



The Committee on the Elimination of Discrimination against Women
Office of the United Nations High Commissioner for Human Rights
Palais Wilson - 52, rue des Pâquis
CH-1201 Geneva (Switzerland)

February 21, 2019

Re: Supplementary information to Myanmar's Report on an exceptional basis, scheduled for review by the CEDAW Committee at its 72nd Session

Dear Committee Members,

This letter supplements and responds to particularly concerning sections of the 6 February 2019 Exceptional Report submitted by Myanmar,¹ which is scheduled for review by the Committee on the Elimination of All Forms of Discrimination against Women ("Committee") on February 22, 2019 during its 72nd Session.

It is the view of the undersigned organizations that Myanmar's submission raises serious doubts as to its willingness and ability to effectively investigate and prosecute those responsible for international crimes committed against the Rohingya, especially sexual and gender-based violence. Myanmar's blanket denials that such crimes occurred and the answers presented in the report underscore not only that accountability will have to be achieved on the international level or before other domestic authorities, but also that there is a real risk of Myanmar aiming to discredit or jeopardize such accountability efforts. In addition to these overarching concerns, we seek to bring the Committee's attention to two major areas of concern: (1) Myanmar's refusal to acknowledge or accept responsibility for conflict, human rights abuses, and displacement; and (2) Myanmar's inability and lack of will to meaningfully investigate and hold those responsible accountable.

I. Refusal to acknowledge or accept responsibility for conflict, human rights abuses and displacement

Myanmar has consistently refused to accept responsibility for the acts of its Security Forces in Rakhine State and continues to deny the identity of the Rohingya. Myanmar's Exceptional Report to this Committee is consistent with this unlawful position.

- **Para. 2 - "(The) report refers to the Muslim population in Northern Rakhine as "Muslims" or "the Muslim community in Rakhine". This group does not include the**

¹ Government of Myanmar, *Report on an exceptional basis*, U.N. Doc. CEDAW/C/MMR/4-5/Add.1 (Feb. 4, 2019) [hereinafter "State Report"].

Kaman Muslims. They are simply referred to as “Kaman”. As in the Annan report, neither “Bengali” nor “Rohingya” is used in referring to the Muslim community.”

While the Committee explicitly requested Myanmar to submit a report on the situation of Rohingya women and girls, Myanmar’s refusal to explicitly report on Rohingya women and girls should be understood as a continuation of its policy to deny the group’s identity and continue discrimination, persecution, and targeting of the Rohingya as an ethnic group. While Myanmar aims to couch this definition as internationally accepted by highlighting the role played in the Commission by former UN Secretary-General Kofi Annan, the Commission’s report makes clear that this nomenclature was utilized “in line with the request of the State Counsellor.”² In fact, Myanmar’s failure to recognize the Rohingya as a group has been widely criticized by human rights experts, including this Committee and the Special Rapporteur on the situation of human rights in Myanmar, as a violation of the group’s right to self-identify.

- **Para. 5 - “The seeds of fear sown by the terrorists led to massive displacement of people internally and to neighbouring Bangladesh.”**

The characterization of the mass and forced displacement of over 725,000 Rohingya to Bangladesh since August 2017 as the result of the actions of “terrorist” groups is both disingenuous and indicative of Myanmar’s unwillingness to accept responsibility for its actions. According to the UN Fact-Finding Mission on Myanmar (“Myanmar FFM”), “[o]n 25 August 2017, the Arakan Rohingya Salvation Army (ARSA) coordinated attacks on a military base and up to 30 security force outposts across northern Rakhine State, in an apparent response to increased systematic oppression of Rohingya communities by Myanmar and with the goal of gaining global attention.”³ However, while acknowledging these attacks by ARSA, the Myanmar FFM firmly establishes that the reason for the displacement of over 725,000 Rohingya was the grossly disproportionate response by Myanmar security forces to these attacks, which targeted the entire Rohingya community and resulted in the mass destruction of Rohingya villages.⁴

- **Para. 11 - “Despite repeated accusations that Myanmar Security Forces committed a campaign of rape and violence against Muslim women and girls residing in Rakhine State, there is no evidence to support these wild claims.”**

The categorical dismissal of the extensive documentation of rape and sexual violence as “wild” and with “no evidence” is perhaps the strongest illustration of Myanmar’s unwillingness to acknowledge and take responsibility for the acts committed by its Security Forces. As this Committee is well aware, the Security Forces’ systematic sexual violence in Rakhine State has been extensively documented not only by the Myanmar FFM but a range of other actors, including the United States State Department⁵ and numerous human rights groups⁶. Furthermore, for decades the military has

² Rakhine Advisory Commission, Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State, p. 12 (Aug. 2017).

³ Human Rights Council, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, 750, U.N. Doc A/HRC/39/CRP.2 (Sept. 17, 2018).

⁴ Human Rights Council, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, ¶ 751, U.N. Doc A/HRC/39/CRP.2 (Sept. 17, 2018).

⁵ United States Department of State, Documentation of Atrocities in Northern Rakhine State, 24 September 2018, <https://www.state.gov/j/drl/rls/286063.htm>.

used sexual violence as a tactic in its campaigns against ethnic minorities in other parts of Myanmar. Similarly, these actions have long been met with official denials and impunity for perpetrators.

Even more egregious, Myanmar offers no support for its assertion that “no evidence exists,” nor does it detail any efforts or investigations that were taken to reach this conclusion. While the Report touts the signing of a joint communiqué with the Special Representative of the Secretary-General on Sexual Violence in Conflict, it remains unclear how Myanmar will meaningfully give effect to the commitments on accountability in the joint communiqué while it continues to insist that no problems exist and no crimes have been committed.

- **Para. 54 - “The complexities and challenges in Rakhine should not be viewed within a narrow lens of human rights for one particular community alone. This may tantamount [sic] to discrimination.”**

The suggestion that calling on Myanmar to account for its treatment of one minority group constitutes discrimination is yet another indicator that it will continue to deflect responsibility for acts against the Rohingya under any apparent guise.

II. Inability and lack of will to meaningfully investigate and hold those responsible accountable

Despite the assurances in the report, Myanmar has unequivocally failed to demonstrate any willingness to investigate or hold perpetrators – civilian and military alike – accountable, compounding its failure to acknowledge and accept any form of responsibility for its acts.

- **Para. 8 - “The Government of Myanmar does not condone human rights violations. Nor does it espouse a policy of ethnic cleansing and genocide. It has therefore established an Independent Commission of Enquiry to establish the facts concerning the situation in Rakhine. The Commission is comprised of two international personalities who are well-versed in matters of human rights and Myanmar nationals with judicial background and vast experience in international organizations on 31 August 2018 to investigate the violations of human rights and related issues following the ARSA terrorist attacks in Rakhine State. The Commission is tasked to investigate allegations of human rights violations and related issues following the terrorist attacks by the Arakan Rohingya Salvation Army in Rakhine State with a view to seeking accountability and formulating recommendations on steps to be taken to ensure peace and stability in Rakhine State. The ICoE has now invited complaints or accounts with supporting data and evidence related to allegations of human rights violations in Rakhine State. ICoE call for submissions was actual from 31 August 2019 [sic] to 28 February 2019.”**

While eight *ad-hoc* commissions and boards have been set up by the Myanmar authorities since 2012 with regard to the situation in Rakhine State, the Myanmar FFM determined that none meet the standards of an “impartial, independent, effective and thorough human rights investigation.” The

⁶ Public International Law and Policy Group, Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar’s Rakhine State, <https://www.publicinternationallawandpolicygroup.org/rohingya-report>.

newly constituted Independent Commission of Enquiry for Rakhine has done nothing to allay these concerns. One of the four Commissioners is a Myanmar Government official who has previously stated that Myanmar had “no intention of ethnic cleansing,” and the chairperson has stated that the Commission will not “blame or finger-point,” which is at odds with Myanmar’s own statement above that the Commission will seek accountability.

Additionally, the framing of the mandate of the Commission with a focus on “terrorist” attacks is a clear indicator that the work of the Commission will likely be biased and unbalanced. In fact, if the assertions made by Myanmar in this report, such as the one discussed above placing the responsibility for forced displacement on “terrorist actors,” are representative, it is unlikely that the work of the Commission will be any different than its predecessors.

- **Para. 9 - “Myanmar is both willing and able to investigate any crimes and violations of human rights that took place on its territory.”**

Structural barriers, as well as a systematic climate of impunity in the country, clearly demonstrate that Myanmar is neither willing nor able to genuinely carry out any investigations and prosecutions related to international crimes committed by its Security Forces.

Myanmar’s civilian government is unable to hold perpetrators accountable due to structural barriers that preclude the possibility of justice. Myanmar lacks domestic legislation on international crimes, rendering its court system unable to prosecute any potential crimes against humanity or genocide. Furthermore, constitutionally-imposed limits on the power of the civilian government over the military, coupled with constitutional protections for the military from prosecution (guarantees of immunity and exclusive jurisdiction in military courts with the Commander-in-Chief able to overturn any decisions unilaterally), ensure that the military will be immune from accountability in Myanmar. Without significant domestic legal and constitutional reforms, Myanmar’s national judicial system is neither available nor able to carry out proceedings for crimes committed by its Security Forces against any ethnic group, including the Rohingya.

Furthermore, as discussed extensively in this letter, Myanmar’s authorities—civilian and military alike—have also failed to demonstrate any willingness to investigate or hold perpetrators accountable. In fact, Myanmar has variously denied any wrongdoing and failed to conduct genuine investigations or impose sanctions or accountability on perpetrators of these crimes.

- **Para. 23 - “In Myanmar, the Penal Code was enacted in 1861. It establishes a legal framework in order to protect and eliminate crimes, including sexual assaults, rapes, human trafficking, domestic violence, and other offenses against women and girls.”**

The existing legal framework in Myanmar, including the Penal Code, is insufficient to ensure justice, protection, and rehabilitation for victims. As a preliminary point, the Constitution shields the military from prosecution in civilian courts, thus the Penal Code would not be the dispositive legal framework. However, if cases were taken up in civilian court, Myanmar’s Penal Code and other criminal procedures, which reflect outdated stereotypes and do not comport with international standards, would be insufficient to ensure justice.

For instance, while Section 375 of the Penal Code includes non-consensual “sexual intercourse” as a criminal element of rape, the undefined requirement of “penetration” as a component of “sexual

intercourse” leaves the overall definition of rape ambiguous, for instance in cases of forced non-penile penetration. Nor does the Penal Code include any specific provisions concerning unwanted sexual touching or sexual harassment outside the context of sexual intercourse, although Section 354 does criminalize assault intended to “outrage [a woman’s] modesty” (a troubling example of outdated and ambiguous language justifying scrutiny of a woman’s “modesty” as a pre-condition for access to justice). The definition of rape under Section 375 applies only to women who are not married to their attacker; the Penal Code neither prohibits nor punishes the rape of women by their husbands, unless the victim is less than 15 years of age.

Additionally, despite Myanmar’s assertion, the Penal Code does not criminalize domestic violence or provide a legal mechanism allowing women to obtain restraining orders to protect them against aggressors. While a long-negotiated comprehensive violence against women law has been promised, it has yet to be introduced in Parliament after nearly four years, and consultations and drafts have indicated that the law will uphold the problematic definitions of crimes discussed above, including rape and marital rape.

Meanwhile, neither Myanmar’s Code of Criminal Procedure nor its Evidence Act contains comprehensive substantive protections for the integrity and dignity of women during the investigation and prosecution of cases involving violence against women. The law also permits judges to both compel victims of rape to testify against their attackers and to draw an adverse inference from a victim’s refusal to answer questions about the rape. The “inconsistencies and vagaries” of the legal process is one cause of low reporting of violence.

- **Para. 30 - “Myanmar National Human Rights Commission officially transmitted complaints on violation of human rights it receives to the authorities concerned to take follow-up action in line with regulations and procedures and relevant laws.” and para. 32 - “The Government also affirms that it will help Muslim displaced persons who have fled to Bangladesh to file cases concerning alleged human rights abuses. Those wishing to file grievances may do so from their current location but will be required to attend a trial in Myanmar. The Government will assist them in so doing.”**

Administration of justice is particularly weak in Myanmar⁷ and neither Myanmar’s domestic courts nor its National Human Rights Commission have the capacity, impartiality, and independence required to deliver justice.

Myanmar’s judiciary is seen as “inactive and subordinate to the military,” with “allegations of judicial corruption, inefficiency, and susceptibility to executive influence [that are] so widespread that they cannot be sensibly discounted.”⁸ State actors, including the executive and the military, have been

⁷ Crouch, Melissa, *The Judiciary in Myanmar* (March 3, 2016). UNSW Law Research Paper No. 2016-10. Available at SSRN: <https://ssrn.com/abstract=2747149> or <http://dx.doi.org/10.2139/ssrn.2747149>.

Progress Rep. of the Special Rapporteur on the situation of human rights in Myanmar to the Human Rights Council (Tomás Ojea Quintana), ¶ 12, U.N. Doc. A/HRC/19/67 (March 7, 2012); Nick Cheesman & Kyaw Min San, *Not Just Defending: Advocating for Law in Myanmar*, 31 WIS. INT’L L.J. 714, available at

http://www.Myanmarlibrary.org/docs19/Cheesman_KMS_Not_just_defending-ocr-tpo.pdf; International Bar Association’s Human Rights Institute, *The Rule of Law in Myanmar: Challenges and Prospects*, (December 2012) AT 58, [Hereinafter IBA 2012 Report], available at

<http://www.ibanet.org/Document/Default.aspx?DocumentUid=DE0EE11D-9878-4685-A20F-9A0AAF6C3F3E>.

⁸ Report of the Special Rapporteur on the situation of human rights in Myanmar, Human Rights Council

known to apply improper pressure on the judiciary and prosecutors in cases related to gross violations of human rights, as well as political and civil cases.⁹ As a result, even if cases were transferred from military court to civilian court, those proceedings would not be free from the military's power and influence.

Attempts to utilize formal court or accountability proceedings are often met with reprisals and raise serious concerns about the safety of those who would opt to utilize formal processes facilitated by the government, whether the National Human Rights Commission or other venues. The case of Brang Shawng, the father of a fourteen-year-old girl who was killed by the military, is a case in point.¹⁰ While he never saw accountability for his daughter's killing, he himself was prosecuted for filing false charges and was embroiled in legal proceedings for over eighteen months. Fear of reprisals, along with widespread corruption and generally low levels of judicial competence, has resulted in a lack of public trust in the legal system.¹¹ Fears of reprisals are only likely to be heightened in those who were attacked and forcibly displaced by Myanmar's Security Forces, rendering Myanmar's promise to "assist" those outside the country in filing human rights complaints in Myanmar's courts, with no assurances of safety and well-being, empty at best.

III. Recommendations

- Immediately cease military and security operations against the Rohingya in Rakhine State and in other ethnic areas, particularly Shan and Kachin states; 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, possibly amounting to international crimes, 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 institutions and mechanisms, 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 into 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.

Thirty-first session, ¶ 20, 21, U.N. Doc. A/HRC/34/67 (March 1, 2017) Report of the Special Rapporteur on the situation of human rights in Myanmar, Human Rights Council, Thirty-first session, ¶ 15, 16, U.N. Doc. A/HRC/31/71 (March 18, 2016). IBA 2012 Report at 59. *See also* International Commission of Jurists, *Country Profile: Myanmar*, (June 2014) 11 available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/CIJL-Country-Profile-Myanmar-June-2014.pdf>; *see also* International Commission of Jurists, *Right to Counsel: the Independence of Lawyers in Myanmar*, (June 2014) at 40 available at <http://www.burmalibrary.org/docs16/ICJ-MYANMAR-Right-to-Counsel-en-red.pdf>

⁹ International Commission of Jurists, *Achieving Justice for Gross Human Rights Violations in Myanmar: Baseline Study* at 19 (Jan. 2018), available at <https://www.icj.org/wp-content/uploads/2018/01/Myanmar-GRA-Baseline-Study-Publications-Reports-Thematic-reports-2018-ENG.pdf>.

¹⁰ International Commission of Jurists, *Achieving Justice for Gross Human Rights Violations in Myanmar: Baseline Study* at 33.

¹¹ Justice Base, *Behind Closed Doors: Obstacles and Opportunities for Public Access to Myanmar's Courts* (May 25, 2017), available at <http://myjusticemyanmar.org/sites/default/files/Justice-Base-Behind-Closed-Doors.compressed-1.pdf>.

- Expediently pass a 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.

Respectfully submitted by:

European Center for Constitutional and Human Rights
Global Justice Center
Women's Initiatives for Gender Justice

Annexes:

1. Global Justice Center, Discrimination to Destruction: A Legal Analysis of Gender Crimes Against the Rohingya, September 2018, available at: http://globaljusticecenter.net/files/Discrimination_to_Destruction.pdf
2. Naripokkho, Women's Initiatives for Gender Justice, Ms. Sara Hossain, European Center for Constitutional and Human Rights, Amicus Curiae Observations Pursuant to Rule 103, available at: https://www.icc-cpi.int/CourtRecords/CR2018_02944.PDF
3. Global Justice Center, Fact Sheet: Structural Barriers to Accountability for Human Rights Abuses in Burma, October 2018, available at: <http://globaljusticecenter.net/files/Structural-Barriers---Burma.pdf>.