

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations

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Myanmar: Investigate and prosecute genocide, crimes against humanity and war crimes

Lawyers' Rights Watch Canada (LRWC) is a committee of lawyers who promote human rights and the rule of law. LRWC is an NGO in Special Consultative Status with the Economic and Social Council (ECOSOC) of the United Nations (UN).

LRWC is deeply disturbed by findings of the UN Human Rights Council (HRC) Independent International Fact Finding Mission (FFM) on Myanmar released 24 August 2018.¹ The FFM confirms persistent reports² of systematic and shockingly brutal violations of human rights in Rakhine, Kachin and Shan States. The FFM report, using a reasonable grounds standard of proof (para. 6), concludes “there is sufficient information to warrant the investigation and prosecution of senior officials in the [Armed Forces of Myanmar] chain of command, so that a competent court can determine their liability for...

- “genocide in relation to the situation in Rakhine State” (para. 85);
- Crimes against humanity in Rakhine, Kachin and Shan States including murder; imprisonment; enforced disappearance; torture; rape and sexual violence on a massive scale (para. 38); sexual slavery; persecution; and enslavement (para. 88); and
- War Crimes in Rakhine, Kachin and Shan States (para. 89).

The International Court of Justice has confirmed that prevention and punishment of the crime of genocide is the concern of every state and of the international community as a whole, and that when genocide occurs in any State, it is the duty of all other States to prevent it.³ Prevention of genocide necessitates the prevention of impunity.

The FFM recommends criminal investigation and prosecution of a number of persons, including several named Generals at the highest level of the Armed Forces of Myanmar (Tatmadaw) suspected of involvement in planning and implementation of genocide, crimes against humanity and war crimes (collectively described as “atrocities crimes”) identified in the FFM report.⁴

¹ Report of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/64, 24 August 2018, para 50, 93, available at: <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/ReportoftheMyanmarFFM.aspx>.

² *Ibid*, FFM Report, Para 102

³ International Court of Justice, Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Judgment, 26 February 2007.

⁴ Tatmadaw 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

The FFM does not ascribe direct responsibility to civilian authorities, who have no legal authority over the Tatmadaw. However, the FFM report concludes that civilian authorities contributed to atrocity crimes by facilitating the spread of false information, blocking all independent investigations, and overseeing the destruction of evidence.⁵ Also, the civilian authorities have chosen not to cooperate with the FFM or to provide the FFM with access to Myanmar. The FFM concludes that State Counsellor, Aung San Suu Kyi, “has not used her *de facto* position as Head of Government, nor her moral authority, to stem or prevent the unfolding events, or seek alternative avenues to meet a responsibility to protect the civilian population.”⁶

Myanmar’s laws, the structure of its legal system, and the lack of independence of its judiciary are among the root causes of decades of impunity for the Tatmadaw generals and troops. The FFM confirms that Myanmar’s domestic processes to investigate the situation in Rakhine since 2011 have been ineffective. Myanmar has demonstrated neither the political will nor the capacity to effectively combat more than a half century of impunity.

LRWC deplores the reprisals against those seeking to document atrocities, including journalists, human rights defenders, and persons meeting with UN officials.⁷ The 3 September 2018 conviction and seven year prison sentence of Reuters journalists, Mr. Wa Lone and Mr. Kyaw Soe, after months of arbitrary detention, illustrates the absence in Myanmar of independent judicial oversight to protect rights, prevent and remedy violations, and guard individuals and groups against the arbitrary use of power by state authorities. In this case the court fully supported the state’s arbitrary use of the legal system to punish the journalists for reporting Tatmadaw actions that have now been identified by the FFM as the most serious international crimes.

Also of grave concern are the FFM findings about the role of social media, particularly Facebook, to spread hate through posts and messages, which then contributed to discrimination and violence. The FFM found Facebook’s initial response “slow and ineffective.”⁸ It is noteworthy that after the release of the FFM Report, Facebook suspended “18 Facebook accounts [of Tatmadaw generals], one Instagram account and 52 Facebook pages, followed by almost 12 million people.”⁹ The FFM recommends that the “extent to which Facebook posts and messages have led to real-world discrimination and violence must be independently and thoroughly examined.”¹⁰ It is important that the role of other social media also be investigated; since the Facebook ban, senior Tatmadaw generals have reportedly begun to amass thousands of followers on Russian social-media accounts.¹¹

Regional Military Command, Major-General Maung Maung Soe; Commander, 33rd Light Infantry Division, Brigadier-General Aung Aung; Commander, 99th Light Infantry Division, Brigadier-General Than Oo. Ibid, para 92.

⁵ *Ibid*, para 93.

⁶ *Ibid*, para 93.

⁷ *Ibid*, para 72.

⁸ *Ibid*, para 74.

⁹ Facebook, Removing Myanmar Military Officials From Facebook, 27 August 2018, <https://newsroom.fb.com/news/2018/08/removing-myanmar-officials/>.

¹⁰ *Ibid*, para 74.

¹¹ James Hookway, “Banned From Facebook, Myanmar’s Top General Finds Russian Refuge,” Wall Street Journal, 30 August 2018, <https://www.wsj.com/articles/banned-from-facebook-myanmars-top-general-finds-russian-refuge-1535631150>.

LRWC urges all States to accept the FFM recommendations and to:

- use “all diplomatic, humanitarian and other peaceful means” (para 103 (a)) and take collective action in accordance with the UN Charter to prevent reoccurrence of atrocity crimes in Myanmar and to ensure remedies for past atrocity crimes;
- urge the UN Security Council to ensure accountability for crimes under international law committed in Myanmar, by referring the situation to the International Criminal Court or alternatively by creating an *ad hoc* international criminal tribunal;
- urge the UN Security Council to impose a binding arms embargo on Myanmar and to “adopt targeted individual sanctions, including travel bans and asset freezes, against those who appear most responsible for serious crimes under international law” (para 103(b));
- urgently seek a resolution of the UN General Assembly to establish an international mechanism to consolidate, gather and preserve evidence of genocide, war crimes and crimes against humanity in Myanmar to enable prosecutions and other remedial actions designed to ensure accountability, allow remedies and prevent impunity.