

Myanmar: Questions and Answers on Human Rights Law in Rakhine State

Briefing Note, November 2017

ICJ Global Redress and Accountability Initiative

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Introduction

More than 600,000 inhabitants of northern Rakhine State have been displaced since 25 August 2017 as a result of security operations commanded by Myanmar's military, the Tatmadaw, which followed attacks on police posts by the Arakan Rohingya Salvation Army (ARSA). This mass movement of people has substantially added to the pre-existing populations of displaced persons from Myanmar both in Rakhine State and in neighboring Bangladesh, resulting in a major humanitarian crisis, amid reports of widespread human rights violations by security forces and human rights abuses by ARSA and non-state actors. The vast majority of persons displaced are Rohingya Muslims, most of whom have crossed to Bangladesh, while tens of thousands remain displaced in Myanmar.

Statements and reporting on this crisis have included the use of both legal and non-legal terminology to assess and describe the situation. The following *Questions & Answers* briefing note from the International Commission of Jurists clarifies some of the applicable national and international law and standards.

This briefing note is based upon both independent legal research and a review of public information and reporting on Rakhine State and neighboring Bangladesh, which is a situation that is evolving on a daily basis. A draft advance version of this briefing was prepared on 18 October 2017, and subsequently updated with minor revisions. The below analysis is based upon information publicly available at the time of finalization on 7 November 2017. This briefing is available in Burmese language; the original version is in English language. The authors of this briefing note appreciate the advice and information shared by those who helped inform the development of this briefing note.

1. Who is responsible for the security operations?

Myanmar's military, the Tatmadaw has overall command and supervisory responsibility for armed forces throughout the country. The Tatmadaw, headed by the Commander-in-Chief Senior General Min Aung Hlaing, is the primary institution responsible for carrying out the most recent security operations in northern Rakhine State since 25 August 2017.

These operations are directed by the Tatmadaw's Western Command, overseen by the Bureau of Special Operations in Nay Pyi Taw, which reports to the Commander-in-Chief. Major General Maung Maung Soe is currently the chief of the Western Command. Under this command, the Myanmar Police Force and its Border Guard Division (not to be confused with Border Guard Forces) have also been involved in the recent operations in northern Rakhine State, as is the established practice during large-scale security operations in Myanmar. The General Administration Department of the Ministry of Home Affairs, also effectively under Tatmadaw command and control, has invoked temporary emergency orders based on Myanmar's criminal law (see below).

The Tatmadaw remains the most powerful institution in the country, largely outside the control of the civilian government and its de facto leader State Counsellor Aung San Suu Kyi, who also serves as Minister of Foreign Affairs and Minister for the Office of the President. Cohabitation and cooperation with the Tatmadaw is a significant and ongoing challenge for the National League for Democracy (NLD)-led government, since entering office in March 2016 following national elections in November 2015.

How powerful in law and practice is the military?

The 2008 Constitution vests significant powers in the Tatmadaw. Article 20(b) confers upon the Tatmadaw the right to independently administer its own affairs without effective oversight from civilian executive authorities, the legislature or the judiciary. Articles 109(b) and 141(b) allocate to the Tatmadaw 25 percent of seats in each of the two houses of the national legislature. These members of parliament are nominated by the Commander-in-Chief as per article 14 of the Constitution, and they are answerable to the Commander-in-Chief, as clarified in article 33 of both the 2010 Amyotha Hluttaw Election Law and the 2010 Pyithu Hluttaw Election Law. The Tatmadaw also has a

majority of seats – six of 11 positions – on the powerful National Defence and Security Council, as prescribed in article 201 of the Constitution. One of Myanmar’s two serving Vice-Presidents, Vice President General Myint Swe, was nominated to the post by the Tatmadaw, through a process of appointment provided for in article 60(iii) of the Constitution.

The Tatmadaw retains an intensive and typically decisive role in performing what in most countries constitutes the functions of civilian authorities. Article 232(Bii) of the Constitution empowers its Commander-in-Chief to appoint high-ranking military personnel to three key security-related ministries. These Union-level ministers are:

- Minister of Border Affairs, Lieutenant General Ye Aung.
- Minister of Defence, Lieutenant General Sein Win.
- Minister of Home Affairs, Lieutenant General Kyaw Swe.

These Ministers and their deputies, also appointed by the Commander-in-Chief (article 234b) are not required to depart the military in order to serve in the cabinet (article 232 Jii), so in supervisory and command terms they remain answerable to the Commander-in-Chief.

The Home Affairs portfolio has four departments including the Myanmar Police Force (MPF). The MPF has limited institutional independence and is generally deferential to the Tatmadaw, particularly in areas of armed conflict and during times of internal disturbances.

The Home Affairs portfolio also includes the General Administration Department (GAD), which effectively wields controls over all the administrative functions of subnational governance. A pervasive institution, the GAD exercises broad administrative power inherited from powers earlier conferred to British administrators and magistrates in the colonial-era statutes that still comprise a significant part of Myanmar’s legal framework. The GAD also supports the security efforts of other government organs, including by invoking orders sourced from Myanmar’s criminal law (see below).

These governance arrangements are patently incompatible with the principle of separation of powers, which is recognized although qualified in article 11 of Myanmar’s Constitution, and incompatible with the rule of law principle that security forces must be accountable to civilian authorities. Constitutional reform is necessary to align Myanmar’s legal and institutional arrangements with rule of law principles, and is indeed a stated priority for the NLD-led Government. Yet the Tatmadaw has strongly resisted such reforms, and effectively wields a veto over reform. This ability to block such legal reform is a consequence of the terms of article 436 of the Constitution, which provides that for specified constitutional provisions, more than 75 percent of the legislature must vote in approval of amendments, prior to and as a prerequisite for the holding of a national constitutional referendum. Given that 25 percent of seats remain under the effective command and control of the Commander-in-Chief, such changes are not possible without military assent.

What are the State’s international human rights law obligations?

Like all States, Myanmar has a duty to respect and to protect the human rights of all persons within its jurisdiction. Myanmar’s international human rights obligations arise from the 1945 Charter of the United Nations, human rights treaties, and general and customary international law.

Myanmar’s security forces, under the command of the Tatmadaw, have a duty to respect and to protect the human rights of all persons in northern Rakhine State, as in any territory that is part of Myanmar or otherwise under its jurisdiction, regardless of their official citizenship or residency status, without any form of discrimination. This responsibility does not absolve other State agents, including civilian authorities, from their obligations under international law.

Even recognizing the legal and practical limitations on the exercise of civilian authority over security operations, the NLD-led civilian government remains bound to do

everything in its power to protect human rights during security operations in Myanmar. Principles of State responsibility affirm that all organs of government are bound by a State's international law obligations and that governance arrangements cannot excuse a failure to perform these obligations.

Myanmar is party to four of the principal international human rights treaties and one Optional Protocol: the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CrC) and its Optional Protocol on the sale of children, child prostitution and child pornography, the Convention on the Rights of Persons with Disabilities (CRPD), and, as of 6 October 2017, the International Covenant on Economic, Social and Cultural Rights (ICESCR). These international treaties create clear obligations upon the State including rights pertaining specifically to the rights of women, the rights of children, and the rights of persons with disabilities. For instance, the CEDAW Committee in its General Recommendation No. 19 has referred to the duty to protect women against gender-based violence as part of the State's obligations under article 1 of CEDAW. The CRPD in article 11 obliges State Parties to take all necessary measures to ensure the protection and safety of persons with disabilities in situations of risks and humanitarian emergencies. As a further example, under article 11 of the ICESCR, the State must respect and protect, among other rights, the right to an adequate standard of living, which includes the right to food, clothing, housing and water.

Myanmar is a party to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Under article 1, States undertake to prevent and to punish genocide, whether committed in time or peace or in time of war. Article 3 identifies the following acts as punishable: a) genocide; b) conspiracy to commit genocide; c) direct and public incitement to commit genocide; d) attempts to commit genocide; and e) complicity in genocide.

Myanmar is also a party to the four 1949 Geneva Conventions relating to international humanitarian law (the 'laws of war').

Many of the rights reflected in instruments such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights, form part of general international law and customary international law, and are also applicable in Myanmar.

In order to conform to its international human rights law obligations, the Government of Myanmar, in all its organs, must desist from conduct that constitutes or gives rise to violations of the State's international human rights law obligations. The governmental administration and responsible authorities are obliged to take measures to protect the right to life, including by allowing immediate humanitarian access to those in need. The administration should also take credible allegations of human rights violations seriously, and take appropriate measures to discourage and hold accountable the perpetrators of violations, including through international cooperation with the Independent International Fact Finding Mission mandated by UN Human Rights Council Resolution 34/22 (see below).

International human rights law also binds the government to establish necessary institutional arrangements to respect and protect human rights, through measures including: the reform or repeal of laws inconsistent with rights obligations, including laws that enable and facilitate impunity for human rights violations (see below); the use of the courts to ensure compliance with the law of both private and public persons, including the military; the enforcement of administrative and judicial sanctions for rights violations; and ensuring access to effective remedies for persons affected by human rights violations by organs of the State or affected by rights abuses by non-State actors such as ARSA.

Did the President authorize the recent military operations?

The Office of President Htin Kyaw designated parts of northern Rakhine State as a 'military operations area' on 25 August 2017, according to statements by Zaw Htay, Director General of the Ministry of the Office of the State Counsellor and spokesperson for the State Counsellor Aung San Suu Kyi.¹ Zaw Htay said that the designation covers the whole of Maungdaw District and was issued as an immediate response to a request from the Office of the Commander-in-Chief of the Tatmadaw. He also said that there were no definitive dates to indicate the period during which this designation would be in force. Authorities have not cited clear legal provisions in reference to the President's designation.

The Constitution provides for a Presidential directive of this nature during a state of emergency pursuant to Chapter 11, however this has not been declared in northern Rakhine State (see below). Article 213(a) of the Constitution also states that the President "shall have the right to take appropriate military action, in co-ordination with the National Defence and Security Council formed in accord with the Constitution, in case of aggression against the Union." Under the NLD-government, the National Defence and Security Council has not been formed. The absence of a declared state of emergency and the absence of a formal National Defence and Security Council meeting calls into question the Constitutional basis for the President's designation of 'military operations areas' in northern Rakhine State.

Article 212 of the Constitution empowers the President to promulgate ordinances for administrative actions requiring immediate actions, with procedural limitations, including the right of parliament to review the ordinance. A review of the weekly Union Government Gazettes published between the 25 August until 31 October 2017 reveals that to date there has been no ordinance or other instrument has been publically promulgated in which the President authorized military operations in northern Rakhine State on 25 August (as of 6 November 2017, the most recently published Gazette was the 27 October 2017 edition).

2. Is Rakhine State under a state of emergency?

Myanmar has not declared a constitutional state of emergency over Rakhine State or any part of it. However, a press release from the Ministry of the Office of the State Counsellor issued on 11 August 2017 stated that parts of northern Rakhine State were subject to a temporary curfew invoked under section 144 of Myanmar's Criminal Procedure Code. It is unclear from the statements of the authorities whether this curfew, or any other measures enacted under this provision, remain in force or if they have in any way been extended following the attacks on 25 August 2017 and during subsequent security operations (on 27 October 2017 an announcement appeared on an official government Burmese-language Facebook page, indicating that section 144 orders had been extended, but this post appears to have subsequently been removed)².

Section 144 is a key provision under chapter 11 of the Criminal Procedure Code, entitled "Temporary Orders in Urgent Cases of Nuisance or Apprehended Danger." It provides that a Magistrate may "[d]irect any person to abstain from a certain act or to take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, or an affray."

The powers of Judges (Magistrates) under section 144, a carry-over provision from colonial-era criminal law, have in practice been appropriated by the executive and are now exercised by the District Administrator or the Township Administrator of the General Administration Department, part of the Ministry of Home Affairs. The invocation of section 144 orders does in itself not constitute a state of emergency but in the past the use of these orders has preceded states of emergency declared under the Constitution.³

What would a state of emergency look like?

Pursuant to article 40 and chapter 11 (comprising articles 410 to 432) of the 2008 Constitution, the President, in coordination and with consent from the National Defence and Security Council, may declare a particular area to be under a temporary state of emergency.

The Constitution contemplates three states of emergency.⁴ The first type, under articles 40(a) and 410, empowers the President to temporarily appropriate executive and legislative powers from lower levels of government, in a particular geographical area. The second type, under articles 40(b), 412 and 413, has two degrees: under article 413(a) the civil service may request temporary support from the Tatmadaw to perform its functions in a particular geographical area; under article 413(b) the President may issue an ordinance temporarily transferring executive and judicial powers to the Tatmadaw in a particular geographical area. The third type of emergency, under article 417, involves the full nationwide transfer of executive, legislative and judicial powers to the Tatmadaw for a period of one year. In each instance, a declaration by the President is required to enact a state of emergency.

States of emergency were declared on three occasions under the Union Solidarity and Development Party-led Government, led by President Thein Sein from 2011 to 2016. Each of these was a 'type two' emergency, under article 40(b) of the Constitution; no 'type one' or 'type three' emergency under the 2008 Constitution has ever been declared in Myanmar. The most recent state of emergency was declared in February 2015 and covered the conflict-affected Kokang Zone of Shan State.

To date, under the NLD-led government, no constitutional state of emergency has been declared in any part of the country, and the prerequisite formal meeting of the National Defence and Security Council has not been convened under the NLD-led government. The President's reported designation of parts of northern as a 'military operations area' does not constitute a state of emergency declared pursuant to the Constitution (discussed above).

Under articles 296, 379, 381, 414 and 420, certain constitutional rights may be temporarily restricted or suspended during a state of emergency. International law permits States to derogate temporarily from full protection of certain human rights to the extent strictly necessary to meet a specific threat to the life of the nation. However certain human rights are never subject to derogation, even during an armed conflict or natural disaster, including the right to life, freedom from discrimination, core aspects of the right to a fair trial, and the right to be free from torture and other ill treatment. Apart from these non-derogable rights, any derogation must not have a basis in discrimination on the grounds of race, colour, gender, sexual orientation or gender identity, disability, religion, language, political or other opinion, national or ethnic origin, property, birth or other status. The right to challenge the lawfulness of one's detention through the writ of habeas corpus or similar procedures must always be available, regardless of constitutional restrictions, even under states of exception such as Myanmar's states of emergency.

3. What rules govern the conduct of security operations?

Myanmar's military and civilian leadership have asserted that security forces are obliged to adhere to codes of conduct and rules of engagement while carrying out operations. These codes and rules are not publicly available, which makes it difficult for persons outside of military and government to assess them, including against international standards.

The State is always required to take all necessary measures intended to prevent deprivations of life, including planning security operations so as to minimize the risk to human life. Where police powers are exercised by military authorities or by other State security forces, such military or other forces are subject to the relevant international

standards for law enforcement officials on matters such as use of force and respect for human rights (see below).

The Tatmadaw's long history of gross and systematic violations of international human rights law and serious humanitarian law violations where there is armed conflict demonstrates that any rules of engagement and codes of conduct for Myanmar's security forces have in practice failed to curtail, or have even facilitated or effectively authorized, gross human rights violations against people throughout the country. There has been a chronic lack of accountability for security personnel committing or contributing to these crimes.

Does international humanitarian law apply?

International humanitarian law (also known as the 'laws of war' or 'laws of armed conflict') only applies in situations recognized as armed conflict under international law. Determination of the existence of armed conflict is contingent on the fulfillment of two criteria. First, the conflict must have reached a minimum level of intensity and constitute a protracted confrontation, with the duration of conflict sustained and going beyond sporadic acts. Second, an armed conflict can only exist between clearly identifiable armed groups and/or State forces that are cohesively organized with a responsible and recognizable command structure, and with the capacity to sustain military operations. If a situation constitutes an armed conflict pursuant to the aforementioned criteria, international humanitarian law applies alongside international human rights law. The presence of an armed conflict does not alter the State's ongoing international law obligation to protect the right to life, for example by allowing humanitarian access where it is necessary to protect that right.

Unlike in other areas of Myanmar, particularly in Kachin and Shan states, evidence that is publicly available to the authors of this briefing at the time of writing suggests that the violence in northern Rakhine State does not fulfill the criteria necessary to classify the situation as an armed conflict according to international law. The fact that military forces were employed to carry out security operations in northern Rakhine State does not of itself mean that those operations are taken pursuant to an armed conflict within the meaning of international law.

Based on this assessment of publicly available evidence, in the absence of armed conflict international humanitarian law does not apply and international human rights law requires that any security concerns be addressed only through criminal justice and other measures that fully comply with the State's ordinary international human rights obligations. In the absence of armed conflict, the State's security operations must be restricted to law enforcement operations governed by criminal law and human rights law rather than military operations governed by international humanitarian law (the 'international law of armed conflict').

Importantly, even if the situation in northern Rakhine State were to be determined as constituting an armed conflict that invoked the application of international humanitarian law, international human rights law would continue to apply, subject only to any permissible derogations the State can justify. Some elements of international human rights law, such as the prohibition of torture and other ill-treatment, always apply with full force and are subject to no form of derogation or limitation even in situations of armed conflict (as noted above in the context of states of emergency). The right to life would also continue to apply in situations of armed conflict, although what constitutes an arbitrary deprivation of life may in a situation of armed conflict depend on whether it was consistent with international humanitarian law.

It is clear that international humanitarian law, when it applies, contains many similar protections to international human rights law. For instance, Common Article 3 of the Geneva Conventions provides that: "(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race,

colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for.” Many additional protections apply as a matter of customary international humanitarian law.

Is there a legal basis for ‘clearance operations’ by security forces?

Following the initial attacks attributed to ARSA in October 2016, government authorities have at various points in time declared parts of northern Rakhine State to be subject to ‘area clearance operations.’ This term was also applied to areas of Kachin State during 2017. In Rakhine State, the last time authorities reported area clearance operations to be in effect was in Maungdaw Township on 12 September 2017, via a public announcement from the government’s Information Committee on 13 September 2017.

Tatmadaw representatives in the national legislature stated in August 2017 that the Constitution empowers the Tatmadaw to initiate area clearance operations of their own volition.⁵ Yet Tatmadaw officials and other government authorities have not linked this term to provisions clearly prescribed in law. On previous occasions, the term has been invoked in practice to grant security forces the authorization, possibly through lax rules of engagement, to ignore legal protections afforded under the Constitution and international standards.

In addition to the terms ‘area clearance operations’ and ‘military operations area,’ in late 2016 the Myanmar authorities commonly used the term ‘joint operations’ to refer to security operations conducted by the Tatmadaw and the Border Guard Division of the Myanmar Police Force in northern Rakhine State. Joint operations appears to be a descriptive term that does not imply special legal effect.⁶

However the security operations are characterized, in northern Rakhine State or anywhere else in Myanmar, the use of force by security forces must comply with protective limitations on the lawful use of force, including principles of necessity and proportionality. Security forces are obliged to abide by constitutional protections and to scrupulously respect international standards governing the use of force (see below).

What are the international standards on the use of force?

The use of force that is potentially lethal but not strictly necessary to protect life can never be considered to be a proportionate use of force. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that the use of lethal force by security forces can be made only when it is strictly unavoidable for the purpose of protecting the right to life. Regarding non-lethal force, this also must be employed only as strictly necessary and proportional, and this means it may only be used for limited purposes, such as in self-defence or in the defence of others against the imminent threat of death or serious injury, to prevent a particular serious act involving a grave threat to life threat or when less extreme means are unavailable.

The 1979 UN Code of Conduct for Law Enforcement Officials specifies that, where police powers are exercised by military authorities or by State security forces, such military or other forces are subject to the relevant international standards for law enforcement officials on matters such as use of force and respect for human rights.

It is not possible for members of armed forces to act in accordance with law enforcement standards unless they have appropriate training about the difference between the standards applicable to police operations and those applicable to combat operations, and this distinction is recognised and enforced in practice. For this and other reasons, the Tatmadaw is not an appropriate institution to carry out law enforcement operations.

Is the use of landmines permissible?

There are reports that anti-personnel landmines, which are designed to injure or kill people, have recently been laid in the border area between Bangladesh and Myanmar, allegedly by Myanmar's security forces, reportedly resulting in injury and death to people fleeing into Bangladesh. Bangladeshi authorities reportedly lodged an official complaint to Myanmar in September about the use of landmines along its border.

The Tatmadaw continues to produce landmines and use them throughout the country. Any person passing through an area where landmines have been deployed runs a real risk of death or serious injury. Such deployments of landmines cannot be necessary to protect life as required to justify their use under international human rights law. On the contrary, they pose serious threats to the right to life and the right not to be subject to ill-treatment.

Similar concerns would arise under international human rights law. While Myanmar is not a State party to the Convention on the Prohibition of the Use, Stockpiling, and Transfer of Anti-Personnel Mines and on their Destruction (The Mine Ban Treaty), it is bound by customary international law on the use of landmines and on general rules for the use of weapons, just as it is by international human rights law including the obligation to protect human life. Under international law, when landmines are used, special care must be taken to minimize their indiscriminate effects, including by taking measures such as clearly fencing and signposting mined areas. Without such precautionary measures being taken, the use of landmines in northern Rakhine State would likely constitute a violation of international law.

Can private individuals lawfully participate in security operations?

Credible reports suggest that groups of individuals who are not members of security forces have carried out acts of violence and arson in northern Rakhine State, allegedly with active involvement or acquiescence by security forces. Regardless of the involvement of security forces in the commission of acts by private individuals, such actions constitute crimes that necessitate investigation and prosecution. In instances where security forces enable, facilitate or otherwise contribute to human rights abuses perpetrated by private individuals, or by militias, this will generally also constitute violations of the State's international human rights law obligations. A failure to intervene to prevent or stop such violence when it happens in the presence of State authorities or when they should be aware of it, or a failure to punish perpetrators in these instances, will also generally constitute a violation of the State's obligations.

Myanmar has a long history of individuals perpetrating human rights abuses with the direct or tacit approval of State security forces. Several instances link the mobilization of civilians to human rights abuses, including but not limited to the 'Depayin Massacre' in 2003, crackdowns against protests led by Buddhist Monks in 2007, and more recent violence including that against student protestors in Yangon in early 2015.

Section 128 of the Criminal Procedure Code authorizes police, as well as magistrates, to acquire "the assistance of any male person, not being an officer, soldier, sailor or airman" to disperse public assemblies and to arrest and confine participants. Under section 127 of the Code, private individuals may be mobilized in this way in instances of unlawful assemblies or assemblies 'of five or more persons likely to cause a disturbance of the public peace'. There have been no reports of these provisions being invoked recently in northern Rakhine State. Regardless, these provisions in no way permit the crimes of violence and arson.

The use of militias by the Tatmadaw is a long-standing practice in Myanmar. Article 340 of the Constitution states that "With the approval of the National Defence and Security Council, the Defence Services has the authority to administer the participation of the entire people in the Security and Defence of the Union. The strategy of the people's militia shall be carried out under the leadership of the Defence Services." Given that the National Defence and Security Council has not convened under the NLD government,

which is a prerequisite to mobilizing a militia in accordance with article 340, any new militias raised in northern Rakhine State would have no legal basis under Myanmar's Constitution.

In October 2016, the Rakhine State Police Force announced an initiative to recruit non-Muslim residents to support regular forces and put them through an accelerated training program. At the time there was confusion about the legal basis, if any, for constituting a force in this manner. The situation was eventually clarified when authorities stated that recruits would be deployed as members of the Border Guard Division of the MPF. There have been concerns that a force recruited and trained in this manner would be poorly trained, undisciplined and prone to perpetrate rights abuses.⁷ There have also been concerns that constituting a force in this way risks blurring the distinction between regular villagers and security personnel in northern Rakhine State.⁸ In the end it is not clear if these recruits completed training or if they were mobilized during subsequent security operations in northern Rakhine State. In any case, international standards affirm that such a force is subject to the same laws and standards as a regularly constituted police force.

4. What would constitute a lawful response to ARSA?

The attacks attributed to ARSA in October 2016 and August 2017 appear to constitute crimes for which perpetrators can be held accountable. Security operations to apprehend and detain suspected perpetrators must be conducted in line with international human rights standards. Anyone taken into custody by military forces must be swiftly handed over to civilian police authorities in accordance with the due process protections in the Constitution, Criminal Procedure Code and Police Manual, and in line with international human rights standards on the treatment of detainees.

Individuals responsible for crimes must only be prosecuted according to Myanmar's criminal laws. The prosecution of persons charged with terrorism-related offences, as with all other criminal offences, must conform to fair trial standards, even during states of exception in which core aspects of the right to a fair trial remain applicable under international law. All effective measures must be taken to ensure that persons detained are brought promptly before a judicial authority and that detention remains under judicial control. Detained persons must have prompt access to lawyers, family members and medical personnel. Detainees have the right at any time to access a court to challenge the lawfulness of her or his detention and to be released if the detention is unlawful.

The authorities in Rakhine State failed to respect these rights following arrests and detentions carried out during security operations in response to the attacks by ARSA in October 2016. Many of the arrests were arbitrary and unlawful, and detainees were not given full access to legal counsel. Government-reported deaths in custody, including of minors, have not been impartially and thoroughly investigated. The failures of Myanmar authorities to respect these rights have been documented throughout the country, and are not limited to situations of internal disturbance or armed conflict.

What are the legal implications of ARSA being designated as a 'terrorist organization'?

On 25 August 2017 the government's Counter-Terrorism Central Committee declared that ARSA is a 'terrorist organization' and that its supporters would be held responsible for acts of terrorism. The attacks allegedly conducted by ARSA should be treated as crimes that qualify as offences under Myanmar's Penal Code or the 2014 Counter-Terrorism Law, to the extent that they do not violate applicable international standards.

Regardless of whether or not the ARSA attacks are designated as terrorist acts by the Myanmar government, counter-terrorism operations must be conducted in line with international human rights standards, and the prosecution of persons charged with terrorism-related offences, as with all criminal offences, must be done in accordance

with fair trial standards. Individual perpetrators of crimes must be treated and judged based on their conduct and not on their designated status.

Under international law there is no comprehensive or universal definition of terrorism. Rather, terrorist offences are dealt with under the domestic law of each State. As with any other criminal legislation, terrorist legislation must comply with the principle of legality, meaning that the definitions must be of sufficient clarity so that those to whom they are addressed are able to conform their conduct to requirements of law. The definition of terrorism or terrorist acts in Myanmar law is vague and over-broad, as is the case in many countries. Globally the use of terrorism determinations has had the effect of wrongly undermining the use of criminal law and the rule of law.

5. Does the situation in northern Rakhine State involve crimes under domestic or international law? What are the definitions of these crimes?

Regarding domestic crimes, Myanmar's Penal Code lists criminal offences warranting investigation and prosecution. These include but are not limited to: the crime of murder, under section 300; the crime of torture, under sections 330 and 331; and the crime of rape, under sections 375 and 376. Myanmar law remains flawed, however, including because the scope of these crimes under Myanmar's Penal Code does not necessarily cover all relevant conduct that should be criminalized as a matter of international human rights law, and several provisions of Myanmar's national laws also include immunities or enable impunity for crimes perpetrated by security forces, such as by shielding security forces from public criminal prosecutions (see below).

Regarding international crimes, international human rights law characterizes certain conduct such as torture (including rape) and similar cruel, inhuman and degrading treatment, summary and arbitrary killing and enforced disappearance, as inherently criminal in character. States are required to ensure these violations are criminalized under their national laws and that allegations that such crimes have been committed are thoroughly and promptly investigated and, where sufficient evidence is available, are referred for prosecution and ultimately suitable redress. States other than the State where such crimes allegedly occurred are also permitted, and in some cases required, to conduct criminal investigations and proceedings if the perpetrator enters their territory, or in certain other circumstances.

Crimes against humanity are a further type of crime under international law. Certain acts, when committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack, constitute crimes against humanity under customary international law. Examples of such acts include, among others: murder; deportation or forcible transfer of population; rape; and persecution against any identifiable group. These acts may in other circumstances also in themselves constitute other crimes under national or international law, but to be characterized as a crime against humanity, they must be part of 'a widespread or systematic attack against a civilian population' and the perpetrator's knowledge of that attack must also be established.

The legal definition of genocide in article 2 of the Genocide Convention, to which Myanmar is a party, is "[a]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: a) Killing members of the group; b) Causing serious bodily or mental harm to members of the group; c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) Imposing measures intended to prevent births within the group; e) Forcibly transferring children of the group to another group." This definition is also reflected in contemporary international criminal law instruments such as the Rome Statute of the ICC and ad hoc criminal tribunals. The special "intent to destroy, in whole or in part" element presents evidentiary challenges in proving individual criminal responsibility for genocide, but circumstantial indicia can provide the

basis for at least triggering the obligation to investigate. UN Special Advisers on the Prevention of Genocide and on the Responsibility to Protect have developed a Framework of Analysis for the Prevention of Atrocity Crimes that identifies risk specific factors for the crime of genocide with a view to identify measures that can be taken by States to prevent the crime of genocide. Risk factors include the presence of: "intergroup tensions or patterns of discrimination against protected groups" and or "signs of an intent to destroy in whole or in part a protected group."⁹ As previously mentioned, the Genocide Convention requires States to prevent and punish all Genocide crimes.

In situations of armed conflict (which, as discussed above, does not seem at this point to include northern Rakhine State), serious violations of international humanitarian law (including, in non-international armed conflicts, violations of Common Article 3 of the Geneva Conventions, and serious violations of customary international humanitarian law) constitute war crimes. These may include but are not limited to willful killing, torture or inhumane treatment, and the extensive destruction and appropriation of property carried out unlawfully, indiscriminately and not justified by military necessity.

The 1998 Rome Statute of the International Criminal Court also sets out definitions of crimes against humanity, war crimes and genocide for the purpose of describing the jurisdiction of the Court. However Myanmar is not a State party to the Rome Statute, and so the International Criminal Court (ICC) does not generally have jurisdiction to investigate or prosecute crimes in Myanmar unless the situation is referred to the ICC via a resolution of the UN Security Council, pursuant to article 13(b) of the Rome Statute and chapter 7 of the UN Charter. The ICC's jurisdiction does not apply retroactively, should Myanmar later become a State party to the Rome Statute, as per articles 24(1) and 126(2) of the Statute.

International human rights law and standards protect the right of everyone to bring forward allegations of the commission of crimes under international law and to call public attention to them, and States have an obligation to investigate all allegations and to ensure protection of those who complain or are witnesses. At the same time actual prosecution and criminal punishment of individuals for crimes under international law is subject to the same human rights requirements as other kinds of crimes, including the requirements for a fair trial by an independent and impartial court, the presumption of innocence, and standards of proof.

The security forces in Myanmar have a well-documented history of human rights violations, including against ethnic minorities. This has included the use of military campaigns in different parts of Myanmar to forcibly transfer populations within national borders and deport them beyond national borders. Such campaigns took place in northern Rakhine State in 1978 and in 1991. In 2016 and 2017, the UN, credible nongovernmental organizations, and the media, have alleged that attacks against the Rohingya population by the Tatmadaw have been both widespread and systematic, and have included acts of: murder; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; rape; and persecution against an identifiable group.¹⁰

Does the current situation constitute ethnic cleansing?

The UN High Commissioner for Human Rights, addressing the Human Rights Council on 11 September 2017, stated: "Last year I warned that the pattern of gross violations of the human rights of the Rohingya suggested a widespread or systematic attack against the community, possibly amounting to crimes against humanity, if so established by a court of law. Because Myanmar has refused access to human rights investigators the current situation cannot yet be fully assessed, but the situation seems a textbook example of ethnic cleansing."

The UN Secretary-General at a 13 September 2017 Press Conference, was asked in light of the High Commissioner's statement, whether he considered the situation to constitute "ethnic cleansing" and answered: "Well, I would answer your question with another

question. When one third of the Rohingya population had to flee the country, can you find a better word to describe it?"

The term 'ethnic cleansing' is generally understood to describe discriminatory acts designed to eradicate a particular ethnic group from a given area. However, the term 'ethnic cleansing' has not been defined in international law and 'ethnic cleansing' is not in itself a distinct crime under international law, though the term has been used in resolutions of the Security Council and the General Assembly, and has been acknowledged in judgments and indictments of the International Criminal Tribunal for former Yugoslavia.

From the perspective of international human rights law, then, the relevant legal question is ultimately whether the actions in question constituted crimes under Myanmar or international law.

6. What are the barriers to accountability for human rights violations and how can these be surmounted?

Myanmar's national laws enable impunity for human rights violations, including by shielding security forces from public criminal prosecutions.

Section 72 of the 1959 Defence Services Act stipulates that military personnel on active service who commit serious crimes are to be tried by courts martial rather than by ordinary courts: "A person subject to this Act who commits an offence of murder against a person not subject to military law, or of culpable homicide not amounting to murder by court against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried-by a court-martial, unless he commits any of the said offences: (a) while on active service, or (b) at any place outside the Union of Burma, or (c) at a frontier post specified by the President by notification in this behalf."

The broad definition of 'active service' under section 3(a) of the Act has the effect that in most instances military personnel, who are subject to the Act, would be considered to be on active service and therefore subject to trial by courts-martial rather than ordinary courts, for the crimes of murder, of culpable homicide and of rape. Articles 293(b), 319 and 343(b) of the Constitution provide for the establishment of permanent military tribunals, in respect of which the Commander-in-Chief exercises appellate power and ultimate authority, with no right of appeal to the Supreme Court or other civilian body. The consequence is that military personnel are subject to the jurisdiction of courts-martial instead of ordinary courts, and no other individual or state institution may appeal the decisions. Under this arrangement, members of the Tatmadaw generally enjoy impunity for the perpetration of criminal offences.

Members of the MPF also generally enjoy impunity for the perpetration of criminal offences largely through the use of special police courts, established pursuant to the 1995 Myanmar Police Force Maintenance of Discipline Law (also see 1997 Law Amending the Myanmar Police Force Maintenance of Discipline Law). Violations of this law are categorized as 'offences' rather than as 'crimes.'

The combined effect of these laws is that alleged violations of international human rights or humanitarian law by military and security forces, including violations committed against civilians, are in Myanmar under the jurisdiction of military and special tribunals that lack the independence, impartiality, and procedural protections required by international law and standards.

Elected members of parliament must reform Myanmar's military justice and police court systems to bring domestic law inline with international standards and to address the effective codification of impunity for human rights violations in national law. Critically, allegations of rights violations by security forces should be tried exclusively by ordinary civilian courts.

How has Myanmar investigated allegations of human rights violations?

The investigation and prosecution of acts involving human rights violations, whether in Rakhine State or elsewhere, have been rarely undertaken within Myanmar's criminal justice system. Instead, security forces, ad hoc government committees and the Myanmar National Human Rights Commission tend to undertake these investigations, which are not impartial and independent or thorough and rarely lead to successful prosecutions of perpetrators. Investigations are not conducted according to Myanmar's criminal procedures or international standards. Members of Myanmar's military and police forces enjoy impunity largely through the use of military courts or special police courts. Convictions for crimes by security forces are rare and penalties are relatively weak, often times not commensurate with the gravity of the acts in question.

The Government of Myanmar has repeatedly challenged the accuracy and credibility of reports that human rights violations have occurred in Rakhine State during 2016 and 2017, while barring access to independent and impartial investigators. An investigation into alleged rights violations in 2016, undertaken by the 'Investigation Commission for Maungdaw in Rakhine State' was chaired by a military general, Vice President General Myint Swe, and largely cleared security forces of rights violations. On 13 October 2017, the Office of the Commander-in-Chief of the Tatmadaw announced that Defence Services Inspector General Lieutenant-General Aye Win would lead a new investigation into allegations of human rights violations perpetrated by security forces in northern Rakhine State.

Rather than commissioning military investigations into their own conduct, the situation in northern Rakhine State requires prompt, independent and impartial international and national investigations. All persons responsible for crimes under international law must be brought to justice. Without proper investigations there will be impunity for rights violations and this is likely to embolden perpetrators to commit rights violations in future.

What is the Independent International Fact Finding Mission?

Established in March 2017 by UN Human Rights Council Resolution 34/22, the mandate of the Independent International Fact Finding Mission on Myanmar (IFFM) is to "establish the facts and circumstances of alleged recent human rights violations by military and security forces and abuses in Myanmar, in particular in Rakhine State." Three experts – Marzuki Darusman of Indonesia, Radhika Coomaraswamy of Sri Lanka and Christopher Dominic Sidoti of Australia – constitute the IFFM and a team of advisers provides support for implementation of their mandate.

The Chairperson of the Mission, Marzuki Darusman, stated in his address to the Human Rights Council on 19 September 2017 that: "We understand our mandate to cover the whole of the country, in particular but not exclusively in Rakhine State, and we are seized of the situation in other parts of the country, particularly where there have been armed clashes... serious allegations of human rights violations and abuses continue to emerge from Kachin and northern Shan, which will be examined." The Chairperson said the IFFM would focus on events since 2011.

The Human Rights Council extended the IFFM's mandate at its 36th session on 29 September 2017. The IFFM is now scheduled to provide an oral update at the 37th session of the Council in March 2018, to submit its final report for consideration at the 39th session of the Council in September 2018, and to present the report to the UN General Assembly at its 73rd session in September 2018. Each Council session is to include an interactive dialogue.

To date Myanmar has been uncooperative with the IFFM, including by refusing to facilitate visas to its members. In response to the proposal to extend the IFFM's mandate, the Myanmar delegation to the Council said, "Extending the mandate would be counterproductive for the Government's efforts to re-establish peace and stability in Rakhine state."

Note that the FFM is a mechanism separate from the Human Rights Council's Special Rapporteur on the Situation of Human Rights in Myanmar, established in 1992 as part of the special procedures of the Council and extended annually. In broad terms the mandate of the Special Rapporteur is to examine the situation of human rights in Myanmar, to report to the UN General Assembly and its Human Rights Council, and to identify areas for international cooperation.

Is Myanmar obliged to comply with the Fact Finding Mission?

As a UN Member State, Myanmar is expected to cooperate in good faith with the United Nations. Article 2(5) of the UN Charter provides that, "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter". As contemplated by article 7 of the UN Charter, the Human Rights Council is a subsidiary body of the United Nations established by General Assembly resolution 60/251, and as such the acts of the Human Rights Council, and action that it mandates be carried out by mechanisms it establishes, are actions of the United Nations in accordance with the Charter.

Human Rights Council Resolution 34/22, which established the FFM, explicitly calls on Myanmar to cooperate with the Mission. While failure to cooperate with the FFM may not as such result in practice in legal consequences for Myanmar, failure to do so casts doubt upon the State's commitment to international cooperation in the field of human rights.

Full cooperation with the FFM would be consistent with State Counsellor Aung San Suu Kyi's recent call – in her 19 September speech in Nay Pyi Taw – for the need to investigate all allegations, establish 'solid evidence' on the ground, and to cooperate with the international community in doing so. As critical first steps, this requires Myanmar to grant the FFM entry to Myanmar, by facilitating visas and enabling travel, and to institute effective measures to ensure that individuals engaging with the Mission are protected from threats or reprisals.

Myanmar has been unwilling or unable to properly investigate recent allegations of human rights violations by security forces and considering that impunity emboldens perpetrators of human rights violations, full cooperation with the FFM is necessary to enable an investigation into allegations of rights violations that is credible by international standards. Cooperation would also reduce the likelihood of further action being taken at the Human Rights Council, or at the UN General Assembly or the UN Security Council. On 6 November 2017, the UN Security Council issued a Presidential Statement in response to the situation in Rakhine State, calling upon the Government of Myanmar to respect and protect human rights.

7. What are Myanmar's obligations and responsibilities toward refugees and internally displaced persons?

In line with the State's obligation to protect the right to life and other human rights, the government's most important and immediate responsibility is to stop the violations against the Rohingya that have driven them to flee their homes and livelihoods. The UN High Commissioner for Human Rights has called on Myanmar authorities to immediately end the ongoing attacks against Rohingya, which the UN asserts have been carried out with the intent of not only driving the population out of Myanmar but also preventing them from returning to their homes. The NLD-led government must reaffirm and repeat instructions to the security forces to respect and to protect the human rights of the Rohingya as well as others in Rakhine State, and the military and other authorities must ensure that in practice the violations are indeed brought to an end.

As part of the State obligation to protect the right to life, the government must also take immediate and effective measures to allow for full humanitarian access to all people affected by violence and displacement.

The government is obliged to provide secure and safe access to all persons seeking to return *to their places of origin* (places of residence prior to displacement) and must do

so without discrimination. Clearly, this obligation cannot be met so long as the current situation of violations against the Rohingya continue and remain unaddressed through criminal and other investigations and proceedings. During the process of return to their places of origin all persons must be able to enjoy the rights to freedom of movement and access to health, education and other services, inline with the State's international human rights law obligations (see above).

The return of refugees and internally displaced persons to their places of origin must not be directly linked to a citizenship verification process. Ongoing problems of statelessness and protracted displacement are linked to discriminatory provisions in the 1982 Citizenship Law and the failure of successive governments to properly apply the law to Muslims in Rakhine State, with an effect being that most Rohingya are not recognized as citizens of Myanmar. A review and modification of the 1982 Citizenship Law and its application is required so that it offers rights to all residents of Myanmar inline with the principle of non-discrimination, as recommended by the Myanmar government's own Advisory Commission on Rakhine State chaired by former UN Secretary General Kofi Annan. Requirements related to documentation or evidence of residence that refugees and internally displaced persons need to present in order to return to their places of origin must be reasonable and non-discriminatory.

Any citizenship verification process that does occur should be carried out in line with the Advisory Commission's recommendations, which includes the need to immediately clarify the rights of persons who are non-citizens. Under international human rights law, non-citizens enjoy the same human rights guarantees as citizens, with only very limited exceptions, such as the right to vote.

What are Myanmar's other obligations and responsibilities toward refugees?

Anyone, including refugees, has the right to return to one's own country of origin, a right that is fully recognized in international law, for example in article 13(2) of the UDHR. The Office of the UN High Commissioner for Refugees (UNHCR) advises that, "In international human rights law, the basic principle underlying voluntary repatriation is the right to return to one's own country. As a corollary of this right, States are duty-bound to admit their nationals and cannot compel any other State to keep them through measures such as denationalization"; and that a number of other rights, including, chiefly, the right to a nationality and the right to life, liberty and security of person, the right not to be subjected to torture or other ill-treatment, the right not to be subjected to exile and the right to freedom of movement, are all related to related to the right of return. Returnees are furthermore entitled to basic rights, including the right to work, to education, health care, social security and other social benefits. The ongoing acts of persecution against the Rohingya population in Rakhine State are antithetical to the exercise of any of these rights.

Until the ongoing persecution is halted, any talk of repatriation of the Rohingya refugees from Bangladesh, including in the context of "voluntary returns", seems incongruous with the gravity of the situation. However, once the persecution has ended, Myanmar and other States will need to respond promptly to ensure that all refugees can safely and effectively exercise their right to return, and States should be taking any measures that can reasonably be taken now with a view to ensuring rapid response should the circumstances change in that direction.

The role of the UNHCR is essential in relation to all questions concerning the refugees. From the beginning of planning stages, UNHCR should be involved in discussions regarding repatriation, to ensure that the rights of refugees are respected and protected.

What is Myanmar's current national and bilateral legal framework governing the return of refugees from Bangladesh?

On 12 October 2017, State Counsellor Aung San Suu Kyi stated the government's "three main tasks (are) first, repatriation of those who have crossed over to Bangladesh and providing humanitarian assistance effectively; secondly, resettlement and rehabilitation; and third, bringing development to the region and establishing durable peace."

Particular concern will be required to ensure that in every instance any return of refugees to Myanmar is truly voluntary and consistent with international law. Past experience reinforces this concern. In 1992 and 1993, both the UNHCR and Non-Government Organizations expressed concerns about the coercion of and forceful repatriation of refugees from Bangladesh to Myanmar. In the repatriation program in 1994 many international observers challenged assertions that return was voluntary.

International human rights law applicable to refugees has been set out above. A discussion of national and bilateral frameworks follows below.

On 19 September 2017 Aung San Suu Kyi stated that repatriation arrangements would be coordinated in accordance with 1993 agreements involving Bangladesh and Myanmar. Bangladesh and Myanmar authorities announced on 1 October 2017 that a "working group" would be established to coordinate repatriation. In a briefing to diplomats on 9 October 2017, the Bangladesh Foreign Minister Abul Hassan Mahmud Ali suggested that further discussions were required because the arrangements made in 1992/3 were "not realistic."

Myanmar authorities have cited various instruments as constituting the legal framework for the return of refugees, including:

- 28 April 1992 Joint Statement between Bangladesh and Myanmar;
- 5 May 1993 Memorandum of Understanding between Bangladesh and the UNHCR;
- 5 November 1993 Memorandum of Understanding between Myanmar and UNHCR;
- 14 January 2000 Bilateral Agreement (or agreements) between Bangladesh and Myanmar.

Among these it appears that the 1992 Joint Statement is the only publicly available document. The two Memorandums of Understandings (MoUs) signed in 1993 are understood to be in part based on the Joint Statement, which has also been referred to as an MoU. In a meeting between the two governments in early October 2017, Myanmar's Minister for the Office of the State Counsellor, Kyaw Tint Swe, also referred to an agreement apparently made during a bilateral meeting on 14 January 2000, the content of which is unknown based on publicly available information. On 24 August 2017 the Myanmar Government announced the signing of two additional MoUs with Bangladesh, one related to 'Security Dialogue and Cooperation' and the other related to the 'Establishment of Border Liaison Offices' between the two States.

Even leaving aside the concern that talk of repatriation of the Rohingya refugees from Bangladesh in the immediate term seems incongruous while the particularly acute persecution continues and indeed while the very existence of that persecution is denied by Myanmar authorities, certain practical and other additional concerns exist that will need to be addressed. The 1992 Joint Statement for instance predicates eligibility for repatriation on the possession of documentation such as proof of citizenship or proof of residence in Myanmar. Many refugees may not be able to return under the terms of this agreement, because many Rohingya Muslims do not possess such documents, in part as a result of discriminatory policies and practices of successive Myanmar governments. Those who do possess documentation often face problems convincing Myanmar authorities of their authenticity or legitimacy. A 'memorandum on repatriation' issued by the UNHCR Information Section on 11 November 1993 noted that refugees would be issued 'appropriate documentation' under terms of the UNHCR's MoU with Myanmar.

However without detail regarding the documentation to be provided, and given the context of decades of discriminatory State practice in this regard, such documentation may be insufficient to enable durable solutions for returning refugees. As noted above, requirements for the return of refugees to Myanmar must not be directly linked to the citizenship verification process.

What are Myanmar's other responsibilities and obligations toward internally displaced persons?

The 1998 UN Guiding Principles on Internal Displacement (the Guiding Principles) define internally displaced persons as persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border (principle 2). As such, internally displaced persons (IDPs) are not refugees.

The Guiding Principles compile international norms and standards addressing the rights of persons internally displaced by armed conflict, violence, human rights violations, and disasters caused by acts of persons. These rights are held by IDPs regardless of their official citizenship status.

Principle 25 of the Guiding Principles reaffirms the right of international humanitarian organizations to offer humanitarian assistance without discrimination, and the obligation of the State to not arbitrarily withhold consent for humanitarian support, particularly when authorities are unwilling or unable to provide such assistance.

Principle 28 affirms that internally displaced persons have the right of return to their place of origin, and that government authorities are obliged to facilitate this: "Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavor to facilitate the reintegration of returned or resettled internally displaced persons."

Are government plans for camps, redevelopment and resettlement – including its invocation of the Disaster Management Law – compatible with its obligations and responsibilities toward refugees and displaced persons?

In line with international law and standards, all persons displaced in and from northern Rakhine State should be able to safely return to their places of origin and to participate in activities to rehabilitate and restore their homes and livelihoods. Any government plans that do not adequately recognize and respond to the recent and ongoing human rights violations cannot be consistent with Myanmar's responsibilities and obligations to the victims.

Even assuming the ongoing violations are brought quickly to an end and redress and justice processes begin, a government plan, first reported in the media in September, to establish new camps to host displaced Rohingyas, and potentially also to host Rohingya refugees repatriated from Bangladesh, would not constitute an appropriate or durable solution to displacement. Given that there are persons who are not Rohingya who have been permitted to return to their homes, and who have been provided with support from the government to do so, but Rohingya have been prohibited from returning, the plan and practice clearly violates the established international law principle of non-discrimination.

The government has not presented any plans to allay fears that the establishment of new camps would not further contribute to and exacerbate a protracted and unacceptable displacement crisis, noting that up to 140,000 Rohingyas displaced in 2012 still remain in camps and experience severe ongoing curtailments on a range of human

rights, in violation of the State's international human rights law obligations, and inconsistent with the Guiding Principles, particularly principle 12(b), which states that IDPs, "[s]hall not be interned or confined to a camp. If in exceptional circumstances such internment or confinement is absolutely necessary, it shall not last longer than required by the circumstances." The situation is also incompatible with principle 14 of the Guiding Principles, which affirms that: "a) Every IDP has the right to liberty of movement and freedom to choose his or her residence; and b) In particular, IDPs have the right to move freely in and out of camps or other settlements."

On 26 September 2017, Union Minister for Social Welfare, Relief and Resettlement Dr. Win Myat Aye stated that 'redevelopment works' (a non-legal term in this instance) would be undertaken in Maungtau Township under government management. (Dr. Win Myat Aye also chairs the Committee for Implementation of the Recommendations on Rakhine State established on 9 October 2017, and acts as Vice Chair of the newly formed Union Enterprise for Humanitarian Assistance, Resettlement and Development in Rakhine announced by Aung San Suu Kyi on 12 October 2017). In an interview published in state media on 29 September 2017, Dr. Win Myat Aye noted that on the advice of the Union Attorney General's Office, rehabilitation activities will be conducted in line with the 2013 Disaster Management Law and its bylaw, the 2015 Disaster Management Rules, on the basis that 'burnt lands' are considered to be affected by disaster.

Section 4 of the Disaster Management Law establishes the National Disaster Management Committee, which is chaired by Vice President Henry Van Thio. The objectives of this Law, contained in section 3, are to support and facilitate rehabilitation and reconstruction activities after a disaster to enable persons affected by disaster to return to their land and reestablish assets and livelihoods. In implementing its disaster response the government must ensure alignment with these objectives, making particular note of sub-section (e), which obliges authorities to provide health, education, social and livelihood programs to bring about better living conditions for victims of disasters. These objectives are broadly in line with the Guiding Principles, particularly principle 29, which reaffirms the duty of authorities to support IDPs to recover their property or assist them in obtaining appropriate compensation or reparation (see above). At the same time, for the reasons described above, it is difficult to see how such measures can be effectively implemented in line with the Guiding Principles when the violations that gave rise to the displacement are continuing.

In her speech on 12 October 2017, State Counsellor Aung San Suu Kyi affirmed the government's stated commitment to resettlement linked with rehabilitation. Consistent with this state commitment, and in line with the objective of the Disaster Management Law, land managed by authorities following a disaster should subsequently be returned to the victims and must not be confiscated or repurposed – the disaster laws do not contemplate the transfer of land use or ownership to the State.

While it may be within the scope of the Disaster Management Law to classify 'burnt lands' as being subject to a 'natural disaster,' the crime of arson must be dealt with as a matter separate to the rehabilitation or restoration of land and property affected by arson.

(Since this report was initially prepared, it was reported that Tin Maung Swe, who holds the highest GAD position in Rakhine State in his capacity as State Secretary, said that the Ministry of Home Affairs would facilitate a process to reclassify land previously occupied by Rohingya so that they would not be permitted to return to their places of origin).¹¹

8. What are the duties of Myanmar's neighbors toward refugees?

The refugee situation has significantly affected the region. All of Myanmar's neighbors and other countries, whether in the region or beyond, should allow Rohingya fleeing persecution in northern Rakhine arrive to enter their jurisdictions unimpeded. Full and unhindered humanitarian access to refugees from Myanmar must also be permitted and facilitated in line with the international human rights law obligations of all States to respect and to protect the rights of all persons within their jurisdiction. Under both international human rights law and international refugee law, refugee-receiving countries have an obligation to provide refugees with protection, including, in particular, protection against *refoulement*.

The principle of *non-refoulement* prohibits the expulsion or return of a refugee in any manner whatsoever to a territory where their lives or freedom would be threatened. *Non-refoulement* is a norm of customary international law, binding the international community of states, including those not party to the 1951 Refugee Convention, such as Bangladesh. *Non-refoulement* is also an obligation under international human rights law, under which States may not transfer individuals to another jurisdiction where they would face a real risk of a violation of the right to life, torture or other ill-treatment or other serious human rights abuses.

Given the ongoing persecution of Rohingya in Myanmar, any attempt by any State to repatriate refugees to Myanmar at this time on a non-voluntary basis would constitute *refoulement*, which is at all times prohibited in customary international law.

As the closest neighbor to Rakhine State, Bangladesh has borne the brunt of the exodus, which has added to a protracted refugee situation existing in the border area since 1991. On 21 September 2017, the Prime Minister of Bangladesh, Sheikh Hasina, told the UN General Assembly that her country now hosts over 800,000 persons forcibly displaced from Myanmar, over half of whom entered during the three-week period from 25 August 2017. She called for full implementation of recommendations made by Myanmar's Advisory Commission on Rakhine.

When the persecution of Rohingya has ended and it eventually becomes reasonable to consider measures for repatriation, Bangladesh will need to reflect on the lessons of repatriations to Myanmar in the early 1990s, when the UNHCR and international organizations expressed concerns about instances of coercion and forced repatriations. Given the problems associated with implementation of the 1993 agreements, a revised legal framework aligned with international law will need to be in place before facilitating future repatriations. As noted above, the UNHCR should be involved to ensure the rights of refugees are respected and protected.

Like Bangladesh, India is not party to the 1951 Refugee Convention but nonetheless remains bound to comply with the customary international law principle of *non-refoulement*, as well as its binding obligations under a number of international human rights treaties to which India is party, including the International Covenant on Civil and Political Rights (ICCPR), the CRC and the CEDAW. The Supreme Court of India is currently considering the lawfulness of an initiative by the Government of India to return Rohingya Muslim refugees to Myanmar. Given the ongoing persecution of Muslims in Myanmar's Rakhine State, the forcible return of refugees from India would constitute *refoulement*, which would be a serious violation of India's obligations under international law.

Other States in the region, including Thailand and Malaysia and Indonesia, as well as Australia, must also ensure that Rohingya refugees (as all other refugees and asylum seekers) under their jurisdiction are offered full protection under international human rights and refugee law. Australia, as a party to the Refugee Convention and the 1967 Protocol relating to the Status of Refugees, must not punish or restrict the movement of refugees on account of their means of entry (article 31 of the Convention) and is bound to respect their rights to work and education, among other rights.

Sources cited

National law discussed in this Briefing Note:

- 2008 Constitution of the Republic of the Union of Myanmar;
- Myanmar Code of Criminal Procedure (Criminal Procedure Code);
- Myanmar Penal Code;
- Myanmar Police Manual;
- 1959 Defence Services Act;
- 1982 Citizenship Law;
- 1995 Myanmar Police Force Maintenance of Discipline Law, and the 1997 Law Amending the Myanmar Police Force Maintenance of Discipline Law;
- 2010 Amyotha Hluttaw Election Law;
- 2010 Pyithu Hluttaw Election Law;
- 2013 Disaster Management Law;
- 2014 Counter-Terrorism Law;
- 2015 Disaster Management Rules.

International law and standards discussed in this Note:

- 1945 Charter of the United Nations;
- 1948 Universal Declaration of Human Rights;
- 1948 Convention on the Prevention and Punishment of the Crime of Genocide;
- 1949 First Geneva Convention, 1949 Second Geneva Convention, 1949 Third Geneva Convention, 1949 Fourth Geneva Convention.
- 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees;
- 1966 International Covenant on Civil and Political Rights;
- 1966 International Covenant on Economic, Social and Cultural Rights;
- 1979 UN Code of Conduct for Law Enforcement Officials;
- 1979 Convention on the Elimination of all forms of Discrimination Against Women;
- 1989 Convention on the Rights of the Child, and its Optional Protocol on the sale of children, child prostitution and child pornography;
- 1997 Convention on the Prohibition of the Use, Stockpiling, and Transfer of Anti-Personnel Mines and on their Destruction (The Mine Ban Treaty);
- 1998 Rome Statute of the International Criminal Court;
- 1998 UN Guiding Principles on Internal Displacement;
- 2006 Convention on the Rights of Persons with Disabilities.

Memoranda involving Bangladesh and Myanmar discussed in this Note:

- 28 April 1992 Joint Statement between Bangladesh and Myanmar;
- 5 May 1993 Memorandum of Understanding between Bangladesh and the UNHCR;
- 5 November 1993 Memorandum of Understanding between Myanmar and UNHCR;
- 11 November 1993 UNHCR Memorandum on Repatriation;
- 14 January 2000 Bilateral Agreement (or agreements) between Bangladesh and Myanmar.

Notes:

¹ Frontier Magazine, "President's Office designates northern Rakhine a 'military operations area,'" 4 September 2017.

² The post was cited on 27 October 2017, at this address: <https://www.facebook.com/MOIWebportalMyanmar/posts/1345425728918623>.

³ See: Melissa Crouch, "The Everyday Emergency: Between the Constitution and the Code of Criminal Procedure in Myanmar", in Andrew Harding and Khin Khin Oo (eds), *Constitutionalism and Legal Change in Myanmar* (Bloomsbury Publishing, 2017).

⁴ This typology has been elucidated by Melissa Crouch, *ibid*.

⁵ The Irrawaddy, "Army Defends Kachin State Clearance Operations," 15 August 2017.

⁶ See: International Crisis Group, "Myanmar: A New Muslim Insurgency in Rakhine State," Asia Report N°283, 15 December 2016, p. 7.

⁷ See: International Commission of Jurists, "Myanmar: proposed Rakhine 'civilian police force' a recipe for disaster," 4 November 2016.

⁸ See: International Crisis Group, "Myanmar: A New Muslim Insurgency in Rakhine State," Asia Report N°283, 15 December 2016, p. 8.

⁹ UN Special Advisers on the Prevention of Genocide and on the Responsibility to Protect, "Framework of Analysis for Atrocity Crimes: a tool for prevention," 2014, pp. 18-19.

¹⁰ For example, see: UN Office of the High Commissioner for Human Rights, "Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016," 3 February 2017. UNOHCHR, "Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh, 13-24 September 2017," October 2017.

¹¹ Nikkei Asian Review, "Tensions over Rohingya return highlight donor dilemmas," 27 October 2017.

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