

ISSUE BRIEF

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Why the U.S. Should Issue a Legal Determination on Crimes Committed Against Rohingya

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On August 27, 2018, the United Nations Fact-Finding Mission (FFM) released its final report on Myanmar (also known as Burma) that found violence committed against Rohingya after August 25, 2017, constituted crimes against humanity, genocide, and war crimes.¹ The report, in many regards, confirmed what the international community already knew: The events that caused more than 700,000 Rohingya to flee from Burma to Bangladesh constituted serious crimes.

Since the U.N. FFM report's release, the U.S. government has waffled over its own legal determination. To this day, the U.S. government still calls what happened in Rakhine, a state situated on Burma's western coast, ethnic cleansing, an outdated determination made in November 2017 by then-Secretary of State, Rex Tillerson.² Following the release of the FFM, the U.S. released a report on September 24, 2018, entitled "Documentation of Atrocities in Northern Rakhine State" that made no legal determination about crimes committed.³

While a determination itself is merely a first step toward productively responding to crimes committed against Rohingya, it has the ability to amplify the urgency of responding to the events. Furthermore, it is an opportunity for the Trump Administration to dem-

onstrate leadership in addressing human rights challenges, especially after the Administration's prioritization of human rights issues was called into question after it pulled out of the Human Rights Council.

The Administration should move quickly to make a determination on what crimes were committed against Rohingya and, given its refusal to refer the case to the International Criminal Court (ICC), explore alternative judicial mechanisms to hold perpetrators accountable. The international community has long looked to the U.S. as a leader in promoting human rights and freedom across the globe; the Trump Administration should demonstrate its commitment to carrying out that legacy by placing a high premium on responding to the plight of the Rohingya.

Crimes Against Humanity, Genocide, and War Crimes Against Rohingya

The U.N. FFM confirmed what many already knew to be true: Crimes against humanity, genocide, and war crimes took place against persons in Rakhine, Shan, and Kachin states. This report will highlight the significance of findings only in Rakhine state.

The FFM said that it believed 10,000 Rohingya were killed after August 25, 2017.⁴ This is, according to the FFM, a conservative estimate of casualties based on information available to the U.N. at the time of the report's release. The FFM documented crimes of a systematic, premeditated nature, including mass killings of Rohingya men and boys, gang rape and other forms of sexual violence against women and girls, and significant razing of Rohingya villages.⁵

This paper, in its entirety, can be found at <http://report.heritage.org/ib4911>

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The FFM specifically outlined the systematic nature of crimes committed and identified instances where it was clear that the Burmese military prepared in advance for the atrocities, including an increased military presence in August 2017, confiscation of knives and other potential weapons from Rohingya, heightened restrictions on Rohingya's freedom of movement, and renewed efforts to institute a National Identification Card ahead of August 25.⁶ These findings are corroborated by other human rights advocacy groups including Fortify Rights.⁷

One particularly illuminating comment from the FFM noted:

The nature, scale and organization of the operations suggest a level of preplanning and design by the Tatmadaw leadership that was consistent with the vision of the Commander-in-Chief, Senior-General Min Aung Hlaing, who stated in a Facebook post on 2 September 2018, at the height of the operations, that "the Bengali problem [a derogatory term for Rohingya] was a long-standing one which has become an unfinished job despite the efforts of the previous governments to solve it. The government in office is taking great care in solving the problem."⁸

All this and more led the U.N. FFM to not only conclude that crimes were premeditated, but that the evidence collected in the report placed primary responsibility on the Tatmadaw (Burmese military) and security forces, including the Burmese police and border guard police. It specifically names Tat-

madaw Commander-in-Chief, Senior-General Min Aung Hlaing; Deputy Commander-in-Chief, Vice Senior-General Soe Win; Commander, Bureau of Special Operations-3, Lieutenant-General Aung Kyaw Zaw; Commander, Western Regional Military Command, Major-General Maung Maung Soe; Commander, 22nd Light Infantry Division, Brigadier-General Aung Aung; and Commander, 99th Light Infantry Division, Brigadier-General Than Oo as directly responsible for the crimes committed against Rohingya. The report also notes that additional known perpetrators were identified and that information is held in U.N. archives for use in international accountability efforts in the future.⁹

The State Department report echoes many of the same themes of the U.N. FFM. While it does not provide an estimate of the number of deaths due to the so-called clearance operations conducted by the Burmese military in the wake of August 25, it does note that of the 1,024 Rohingya interviewed for their report, most directly witnessed "a killing, two-thirds witnessed an injury, and half witnessed sexual violence" and identified the Burmese military as the perpetrator in 84 percent of the killings or injuries witnessed.¹⁰ Of those interviewed, one-fifth of respondents said they witnessed a mass casualty event where more than 100 people were killed or injured.¹¹

The report acknowledged that the "stories from some refugees show a pattern of planning and pre-meditation in their villages on the part of the attackers" and that the "scope and scale of the military's operations indicate they were well-planned and coordinated."¹²

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1. "Report on the independent international fact-finding mission on Myanmar." United Nations Human Rights Office of the High Commissioner, September 10–28, 2018, <https://www.ohchr.org/en/countries/asiaregion/pages/mmindex.aspx> (accessed October 19, 2018).
 2. Hannah Beech, "Rex Tillerson Tells Myanmar Leaders to Investigate Attacks on Rohingya," *The New York Times*, November 15, 2017.
 3. "Documentation of Atrocities in Northern Rakhine State." US Department of State, September 24, 2018, <https://www.state.gov/documents/organization/286307.pdf> (accessed October 19, 2018).
 4. "Report on the independent international fact-finding mission on Myanmar," p. 8.
 5. *Ibid.*, p. 9.
 6. *Ibid.*, pp. 9–10.
 7. "They Gave Them Long Swords: Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar," Fortify Rights, July 2018, https://www.fortifyrights.org/downloads/Fortify_Rights_Long_Swords_July_2018.pdf (accessed October 19, 2018).
 8. "Report on the independent international fact-finding mission on Myanmar," p. 8.
 9. *Ibid.*
 10. "Documentation of Atrocities in Northern Rakhine State."
 11. *Ibid.*
 12. *Ibid.*
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Nonetheless, the report stops short of making any legal determination on the nature of crimes. It merely notes that what the Rohingya experienced was “extreme, large-scale, widespread, and seemingly geared toward both terrorizing the population and driving out the Rohingya residents.”¹³

The U.S. Response to the Rohingya Crisis

Credit should be given where credit is due. The U.S. remains the top provider of humanitarian assistance to the more than 700,000 displaced Rohingya refugees currently in Bangladesh. Concurrent with the release of the State Department’s report, the U.S. announced another \$185 million in humanitarian assistance to Burma and Bangladesh in response to the Rohingya crisis, bringing total U.S. assistance to the region since August 2017 to just under \$389 million.¹⁴

The U.S. also designated a handful of Burmese officials under Global Magnitsky authorities, which permits the U.S. to place individuals and entities on the Specially Designated Nationals (SDN) list on human rights and corruption grounds. Specifically, one Burmese official, Maung Maung Soe, was designated in December 2017.¹⁵ An additional four members of the Burmese military, including Aung Kyaw Zaw, and the 99th and 33rd Light Infantry Divisions were also designated on August 17, 2018.¹⁶

In addition to executive-level action, Congress introduced the Burmese Human Rights and Democracy Act that has been held up in the Senate Foreign Relations Committee for months.¹⁷ The bill advocates for the use of additional targeted financial measures and travel restrictions on members of the Burmese military, among other punitive measures to hold the Burmese military accountable for atrocities.

While the U.S. government’s humanitarian response to the Rohingya crisis is notable, fund-

ing levels still fall far short of the need. This is what makes a legal determination of crimes committed so important. While the legal determination at the U.N. is significant, U.S. leadership on this issue is critical to galvanizing international funding and support for the Rohingya.

As the aftermath of the Rohingya crisis plays out more than one year later, donor fatigue is likely to set in. An international consensus principally led by a U.S. legal determination of crimes has the potential to be a game-changer—particularly if the legal determination is viewed as a call to action that mobilizes international efforts to support Rohingya refugees in need.

Addressing the Rohingya Crisis Head-on

The Rohingya crisis is an opportunity for the U.S. to demonstrate that it will continue to lead in promoting human rights and freedom worldwide. In order to do so, the U.S. government should:

- **Make an official, public legal determination on crimes committed against Rohingya.** Refusal to issue a legal determination calls into question the sincerity of the Administration in responding to crimes committed. If the U.S. intends to continue to lead, not just in provision of humanitarian assistance, it should issue a determination.
- **Pursue alternative legal and judicial mechanisms for holding the Burmese military accountable in light of the Administration’s objections to bringing a case before the ICC.**
- **Issue additional Global Magnitsky sanctions against members of the Burmese military, security forces, and border guard police.** Sanctions, thus far, stopped short of designating

13. Ibid., pp. 1-2.

14. “Press Release: Ambassador Haley Announces Additional Humanitarian Assistance to Those Affected by the Crisis in Burma’s Rakhine State,” United States Mission to the United Nations, September 24, 2018, <https://usun.state.gov/remarks/8633> (accessed October 19, 2018).

15. “United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe,” U.S. Department of the Treasury, December 21, 2017, <https://home.treasury.gov/news/press-releases/sm0243> (accessed October 19, 2018).

16. “Global Magnitsky Designations,” U.S. Department of the Treasury, August 17, 2018, <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20180817.aspx> (accessed October 19, 2018).

17. Mahtani, Shibani. “McConnell Once Pushed Sanctions Against Myanmar. Now He’s Blocking a New Round,” *The Washington Post*, July 1, 2018, https://www.washingtonpost.com/world/asia_pacific/mcconnell-once-pushed-sanctions-against-myanmar-now-hes-blocking-a-new-round/2018/07/01/c48afe7c-795e-11e8-8df3-007495a78738_story.html?utm_term=.b5db13f3fb60 (accessed October 19, 2018).

18. Olivia Enos, “Crafting a Successful U.S. Strategy Toward Burma: Beyond the Rohingya Crisis,” Heritage Foundation *Backgrounders* No. 3292, March 8, 2018, <https://www.heritage.org/global-politics/report/crafting-successful-us-strategy-toward-burma-beyond-the-rohingya-crisis>.

Senior-General Min Aung Hlaing. Given the visible role he played in atrocities carried out against Rohingya, he should be designated. Other Burmese military and security officials should be explicitly targeted and placed on the SDN list.

- **Continue to affirm the legitimacy of the civilian government and express support for the continuation of the peace process.** Such rhetoric should encourage Aung San Suu Kyi and the National League for Democracy to act responsibly and develop a more comprehensive response to the Rohingya crisis. It should also voice continued U.S. support for the Burmese people and recognize that the Burmese people possess the right to self-determination in forging future political outcomes.
- **Use the Rohingya crisis as an opportunity to re-evaluate and reset U.S. policy toward Burma.** At the root of atrocities committed against Rohingya lies a crisis of good governance in Burma. The Obama Administration's premature lifting of sanctions on Burma after the 2015

elections reduced pressure on the Burmese military in a way that hampered the civilian government's ability to lead the country on a path toward meaningful democratic reform. The U.S. should conduct an audit of the U.S.–Burma relationship to determine the ways that the U.S. response to the Rohingya crisis can dovetail with a reset of U.S. policy toward Burma.¹⁸

The U.S. should issue a legal determination on crimes committed against Rohingya, continue to provide robust humanitarian assistance, issue additional targeted financial measures against those responsible for crimes committed, and undertake a comprehensive reset of U.S. policy toward Burma. U.S. leadership is critical to galvanizing critical, life-saving support in the aftermath of the Rohingya crisis. The U.S. should take these steps to demonstrate its enduring leadership in promoting rights and freedoms across the globe.

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