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U.N. Report Recommends Burmese Military Leaders Be Investigated and Prosecuted for Possible Genocide

The U.N. Independent International Fact-Finding Mission on Myanmar (UNFFM) has recommended that the U.N. Security Council (UNSC) authorize the International Criminal Court (ICC) to investigate and prosecute “senior officials in the Tatmadaw” (Burma’s military) for genocide, crimes against humanity, and war crimes. The UNFFM found over the course of a nearly 18-month investigation that there are “reasonable grounds” to conclude that:

- Tatmadaw leaders planned a genocidal attack on the Rohingya that was implemented in September and October 2017 by Tatmadaw soldiers and other Burmese security forces;
- “Crimes against humanity have been committed in Kachin, Rakhine, and Shan States, principally by the Tatmadaw”; and
- The Tatmadaw, other Burmese security forces, some of the ethnic armed organizations (EAOs), and the Arakan Rohingya Salvation Army (ARSA) committed war crimes.

Findings of the UNFFM Report

The UNFFM was established by U.N. Human Rights Council (UNHRC) in March 2017 “to establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State.” In an advance unedited version of its full report (the final report is due on September 18, 2018), the UNFFM determined that the Tatmadaw’s “clearance operations,” which were conducted after ARSA’s attacks of August 25, 2017, “constituted a human rights catastrophe,” and that the ARSA attacks and the “clearance operations” were “foreseeable and planned.”

The UNFFM also found that there was a history of “systemic oppression and persecution” of the Rohingya, and the Burmese government’s portrayal of the 2012 violence as “intercommunal” between the Rakhine and Rohingya is inaccurate, and that the Tatmadaw and various Rakhine organizations fomented a plan to “instigate violence and amplify tensions.”

The UNFFM identified certain Burmese security forces as being responsible for human rights violations in Rakhine State, including the Myanmar Police Force, the Border Guard Police, the 33rd Light Infantry Division, the 99th Light Infantry Division, and “units of the Western Command.” In addition, ARSA was cited for committing “serious human rights abuses” in Rakhine State.

In its investigation of human rights abuses in Kachin and Shan States, where the government continues to fight a decades-long civil war against EAOs, the UNFFM observed “similar patterns of conduct by security forces, particularly the Tatmadaw.” These patterns include systematic attacks on civilians; unlawful killings; torture; rape and other forms of sexual violence; arbitrary arrest and detention; forced labor; and the recruitment of child soldiers. The investigators also cited several EAOs for arbitrary arrest and detention, the appropriation of property, and the recruitment of child soldiers.

The UNFFM identified six senior Tatmadaw officers (see text box) that it recommends face investigation and prosecution “preferably by the International Criminal Court or alternatively by creating an ad hoc international criminal tribunal.” Among its other recommendations are:

- The UNSC impose an arms embargo on Burma;
- The U.N. General Assembly (UNGA) or the UNHRC create an “independent, impartial mechanism to collect, consolidate, preserve, and analyze evidence of violations of international humanitarian law and human rights violations and abuses”; and
- “All Member States should ensure that engagement with Myanmar and support for aid, development and reform projects, take into account and address human rights concerns.”

Possible ICC Prosecutions

In April 2018, the ICC Prosecutor asked the ICC Pre-Trial Chamber to determine whether the Court may exercise jurisdiction over the forced deportation of Rohingya from Burma into Bangladesh, which the Prosecutor argues constitutes a crime against humanity. The Prosecutor argued that because forced deportation of Rohingya occurred partially on the territory of Bangladesh (a state party to the Rome Statute, the convention that created the ICC), the Court may exercise jurisdiction over the crimes. On September 6, 2018, the Pre-Trial Chamber agreed, deciding that the ICC Prosecutor can begin an investigation into the situation in Bangladesh, opening the possibility of prosecuting Burmese officials.

Although the ICC Prosecutor may now proceed with her investigation based on events in Bangladesh, the UNSC could still refer the Rohingya situation in Burma to the ICC, thus granting it jurisdiction over Burma (a non-party to the Rome Statute) that would otherwise not exist. An ad hoc tribunal in Burma could also be established, but would

likely require the specific request of the Burmese government—an unlikely development at this time. Establishing an “independent, impartial mechanism” for Burma (possibly to include events spilling into Bangladesh), like the one recently created to document atrocity crimes in Syria, may preserve vital evidence that may be used in any future prosecutions.

Sanctioned Burmese Security Officers

Canada, the European Union (EU), and/or the United States (US) have sanctioned the following Burmese security officers and units, or they have been identified by the UNFFM as being responsible for genocide, crimes against humanity, and or war crimes in Burma.

- Commander-in-Chief Senior General Min Aung Hlaing—UNFFM
- Deputy Commander-in-Chief Vice Senior General Soe Win—UNFFM
- Commander of Special Operations 3 Lieutenant General Aung Kyaw Zaw—Canada, EU, UNFFM, US
- Commander of Military Operations Command 15 Major General Khin Maung Soe—Canada, EU, US
- Commander of Western Command Major General Maung Maung Soe—Canada, EU, UNFFM, US
- Commander of the 33rd Light Infantry Division Brigadier General Aung Aung—Canada, EU, UNFFM
- Commander of the 99th Light Infantry Division Brigadier General Khin Hlaing—US
- Commander of the 99th Light Infantry Division Brigadier General Than Oo—Canada, EU, UNFFM
- Commander of the 8th Security Police Battalion Thant Zin Oo—Canada, EU
- Commander of the Border Guard Police Thura San Lwin—Canada, EU, US
- 33rd Light Infantry Division—US
- 99th Light Infantry Division—US

U.S. and International Response

The State Department has maintained an arms embargo on Burma since 1993. The Treasury Department placed Maung Maung Soe on its Specially Designated Nationals and Blocked Persons (SDN) list on December 21, 2017, under the authority of Global Magnitsky Human Rights Accountability (Global Magnitsky) Act of 2016 for his role overseeing the “widespread human rights abuses against Rohingya civilians.” On August 17, 2018, the Treasury Department added four military officers and two military units to its SDN list, also under the authority of the Global Magnitsky Act (see text box).

On the anniversary of ARSA’s attacks (August 28, 2018), Secretary of State Michael Pompeo posted a tweet, stating:

A year ago, following deadly militant attacks, security forces responded by launching abhorrent ethnic cleansing of ethnic #Rohingya in Burma. The U.S. will continue to hold those responsible

accountable. The military must respect human rights for #Burma democracy to succeed.

U.S. Ambassador to the U.N. Nikki Haley, in a statement to the UNSC on August 28, 2018, provided details of an undisclosed State Department report that are consistent with the UNFFM report. She also said, “Here in the Security Council, we must hold those responsible for violence to account.... The whole world is watching what we will do next, and if we will act.”

On June 25, 2018, the European Union placed sanctions on seven Burmese security officers (see text box). Canada placed an arms embargo on Burma in 2007 and on June 25, 2018, sanctioned the same seven security officers as the European Union.

Burma’s Actions to Date

Burma’s leaders have consistently denied accusations of systematic human rights abuses in Rakhine State. In November 2017, an internal investigation conducted by the Tatmadaw determined its soldiers did not fire on “innocent villagers,” or commit sexual violence during the clearance operations. On July 30, 2018, Burma’s President Win Myint established a four-person, joint domestic and international Independent Commission of Enquiry to investigate “the allegations of human rights violations and related issues, following the terrorist attacks by Arakan Rohingya Salvation Army (ARSA).”

Next Steps

After the UNFFM delivers its full report on September 18, 2018, the UNHRC is likely to discuss the report’s findings and submit its recommendations to the UNSC and the UNGA. Because the United States withdrew from the UNHRC on June 19, 2018, the United States is to have no direct role in the deliberations on the UNFFM report, but may raise the issue at the UNSC and with the UNGA.

Many of the previous U.S. sanctions on Burma remain in effect, but enforcement was suspended by President Obama in October 2016 (via presidential Executive Order 13742) in part to show U.S support for Aung San Suu Kyi and her new government. As a result, some or all of those sanctions could be reinstated by the President without the involvement of Congress.

The State Department has financed its own investigation into alleged human rights abuses in Burma, and its findings have reportedly been given to Secretary Pompeo. That report’s possible release may have been postponed due to disagreement within the State Department about appropriate U.S. policy in light of the investigation’s findings.

Two bills are pending in the 115th Congress, H.R. 5819 and S. 2060, that would add new restrictions on relations in light of the human rights abuses in Burma. Both bills are awaiting floor consideration in their respective chambers.

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