

INTERNATIONAL CRISIS GROUP

U.S. PROGRAM DIRECTOR STEPHEN POMPER

TESTIMONY FOR HEARING TITLED: “GENOCIDE AGAINST THE BURMESE ROHINGYA”

U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON FOREIGN AFFAIRS

SEPTEMBER 26, 2018

Mr. Chairman, Ranking Member Engel, and distinguished members of the Committee. First, let me express my deep appreciation for the invitation to testify before the Committee and to discuss how best to address the horrific atrocities committed against the Rohingya population. I am the U.S. Program Director of the International Crisis Group, a non-governmental organization that conducts field-based research on 40 conflicts and vulnerable countries and monitors another 30 around the world. I am also a non-resident Senior Fellow at the Columbia Law School Human Rights Institute and the NYU School of Law Center on Law and Security. I previously had the privilege to serve on the staff of the National Security Council under President Obama, including as Special Assistant to the President and Senior Director for Multilateral Affairs and Human Rights, and before that for nine years in the Department of State Office of the Legal Adviser, including as the Assistant Legal Adviser for Political-Military Affairs.

Speaking today as a representative of Crisis Group, which seeks to prevent and resolve conflict and mass violence around the world, I will be drawing both on the research of my colleagues in the field, and on my own experience as a policymaker and a lawyer, to offer thoughts on how best to address the horrific atrocities committed against the Rohingya population of Rakhine State. I will focus in particular on tools and strategies for shaping the actions of decision-makers in Myanmar (including potential future perpetrators of atrocities), for affording atrocity victims a measure of justice, and for encouraging progress down the long and difficult path that might lead to the safe, dignified, and voluntary repatriation of Rohingya refugees.

As I will note, the challenges facing the Rohingya are immense, and the tools for addressing them are frustratingly limited. This makes it all the more critical that the United States take a broad-gauged approach to this humanitarian and human rights crisis. One element of its approach should be to send a clear and principled signal about the gravity of the crimes that Myanmar’s military (the Tatmadaw) and others have committed—including through the imposition of targeted sanctions under the Global Magnitsky executive order and support for international accountability mechanisms (such as the international mechanism for the collection and preservation of evidence that is in the process of being created). Evidence concerning the crimes committed has been powerfully documented in recent reports by the U.N.-mandated Independent International Fact-Finding Mission on Myanmar (which includes findings of law) and the U.S. Department of State (which does not). At the same time, the United States will need to continue working with other donors and the government of Bangladesh by providing resources for humanitarian relief, as well as supporting and encouraging development efforts that can help reduce economic pressure on host communities. Finally, continued engagement with the civilian government will be necessary in order to press for recognition of the magnitude of the Rakhine State catastrophe, and seek the changes in law, policy, and practice that will be necessary in order to enable repatriation.

Background

A Stalled and Struggling Transition in Myanmar

In 2011, Myanmar embarked on a remarkable and largely unanticipated transition away from 50 years of isolationist and authoritarian military rule. The transition culminated in a landslide victory for the National League for Democracy (NLD) opposition party, and the peaceful transfer of power to an

administration headed de facto by Aung San Suu Kyi – the military regime’s long-time nemesis and an international democracy icon.

Aung San Suu Kyi took over as Myanmar’s de facto leader in March 2016. Although the military-drafted constitution prevented her from becoming president, she was able to use the NLD’s legislative majority to pass a law installing her in a newly created position of “state counsellor”, fulfilling her pre-election pledge that she would be “above the president” and “make all the political decisions”. In fact, Suu Kyi has struggled with governance, has no control over the military (which also retains the power to block constitutional changes), and has been unable to make progress on key issues. From early in her term, the Suu Kyi declared peace with Myanmar’s many ethnic conflicts to be her top priority, yet she has achieved little. Crisis Group has also reported on the government’s authoritarian turn, marked among other things by its prosecution of journalists and social media users, including two Reuters journalists recently convicted under the colonial-era Official Secrets Act in what has been widely observed to be a police entrapment operation.

These observations form the backdrop for the government’s failure to begin defusing the fractious situation in Rakhine State that it inherited when it took office. Aung San Suu Kyi initially sought to buy time, announcing in August 2016 the establishment of an advisory commission headed by former UN Secretary-General Kofi Annan, with a twelve-month mandate to examine the crisis and recommend steps to address the underlying issues, including the plight of Rohingya Muslims. The advisory commission was an effort to buy time at a moment when there was no political consensus on a way forward, and steps on citizenship, basic rights and desegregation—which were obviously needed to create a more tenable situation for the long-mistreated Rohingya minority—were hugely controversial among Rakhine State’s Buddhist majority and in Myanmar as a whole.

It did not work. While the civilian government was still coming to grips with the basic tasks of governing the country and learning to work with the military, Rakhine State tensions boiled over. First, the Tatmadaw led a spike in reprisal violence against the Rohingya following attacks by the Arakan Rohingya Salvation Army (ARSA) against three border guard police stations in October 2016. Then, after a series of coordinated ARSA attacks in August 2017, the Tatmadaw mounted a massively disproportionate, indiscriminate, and seemingly planned campaign that drove (according to the U.N. Fact-Finding Mission) nearly 725,000 Rohingya from their home, leaving thousands dead, wounded, and brutalized in its wake. While the civilian government in Naypyitaw does not control the Tatmadaw or other security forces associated with the atrocities, its response suggested both the lack of competence and an absence of will to address the atrocities.

Myanmar’s civilian government has over time evolved from a posture of intransigence, during which it appeared to be hoping to wait out the storm, to one in which it has acknowledged the concerns of the international community, but it has not accepted the veracity of the allegations or taken meaningful steps to address them. The government-supported “Commission of Enquiry” announced in late May 2018 to investigate alleged human rights violations in northern Rakhine State demonstrated its lack of credibility when its chair announced, in an inaugural press briefing, “there will be no blaming of anybody, no finger pointing of anybody, because we don’t achieve anything by that procedure(.)” As a practical matter, it is further constrained by having only a small number of junior, government-assigned administrative staff. The Rakhine Advisory Board (formed to advise the government on implementation of the Annan commission recommendations) disbanded in August 2018 after high profile resignations by members frustrated by its lack of progress, including former Ambassador Bill Richardson. The government has also done little to facilitate implementation of a memorandum of understanding signed with the U.N. development and refugee agencies to begin fostering conditions conducive to the return of the Rohingya to Rakhine state.

A Refugee Crisis in Bangladesh

More than 700,000 Rohingya who fled the Tatmadaw in northern Rakhine State following the August 2017 violence now reside in Bangladesh. They joined tens of thousands who left earlier in 2017, and many more from previous years. The two countries have agreed upon a procedural framework for voluntary repatriation, but no Rohingya have returned and small numbers continue to flee. For now, host communities and political elites in Bangladesh largely sympathize with the refugees, but at the level of local communities that is starting to shift. If that shift gathers momentum – after the coming December elections, for example, or due to prolonged negative impacts on host communities – the Rohingya might face pressure to return against their will or move into more isolated camps in Bangladesh, such as those the Bangladeshi government is building on remote Bhasan island. Such developments could prompt instability or violence on either side of the border. In the meantime, the camps in which the refugees live are squalid, over-crowded, and dangerous.

As noted, Myanmar has done little if anything to create conditions on the ground that would give refugees, who continue to be fearful and traumatized, the confidence to go back. Hostility toward the Rohingya across Myanmar political elites and in society more broadly remains firmly entrenched. Meaningful steps to provide the Rohingya citizenship, respect their universal rights, and promote desegregation are nowhere on the horizon. At a practical level, curfews, checkpoints and movement restrictions imposed by local authorities and security forces mean that the Rohingya who remain in northern Rakhine State cannot gain access to farms, fishing grounds, markets, day labor opportunities, or social services. Myanmar has bulldozed many burned Rohingya villages, is building new roads, power lines and security infrastructure across northern Rakhine State, and has in some cases promoted or allowed the expansion of existing villages and construction of new settlements inhabited by other ethnicities. Ethnic Rakhine political leaders and local communities are staunchly opposed to repatriation, and the national government has done little to mitigate their resistance.

Against this backdrop, even as the international community seeks through pressure and engagement to encourage better conditions in northern Rakhine state, it must face the likelihood that those conditions are not likely to emerge in the near future. The United States and other donors should therefore prepare for the long haul by providing desperately needed resources to underfunded humanitarian operations and investing in the development of Cox’s Bazar district, where the refugees currently reside, to reduce the economic burden on host communities. At the same time as it is important to press for the goal of a safe, voluntary, and dignified return, it is also important to develop plans for a prolonged stay that can mitigate both their suffering of the Rohingya and the risk of propelling the crisis in a still more dangerous direction.

The U.N. Fact Finding Mission Report and the Department of State Report

While there have been many accounts of the atrocities committed against the Rohingya, the recently published account of the Independent International Fact-Finding Mission on Myanmar—published in draft form in August and final form in recent weeks—are extensively documented and likely to shape international discussion about the situation in Rakhine state. Operating under a mandate conferred by the U.N. Human Rights Council, the Fact Finding Mission reviewed allegations with respect to the situations in Rakhine, Kachin, and Shan states since 2011, and reported finding a “reasonable basis” to reach, *inter alia*, the following conclusions:

- The security forces’ conduct in Rakhine State following the ARSA attacks on the morning of August 25, 2017 was “immediate, brutal and grossly disproportionate.”
- Authorities referred to the security forces’ activities as “clearance operations”. These operations targeted the entire Rohingya population and suggest, by their nature, scale, and organization, a “level of preplanning and design on the part of the Tatmadaw leadership(.)”

- In the period beginning August 25, 2017, 392 villages were partially or totally destroyed, encompassing 40 per cent of northern Rakhine settlements and at least 37,700 individual structures.
- The operations against the Rohingya included indiscriminate shooting, targeted executions, men being rounded up and taken away never to be seen again, children targeted for killings, women and girls raped or gang raped together, villages burned to the ground, people burned alive, and bodies disposed of by soldiers through burning and burials in mass graves.
- The perpetrators of these activities were led by the Tatmadaw (in particular the 33rd and 99th Light Infantry Divisions) joined by other armed security forces and sometimes civilian perpetrators.

In light of its factual findings, the Fact Finding Mission also found a reasonable basis to conclude that (1) the Tatmadaw committed crimes against humanity and (together with certain other security forces) war crimes; (2) ARSA committed war crimes; and (3) there is “sufficient information” to warrant the investigation and prosecution of Tatmadaw senior officials so that “a competent court can determine their liability for genocide(.)”

By contrast, the just-released Department of State report includes no findings of law. Its factual findings, however, complement the findings of the U.N. Fact Finding Mission, and are framed in language that would be directly relevant to an analysis of whether atrocity crimes have been committed. These include (among other things) findings that the military “targeted civilians indiscriminately and often with extreme brutality,” that the violence in northern Rakhine State was “extreme, large-scale, widespread, and seemingly geared toward both terrorizing the population and driving out the Rohingya residents,” and that the “scope and scale of the military’s operations indicate that they were well-planned and coordinated.”

Encouraging Accountability and Progress toward Return

The tools for imposing consequences on the perpetrators of atrocity crimes and holding them to account are to a great extent dependent on oft-lacking cooperation by states and therefore have a disappointing track record. Nevertheless, these tools remain an essential element of any response to such crimes (and for the prevention of their recurrence) and should be pursued in the present context, both to reinforce the principle that crimes of this gravity should not go unpunished, and for the caution it may help to instill in possible future perpetrators.

U.S. and Multilateral Targeted Sanctions

Targeted sanctions can serve as an important signal of principle – to Myanmar and others around the globe – even though, in part because of Myanmar’s long history with tough U.S. sanctions (and the resulting sense that they can be endured), they are very unlikely to change the thinking of the military or the government.

Under Executive Order 13818 “Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption”—which implements the Global Magnitsky Act—the executive branch has far-reaching authority to impose financial and visa sanctions on any non-U.S. person or entity responsible for or complicit in “serious human rights abuses.” The Tatmadaw Western Command Commander Maung Soe was included in the first tranche of individuals designated for sanctions under this new authority on December 21, 2017. Subsequently, the administration designated four additional military officers and two security force units. The individuals and entities named in the Fact Finding Mission report as appropriate targets for criminal investigation should (to the extent not already sanctioned) be considered for targeted sanctions in this context, as should other perpetrators identified in due course. Proceeding with designations under the human rights prong of Executive Order 13818 would send an appropriate signal to potential future perpetrators in Myanmar and elsewhere.

As a rule, sanctions are more effective as both a naming-and-shaming tool and in terms of their impact if they are imposed in concert with other countries. To the extent that the United States proceeds with additional targeted sanctions, it should seek where appropriate to work in concert with other partners. Ideally this would mean obtaining a U.N. Security Council resolution imposing multilateral sanctions (a path likely to be blocked by China and possibly others) but it can also mean coordinating outside a U.N. framework with actors like Canada and the European Union, which have already imposed targeted sanctions of their own. It is also good practice to establish “off ramps” for targeted sanctions. The United States should accordingly make clear the circumstances under which sanctions would be lifted. In the case of individual designated for serious human rights violations or abuses, for example, it might be appropriate to signal that sanctions will be lifted if and when that individual has faced justice before an independent and impartial court or tribunal and been exonerated.

Criminal Accountability

While Crisis Group’s field work suggests that decision makers in Myanmar’s civilian government and military are likely to be more concerned about the prospect of criminal accountability than targeted sanctions, the path in this direction is also subject to many limitations. The proven deficiencies of Myanmar’s domestic justice system and the limited enforcement power of international or foreign tribunals that might assert jurisdiction over perpetrators all mean that the concrete impact of any judicial proceedings is likely to be significantly blunted. Nevertheless, it is important to pursue accountability through available channels to provide a measure of justice for the victims, to send a signal to future perpetrators, and to help begin creating the circumstances under which the Rohingya might feel safe returning home. Against this backdrop, certain questions have arisen:

What kind of crimes are being alleged, and are any of them more grave than others? The Fact Finding Mission report makes allegations with respect to genocide, crimes against humanity, and war crimes. Because of their gravity, these are all considered crimes of international concern that may be tried by international tribunals or by the national courts of countries with no link to the jurisdiction where the crime was committed beyond the presence of an alleged perpetrator on their territory.

Among the crimes of international concern, genocide and crimes against humanity can occur both in situations of war or in peace and are the most likely to be concerned with atrocities committed against large numbers of people. By contrast, war crimes take place in the context of armed conflict and are more prone to include one-off acts or acts against sole individuals. As between genocide and crimes against humanity, there is sometimes a perception that genocide is necessarily a crime of greater gravity. In fact, there are no specific numerical thresholds for either category of crime, and both are capable of encompassing mass murder on an unlimited scale and other bottomless depravity. The Nazi officials tried at Nuremberg were convicted of crimes against humanity rather than genocide, which was not formulated as a crime under international law until the Genocide Convention of 1948 came into force.

Genocide is, however, the most difficult of the atrocity crimes to prove. Under the United States’ understanding of the crime, it requires proof that an enumerated act (killing, the commission of bodily harm, deliberately inflicting destructive conditions of life, preventing births, or transferring children) is committed against the member of a specified kind of group (national, ethnical, religious or racial) with the specific intent to destroy the group in whole or substantial part. The specific intent and destruction prongs of this test are especially difficult to prove.

By contrast, proving crimes against humanity is generally understood to require a showing that the perpetrator knowingly committed certain enumerated acts—murder, sexual violence, persecution, deportation, and forced transfer are among them—in a widespread or systematic manner. Crimes against

humanity (and war crimes, which in many cases cover similar conduct but exclusively in the context of armed conflict) are therefore generally more straightforward to prove than genocide even in cases where greater numbers of people may have been affected.

Where can the alleged crimes be tried? The three atrocity crimes can be tried either by an international criminal tribunal, such as the International Criminal Court, an *ad hoc* tribunal that has been created by the U.N. Security Council to address a particular situation (like the International Criminal Tribunal for the former Yugoslavia), or a hybrid tribunal that combines domestic and international elements (like the Special Court for Sierra Leone). In countries that have passed legislation that recognizes universal jurisdiction over these crimes, national courts may also try perpetrators simply on the basis of their presence on the country's territory.

Generally, the International Criminal Court's jurisdiction is limited to acts committed on the territory of a party to the ICC Rome Statute, or in the context of a situation that has been referred to the court by the U.N. Security Council. But even though Myanmar is not a state party, and there has been no Security Council referral, the court has asserted jurisdiction over certain crimes arising out of the anti-Rohingya violence in Rakhine state. Several weeks ago, a pre-trial chamber of the court ruled that because the alleged crimes against humanity of deportation and forced transfer occurred partly on the territory of Bangladesh, which is a party to the Rome Statute, the court has jurisdiction over those crimes. It has also left the door open for the prosecutor to pursue other ICC crimes that she can demonstrate were completed on the territory of Bangladesh.

While this interpretation of the court's jurisdiction may raise concerns among those who criticize it for addressing matters that involve non-party states, it also means that the ICC has a head start over other fora where accountability might be pursued. The ICC prosecutor has already launched a pre-investigatory "preliminary examination" that covers some of the crimes in question. While the Security Council could augment the limited scope of the ICC's inquiry through a referral that would give the court full jurisdiction over the situation in Myanmar, China (and perhaps Russia) would almost certainly oppose such a referral. Any move to create a Council-mandated *ad hoc* tribunal would likely also be vetoed.

Although the only active option in the Myanmar context, as a vehicle for accountability, the ICC is imperfect. Operating with limited resources and without the support of any of the great powers, it tends to move through its caseload slowly and must rely on the spotty efforts of its 123 member states to enforce its judgments. It has particularly struggled to pursue prosecutions when the state where the crime occurred refuses cooperation. It could take years for the court to move from the preliminary examination stage to the opening of a formal investigation, and yet more years before it has assembled sufficient evidence to bring charges (an outcome that is by no means guaranteed).

To be sure, the court is not wholly without enforcement tools. In cases where the ICC brings charges and the indictee does not appear before the court, the court may issue a warrant or summons that obligates states parties to arrest the indictee and deliver him or her to The Hague. This ability to hamper the mobility of indictees casts a shadow that by itself can have deterrent effect. In order to be effective, however, it is important to build a large coalition of states that will commit to enforcing the warrant should an ICC indictee travel to their territory.

What more can the United States do? Unfortunately, the administration's policies have already set it at odds with the multilateral institutions that have played—and will almost certainly continue to play—key roles in pursuing accountability for atrocity perpetrators involved with the anti-Rohingya violence. It has withdrawn from the U.N. Human Rights Council and attacked its legitimacy. It has also attacked the legitimacy of the International Criminal Court ceased to support its efforts, even in matters where the

United States and the court share a common objective. If the United States were to reverse these policies, it would be in a better position to support the Human Rights Council as it weighs the creation of an independent investigative mechanism to collect and preserve evidence and to help ensure its success. (It still can, and should, look for ways to support the new mechanism, just as it has supported the analogous mechanism created for Syria.) A shift in policy would also allow it to provide support to, and share information with, the ICC, as it used to do in cases where it shared the court's objectives and there was no legal bar to doing so.

As for Congress, actions that call the world's attention to the crimes committed against the Rohingya, and help to galvanize the demand for justice, are important. Hearings and high level visits to the region are especially helpful. Congress might also fund efforts that serve the purpose of accountability – such as documentation, search, and recover efforts relating to mass graves to which there is access. And, much like it created a powerful human rights tool in the form of the Global Magnitsky Act, Congress could signal its commitment to accountability by enacting a crimes against humanity statute, to help ensure that should perpetrators from Myanmar set foot on U.S. soil, they would face justice for their crimes.

Refugee Support

The Rohingya refugee crisis presents a significant dilemma for the international community. On one hand, it is vital to insist on the right of the Rohingya to return home and Myanmar's obligation to create conditions conducive to that, as well as to pursue accountability. On the other, no voluntary repatriation is feasible for the foreseeable future, which means concerted efforts are required to ease the burden on Bangladesh and provide alternative options for the refugees.

Until now, many countries have been concerned that explicitly acknowledging that the refugees are unlikely to go home would relieve pressure on Myanmar to accept them back and could be seen as rewarding the architects of ethnic cleansing. But the terrible reality is that concerted international pressure thus far has not altered Myanmar's political stance on this issue and even such increased efforts as could be plausibly achieved – especially given China's seemingly fixed opposition to any punitive action from the Security Council – are likely to fall short in the foreseeable future. In the meantime, the status quo for the Rohingya refugees could morph in dangerous ways. If host communities or national political sentiment in Bangladesh turns against the refugees (building on what appears to be gathering momentum at the local level), the government may pressure them to return against their will or force them into more isolated camps in Bangladesh, such as those being constructed on Bhasan island. Such developments could prompt instability or violence on either side of the border.

Principled Engagement

As the United States considers its bilateral relationship with Myanmar in light of what is known and what continues to surface about the Rakhine State atrocities, it will have to thread something of a needle.

On the one hand, the civilian government's direct responsibility for the 2017 violence in northern Rakhine is limited by the fact that it does not have oversight or control of the armed forces, nor visibility of what they are doing. Nevertheless, it is also now clear that the civilian government, led by Aung San Suu Kyi is part of the problem - not only for failing to speak out, but for failing to curb anti-Rohingya hate speech in the state media, denying that human rights abuses have taken place, providing cover to the military, and perpetuating policies in Rakhine State that Amnesty International has concluded amount to the crime against humanity of apartheid. On the other hand, it does not appear that the NLD-led government is going anywhere. Though illiberal (as witnessed by the jailing of the Reuters journalists, and more general crackdown on free media and civil society) it is still sufficiently popular to make victory in the next

national election (2020) highly likely. If that happens, then it could be at least 2025 before leadership changes hands.

This suggests that even as the United States mounts pressure through sanctions, and whatever assistance it is able to offer to international accountability efforts, it should also recognize that these alone are not likely to change the direction of the government's handling of the Rohingya crisis, and continue to engage diplomatically. Through principled engagement—in which the United States speaks candidly about its views on the past and concerns about the future—U.S. diplomats should probe on an ongoing basis any openings for making meaningful progress. U.N. Special Envoy Christine Schraner Burgener has access to both Aung San Suu Kyi and the Commander in Chief of the armed forces and therefore could also be an important channel.

We will never again have the opportunity, unfortunately, to prevent the atrocities of summer 2017. Through the right balance of pressure and engagement, however, the United States now has an opportunity to try to prevent them from happening again, while providing some measure of justice to the victims.