**THE UN INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON MYANMAR**

# Genocide, Crimes against Humanity, and War Crimes

Consistent with the practice of United Nations fact-finding bodies, factual findings in the report are based on the “reasonable grounds” standard of proof. This standard is met when a sufficient and reliable body of primary information, consistent with other information, would allow an ordinarily prudent person to reasonably conclude that an incident or pattern of conduct occurred. The Mission then assessed the facts against the applicable legal framework, primarily international human rights law and international humanitarian law. It also examined to what extent violations may amount to crimes under international law.

## Genocide

## Genocide was codified as a crime in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which almost 150 States, including Myanmar in 1956, have now ratified.

## The Genocide Convention defines genocide as any of the following acts committed with the 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. The definition requires consideration of whether there is a protected group, whether acts in one or more of the specified categories have been committed, and whether the acts were committed with the specific intent to destroy the protected group in whole or in part, as such.

The report concludes that the Mission is satisfied that the Rohingya, who predominantly live in Myanmar’s Rakhine State, constitute a protected group. Moreover, their treatment by the Myanmar security forces, acting in concert with certain civilians, includes conduct that amounts to four of the five defined prohibited acts: (a) killing; (b) causing serious bodily or mental harm; (c) inflicting conditions of life calculated to bring about the physical destruction of the group in whole or in part; and (d) imposing measures intending to prevent births.

Concerning genocidal intent, the report notes that “[d]irect evidence of genocidal intent will rarely exist. In its absence, genocidal intent can be inferred from circumstantial evidence, that is, “all of the evidence taken together’”. The Mission assesses the body of information in light of the jurisprudence of international tribunals regarding the reasonable inference of genocidal intent, and stresses that “this exercise has been undertaken to assist in any subsequent determination of genocidal intent on the part of particular perpetrators, properly identified, before a court of law.”

The report then draws the following conclusions:

* “The question of whether genocidal intent exists can sometimes usefully be approached in reverse, by examining what the relevant authorities and perpetrators would have done, had they wished to destroy the target group in whole or in part. The actions of those who orchestrated the attacks on the Rohingya read as a veritable check-list: the systematic stripping of human rights, the dehumanizing narratives and rhetoric, the methodical planning, mass killing, mass displacement, mass fear, overwhelming levels of brutality, combined with the physical destruction of the home of the targeted population, in every sense and on every level.”
* “The Mission therefore concludes, on reasonable grounds, that the factors allowing the inference of genocidal intent are present. It is now for a competent prosecutorial body and court of law to investigate and adjudicate cases against specific individuals to determine individual guilt or innocence.”

## Crimes against Humanity

## Crimes against humanity are particularly serious offences giving rise to grave humiliation or degradation, committed as part of a widespread or systematic attack directed against any civilian population. It is this specific context, indicating a scale and level of organization that shocks the conscience of humanity, which elevates “ordinary” criminal acts to those concerning the international community as a whole. In its consideration of whether established facts may amount to crimes against humanity, the Mission relies on the definition in Article 7 of the Rome Statute of the International Criminal Court.

## The report notes that the legal threshold for crimes against humanity is high. First, it must be demonstrated that one of the prohibited acts took place, with the requisite criminal intent. Given that crimes against humanity are defined by their contextual element, it must also be demonstrated that the act was committed “as part of a widespread or systematic attack directed against any civilian population”. An attack directed against any civilian population means “a course of conduct involving the multiple commission of [prohibited] acts against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”. An “attack” does not need to involve a military attack or the use of armed force; it can, for example, encompass mistreatment of the civilian population.

## The report finds that a widespread and systematic attack directed against a civilian population existed in both Kachin and Shan States, and in Rakhine State:

## When considering Tatmadaw operations in Kachin and Shan States, the report notes, “At the core of this attack was the overriding assumption on the part of the Tatmadaw that everyone of a given ethnicity supported the associated ‘ethnic armed organization’. This coloured all the Tatmadaw’s dealings with civilians and led to a widespread and systematic campaign of abuses against them.”

* Concerning Rakhine State, the report concluded that the 2016 and 2017 clearance operations against the Rohingya population “were widespread in terms of their geographical reach and the large numbers of targeted persons and victims. They were also organized and implemented in a manner as to rule out the probability of their random occurrence, and thus they were systematic” Noting, however, that an “attack” can be a campaign of mistreatment, the Mission considered that the relevant context was not limited to these 2016 and 2017 “operations”, “but also encompassed the regime of State-sanctioned discrimination and oppression, that gradually eroded the human dignity of this group of civilians within Myanmar’s borders.” As such, the Mission considers that all underlying acts committed since the 2016 violence constituted crimes against humanity.

Having established the relevant contextual elements, the report concludes that in the case of Kachin and Shan States, the relevant underlying acts committed by the Tatmadaw and other security forces, sometimes in concert with civilians, include murder, imprisonment, enforced disappearance, torture, rape, sexual slavery and other forms of sexual violence, persecution, and enslavement as crimes against humanity. In Rakhine State, the report concludes that the elements of extermination and deportation are also present, while the systematic oppression and discrimination not only supports a finding of persecution but may also amount to the crime of apartheid.

Acts of forced labour by the Tatmadaw against the ethnic Rakhine are also found to reach the threshold of enslavement as an underlying act of crimes against humanity, although whether they were committed in the context of a widespread of systematic attack is found to warrant further investigation.

## War Crimes

War crimes are serious violations of international humanitarian law that give rise to individual criminal responsibility. To amount to war crimes, the offences in question must have a link to an armed conflict.

The Mission considers that non-international armed conflicts existed in Kachin and Shan States (for the entire period under review) and in Rakhine State since at least August 2017. As such, the report states that the vast majority of incidents that occurred in Kachin and Shan States and Rakhine State that give rise to crimes against humanity on the part of the Tatmadaw and other security forces “will also satisfy the war crime elements of murder; torture; cruel treatment; outrages upon personal dignity; attacking civilians; displacing civilians; pillaging; attacking protected objects; taking hostages; sentencing or execution without due process; as well as rape, sexual slavery and sexual violence. Certain acts committed by “ethnic armed organizations” and ARSA may also constitute war crimes.”

*For further information and the full underlying analysis, please see Chapter VIII: Crimes under International Law in the Mission’s detailed report, available here*