. They started to scream that we do not belong in [Burma] and that it is not our country. Then they started to shoot. . .”³⁹⁰
- “The [Burmese] security forces came during prayer time. They set the mosque on fire, took our holy books and tore them apart in front of us, yelling, ‘Where is your Allah now, will he come and save you? You are Muslims and you do not belong here. We want a state only for us.’”³⁹¹
- “The one who raped me asked me where my husband was. I said ‘I do not know, my house burned’. He said: ‘Tell the truth and we will release you. Then he beat me and raped me.’”³⁹²
- “I only understood one word ‘khalar’ that they were repeating, which means Bengali people from Bangladesh”³⁹³
- “All Muslims must be wiped out of [Burma].” “There’s no place for Muslims here.”³⁹⁴
- “You are just raising your kids to kill us, so we will kill your kids.”³⁹⁵
- “You Muslim bitch.”³⁹⁶
- “We will kill you because you are Muslim.”³⁹⁷
- “They were saying that my husband was sheltering people from Bangladesh, I said no, we are all Burmese but they did not believe me. They said that they would kill all Muslims. They beat us with wooden sticks and rifle butts.”³⁹⁸
- “If they’re Bengali, they’ll be killed.”³⁹⁹
- “If we find any terrorists we’ll burn your village to ashes. Your future generations won’t last.”⁴⁰⁰
- “The central government sent us specifically to kill you Bengali people.”⁴⁰¹

Antoni Slodkowski et al., “How a Two-Week Army Crackdown Reignited Myanmar’s Rohingya Crisis,” Reuters, Apr. 25, 2017; Human Rights Watch, “Burma: Security Forces Raped Rohingya Women, Girls”; U.S. Holocaust Memorial Museum & Fortify Rights, “They Tried to Kill Us All,” at 12.

389. OHCHR, “Report of OHCHR mission to Bangladesh,” at 42, Feb. 3, 2017.

390. OHCHR, “Mission Report of OHCHR Rapid Response Mission: 13-24 September 2017,” at 4, Oct. 11, 2017.

391. OHCHR, “Mission Report of OHCHR Rapid Response Mission: 13-24 September 2017,” at 8, Oct. 11, 2017.

392. OHCHR, “Report of OHCHR mission to Bangladesh,” at 21, Feb. 3, 2017.

393. OHCHR, “Report of OHCHR mission to Bangladesh,” at 21, Feb. 3, 2017.

394. Kate Brannen, “When Claims of ‘Fake News’ Hide Ethnic Cleansing,” Just Sec., May 8, 2018.

395. Human Rights Watch, “Burma: Security Forces Raped Rohingya Women, Girls.”

396. Human Rights Watch, “Burma: Security Forces Raped Rohingya Women, Girls.”

397. Human Rights Watch, “Burma: Security Forces Raped Rohingya Women, Girls.”

398. OHCHR, “Report of OHCHR mission to Bangladesh,” at 29-30, Feb. 3, 2017.

399. Simon Lewis et al., “Tip of the Spear: The Shock Troops that Expelled the Rohingya from Myanmar,” Reuters, June 26, 2018.

400. Simon Lewis et al., “Tip of the Spear: The Shock Troops that Expelled the Rohingya from Myanmar,” Reuters, June 26, 2018.

401. Simon Lewis et al., “Tip of the Spear: The Shock Troops that Expelled the Rohingya from Myanmar,” Reuters, June 26, 2018.

The references to the Muslim religion and Rohingya as “Bengalis” make clear that the Rohingya were targeted because of their religious or ethnic identity.⁴⁰² By describing Rohingya by other terms, including “Rakhine State Muslims”⁴⁰³ or “Bengali,” Burmese authorities display their intent to portray the Rohingya as foreigners whose presence is irreconcilable with Burma’s “national character” and “national races.”⁴⁰⁴ On September 10, 2017, Senior General Min Aung Hlaing described the “Bengali issue” as originating in the colonial era, and that “[e]fforts to solve this problem by the successive governments went unfinished.”⁴⁰⁵ He also urged other, non-Rohingya, internally displaced peoples (as opposed to Rohingya refugees who had fled to Bangladesh) to return to their communities, saying that the “necessary” and “important” thing is “to have our people in the region” and to “have control of our region with our national races...that is their rightful place.”⁴⁰⁶

The government and military continue to portray, or at least fail to distinguish between, Rohingya civilians and ARSA insurgents, commonly referring to whole communities as “Bengali terrorists.”⁴⁰⁷ Even women and children are portrayed as “manipulated by shadowy groups in Bangladesh and elsewhere in the Islamic world.”⁴⁰⁸ This lack of distinction resonates with the military’s Four Cuts

402. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment (Volume I), para. 551, Mar. 24, 2016. In some attacks, perpetrators have targeted symbols of the Muslim religion, such as mosques, the Quran, civilians’ beards, and religious leaders. Foster Klug, “AP Finds Evidence for Graves, Rohingya Massacre in Myanmar,” Assoc. Press, Feb. 1, 2018; OHCHR, “Report of OHCHR mission to Bangladesh,” at 32, 36, Feb. 3, 2017. During the 2016 conflict, women were also reportedly raped inside of mosques. OHCHR, “Report of OHCHR mission to Bangladesh,” at 32, Feb. 3, 2017.

403. See, e.g., Rodion Ebbighausen, “Pope Faces Tightrope Act in Myanmar Amid Rohingya Crisis,” Deutsche Welle, Nov. 27, 2017.

404. See, e.g., Amnesty Int’l, “Caged Without a Roof,” at 28, 96; Senior General Min Aung Hlaing, Facebook Post, “Lack of country-loving spirits may lead to disunity and all citizens should have country-loving spirits, patriotic spirits and Myanmar spirits, Nay Pyi Taw,” September 10, 2017 (“The term ‘Rohingya’ was not present in the country’s history. The term ‘Bengali’ was used since the colonial era. The country could not accept and recognize the term ‘Rohingya’ by hiding the truth. Rakhine ethnics are only our indigenous people who had long been living there since the time of their forefathers.”); Speech by Senior General Min Aung Hlaing, “As Tatmadaw members legally hold arms in serving duties, they must abide by military discipline, civil-military laws, international laws and conventions and must be free from personality cult and isms and must have consideration in accord with the law,” April 18, 2018 (“Every country has its national character. Being the strongest organization, the Tatmadaw must try to safeguard Myanmar from losing national character due to the current mainstreams.”); Hannah Beech, “Across Myanmar, Denial of Ethnic Cleansing and Loathing of Rohingya,” N.Y. Times, Oct. 24, 2017.

405. Facebook Post, Senior General Min Aung Hlaing, “Lack of country-loving spirits may lead to disunity and all citizens should have country-loving spirits, patriotic spirits and Myanmar spirits, Nay Pyi Taw,” September 10, 2017; *see also*, James Hookway, “Myanmar Says Clearing of Rohingya is Unfinished Business from WWII,” Wall Street J., Sept. 2, 2017.

406. Jurawee Kittisilpa, “Myanmar Army Chief Urges Internally Displaced to Return to Rakhine,” Reuters, Sept. 21, 2017.

407. Amnesty Int’l, “My World is Finished,” at 43; Int’l Crisis Group, “Myanmar’s Rohingya Crisis Enters a Dangerous New Phase,” at 13; Speech by Senior General Min Aung Hlaing, “As Tatmadaw members legally hold arms in serving duties, they must abide by military discipline, civil-military laws, international laws and conventions and must be free from personality cult and isms and must have consideration in accord with the law,” April 18, 2018 (“the Bengali terrorists failed to achieve their aim... Fearing punishment for their lawless acts, they as well as their families, relatives and accomplices fled to the other country. As they did not dare to come back for fear of punishment, they made false accusations against the Tatmadaw to mislead the international community.”); Amnesty Int’l, “We are at a Breaking Point,” at 9; Tatmadaw True News Information Team, “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,” paras. 13-14, Nov. 13, 2017 (stating that prior to the August 25 attacks, “Villagers from the most of the Bengali villages were persuaded to become terrorists.” And that “action will be taken against those responsible and arrests of the remaining ARSA Bengali terrorists will continue.”); OHCHR, “Report of OHCHR mission to Bangladesh,” at 13, 15, Feb. 3, 2017.

408. Hannah Beech, “Myanmar Official Line: Rohingya are Returning. But Cracks in that Story Abound,” N.Y. Times, Aug. 2, 2018.

strategy, which is a longstanding Tatmadaw strategy that purposely targets civilian populations through four “cuts” (food, funds, intelligence, recruits) in order to reach rebel forces perceived to be associated with them.⁴⁰⁹ The strategy’s tactics of isolating territory, forcing populations to move, destroying villages, confiscating food and preventing humanitarian aid, and using a “calculated policy of terror,” parallels many of the specific acts committed during the 2016 and 2017 attacks,⁴¹⁰ including the use of sexual violence, public humiliation, and collective punishment to terrorize the Rohingya community as a whole.

Conclusion

When examined together, the scale and knowledge, the longstanding discrimination against the Rohingya, the systemic pattern of attack, the brutal and public sexual and gender-based violence crimes, the consequences beyond displacement that have occurred and the government and the Forces’ own statements, are strong indicators of genocidal intent to destroy the Rohingya.

2. Killing of Rohingya Women and Girls

In addition to the chapeau element of intent to destroy, genocide can be committed by the killing of one or more persons belonging to a particular group.⁴¹¹ Indeed, killing is mistakenly, more often than not, the only act examined in determining the occurrence of genocide. In general, these examinations focus only on relatively “fast” killings of men and boys (e.g. execution by gunshot), and leave behind gendered aspects of the act of killing.

The requirements of “killing” as a genocidal act are equivalent to those for murder as a crime against humanity, namely, when a perpetrator intentionally causes the death of one or more persons by act or omission.⁴¹²

Burmese Security Forces targeted all Rohingya for “fast” manner killings, openly targeting men, women, and children for intentional killings by gunfire, artillery explosions, and beating.⁴¹³ After initial waves of indiscriminate attacks, Security Forces systematically swept through Rohingya villages, calling out families from their homes, singling out men and boys for instantaneous execution, and women and girls for physical and sexual assault before murder.⁴¹⁴

The non-instantaneous killings of females demonstrates how women fit in to the Burmese Security Forces’ deeply gendered conceptions of dominance, power, and masculinity—highlighting the misogyny of the Forces, their need to humiliate and diminish women and girls, and how this informed their genocidal strategies.

409. See, e.g., OHCHR, “Report of OHCHR mission to Bangladesh,” at 41, Feb. 3, 2017 (clearance operations in the most affected villages seem to be “in line with the Tatmadaw’s counter-insurgency ‘four cuts’ strategy – a strategy developed in the 1960s to cut off rebel forces from their four main support sources (food, funds, intelligence, recruits), and largely unchanged since.”).

410. Int’l Crisis Group, “Myanmar: A New Muslim Insurgency in Rakhine State,” at 7; OHCHR, “Report of OHCHR mission to Bangladesh,” at 41, Feb. 3, 2017.

411. Elements of Crimes, art. 6(a).

412. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Trial Judgment, para. 542, Mar. 24 2016

413. UN Doc. A/HRC/37/70, at para. 46; OHCHR, “Mission report of OHCHR rapid response mission: 13-24 Sept. 2017,” at 6; US Holocaust Museum & Fortify Rights, “Atrocity Crimes Against Rohingya Muslims,” at 9.

414. UN Doc. A/HRC/37/70, at 46.

For example, many women and girls who were raped died from the injuries they sustained, including as a consequence of gang rape.⁴¹⁵ One survivor recalled: “During their operations, the army entered our house, where they found my mother, wife and sister at home. They took my 18-year-old sister to nearby bushes and gang-raped her. She was brought back after the rape. She was in a critical situation and died the same day.”⁴¹⁶

Additionally, the OHCHR gathered testimonies from witnesses whose female family members were killed when their throats were slit by long knives that are usually used for slaughtering livestock.⁴¹⁷ For instance, one 14-year-old girl saw her two sisters killed in a knife attack: “When my two sisters, 8 and 10 years old, were running away from the house, having seen the military come, they were killed. They were not shot dead, but slaughtered with knives.”⁴¹⁸ The OHCHR also collected testimonies about entire families, including elderly and disabled people, being forced and locked into homes that were set on fire.⁴¹⁹

These latter examples—killings by stabbing/slashing and burning—mirror methods usually reserved for destroying objects and property like animals, crops, or building structures. Choosing these means as those fit for murdering women shows the perceived lower status of Rohingya women and girls—akin to animals or objects—in the eyes of their murderers.⁴²⁰

Thus, while all Rohingya were targeted for the genocidal act of killing, women and girls were killed in ways that reflected deep-seated gender power dynamics, demonstrating the depth of the Burmese Forces’ hatred of Rohingya women and girls. Furthermore, the slower killings of women and girls by rape, stabbing, or burning are no less genocidal than the immediate and faster killings by gunshot, and must be understood to be a part of the continuum of genocidal violence.

3. Causing Serious Bodily and Mental Harm to Rohingya Women and Girls

Causing serious bodily or mental harm to an individual or members of a particular group, when conducted with the requisite intent to destroy, constitutes genocide.⁴²¹

In determining the meaning of “serious bodily or mental harm,” courts have repeatedly held that the harm must be assessed on a case-by-case basis.⁴²² The harm does not have to be permanent or irremediable⁴²³ and “[t]he degree of threat to the group’s destruction may...be considered as a measure of the seriousness of the bodily or mental harm.”⁴²⁴ Additionally, the harm must go “beyond temporary unhappiness, embarrassment or humiliation” and result “in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.”⁴²⁵ Bodily harm is typically

415. OHCHR, “Report of OHCHR mission to Bangladesh,” at 23, Feb. 3, 2017.

416. OHCHR, “Report of OHCHR mission to Bangladesh,” at 23, Feb. 3, 2017.

417. OHCHR, “Report of OHCHR mission to Bangladesh,” at 16, Feb. 3, 2017.

418. OHCHR, “Report of OHCHR mission to Bangladesh,” at 16, Feb. 3, 2017.

419. OHCHR, “Report of OHCHR mission to Bangladesh,” at 16, Feb. 3, 2017.

420. UN Doc. A/HRC/37/70, at 48; OHCHR, “Report of OHCHR mission to Bangladesh,” at 23, Feb. 3, 2017; United States Holocaust Museum & Fortify Rights, “Atrocity Crimes Against Rohingya Muslims,” at 9.

421. Elements of Crimes, art. 6(b).

422. Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, paras. 108, 110, May 21, 1999.

423. Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, para. 690, Sept. 1, 2004 (citing Stakić Trial Judgment, para. 516; Akayesu Trial Judgment, paras. 502-504; Kayishema Trial Judgment, paras. 108-110; Kajelijeli Trial Judgment, paras. 814-816).

424. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment - Vol. I of IV, para. 544, Mar. 24, 2016.

425. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, para. 513, Aug. 2, 2001.

defined in relevant case law as “harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses.”⁴²⁶ With respect to serious mental harm, courts have found that it “includes ‘more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat.’”⁴²⁷

Burmese Security Forces inflicted serious bodily and mental harm on Rohingya women and girls through a range of means, including rape and sexual violence, beating, torture and cruel, inhuman or degrading treatment, and forced displacement. Importantly, many of the ways these harms were perpetrated amount to overlapping acts, each qualifying as causing serious bodily and mental harm. In general, the Security Forces’ conduct caused a great deal of mental anguish to Rohingya women and girls, including in the time leading up to the attacks when women reported living in “constant fear of sexual assault by security forces.”⁴²⁸ With the commencement of the attacks came the inevitable deaths (detailed above). Besides the bodily harm involved with death, there is also significant mental harm inflicted as a result of witnessing a loved one, including one’s own children, killed, beaten, raped, and sexually abused. More precisely, such violence can have “the effect of inflicting often severe mental anguish, and instilling fear.”⁴²⁹ In the case of the violence in Rakhine, Burmese Security Forces perpetrated extreme acts of cruelty such as killing children by throwing them into the river or fires, slitting their throats, shooting them, and hacking them with machetes.⁴³⁰ Witnessing such unimaginable horror, which included killings of infants and toddlers,⁴³¹ certainly impacts an individual’s ability to continue leading a normal life. Since many of the Rohingya men were targeted for immediate killing, women and girls were often disproportionately the ones forced to witness these acts.

Rape and Sexual Violence—Serious Bodily Harm

The particular conduct causing serious bodily harm may include rape and other forms of sexual violence.⁴³² The ICTR classified rape and sexual violence as “one of the worst ways” to inflict harm on a victim since “he or she suffers both bodily and mental harm,”⁴³³ and found that sexual violence plays an “integral” role in the destruction of a particular group.⁴³⁴

The Burmese Forces’ campaign of rape and sexual violence caused serious bodily harm to Rohingya women and girls. The rapes inflicted serious injury to women and girls’ bodies, resulting in vaginal lacerations, extensive vaginal bleeding, infections, and severe pain.⁴³⁵ Such harm was compounded in the widespread instances of gang rape, where victims were held down and penetrated by multiple

426. Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, para. 109, May 21, 1999.

427. Prosecutor v. Seromba, Case No. ICTR-2001-66-A, Judgment, para. 46, Mar. 12, 2008 (citing Kajelijeli Trial Judgment, para. 815, referring to Kayishema and Ruzindana Trial Judgment, para. 110; Semanza Trial Judgment, para. 321).

428. Kaladan Press Network, “Rape by Command,” at 22.

429. OHCHR, “Mission report of OHCHR rapid response mission: 13-24 Sept. 2017,” at 8.

430. UN Doc. A/HRC/37/70, para. 45; OHCHR, “Report of OHCHR mission to Bangladesh,” at 24, Feb. 3, 2017; OHCHR, “Mission report of OHCHR rapid response mission: 13-24 September 2017,” at 5; HRW, “Massacre by the River,” at 21.

431. HRW, ‘All of My Body Was Pain,’ at 24.

432. Elements of Crimes, art. 6(b).

433. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 731, Sept. 2, 1998.

434. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 731, Sept. 2, 1998.

435. OHCHR, “Mission report of OHCHR rapid response mission: 13-24 Sept. 2017,” at 7; UN Doc. A/HRC/37/70, para. 48; HRW, “Burma: Security Forces Raped Rohingya Women, Girls,” Feb. 6, 2017; HRW, ‘All of My Body Was Pain,’ at 3; Kristen Gelineau, “Rohingya methodically raped by Myanmar’s armed forces,” AP, at 8, Dec. 11, 2017.

soldiers in turn.⁴³⁶ In some cases, women and girls ultimately died as a result of rape and gang rape.⁴³⁷ For those who survived, the physical journey to Bangladesh was an excruciating experience in which some women had to be carried by relatives and others because they could not walk.⁴³⁸

Additional acts of sexual violence accompanied the Burmese Security Forces' attacks on Rohingya women and girls. For example, some victims were mutilated,⁴³⁹ one woman's nipples were cut off,⁴⁴⁰ and an older woman's vagina was cut with a knife.⁴⁴¹ Additionally, in instances where women tried to resist their perpetrators, one victim received an 8-10 cm long scar near her vagina from being stabbed trying to defend herself against rape, and another was burned on her leg from a soldier putting a burning piece of plastic on her.⁴⁴² In this way, attempts to escape or resist sexual violence led to additional acts of serious harm.

Rape and Sexual Violence—Serious Mental Harm

Rape and sexual violence are amongst “the worst ways” to inflict serious mental harm, in part because, as the ICTR found, they cause “the destruction of the spirit, of the will to live, and of life itself.”⁴⁴³

The instances of rape and sexual violence by the Burmese Security Forces inevitably inflict serious mental harm on Rohingya women and girls. Women reported that during rapes they feared that they would be killed.⁴⁴⁴ Women and girls—some only five years old—were raped in front of others, including family and children.⁴⁴⁵ As one young woman stated about her sister who was raped, “her dignity is destroyed.”⁴⁴⁶ Other “severe mental consequences” include suicidal thoughts, “insomnia, depression, fainting, persistent fear, and getting startled at any noise.”⁴⁴⁷ In some cases pregnant women were raped and expressed fears of losing their babies as a result of the attacks.⁴⁴⁸ In one reported instance, a perpetrator slit open the pregnant woman's stomach and killed her unborn baby with a knife after having raped the woman.⁴⁴⁹ In another, after a “brutal gang rape,” one pregnant

436. HRW, ‘All of My Body Was Pain,’ at 1-2.

437. Kaladan Press Network, “Rape by Command,” at 11, 37; Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict, Ms. Pramila Patten – Security Council Briefing on Myanmar, at 2, Dec. 12, 2017; OHCHR, “Mission report of OHCHR rapid response mission: 13-24 Sept. 2017,” at 23; Statement by Mr. Marzuki Darusman, Chairperson of the Independent International Fact-Finding Mission on Myanmar – 37th session of the Human Rights Council, at 5, Mar. 12, 2018.

438. John Sifton, “Submission to the US Senate Foreign Relations Committee on the Rohingya Crisis in Burma,” Human Rights Watch, at 3, Oct. 24, 2017; Kaladan Press Network, “Rape by Command,” at 24; Antoni Slodkowski et al., “How a Two-Week Army Crackdown Reignited Myanmar's Rohingya Crisis,” Reuters, Apr. 25, 2017.

439. Kaladan Press Network, “Rape by Command,” at 9-10; Fortify Rights & US Holocaust Memorial Museum, ‘They Tried to Kill Us All,’ at 10.

440. OHCHR, “Mission report of OHCHR rapid response mission: 13-24 Sept. 2017,” at 7.

441. Kaladan Press Network, “Witness to horror,” at 24.

442. OHCHR, “Report of OHCHR mission to Bangladesh,” at 22, Feb. 3, 2017.

443. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 732, Sept. 2, 1998.

444. HRW, ‘All of My Body Was Pain,’ at 16.

445. OHCHR, “Mission report of OHCHR rapid response mission: 13-24 Sept. 2017,” at 4, 7-8; Kaladan Press Network, “Witness to horror,” at 1-2; Fortify Rights & US Holocaust Memorial Museum, ‘They Tried to Kill Us All,’ at 10; OHCHR, “Report of OHCHR mission to Bangladesh,” at 28, Feb. 3, 2017.

446. OHCHR, “Mission report of OHCHR rapid response mission: 13-24 Sept. 2017,” at 7.

447. OHCHR, “Report of OHCHR mission to Bangladesh,” at 22, Feb. 3, 2017; HRW, ‘All of My Body Was Pain,’ at 30.

448. OHCHR, “Mission report of OHCHR rapid response mission: 13-24 Sept. 2017,” at 8; OHCHR, “Report of OHCHR mission to Bangladesh,” at 21, Feb. 3, 2017; HRW, ‘All of My Body Was Pain,’ at 18.

449. OHCHR, “Mission report of OHCHR rapid response mission: 13-24 Sept. 2017,” at 7.

woman reported that she woke up to significant bleeding and suffered a miscarriage.⁴⁵⁰ Taken individually and collectively, these examples certainly rise to the required level for serious mental harm of impacting the victims' ability to lead normal lives.

Beatings, Torture, and Inhumane or Degrading Treatment

Additional acts such as beatings,⁴⁵¹ death threats, "harm that damages health or causes disfigurement or serious injury," torture, and inhumane or degrading treatment may also amount to serious bodily or mental harm.⁴⁵²

The Burmese Security Forces' rapes were often perpetrated with additional violence, which caused serious bodily harm to Rohingya women and girls. Human rights organizations have found that "[r]ape survivors spoke of enduring numerous abuses at once."⁴⁵³ Women and girls were beaten with guns, rifles, and fists, kicked with boots, slapped, and burned.⁴⁵⁴ One woman reported that Security Forces "used a lighter to burn her genitals."⁴⁵⁵ Victims were also bitten, including on their breasts, and cut with knives, with some victims' breasts cut off and others' vaginas cut.⁴⁵⁶ In one particular instance, as a woman was being raped the soldiers stuck her in the side with a knife to keep her from moving.⁴⁵⁷ This type of violence inflicts serious injuries which likely amount to serious bodily harm.

Forced Displacement

Forcible transfer or deportation and persecution have also been determined to be included in the acts that cause serious bodily and mental harm.⁴⁵⁸ The ICTY found that, depending on the circumstances, forced displacement may cause serious mental harm by triggering "grave and long-term disadvantage to a person's ability to lead a normal and constructive life so as to contribute or tend to contribute to the destruction of the group as a whole or a part thereof."⁴⁵⁹

The Burmese Security Forces' sexual violence towards Rohingya women and girls has been called a "driver" and "push factor" for forced displacement on a massive scale, and a calculated tool of terror aimed at the extermination and removal of the Rohingya as a group."⁴⁶⁰ Similarly, the Forces' policy and practice of totally destroying Rohingya villages and townships further forces them away from their homes and communities. In the few months after the October 2016 attacks, human rights organizations documented the Security Forces' "mass movement ... into at least 40 villages across a relatively vast geographic area."⁴⁶¹ More recent reports indicate that "at least 392 villages (40%

450. HRW, 'All of My Body Was Pain,' at 17.

451. Prosecutor v. Tolimir, Case No. IT-05-88/2-T, Judgment, para. 737, Dec. 12, 2012.

452. Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, para. 690, Sept. 1, 2004.

453. HRW, 'All of My Body Was Pain,' at 3.

454. HRW, 'All of My Body Was Pain,' at 2-3, 16; Kaladan Press Network, "Rape by Command," at 11, 38.

455. Kaladan Press Network, "Witness to horror," at 25.

456. Kaladan Press Network, "Rape by Command," at 11, 38, 43; Kaladan Press Network, "Witness to horror," at 1-2; HRW, 'All of My Body Was Pain,' at 16.

457. HRW, 'All of My Body Was Pain,' at 1.

458. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, para. 513, Aug. 2, 2001; Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment - Vol. I of IV, paras. 543-545, Mar. 24, 2016; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 504, Sept. 2, 1998.

459. Prosecutor v. Tolimir, Case No. IT-05-88/2-A, Judgment, para. 209, April 8, 2015.

460. Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict, Ms. Pramila Patten – Security Council Briefing on Myanmar, Dec. 12, 2017.

461. Fortify Rights & US Holocaust Memorial Museum, 'They Tried to Kill Us All,' at 14.

of all settlements in northern Rakhine state) were partially or totally destroyed, encompassing at least 37,700 individual structures.”⁴⁶² The Myanmar FFM’s report called specific attention to how “[r]ape and sexual violence ha[s] been a particularly egregious and recurrent feature of the targeting of the civilian population.”⁴⁶³ As a result of the Burmese Security Forces’ campaigns, over 700,000 Rohingya civilians have fled to Bangladesh and currently live in refugee camps.⁴⁶⁴ Displacing massive populations has obvious impacts on a person’s ability to lead a normal life likely causing serious mental harm, since they are no longer living in their homes but rather forced to begin a new, often extremely limited, existence within refugee camps.

A gendered analysis of such forced displacement reveals an acute impact on women and girls and their inability to access health care, including care for victims of rape and sexual violence.⁴⁶⁵ After the attacks in October 2016, the UN Population Fund “warned of ‘grave consequences’ if the acute health, protection and hygiene needs of women and girls were not promptly addressed.”⁴⁶⁶ Since then, the crisis has only worsened. Thus, the serious bodily and mental harm caused by the Burmese Security Forces’ widespread sexual violence on Rohingya women and girls has a ripple effect, from the immediate wounds inflicted by rape and sexual abuse, to the exacerbated injuries experienced during the exodus to Bangladesh, to the suffering caused by delays in victims’ access to adequate health care, shelter, and other basic necessities.

Conclusion

As shown above, the Burmese Security Forces’ rape and sexual violence, beatings, torture, inhumane and degrading treatment, and forced displacement of Rohingya women and girls caused serious bodily and mental harm constituting the crime of genocide.

4. Deliberately Inflicting on Rohingya Women and Girls Conditions of Life Intended to Bring About their Physical Destruction

The deliberate infliction of conditions of life calculated to bring about physical destruction, when combined with the chapeau element of intent to destroy, constitutes genocide.⁴⁶⁷ The ICTR found that such conditions “include methods that do not immediately kill members of a group, but which, ultimately, seek their physical destruction.”⁴⁶⁸ These may include deliberate deprivation of resources essential to survival, such as food, water, clothing, sanitation, or medical care, or subjecting members of a group to systemic expulsion from homes or excessive physical exertion or work.⁴⁶⁹ Further, the

462. UN Doc. A/HRC/39/64, para. 42.

463. UN Doc. A/HRC/39/64, para. 79

464. Inter Sector Coordination Group, “Situation Report Data Summary,” at 1, Aug. 16, 2018.

465. Amnesty Int’l, ‘We are at Breaking Point,’ at 33; HRW, “Burma: Security Forces Raped Rohingya Women, Girls,” Feb. 6, 2017.

466. Amnesty Int’l, ‘We are at Breaking Point,’ at 33.

467. Rome Statute, art. 6(c).

468. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 505, Sept. 2, 1998. The physical destruction of the group does not necessarily need to have been successfully achieved, as acts would then likely constitute other acts of genocide (killing or inflicting serious bodily or mental harm). Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment (Volume I), para. 546, Mar. 24, 2016; Prosecutor v. Brđanin, Trial Judgment, Case No. IT-99-36-T, para. 691, Sept. 1, 2004 (“does not require proof of the physical destruction in whole or in part of the targeted group”).

469. Elements of Crimes, art. 6(c)(4), fn. 4; Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, paras. 115-16, May 21, 1999; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 506, Sept. 2, 1998; Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, para. 52, Dec. 6, 1999; Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment, para. 157, Jan. 27, 2000; Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, para.

ICTR found that rape and sexual violence themselves can constitute a condition of life calculated to bring about the physical destruction of a group,⁴⁷⁰ as has the International Court of Justice (“ICJ”).⁴⁷¹ In “absence of direct evidence” of deliberate calculation to bring about physical destruction, courts have examined the “actual nature” of conditions, the length of time they were imposed, and the group’s vulnerability to determine the “objective probability” that conditions would lead to the group’s destruction.⁴⁷²

In Rakhine State, the Burmese Security Forces’ conduct has undoubtedly inflicted conditions of life intended to bring about the physical destruction of the Rohingyas, including through extensive and brutal sexual violence, systematic expulsion from homes, starvation and denial of humanitarian access, and preventing healthcare access.

Sexual Violence

Sexual violence can bring about the physical destruction of a group, even where it does not “lead immediately to the death of members of the group,” because it is capable of destroying group members’ potential for future relationships and marriages, and of ostracizing them from the community (or in the extreme, subjecting them to increased risk of violence).⁴⁷³ Sexual violence leaves lasting devastation on its victims and their communities, including trauma, stigma, poverty, and health conditions.⁴⁷⁴

The calculated sexual violence perpetrated against the Rohingya fits this definition. Sexual violence occurred in diverse geographic areas through the duration of both clearance operations and was integral to the Burmese Security Forces’ strategy to destroy the Rohingya.⁴⁷⁵ The brutal nature of the sexual violence perpetrated against the Rohingya, its persistence within the conflict, and the community’s vulnerability all point to its calculated nature as a condition of life calculated to bring about physical destruction.⁴⁷⁶ Targeting of women of childbearing age (including pregnant women)⁴⁷⁷ and the public nature of sexual violence⁴⁷⁸ also attacked the dignity, perceived religious purity, and societal roles of Rohingya women and girls as wives and mothers.⁴⁷⁹

517, July 31, 2003; Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment (Volume I), para. 547, Mar. 24, 2016; Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Second Decision on the Prosecution’s Application for a Warrant of Arrest, paras. 32-40, July 12, 2010.

470. Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, para.116, May 21, 1999.

471. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), 2015 I.C.J. 3, para. 362-64, Feb. 3, 2015.

472. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment (Volume I), paras. 546-48, Mar. 24, 2016.

473. See, e.g., M. Cherif Bassiouni & Peter Manikas, “The Law of the International Criminal Tribunal for the Former Yugoslavia,” at 587, 1996; UN Doc. S/2018/250, para. 13; see also section above on “Brutality and Public Nature of Sexual Violence Crimes.”

474. UN Doc. S/2018/250, para. 14.

475. UN Doc. S/2018/250, paras. 55, 56; Kristen Gelineau, “AP: Rohingya Methodically Raped by Myanmar’s Armed Forces,” Assoc. Press, Dec. 11, 2017.

476. Human Rights Watch, “Burma: Security Forces Raped Rohingya Women, Girls”; Kaladan Press Network, “Rape by Command,” at 9, 11, 26; Human Rights Watch, “Massacre by the River,” at 21.

477. OHCHR, “Report of OHCHR mission to Bangladesh,” at 19, Feb. 3, 2017.

478. See, e.g., OHCHR, “Report of OHCHR mission to Bangladesh,” at 22, Feb. 3, 2017; Human Rights Watch, “Massacre by the River,” at 28.

479. UNDP et al., “Situational Analysis: Gender Equality and Women’s Rights in Myanmar,” at 77; Women’s League of Burma, “Same Impunity, Same Patterns,” at 14.

In addition to coercing Rohingya communities to flee, the brutality, violence, and public nature of sexual violence committed against Rohingya women and girls in some cases resulted in their death.⁴⁸⁰ But death is only one form of physical destruction, and sexual violence also threatens the physical and biological integrity of the Rohingya as a group because it resulted in serious injury and trauma, both to individual survivors as well as their families and communities who were often forced to witness acts of sexual violence.⁴⁸¹

Sexual violence survivors endure serious consequences that are capable of destroying the Rohingya as a group, including sexually transmitted diseases⁴⁸² and lasting injuries compounded by lack of available medical care,⁴⁸³ loss of acceptance and support within their community due to stigma,⁴⁸⁴ and loss of the desire or ability to have future procreative relationships (whether due to physical or psychological suffering⁴⁸⁵). Although successful physical destruction is not necessary to prove that “conditions of life” were calculated and likely to bring it about, the physical and biological destruction of victims and their communities is very strong evidence of the “deliberate calculation” and the “objective probability” that sexual violence would lead to the destruction of the Rohingya as a group.⁴⁸⁶

Systematic Expulsion

The “systematic expulsion from homes” can amount to the genocidal act of inflicting conditions to totally destroy a group.⁴⁸⁷ While the ICTY has explained that conditions must be more than deportation and dissolution of the group,⁴⁸⁸ the ICJ has noted that forced displacement can potentially constitute genocide when accompanied by the required intent to destroy the group.⁴⁸⁹ In the context of the Darfur situation, the ICC concluded that in addition to contamination of wells and water pumps, there were reasonable grounds to believe that “the forcible transfer of hundreds of thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups coupled with the resettlement in those villages and lands they had left by members of other tribes” were conditions of life calculated to bring about physical destruction of the groups as part of a genocidal policy.⁴⁹⁰

480. “Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict, UN Security Council Briefing on Myanmar,” Dec. 12, 2017.

481. OHCHR, “Report of OHCHR mission to Bangladesh,” at 28, Feb. 3, 2017.

482. The deliberate infection of Rwandan women with HIV as part of the Rwandan genocide is one example. Mark A. Drumbl, “She Makes Me Ashamed to Be a Woman: The Genocide Conviction of Pauline Nyiramasuhuko, 2011,” 34 Mich. J. Int’l L. 559, 2013. See also, Obijiofor Aginam, “Rape and HIV as Weapons of War,” United Nations University, June 27, 2012; Jennifer Hentz, “The Impact of HIV on the Rape Crisis in the African Great Lakes Region,” 12 Human Rights Brief 12-15, 2005.

483. Amnesty Int’l, “We are at a Breaking Point,” at 26.

484. Human Rights Watch, “All of My Body Was Pain,” at 33-34.

485. Human Rights Watch, “All of My Body Was Pain,” at 29, 32.

486. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment (Volume I), para. 548, Mar. 24, 2016.

487. Elements of Crimes, art. 6(c) Element 4, fn. 4

488. Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, paras. 519, 557, July 31, 2003. Deportation was not considered as “conditions of life calculated to bring about physical destruction” itself in the Brđanin Trial Judgment because it had not been pleaded in the indictment, but was included as evidence of genocidal intent. Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, para. 693, Sept. 1, 2004.

489. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), 2015 I.C.J. 3, para. 376, Feb. 3, 2015.

490. Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Second Decision on the Prosecution’s Application for a Warrant of Arrest, para. 38, July 12, 2010.

Burmese Security Forces systematically expelled Rohingya from their homes and communities in both 2016⁴⁹¹ and 2017, but the scale of displacement in the 2017 operation was unprecedented: 270,000 refugees fled to Bangladesh in the first two weeks of the violence, and over 700,000 Rohingya fled in the following ten months (more than 80% of the Rohingya population in northern Rakhine State).⁴⁹² The expulsion was well-organized and coordinated, and occurred over time and in similar patterns in villages throughout Rakhine State.⁴⁹³

The way in which Security Forces expelled the Rohingya and destroyed their communities makes clear that its intent was to destroy the Rohingya as a group, and the expulsion was executed alongside brutal violence intended to instill fear in the Rohingya population so that those who survived attacks would not return to their communities.⁴⁹⁴ One clear and consistent pattern of attack involves Security Forces brutally beating and raping Rohingya women and girls after beating or killing their family members, and then locking them in huts before setting the huts on fire, trapping victims inside.⁴⁹⁵ These atrocities destroy the possibility of Rohingya returning to their communities in an attempt to alter the ethnic makeup of Rakhine State⁴⁹⁶ and to allow Rohingya populations only in places where they can be controlled.⁴⁹⁷ Furthermore, these acts have been coupled with calls from Commander-in-Chief Min Aung Hlaing for non-Rohingyas to repopulate the destroyed areas of Rakhine State: “Regarding the rehabilitation of villages of our national races, for the national races who fled their homes, first of all they must go back to their places... The important thing is to have our people in the region. It’s necessary to have control of our region with our national races.”⁴⁹⁸

Preventing Healthcare Access

Movement restrictions and curfews implemented following an outbreak of violence in 2012 have remained in force years later, and similar curfews have been imposed in the wake of both the 2016 and 2017 violence.⁴⁹⁹ These movement restrictions severely limit the ability to travel to hospitals, which, together with the denial of humanitarian access, has impacted the health of the Rohingya population.⁵⁰⁰ Even before the 2016 clearance operations began, UN entities reported that these restrictions led to preventable deaths as Rohingya were denied travel for emergency treatment,⁵⁰¹ or subjected to costly and additional referral processes in order to access health care.⁵⁰² UN sources

491. Attacks in 2016 “resulted in the displacement of at least 94,000 Rohingya civilians from Maungdaw Township over a three-month period.” U.S. Holocaust Mem’l Museum & Fortify Rights, “They Tried to Kill Us All,” at 14.

492. UN Doc. A/HRC/37/70, para. 44; Amnesty Int’l, “We Will Destroy Everything,” at 8.

493. OHCHR, “Mission Report of OHCHR Rapid Response Mission: 13-24 September 2017,” at 3, Oct. 11, 2017.

494. See, e.g., OHCHR, “Mission Report of OHCHR Rapid Response Mission: 13-24 September 2017,” at 1, Oct. 11, 2017.

495. UN Doc. A/HRC/37/70, para. 45; “Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict, UN Security Council Briefing on Myanmar,” Dec. 12, 2017; Amnesty Int’l, “My World is Finished,” at 7, 21-22.

496. Amnesty Int’l, “Caged Without a Roof,” at 75-76 (describing projects by the Ministry for Development of Border Areas and National Races (“NaTaLa”) to relocate Rakhine and other non-Rohingya villagers to newly-built villages on formerly Rohingya land in northern Rakhine State, which are “often built on land confiscated from Rohingya using Rohingya villagers for forced labour”); Amnesty Int’l, “Remaking Rakhine State,” at 3, 7.

497. UN Doc. A/HRC/37/70, para. 60; U.S. Holocaust Mem’l Museum & Fortify Rights, “They Tried to Kill Us All,” at 5.

498. Jurawee Kittisilpa, “Myanmar Army Chief Urges Internally Displaced to Return to Rakhine,” Reuters, Sept. 21, 2017.

499. Amnesty Int’l, “Caged Without a Roof,” at 8, 60-61; Fortify Rights, “They Gave Them Long Swords,” at 50-51.

500. Amnesty Int’l, “Caged Without a Roof,” at 60-66.

501. UN Doc. A/HRC/31/71, para. 40.

502. UN Doc. A/HRC/31/71, para. 40; UN Doc. A/HRC/32/18, para. 39; Amnesty Int’l, “Caged Without a Roof,” at 62.

indicate that delays in accessing emergency care “have particularly devastating consequences” for women with pregnancy and childbirth complications, and for children.⁵⁰³

The harmful effects of these practices were exacerbated by the tightening of travel restrictions and exclusion of humanitarian aid organizations (which provided much of Rakhine State’s medical care) during clearance operations in 2016 and 2017.⁵⁰⁴ Women were unable to access care for sexual violence until they arrived in Bangladesh (if then), sometimes after walking with serious injuries for days or weeks,⁵⁰⁵ and missing windows for critical interventions to address unwanted pregnancies and prevent HIV infection.⁵⁰⁶

Placing additional burdens on the access to medical care of a specific group has created a systematic practice of denying Rohingya access to even minimum levels of medical care. This practice has serious consequences for the health and life of the Rohingya and evinces the desire to bring about physical destruction.⁵⁰⁷

In sum, the Burmese Security Forces calculated to destroy the Rohingya by targeting Rohingya women and girls with sexual violence, systemic expulsion, and restrictions on access to healthcare – each and together conditions designed to bring about the destruction of the group.

5. Imposing Measures to Prevent Births in the Rohingya Population

When committed with the specific intent to destroy, the imposition of measures intended to prevent births constitutes genocide.⁵⁰⁸ The ICTR found that such measures “should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages,” and can also include forced pregnancies.⁵⁰⁹ The Court also went on to find the measures may be physical or mental, and in the context of rape found that “rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.”⁵¹⁰ Courts have also considered the procreative impacts on a group of the separation of sexes and the killing of one gender of a group to be indicia of measures intended to prevent births.⁵¹¹ Notably, such measures

503. UN Doc. A/HRC/32/18, para. 39; “Statement by High Commissioner for Human Rights Zeid Ra’ad al Hussein at the Special Session of the Human Rights Council on the human rights situation of the minority Rohingya Muslim population and other minorities in the Rakhine State of Myanmar,” Dec. 5, 2017. According to 2010 statistics, “only 38% of women with complications in 2010 were referred to a hospital; 24% reached the hospital, but 14% died en route due to late referral or transportation delays.” UNDP et al., “Situational Analysis: Gender Equality and Women’s Rights in Myanmar,” at XX.

504. OHCHR, “Report of OHCHR mission to Bangladesh,” at 31, Feb. 3, 2017.

505. OHCHR, “Report of OHCHR mission to Bangladesh,” at 23, Feb. 3, 2017; Human Rights Watch, “Burma: Security Forces Raped Rohingya Women, Girls.”

506. Human Rights Watch, “All of My Body Was Pain,” at 3.

507. Compare, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), 2015 I.C.J. 3, paras. 369-72, Feb. 3, 2015 (entertaining Croatia’s claim that the denial of medical supplies could fall within the scope of this act).

508. Rome Statute, art. 6(d).

509. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, para. 507, Sept. 2, 1998.

510. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, para. 508, Sept. 2, 1998.

511. Prosecutor v. Krstić, Case No. IT-98-33-A, para. 28, Apr. 19, 2004 (affirming Krstić Trial Judgment). See also, Prosecutor v. Popović et al., Case No. IT-05-88 -T, para. 866, June 10, 2010.

Prosecutor v. Karadžić, Case No. IT-95-5/18-T, para.5671, Mar. 24, 2016.

need not succeed in actually preventing births,⁵¹² nor do they need be calculated to bring about the destruction of the group in whole or in part: they need only to be intended to prevent births.⁵¹³ As such, these measures need not be integral to a genocidal plan, and can be “merely ancillary.”⁵¹⁴

Numerous reports indicate that Burmese Security Forces brutally raped, and often gang raped, women of reproductive age.⁵¹⁵ Rapes were often preceded by the separation and execution of men (see section on killing above), and accompanied by acts of sexual mutilation, such as the cutting of nipples,⁵¹⁶ breasts, vaginas and stomachs⁵¹⁷ with long knives. Doctors in Bangladesh also reported treating Rohingya women for torn vaginal tissue as a result of having guns inserted.⁵¹⁸ The Myanmar FFM found that women “suffered serious injuries to reproductive organs, including from rape with knives and sticks.”⁵¹⁹

One report concluded that “the pattern of mutilation of women’s breasts and genitals after rape—already apparent in 2016—suggest[s] a specific directive to instill terror in this way, flaunting the army’s ability not just to sexually possess the women of their “enemy,” but also destroy their very means of reproduction.”⁵²⁰ Pregnant women were also not spared.⁵²¹ Stories abound of pregnant women who were raped and then subsequently beaten or had stomachs cut open.⁵²² One survivor testified that she miscarried after being gang raped by four soldiers: “After the fourth rape I went black,” she said. “After the rape I woke up...there was so much bleeding and then two hours later the baby came out. It died right after.”⁵²³ As the SRSG on Sexual Violence in Conflict concluded:

Violence was visited upon women, including pregnant women, who are seen as custodians and propagators of ethnic identity, as well as on young children, who represent the future of the group.⁵²⁴

Women and girls also suffered mental trauma as a result of rape. One doctor who treated rape victims in Bangladesh after the clearance operations in 2016 stated that rape victims he treated, including girls as young as 15, had demonstrated severe trauma as a result of rape, including “being scared for their married life” which he described as a “big social problem.”⁵²⁵ It has also been noted that there is a reluctance to report rape by unmarried women because after rape “nobody will want you anymore.”⁵²⁶

512. William Schabas, “Genocide in International Law,” at 173, 2000.

513. William Schabas, “Genocide in International Law,” at 174, 2000.

514. William Schabas, “Genocide in International Law,” at 174, 2000 (citing *A-G Israel v. Eichmann*, para. 199).

515. UN Doc. S/2018/250, para. 13.

516. OHCHR, “Mission report of OHCHR rapid response mission: 13-24 Sept. 2017,” at 7.

517. Human Rights Watch & Fortify, “Convention on the Elimination of All Forms of Discrimination against Women Joint Submission,” at 3, May 24, 2018.

518. Antoni Slodkowski et. al, “How a Two-Week Army Crackdown Reignited Myanmar’s Rohingya Crisis,” Reuters, Apr. 25, 2017.

519. UN Doc. A/HRC/39/64, para. 38.

520. Kaladan Press Network, “Rape By Command,” at 11.

521. OHCHR, “Mission Report of OHCHR rapid response mission: 13-24 Sept. 2017,” at 8.

522. OHCHR, “Mission Report of OHCHR rapid response mission: 13-24 Sept. 2017,” at 7; OHCHR, “Report of OHCHR mission to Bangladesh,” at 26, Feb. 3, 2017; Fortify Rights, “They Gave Them Long Swords,” at 61.

523. HRW, “All of My Body Was Pain,” at 17.

524. UN Doc. S/2018/250 para. 55.

525. Fortify Rights, “They Gave Them Long Swords,” at 152.

526. Medecins Sans Frontieres, “‘No One Was Left’: Death and Violence Against the Rohingya in Rakhine State, Myanmar,” at 13, 18, 2018.

Burmese Security Forces' desire to destroy the next generation of the Rohingya can also be seen in the multiple reports of children being killed, often in front of their families, including by being stabbed, cut, and burned alive. One woman reported a soldier saying to her "you are just raising your kids to kill us, so we will kill your kids."⁵²⁷ In Tula Toli, soldiers killed children by throwing them into fires or a nearby river, or hacked them to death with machetes.⁵²⁸

These acts must also be considered against the background of discrimination against the Rohingya, including through the imposition of measures such as the 2015 Population Control Law (see discussion above on genocidal intent) and policies restricting the Rohingya couples to having two children.⁵²⁹ As the SRS on Sexual Violence in Conflict has noted, "The violence is linked with an inflammatory narrative alleging that high fertility rates among the Rohingya community represent an existential threat to the majority population."⁵³⁰

Conclusion

Taken together, the Burmese Security Forces' brutal acts of sexual violence, including against pregnant women; the deliberate sexual mutilation of women; the targeting of reproductive organs and pregnant women's stomachs; coupled with long-standing rhetoric and discrimination against the size and growth of the Rohingya population, strongly support that these Forces imposed measures to prevent birth as a part of their genocidal campaign against the Rohingya.

527. HRW, "Burma- Security Forces Raped Rohingya Women, Girls," Feb. 6, 2017.

528. HRW, "Massacre by the River – Burmese Army Crimes Against Humanity in Tula Toli," at 21, 2017.

529. Amnesty Int'l, "Myanmar: Parliament must reject discriminatory 'race and religion' laws," at 5, Mar. 3, 2015.

530. UN Doc. S/2018/250 para. 55.

CONCLUSION AND RECOMMENDATIONS

Regardless of the accountability avenue pursued, a few factors are clear on the path to justice. First, gender has long defined and informed the commission of human rights abuses against ethnic groups by Burmese Security Forces, and accountability for crimes against women and girls must be at the forefront of all accountability efforts. Second, while the scope and scale of the atrocities against the Rohingya have reinvigorated international discussions around justice in Burma, it must be remembered that despite Burma's quasi-civilian transition, justice has been denied to all those who have suffered at the hands of Burma's military since the junta took power in 1962. Third, as human rights advocates have long raised, unless structural barriers to accountability in Myanmar are confronted, justice is not available to the Rohingya, or any other ethnic minority, in Burma's domestic courts or any other domestic mechanism. Fourth, justice is not only necessary to assign responsibility and hold individuals to account, but is also a necessary pre-cursor for the safe return and reintegration of the Rohingya back to Rakhine State. Last, as a result of the scope and scale of the crimes, justice will likely need to be pursued in myriad venues, both international and domestic, and must set the stage to ensure effect remedy and reparations to victims, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

And while Burma's civilian government is unable to exert any controls on the Security Forces or to hold the Forces accountable for their actions, these barriers do not excuse the civilian government for its failure to take action to curb or punish violations by Security Forces. Burma is a party to the Convention on the Punishment and Prevention of the Crime of Genocide, and as such, is obligated to take measures to comply with its obligations under the Convention. These include the cessation of any acts of genocide, as well punishment of responsible individuals. The current government has shown that where political will exists, it has the ability to creatively interpret constitutional limits and executive powers—when Aung San Suu Kyi was prevented by the Constitution from taking up the role of President after the 2015 elections, the role of “State Counsellor” was created, which allows her to become the de facto head of government and skirt these constitutional limits. Accordingly, the civilian government should take all steps within its power to facilitate and open the door for justice and accountability.

Albeit necessary, domestic justice procedures are unlikely to begin on their own. The international community must act expeditiously to jumpstart justice and accountability efforts for crimes committed against the Rohingya. The ICC's recent recognition of jurisdiction over a limited sub-set of crimes that have an element occurring in Bangladesh—including deportation, persecution and other inhumane acts—is an important start. However, the Court's ruling leaves open the possibility that other crimes occurring solely within Burma will inevitably be left behind in any ICC case built on this jurisdictional theory—including the crimes of rape and sexual violence. Thus, this decision is not an absolution of the international community's duties to act. Justice for Rohingya women and girls will take individual and collective action from states and international organizations alike. Indeed, as Burma's history of impunity has taught us, comprehensive justice and accountability is a pursuit and must be affected.

RECOMMENDATIONS

To the UN Security Council

- In line with the findings of the Myanmar FFM, refer the situation in Burma/Myanmar to the International Criminal Court, at a minimum for those crimes occurring since 2011 in Rakhine, Shan, and Kachin States, and support the funding of any investigations and prosecutions resulting from any such referral.
- Impose sanctions on Burmese military and security force leaders, including those identified by the Myanmar FFM and on the Tatmadaw in line with their listing as a party credibly suspected of committing or being responsible for patterns of rape and other forms of sexual violence in the Annex of the 2018 report of the Secretary General on Conflict-Related Sexual Violence.

To the UN General Assembly

- Establish an international, impartial and independent mechanism with the mandate to collect, consolidate, preserve and analyze evidence of violations of international criminal, human rights, and humanitarian law and to prepare files to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes. The creation of any such mechanism should involve consultation and the involvement of relevant UN bodies, including the Advisory Committee on Administrative and Budgetary Questions, to ensure sufficient funding and to build on the structure and best practices established by other such mechanisms, including the IIIM on Syria.
- Urge Burmese authorities to cooperate with and allow access to international human rights experts and monitors, including the Myanmar FFM, the Special Rapporteur on the situation of human rights in Myanmar, the International Criminal Court.

To the Office of the Prosecutor of the International Criminal Court

- Expeditiously conduct a preliminary examination and apply to conduct an investigation into cross-border crimes committed against the Rohingya, where at least one element or a part of such a crime was committed on the territory of Bangladesh. Consider all crimes with potential cross-boarder elements committed against the Rohingya, including the crimes against humanity of deportation, persecution, other inhumane acts, torture and murder, and the genocidal acts of killing, causing seriously bodily and mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction, and imposing measures to prevent births.
- In line with the Office of the Prosecutor's Policy Paper on Sexual and Gender-Based Crimes, ensure the integration of a gender analysis and perspective into all stages of investigations and prosecutions, including at the preliminary examination stage.

To the Burma Government and Authorities

- Immediately cease military and security operations against the Rohingya in Rakhine State, issue orders to cease all acts of rape and sexual violence, and permit humanitarian access to the State.
- Initiate impartial and independent investigations into violations of international criminal, human rights, and humanitarian law with a view to ensuring justice and accountability and comprehensive and transformative reparations to affected individuals and populations.
- Cooperate with and facilitate access for all international human rights and accountability efforts, including the Myanmar FFM, the Special Rapporteur on the situation of human rights in Myanmar and other UN special procedures, the International Criminal Court, and international human rights organizations.
- Ratify the Rome Statute of the International Criminal Court and provide retroactive jurisdiction to the entry in to force of the Statute, July 1, 2002.
- Amend the 2008 Constitution to bring the military and security forces under civilian oversight, and repeal provisions granting the military actors impunity for human rights abuses, including Article 445.
- Expeditiously pass the Prevention (and Protection) of Violence Against Women Law in line with international human rights standards, eliminate contradictory penal code provisions including the definition of rape and marital rape exceptions, and ensure jurisdiction over the military for crimes under the ambit of the law in civilian courts.
- Amend the 1982 Citizenship Act to repeal discriminatory provisions based on national origin, religion, and ethnicity and restore citizenship to those whose citizenship was stripped under the law.
- Guarantee the safe return of Rohingya and other displaced ethnic minorities, including the repatriation of any confiscated land and ensure the equal participation of women in all decision making processes related to these efforts.
- Submit timely reports to international human rights bodies, including overdue reports to the Committee on the Elimination of All Forms of Discrimination against Women (extraordinary report on the situation in Rakhine State (due May 24, 2018) and interim reporting (due July 28, 2018)).

To the International Community

- Take all possible measures to prevent, suppress, and punish genocide against the Rohingya in line with obligations under the Convention on the Prevention and Punishment of Genocide, including by initiating proceedings against the Burmese government at the International Court of Justice, and the imposition of arms embargoes and sanctions.
- Support efforts at the United Nations, including the Security Council, General Assembly and the Human Rights Council, to monitor the human rights situation in Burma and hold the state and individuals accountable for violations of international, criminal, human rights, and humanitarian law.
- Use bilateral and multilateral engagement to urge the Burmese government to cease human rights violations and initiate credible accountability proceedings.
- Utilize universal jurisdiction to prosecute responsible individuals for international crimes, war crimes, genocide and crimes against humanity.



**Global
Justice Center**

Human Rights Through Rule of Law



GLOBAL JUSTICE CENTER

www.globaljusticecenter.net | info@globaljusticecenter.net

11 Hanover Square, 6th Floor, New York, NY 10005