

## MYANMAR:

### **NEW COMMISSION OF INQUIRY CANNOT DELIVER JUSTICE OR ACCOUNTABILITY, INTERNATIONAL RESPONSE REQUIRED**

7 September 2018<sup>1</sup>

#### **Summary:**

- None of the previous Government-commissioned inquiries since 2011 is known to have led to any effective prosecution of security forces for gross human rights violations, or to any redress to victims or their families.
- In current circumstances it is impossible to rely on any national courts, prosecution services, or commissions of inquiry in Myanmar to deliver justice or accountability of security forces in relation to human rights violations constituting crimes under international law.
- The most recently-established Independent Commission of Inquiry (ICOE) on Rakhine State cannot reasonably be seen as having any chance of being independent, impartial, or making an effective contribution to justice or accountability for the crimes under international law. To the contrary, giving any recognition to it is likely to undermine and delay effective international measures for justice and accountability.
- The UN Security Council should refer the situation to the International Criminal Court or a similarly constituted international tribunal without delay.
- The UN Human Rights Council should promptly establish a robust International Impartial and Independent Mechanism (IIIM) or similar mechanism, to collect and analyse evidence for future prosecutions; action should be taken by the Council at its September 2018 session – waiting for or deferring to the UN General Assembly to act would risk further delaying or denying justice for victims, including because key criminal evidence could be irretrievably lost, destroyed, or deteriorate in the meantime.

“We have formed the Independent Commission of Enquiry to response [sic] to false allegations made by the UN Agencies and other international communities.”

- Spokesperson for the Office of the President, 28 August 2018.<sup>2</sup>

“[T]here will be no blaming of anybody, no finger-pointing of anybody... saying you’re accountable.”

- Chairperson of the ICOE, 16 August 2018 press conference.<sup>3</sup>

“The Government’s recently-created Commission of Inquiry will not and cannot provide a real avenue for accountability, even with some international involvement. The impetus for accountability must come from the international community.”

- Independent International Fact Finding Mission on Myanmar,  
27 August 2018 summary report.<sup>4</sup>

## **Background**

Crimes against humanity and war crimes have been committed in Myanmar, and an investigation of evidence of the crime of genocide is warranted<sup>5</sup>, according to the summary report of the United Nations Independent International Fact-Finding Mission [IIFFM], published on 27 August 2018.<sup>6</sup>

In Myanmar the rule of law is severely undermined by a lack of accountability for perpetrators of rights violations; lack of access to remedies and reparation for victims; and persistent challenges to the independence of the justice system.

On 30 May 2018 the Government of Myanmar announced its latest "International Commission of Enquiry" (ICOE).<sup>7</sup> Its creation follows some eight other special government inquiries and boards conducted since 2012 in Rakhine State alone.<sup>8</sup> Ten weeks following this announcement the four ICOE members met in Nay Pyi Taw, apparently for the first time, culminating in a press conference on 16 August.

On 28 August the spokesperson for the Office of the President stated that, "We have formed the Independent Commission of Enquiry to response [sic] to false allegations made by the UN Agencies and other international communities."<sup>9</sup> Indeed, the Chairperson of the ICOE stated at the 16 August press conference, that "there will be no blaming of anybody, no finger-pointing of anybody... saying you're accountable."<sup>10</sup>

Such prejudicial statements confirm the conclusion of the IIFFM's experts, that:

"The Government's recently-created Commission of Inquiry will not and cannot provide a real avenue for accountability, even with some international involvement. The impetus for accountability must come from the international community."<sup>11</sup>

The International Commission of Jurists (ICJ)<sup>12</sup> has had a continuous presence working in Myanmar since early 2014, and first began monitoring the situation of the justice system in the country more than fifty years ago.<sup>13</sup> Based on its extensive experience in Myanmar and globally, the ICJ concurs with the IIFFM's assessment of the impossibility of justice or accountability before national courts or commissions in Myanmar in relation to crimes under international law perpetrated in Rakhine, Kachin and Shan states, and that the situation should be referred to the International Criminal Court or a similarly constituted international tribunal, for further investigation and the prosecution of those responsible.<sup>14</sup>

## **Investigating, prosecuting and punishing rights violations in Myanmar**

All States have obligations under international law to ensure effective investigation, prosecution and punishment of perpetrators of human rights violations that constitute crimes under international law, and redress to victims and their families.

To conform to international law and standards, any investigation must be prompt and thorough, investigators must be independent of those suspected of being involved, and they must be impartial, acting without preconceptions, bias or discrimination. They require adequate capacity and resources to be thorough and effective, and require a genuine will to prosecute alleged perpetrators of crimes.

The Government of Myanmar's failure to acknowledge, much less address, the commission of crimes under international law, necessarily implies an unwillingness to take effective measures towards legal accountability and redress for gross human rights violations, including those perpetrated in Rakhine, Kachin and Shan States.

Myanmar is also unable to provide justice for gross human rights violations. Challenges to the independence of the judiciary, limitations on its competence and capacity, and restrictions on its jurisdiction undermine and limit the ability of judges to provide for accountability and redress, and to adequately administer

justice. Government law officers also lack the independence, competence and capacity to effectively prosecute acts involving human rights violations. Members of security forces involved in human rights violations generally enjoy impunity.<sup>15</sup>

Without prompt investigations and prosecutions conducted in line with international law and standards, impunity reigns, emboldening perpetrators of gross human rights violations, silencing victims and their families, and increasing the likelihood of future gross human rights violations against people in Myanmar.

### **International standards for commissions of inquiry**

When properly constituted, a commission of inquiry can contribute to fulfilling the State's duty to investigate, prosecute and punish crimes.<sup>16</sup> Such inquiries can help shed light on facts, and provide recommendations that may lead to prosecutions, and institutional or legal reforms to prevent repetition. However, the establishment of a commission of inquiry cannot in itself fulfil the State's obligations if it is not accompanied by effective, independent courts before which impartial prosecutors bring and diligently pursue individual criminal cases.

A key international standard for assessing inquiries and related justice processes are the UN Impunity Principles.<sup>17</sup> Commissions of inquiry should among other things: have a mandate that does not suggest a premeditated outcome; possess necessary resources; be able to provide witnesses with effective protection from intimidation and violence; be composed of members with the expertise, competence and independence to investigate effectively; and be free to report fully and publicly.<sup>18</sup>

Global experience shows that when inquiries fail to meet these standards they actually have the effect of promoting impunity by diverting criminal investigation from domestic or international mechanisms.<sup>19</sup> Reflecting on "lessons learned from 26 years reporting on commissions," then-UN Special Rapporteur on extrajudicial, summary or arbitrary executions Philip Alston concluded:

"Commissions can be used very effectively by Governments for the wrong purposes: to defuse a crisis, to purport to be upholding notions of accountability and to promote impunity... An ineffective commission can be more than just a waste of time and resources; it can contribute to impunity by deterring other initiatives, monopolizing available resources and making subsequent endeavours to prosecute difficult or impossible."<sup>20</sup>

### **Commissions of inquiry in Myanmar**

Since 2011, after formation of the first parliament under the 2008 Constitution, the Government has commissioned several special inquiries into allegations of human rights violations, in different parts of Myanmar.<sup>21</sup> These inquiries have clearly been inadequate as mechanisms for accountability or redress.<sup>22</sup>

In Rakhine State alone there have been some eight inquiries and boards since 2012, including at least two commissioned by the Office of the President, including under the current National League for Democracy-led Government.

The report of the "Investigation Commission on Sectarian Violence in Rakhine State," active from 2012-13,<sup>23</sup> failing profoundly to recognise or effectively address the serious human rights violations already taking place at that time, instead engaged in victim-blaming by asserting that "Bengalis now pushing to use the term Rohingya are surely fanning the flames of sectarian violence."<sup>24</sup> The report recommended bolstering the presence of security forces, and instituting family planning measures for Muslim women in Rakhine State. The report did not include recommendations on prosecutions of security forces.

The "Investigation Committee of Maungdaw" published its interim report in January 2017, 33 days after being established.<sup>25</sup> It concluded that, "[c]oncerning the claims that (Rohingya) women were raped, the Commission interviewed local

villagers and women using various methods, finding insufficient evidence to take legal action up to this date."<sup>26</sup>

The resolution adopted at the subsequent Human Rights Council session, which also established the Fact-Finding Mission, noted this inquiry and encouraged the publication of a credible report.<sup>27</sup> A final report, many times delayed, was published on 6 August 2017. The report was generally dismissive of previous reporting by the UN Office of the High Commissioner for Human Rights, and the recommendations failed to include measures to effectively prosecute crimes perpetrated by security forces.<sup>28</sup>

### **The "Independent Commission of Enquiry" on Rakhine State**

The Government announced a further commission, the "Independent Commission of Enquiry" (ICOE), in May 2018, through a press release describing its mandate as being to "investigate the allegations of human rights violations and related issues, following the terrorist attacks by ARSA."<sup>29</sup> Two months later the ICOE was formally established by the Office of the President, comprised of two members from Myanmar, one from the Philippines and one from Japan.<sup>30</sup>

Several meetings have taken place between ICOE members and the authorities.<sup>31</sup> According to a press release issued by the ICOE, on 31 August the ICOE "toured the villages" in northern Rakhine State and conducted interviews with residents.<sup>32</sup>

More than three months after it was announced, limited documentation of the mandate or terms of reference of the ICOE has been made publicly available, although State media has reported: "In discharging its mandate, the ICOE will apply the laws of Myanmar, in particular, the Investigation Committees Act 1950. The ICOE will also avail of international human rights law and international humanitarian law, when applicable."<sup>33</sup> The 31 August press release noted for the first time that the ICOE would conduct its investigation "with a view to seeking accountability."<sup>34</sup>

Despite the belated inclusion of a reference to accountability, the ICOE's mandate and its composition remain wholly inconsistent with international human rights law and standards.<sup>35</sup> It is not impartial or independent, and as constituted and given the broader context in which it operates, is clearly incapable of providing meaningful accountability or redress for human rights violations:

- The impartiality and neutrality of the ICOE has been compromised by prejudicial comments by government officials, such as when on 28 August the spokesperson for the Office of the President stated that, "We have formed the Independent Commission of Enquiry to response [sic] to false allegations made by the UN Agencies and other international communities."<sup>36</sup>
- The Chairperson of the ICOE does not appear to view accountability as part of its mandate at all, suggested by comments at the 16 August 2018 press conference that "there will be no blaming of anybody, no finger-pointing of anybody... saying you're accountable."<sup>37</sup> At the same event, a question about how alleged human rights violations by military would be investigated was met with two minutes of silence, followed by a muddled answer from the Chairperson that failed to address the question.<sup>38</sup>
- The ICOE cannot reasonably be seen as impartial or independent in light of other prejudicial public statements by members, as well as conflicts of interest. For instance, Commissioner Dr. Aung Tun Thet also serves as Chief Coordinator of the Union Enterprise for Humanitarian assistance, Resettlement and Development (UEHRD). Established in October 2017, the UEHRD is mandated to implement development projects in Rakhine State.<sup>39</sup> Its activities have included overseeing bulldozing, which may have destroyed evidence of crimes,<sup>40</sup> an allegation Dr. Aung Tun Thet has

denied.<sup>41</sup> Formerly a member of the Investigation Committee on Maungdaw (see above), in April 2018 Dr. Aung Tun Thet stated that, "whatever has happened in Rakhine State is not systematic, and that Myanmar is now working for their repatriation clearly demonstrates that there was no intention of ethnic cleansing."<sup>42</sup>

- While the ICOE Chairperson has given a verbal assurance of witness protection, no effective measures appear to be in place to ensure this in either law or practice, yet members of the ICOE have nonetheless commenced interviews with individuals in northern Rakhine State.<sup>43</sup> Witnesses and victims interviewed by the Commission may face retaliation, including criminal prosecution. Section 6 of the Enquiry Act notes that a false witness statement constitutes a criminal offense under Section 193 of the Penal Code, incurring a penalty of up to seven years imprisonment. Unjustified or politically-motivated criminal proceedings are often brought in Myanmar in retaliation against individuals who have made credible allegations of human rights violations by security forces.<sup>44</sup>
- State media has reported that a Secretariat has been established, and that "legal and forensic international experts will be called upon by ICOE as and when necessary."<sup>45</sup> Past experience suggests there will not be dedicated in-house human resources required to support a proper investigation that conforms to international standards.
- The Government of Myanmar has a poor track record of implementing the recommendations of inquiries and boards relevant to holding members of security forces individually and institutionally accountable for human rights violations and crimes under international law. For instance, a Committee to implement recommendations on Rakhine State, established by the Office of the President in September 2017,<sup>46</sup> has failed provide sufficient information to support its claims that 80 of 88 recommendations have been implemented, while reports suggest key proposals were in fact rejected.<sup>47</sup>

## **Recommendations**

Given the Government of Myanmar has been demonstrably unwilling or unable to effectively investigate and prosecute gross human rights violations through domestic justice mechanisms, the situation demands an effective international response:

- The UN Security Council should refer the situation to the International Criminal Court or a similarly constituted international tribunal without delay.
- The UN Human Rights Council should promptly establish a robust International Impartial and Independent Mechanism, to collect and analyse evidence for future prosecutions; action should be taken by the Council at its September 2018 session – waiting for or deferring to the UN General Assembly to act would risk further delaying or denying justice for victims, including as key criminal evidence could be irretrievably lost, destroyed, or deteriorate in the meantime.
- Justice must not be deterred or delayed by the Government of Myanmar's latest Commission of Inquiry, which cannot and will not provide accountability or redress for gross human rights violations, and in fact is likely only to promote impunity by deterring or delaying other justice initiatives. The resolution adopted by the Human Rights Council should reject the Commission as incapable of contributing in a substantial way to Myanmar meeting its international obligations of justice and accountability.

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<sup>1</sup> An updated version of a private memorandum produced on 31 August 2018, this public document includes additional text to incorporate relevant reporting in Myanmar's State media published on 1 September 2018.

<sup>2</sup> The Global New Light of Myanmar, "U Zaw Htay, Spokesman of the Office of the President: the questions have been raised as to the reasons for the removal of the Facebook accounts and pages associated with Tatmadaw," 29 August 2018, pp. 6.

<sup>3</sup> ICOE Press conference, Nay Pyi Taw, 16 August 2018 (video available at <https://www.facebook.com/theirrawaddyburmese/videos/218544952337657/>) Accessed 28 August 2018.

<sup>4</sup> "Report of the Independent International Fact-Finding Mission on Myanmar," 27 August 2018, A/HRC/39/64.

<sup>5</sup> On the requirement to prove "special intent" or "genocidal intent", which is a critical constitutive and distinctive element of the crime of genocide, see: ICJ, "Questions and Answers on the Crime of Genocide," Legal Briefing Note, August 2018. <https://www.icj.org/icj-releases-legal-q-a-on-crime-of-genocide/>

<sup>6</sup> The UN Human Rights Council established the Mission in 2017. UN Human Rights Council resolution on the situation of human rights in Myanmar, UN Doc. A/HRC/RES/34/22, para 11 (24 March 2017).

<sup>7</sup> Republic of the Union of Myanmar, "Government of the Republic of the Union of Myanmar will establish an Independent Commission of Enquiry," Office of the President Announcement 3/2018, 31 May 2018.

<sup>8</sup> "Report of the Independent International Fact-Finding Mission," para. 19.

<sup>9</sup> The Global New Light of Myanmar, "U Zaw Htay, Spokesman of the Office of the President: the questions have been raised as to the reasons for the removal of the Facebook accounts and pages associated with Tatmadaw," 29 August 2018, pp. 6.

<sup>10</sup> ICOE Press conference, Nay Pyi Taw, 16 August.

<sup>11</sup> "Report of the Independent International Fact-Finding Mission on Myanmar."

<sup>12</sup> Composed of 60 eminent judges and lawyers from all regions of the world, the ICJ promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

<sup>13</sup> See e.g. "Military Rule in Burma", Bulletin of the International Commission of Jurists, No. 15 (1963), pp 4-10, reporting on a 1962 mission to the country conducted on behalf of the ICJ, <https://www.icj.org/wp-content/uploads/2013/07/ICJ-Bulletin-15-1963-eng.pdf>.

<sup>14</sup> Report of the Fact-Finding Mission, August 2018. "The Security Council should ensure accountability for crimes under international law committed in Myanmar, preferably by referring the situation to the International Criminal Court or alternatively by creating an ad hoc international criminal tribunal" (para. 103(b)). "Until the Security Council acts, the General Assembly, or alternatively the Human Rights Council, should create an independent, impartial mechanism to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files to facilitate and expedite fair and independent criminal proceedings in national, regional or international courts or tribunals" (para. 103(c)).

<sup>15</sup> See: ICJ, "Achieving accountability for gross human rights violations in Myanmar," January 2018. <https://www.icj.org/myanmar-reverse-laws-and-practices-that-perpetuate-military-impunity-new-icj-report/>

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<sup>16</sup> For example, see: Revised UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (United Nations, 2016).

<sup>17</sup> Independent Expert to update the Set of principles to compat impunity, Diane Orentlicher, Report to the Commission on Human Rights, UN Doc. E/CN.4/2005/102/Add.1 (8 February 2005)

<sup>18</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston, Report to the Human Rights Council, UN Doc. A/HRC/8/3, para 25 (2 May 2008).

<sup>19</sup> See: ICJ, "Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity," June 2012. <https://www.icj.org/nepal-toothless-commissions-of-inquiry-do-not-address-urgent-need-for-accountability-icj-report/>

<sup>20</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston, Report to the Human Rights Council, UN Doc. A/HRC/8/3, para 51 (2 May 2008).

<sup>21</sup> Other inquiries have included an investigation into a police crackdown at Letpadaung Copper Mine in 2012 and an investigation into the unlawful killing of journalist Ko Par Gyi in Mon State in 2014. See: ICJ, "Achieving Justice for Gross Human Rights Violations in Myanmar," pp. 19-22.

<sup>22</sup> ICJ, "Achieving Justice for Gross Human Rights Violations in Myanmar," January 2018.

<sup>23</sup> Republic of the Union of Myanmar, President Office Notification No. 58/2012, 17 August 2017.

<sup>24</sup> Republic of the Union of Myanmar, "Final Report of the Inquiry Commission on Sectarian Violence in Rakhine State," 8 July 2013, pp. 56.

<sup>25</sup> Republic of the Union of Myanmar, President Office Notification No. 89/2016, 1 December 2016.

<sup>26</sup> Republic of the Union of Myanmar, "Interim Report of the Investigation Commission on Maungdaw," 3 January 2017, para. 11.

<sup>27</sup> UN Human Rights Council resolution on the situation of human rights in Myanmar, UN Doc. A/HRC/RES/34/22, para. 10 (24 March 2017).

<sup>28</sup> Republic of the Union of Myanmar, "Summary Report of the Investigation Commission for Maungdaw in Rakhine State," 6 August 2018.

<sup>29</sup> Republic of the Union of Myanmar, "Government of the Republic of the Union of Myanmar will establish an Independent Commission of Enquiry," Office of the President Announcement 3/2018, 31 May 2018. Republic of the Union of Myanmar, "Government of the Republic of the Union of Myanmar Establishes the Independent Commission of Enquiry," Office of the President Press Release 8/2018, 30 July 2018. Note "ARSA" is an acronym for the Arakan Rohingya Salvation Army.

<sup>30</sup> Republic of the Union of Myanmar, "Government of the Republic of the Union of Myanmar will establish an Independent Commission of Enquiry," Office of the President Announcement 3/2018, 31 May 2018. Its members are: Ambassador Rosario Manalo (Philippines); U Mya Thein (Myanmar); Ambassador Kenzo Oshima (Japan); and Prof. Dr. Aung Tun Thet (Myanmar).

<sup>31</sup> For example, see: Global New Light of Myanmar, "Vice Senior General Soe Win receives Independent Commission of Enquiry," 30 August 2018. Global New Light of Myanmar, "State Counsellor receives Independent Commission of Enquiry," 31 August 2018.

<sup>32</sup> Office of the Independent Commission of Enquiry, "Independent Commission of Enquiry issues press release," Nay Pyi Taw, 31 August. The Global New Light of Myanmar, "Independent Commission of Enquiry visits Maungdaw, Rakhine State," 1 September 2018.

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<sup>33</sup> The Global New Light of Myanmar, "Independent Commission on Enquiry holds press conference," 17 August 2018, pp. 7.

<sup>34</sup> Office of the Independent Commission of Enquiry, "Independent Commission of Enquiry issues press release," Nay Pyi Taw, 31 August.

<sup>35</sup> In addition to international law and standards regarding the conduct of investigations, applicable general standards are also articulated in Section 5 of the Alston Report to the Human Rights Council "Lessons learned from 26 years of reporting on commissions of inquiry," Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston, Report to the Human Rights Council, UN Doc. A/HRC/8/3, para 25 (2 May 2008). See also ICJ, "Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity," June 2012, pp. 23.

<sup>36</sup> The Global New Light of Myanmar, "U Zaw Htay, Spokesman of the Office of the President: the questions have been raised as to the reasons for the removal of the Facebook accounts and pages associated with Tatmadaw," 29 August 2018, pp. 6.

<sup>37</sup> ICOE Press conference, Nay Pyi Taw, 16 August 2018.

<sup>38</sup> ICOE Press conference, Nay Pyi Taw, 16 August 2018. Commissioners are seen discussing amongst themselves on how to respond when a compere wrongly says they are having 'technical problems,'.

<sup>39</sup> Office of the President Order No. 86/2017, 17 October 2017.

<sup>40</sup> Satellite imagery reveals mass bulldozing first took place in November 2017, soon after establishment of the UEHRD, in areas of Rakhine State vacated by Rohingyas. See: Human Rights Watch, "Burma: Scores of Rohingya Villages Bulldozed," 23 February 2018. OHCHR, "Infrastructure investment in Myanmar: Open for business?," Op-ed by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein, 2018.

<sup>41</sup> Shoon Naing, "Bulldozing Rohingya villages was not 'demolition of evidence', Myanmar official says," Reuters, 26 February 2018.

<sup>42</sup> Rezaul Karim and Porimol Palma, "'Not my concern': in an interview with Star, top Myanmar official downplays ethnic cleansing allegation, but admits Rohingya torture," The Daily Star, 20 April 2018.

<sup>43</sup> ICOE Press conference, Nay Pyi Taw, 16 August 2018. Office of the Independent Commission of Enquiry, "Independent Commission of Enquiry issues press release," Nay Pyi Taw, 31 August.

<sup>44</sup> These include sections: 124(a) of sedition; 211 of making false charges; 499 of defamation; and 505 of incitement. See: ICJ, "Achieving Justice for Gross Human Rights Violations in Myanmar," pp. 25, 31.

<sup>45</sup> The Global New Light of Myanmar, "Independent Commission on Enquiry holds press conference," 17 August 2018, pp. 7.

<sup>46</sup> Office of the President Order No.75/2017, 9 October 2017.

<sup>47</sup> Poppy Elena McPherson and Simon Lewis, "Myanmar rejects citizenship reform at private Rohingya talks," Reuters, 27 June 2018.