

Supplementary information about the concept note on the accountability mechanism for Myanmar proposed by the Special Rapporteur on the situation of human rights in Myanmar

This note provides further clarifications to questions and inquiries that the Special Rapporteur has received since the presentation of the concept note on the accountability mechanism¹ for Myanmar.

1. Why does the proposed mechanism not have an adjudication or judicial component?

Under international law, Myanmar has a legal duty to exercise its criminal jurisdiction over those responsible for international crimes that were committed within its territory. It is clear that the Government of Myanmar is unwilling and incapable of holding the perpetrators who were involved in serious crimes under international law to account. The Special Rapporteur has said that the situation of Myanmar clearly warrants the attention of the International Criminal Court (ICC).² The Special Rapporteur has recommended to refer the situation of Myanmar to the ICC primarily because the Government of Myanmar has been unable and unwilling to address the most serious international crimes, which have been and continue to be perpetrated in Myanmar. Also, the ICC is designed to deal with the most serious international crimes and to put an end to impunity for their perpetrators. The Special Rapporteur considers the ICC as the most appropriate forum for adjudication not only because of the overwhelming credible allegations of commission of international crimes in Myanmar by various duty bearers, but also because the Government of Myanmar, despite these credible allegations, continues to deny that violations and abuses have taken place.

As Myanmar is not a party to the ICC Statute, and is unlikely to accept the court's jurisdiction of its own violation, a referral by the Security Council is necessary for the Court to have jurisdiction. The Special Rapporteur is concerned about the Council's lack of political will to so far to refer the situation. The ICC prosecutor has requested a ruling on jurisdiction under Article 19(3) of the Rome Statute over the alleged deportation of the Rohingya people from Myanmar to Bangladesh; while this is welcome, it is only one crime among allegations of many to have been committed against the Rohingya. Additionally, the request excludes the possibility of the Court to investigate the alleged commission of crimes in other areas of Myanmar, and is insufficient to achieve justice for all in Myanmar.

2. What is a credible mechanism?

The term "credible mechanism" refers to a mechanism that is impartial, prompt, thorough and consistent with the principles of international law. It must guarantee that it is free from political affiliation and influence both nationally and internationally, and should have clarity in its mandate, jurisdiction and other functional aspects. The mechanism must be inclusive and must have the trust of the victims for which it seeks to achieve justice.

¹ The concept note is available at <https://www.ohchr.org/Documents/Countries/MM/ConceptNoteAccountabilityFramework.pdf>

² Oral update by Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 38th session of the Human Rights Council, available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23268&LangID=E>

3. Why is the proposal not to work towards justice in Myanmar's domestic courts or through a domestic investigation?

The concept note provides a detailed analysis of the justification for an international accountability mechanism. Suffice to say here that it is manifestly clear that the national courts in Myanmar are not independent and impartial, and are not capable of delivering justice for international crimes. Currently, domestic legislation does not criminalise international crimes, most importantly war crimes, crimes against humanity and genocide. The military and the executive government influence the judiciary. Victims do not trust the justice system, and fear to approach the police and courts partly due to the risk of reprisals against them or their families. Even assuming a complaint could be made and reached the courts, court proceedings are extremely lengthy. It is therefore not possible for Myanmar's justice system to effectively hold perpetrators of international crimes to account and deliver justice and redress for all the victims.

The Government of Myanmar has established many different investigatory bodies in recent years, none of which obtained impartial, credible, and independent findings or effectively held perpetrators to account. It has recently established "an independent commission of enquiry" in order to "address reconciliation, peace, stability and developments in Rakhine." However, its composition, methodology and terms of reference are still unknown. Given this, the continued denial of possible wrongdoing, lack of strong political will and weak investigative and prosecutorial capacity make it highly unlikely that a domestic body would be capable of ensuring accountability. Additionally, the investigative bodies in the past have included members who were from the military or were ex-military officers, for example, the commission led by Vice President Myint Swe formed after the October 2016 violence in Rakhine State.

4. Is an international court or tribunal intended to be established after the accountability mechanism?

Establishing the proposed accountability mechanism does not exclude the possibility of an international court or tribunal being established in addition to it. The Special Rapporteur does not wish to preclude the possibility of a judicial mechanism including the establishment of an international *ad hoc* tribunal or a credible international judicial mechanism under the auspices of the United Nations or a Regional organisation, or the creation of such with the support of United Nations and regional organisations, or United Nations, regional organisations and Myanmar Government. In fact, should the ICC continue not to have jurisdiction in relation to the situation in Myanmar, an *ad hoc* international judicial mechanism may be required. Further, she encourages member states to use universal jurisdiction and prosecute the perpetrators who have allegedly committed the crimes in Myanmar when they are inside their jurisdiction. The Special Rapporteur is aware that establishment of any new a judicial mechanism would endure a lengthy process, enormous resources, political complications, as well as challenges of legitimacy if it is not established by the United Nations. She firmly believes that justice needs to be served to the people in Myanmar and that the onus lies on international community to bring it about.

5. Does it mirror the International Impartial and Independent Mechanism (IIIM) on Syria?

The Special Rapporteur is aware that the second component of the proposed accountability mechanism may appear similar to the mandate of the IIIM on Syria established in December

2016 by the UNGA pursuant to resolution 71/248. The second component envisages that the accountability mechanism will collect, consolidate and preserve evidence in addition to building up cases in accordance with an international criminal law standard for prosecution. However, it must be noted that the proposed accountability mechanism has two additional components: continuation of documenting allegations of human rights violation and abuses, and supporting victims in their pursuance of justice. The IIIM is not mandated for either of these components. Given the horrible experiences that victims have gone through for example in Syria, Nepal, Palestine, Sudan and Sri Lanka, and that their search of justice continues as a result of lack of support from their respective governments and the international community, it is a high time that international community learns lessons from these experiences. Therefore, the mechanism for Myanmar should ensure that justice does not operate in vacuum and victims are able to seek justice and an effective remedy with continuous support from international community into the future.

6. Why the focus on supporting victims?

Since the beginning of conflict in Myanmar in 1948, victims have suffered violations and abuses with no redress and support, and this continues today. Throughout these decades, many thousands of members of communities around the country were affected. This includes members of ethnic, religious or national minority groups both in Rakhine State and other ethnic States of Myanmar, as well as the majority Bamar or Burman population.

Often ignored by the international community, the trauma of the victims in Myanmar is immense as a result of the scale of violence. Therefore, victims should not be taken merely as witnesses; there should rather be a strong focus on supporting victims throughout the accountability process and they should be considered as an integral element to it. Prosecution of serious international crimes is an obligation under international law, which the Special Rapporteur has constantly been emphasising. However, the reason that she suggested supporting victims together with promoting reconciliation and reintegration is for the international community to consider restorative justice, which involves looking into or combining punitive justice with non-punitive measures to promote accountability in line with the norms and standards of international law.³ Reintegration and reconciliation will be crucial for those displaced when they return to home and in the repatriation of refugees from Myanmar and other countries.

Meaningful justice for victims will not be achieved in Myanmar if victims are not able to enjoy their rights in the long run, and do not also receive redress for what they have suffered. This includes ensuring all their rights are fulfilled, especially their rights to live in dignity, without fear, with access to livelihoods and education, and services. The victim support part of the mechanism aims to provide livelihood support, healthcare, and psychosocial and trauma assistance. Victims must be afforded compensation or reparations for what they have suffered and restitution of their lost property, as well as legal assistance to pursue individual or collective justice should they wish to do so. These elements will assist in the victims achieving long-term reintegration and reconciliation. The mechanism does not preclude the possibility of introduction of a comprehensive transitional justice measures introduced in the future.

³ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005

7. Why is the collection and preservation of information crucial if no judicial mechanism will be established immediately?

The immediate collection, consolidation, and preservation of information is crucial in order for the information related to the allegations of violations and abuses to be used in the future. It must be noted that many victims have been interviewed multiple times by numerous actors (particularly those in Cox's Bazar, Bangladesh). It is not clear whether all the information collected so far by various organisations and individuals can be used for evidentiary purposes and whether the information is properly analysed and securely preserved. Experiences from similar situations elsewhere have shown that memories will be lost and forgotten if information is not documented and adequately preserved in a timely manner. There will also be mix ups and errors in stories that will only increase as time goes on and collective memories develop. Additionally, the violations in Myanmar continue and must be continually properly documented for future use.

Given that the UN Security Council has not so far been able to refer Myanmar to the ICC, there does not seem to be any realistic possibility for the international community to come together and establish an independent and credible and *ad hoc* mechanism or a special court to deal with the crimes in Myanmar in near future. Until the international community considers referring the situation to a credible prosecutorial judicial mechanism, it is important that information is gathered, preserved, analysed and corroborated, that modes, liability and participation of individual perpetrators are identified, and that evidence is prepared and continues to be prepared for prosecution. Evidence that is collected immediately may also be used by national criminal proceedings, such as those commenced under universal jurisdiction.

8. Given the current situation facing the Rohingya and other minorities in Myanmar and Cox's Bazar, is this the appropriate time to focus on accountability?

Ensuring accountability for past and more recent human rights violations is a critical aspect of breaking the very longstanding cycle of appalling violence, injustice and discrimination that has been the experience of the entire population of Myanmar for decades and continues today. It is also critical as one important means of providing justice, acknowledgement and relief to victims of those human rights violations and their families. The full ambit of the challenges facing Myanmar and all its peoples today must be faced head on. Justice and accountability cannot be shelved or put aside, but will play a critical role in helping the country confront its problems, and to move forward. The responsibility for doing this lies, first and foremost, with the Myanmar Government. Given the current intractability of the situation and the unwillingness of the Government to take action, the international community must step in now. As time goes on and the international community remains inactive, human rights violations will continue around the country. Taking action for accountability is the only way to stop the violence that continues, and to prevent future violations from occurring.

9. Could focusing on accountability threaten Myanmar's transition to democracy?

Populations around Myanmar have experienced decades of serious violations of human rights and international humanitarian law at the hands of successive military juntas since 1962. These violations have continued into the transitional period both under the quasi-civilian government led by President Thein Sein and the National League of Democracy government. The obscene violence levelled against the Rohingya population in 2016 and 2017 was followed by the same

types of violations against ethnic populations in Kachin and Shan States, alleged to have been committed by the some of the same Tatmadaw battalions. The Tatmadaw continues to commit violations of human rights and international humanitarian law in Myanmar's ethnic states, and will continue to do so into the future unless action is taken to ensure perpetrators are held accountable. The people of Myanmar have not ever received any form of justice or redress for the violations they have suffered. Ensuring accountability now will assist the government to consolidate a real democracy that embraces and enforces the rule of law, and respects, protects and fulfils the rights of its people.

10. Is this mechanism focused on getting justice for the Rohingya?

This mechanism would cover violations of human rights and international humanitarian law around the whole of Myanmar, including Rakhine, Kachin and Shan States. The Special Rapporteur since 1992 and international and national human rights organisations have documented and reported allegations of the involvement of Myanmar's senior military officers in serious crimes in Rakhine State and other locations around the country for decades.⁴ Additionally, the International Labour Organisation's commission of inquiry in 1997 made significant findings of systematic forced labour and related human rights violations across the country.

The mechanism would cover past violations experienced by various different ethnic minority groups as well as the majority Bamar or Burman population. The monitoring and documenting component of the mechanism would look at violations that may occur in the future around the country. This is necessary, as for example in March 2018, there was a resumption of conflict between the Tatmadaw and the Karen National Liberation Army, a party to the Nationwide Ceasefire Agreement, that led to a civilian death and displacement of thousands of people.

11. What is the relationship of this mechanism to the already-existing Fact Finding Mission (FFM) and other UN mechanisms?

The current FFM is due to present its final findings to the Human Rights Council in September, which will probably mark the end of its mandate. The FFM has documented hundreds of allegations of violations and abuses of human rights and violations of international humanitarian law. The proposed accountability mechanism will continue documenting and reporting allegations of violations and abuses in Myanmar for a period of three years; this partly resembles the work of the FFM. However, the proposed accountability mechanism will be a step forward as it includes the preparation of cases in accordance with international criminal justice standards so that any courts and judicial mechanisms, national or international, may initiate criminal proceedings.

The proposed accountability mechanism is an independent mechanism to be established under the auspices of the United Nations. The mechanism does not replace any existing UN office or mandate. It may or may not necessarily complement the work of any of the existing UN entities, organisations and mandate holders. It is also different than the work of the Special Rapporteur

⁴ See for example, Report of the Special Rapporteur on the situation of human rights in Myanmar, A/HRC/37/70, Amnesty International, Atrocities against the Rohingya: How we built the case to implicate Myanmar military officials in crimes against humanity, 29 June 2018, available at <https://www.amnesty.org/en/latest/news/2018/06/atrocities-against-the-rohingya-how-we-built-the-case-to-implicate-myanmar-military-officials-in-crimes-against-humanity/>

on the situation of human rights who is mandated by the Human Rights Council to monitor and report the situation of human rights in Myanmar.

12. How will the mechanism be established?

The Special Rapporteur has presented the concept and elements to member states to provide them with her reasoning and plans for the accountability mechanism. The type, modality and formation of the accountability mechanism largely depends on the willingness of the member states and commitment to advance accountability in Myanmar.

Since the FFM will be presenting its final report in September 2018, the Special Rapporteur reiterates the calls that she has been making since March 2018 that (1) the situation of Myanmar must be discussed, (2) the mechanism proposed should be established by the HRC immediately and (3) the international community must join hands together before it is too late, as violations continue in Myanmar.

In order to give effect to the proposal and depending on the willingness of the international community as well as the extent of cooperation by the Government of Myanmar, a resolution by the Human Rights Council is required to establish the mechanism. The Special Rapporteur expects that the HRC will request the GA to endorse the resolution.

13. What will be the tenure of the accountability mechanism?

Given the high volume of allegations and high level of violations and abuses, the Special Rapporteur considers that the first component (human rights monitoring and reporting) shall have the mandate for an initial period of three years, whereas the two other components of the mechanism (building cases and victim support) shall have a longer mandate.