

Engaging with the UN and UN Infrastructure in the pursuit of solutions

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In its September 2019 report, the International Independent Fact-Finding Mission on Myanmar (FFM) identified rape and other sexual violence as a central part of the atrocities inflicted on the Rohingya. The report documented hundreds of cases, stating that 80% of the women who experienced these crimes were gangraped by soldiers of the Myanmar military (Tatmadaw).¹

Allegations of sexual violence is only one form of persecution that led hundreds of thousands of Rohingya to flee since 25 August 2017. This was not the first time violence perpetrated against the Rohingya resulted in mass displacement, but the difference today is the enormous media attention and establishment of specific investigations, justice and accountability mechanisms and pursuing legal redress through UN and national channels.² However legal proceedings are a slow process, and Myanmar's continued stance is wholesale rejection of allegations of human rights violations and holding officials accountable.

There is also a paradox in seeking accountability, as pursuing criminal charges against the Tatmadaw and other officials may result in them feeling they cannot risk letting go of the state and will use any means necessary to maintain power. This does not mean one should refrain from pursuing justice and accountability robustly, but as concerns repatriation it is difficult to imagine what political advantage or interests the Tatmadaw would have in permitting largescale returns. As we know, in Myanmar the Tatmadaw calls the shots.

What about the UN Security Council?

Eight months after the 'clearance operations' began, UN Security Council Ambassadors traveled to Bangladesh and Myanmar where they met government officials, refugees, UN

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¹ See UN doc ref: A/HRC/39/64, 18 September 2019: <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23575&LangID=E>; as well as the FFM's subsequent reports: *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts* (UN doc ref: A/HRC/42/CRP.4, 22 August 2019): <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/sexualviolence.aspx>; and *Economic interests of the Myanmar military*, A/HRC/42/CRP.3, 5 August 2019: <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/EconomicInterestsMyanmarMilitary.aspx>

² See 'Three Complementary Legal Strategies for Accountability: A Momentous Week for the Rohingya' by Priya Pillai in *Opinio Juris* at: http://opiniojuris.org/2019/11/19/three-complimentary-legal-strategies-for-accountability-a-momentous-week-for-the-rohingya/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29

officials and civil society personnel. While traveling to Myanmar they reportedly flew over areas of Northern Rakhine State which had been razed to the ground.

Unfortunately without China and Russia on board (two permanent Council members who strongly support Myanmar) nothing will happen. China in particular has close political and economic ties with Myanmar, and despite efforts by some members including formerly Sweden and the UK to move things forward the Council remains stuck.

There is a continued need to call out the lack of statesmanship shown by some Council members, and especially those powerful states who can leverage and pressure Myanmar.³ Lack of leadership by the Security Council⁴, and the UN more broadly, impacts on what the UN as a community of actors can do to support the Rohingya.

UN role and presence in Myanmar

The UN's presence and operations in Myanmar have been between a rock and a hard place for decades. Staff on the ground have limited freedom of movement and autonomy, but are still expected to be the 'eyes and ears' of the international community. Limited presence and scope of activities can compromise the ability to fulfill mandates which ultimately undermines impact and effectiveness. As a result 'negative coping strategies'⁵ have been adopted. Despite repeated calls by the General Assembly⁶ and the imperative of the Human Rights Up Front mandate⁷, the UN's track record of ensuring a strong human rights operational focus in Myanmar is not evident.

That said, the reality on the ground in Myanmar is perceived overstepping by UN officials can lead to admonishment or being asked to leave by the country. This in turn leads to limited engagement and an unhealthy degree of secrecy and self-censorship. Lack of sharing information even between offices of the same organisation is the way some UN agencies have operated for years. Given the current political climate in Myanmar the possibility of UNHCR and other UN actors undertaking credible and effective monitoring for refugee returns is unclear.

³ See the Global Centre for the Responsibility to Protect Occasional Paper *If Not Now, When? The Responsibility to Protect, the Fate of the Rohingya and the Future of Human Rights*, Dr Simon Adams, January 2019, at p 10. The report is available at: http://www.global2p.org/media/files/occasionalpaper_rohingyafinal.pdf

⁴ For a sobering discussion on the politics of the UN and the real limits of executive organs including the Security Council to take responsibility in times of crises and *inter alia* how this impacts on the 'question of courage in UN leadership at the highest level' see *Our Shared Humanity: The Arc of Intervention* organized by Chatham House on 3 June 2019 featuring Lakhdar Brahimi (The Elders; Chair, Panel on United Nations Peace Operations (2000)), Comfort Ero (Africa Program Director, International Crisis Group), and Ian Martin (Special Representative of the UN Secretary-General in East Timor (1999), Nepal (2007-9) and Libya (2011-2)). An archived video-recording of the discussion with Q & A is available on the Chatham House website at: <https://www.chathamhouse.org/file/our-shared-humanity-arc-intervention#>

⁵ See *Time to Break Old Habits: Shifting from Complicity to Protection of the Rohingyas in Myanmar*, Liam Mahony, June 2018, p 26. The full report is available at: http://www.fieldviewsolutions.org/fv-publications/Time_to_break_old_habits.pdf

⁶ The 2018 UNGA resolution on 'Situation of Human Rights in Myanmar' highlights this point; UN doc ref: A/RES/73/264 p 5, para 6. Full text available at: <https://undocs.org/en/A/RES/73/264>

⁷ https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/013_fact_sheet_-_rights_up_frontin_the_field_draft_2014-08-21_2.pdf

Time to consider other solutions for the Rohingya

While many Rohingya wish to return to Myanmar, many do not. Most if not all have expressed several reasonable demands before considering a move back across the border. These include repatriating to their home villages and regions with assured long-term physical security; respect for their human rights including the grant of Myanmar citizenship; ensuring justice and reparations for their losses; and accountability for those officials who committed serious crimes.

Delivering on these demands requires cooperation and political will by the Myanmar government, in particular the Tatmadaw, which to date is sorely lacking. Against this background it is time to seriously consider and work towards other solutions for the Rohingya. These include:

- advocating for local integration in Bangladesh including a gradual end to encampment, in addition to providing support to host communities;
- regional responsibility sharing and solidarity through moving some Rohingya to neighbouring Asian countries under a managed scheme;
- third country resettlement for the most vulnerable to countries willing to take them such as Canada;
- and granting access to public education, health services and work rights with government support wherever Rohingya refugees are located.

Suggesting these solutions in no way condones what happened in Myanmar; and claims that not promoting return will play into designs of ethnic cleansing needs to be considered in the human rights interests of the Rohingya. Further, no one is suggesting the international community will resettle 1 million Rohingya as only the most vulnerable protection cases may initially benefit from this limited durable solution.⁸

Rohingya refugee and diaspora leadership and civil society organizations can play important roles in advocating for these alternative solutions. Curiously no one in the UN or IOM, or ASEAN or the OIC for example appears to be publicly doing so, yet. Because it may be too difficult or unrealistic is not a valid response. The same thing can be said about the prospects of repatriation. In the case of the Rohingya, the historical legacy of repatriation in the 1970s and 1990s also requires serious reflection. In many respects earlier repatriation exercises were not well managed and indeed reflect low points in UNHCR's operational history in Asia.⁹ We should avoid history repeating itself in a similar manner.

⁸ It should be recalled the international community was able to resettle some 110,000 refugees from Nepal over a period of several years, and several thousand Rohingya refugees were resettled from other countries in Southeast Asia, in particular Malaysia.

⁹ See for example David Petrusek, 'Through Rose-Coloured Glasses: UNHCR's Role in Monitoring the Safety of the Rohingya Refugees Returning to Burma', in *Human Rights and Forced Displacement*, AF Bayefsky and J Fitzpatrick (editors), Kluwer Law International, 2000, at pp 114-136.

In a 4 September 2019 article in *The Dhaka Tribune*, the former deputy commissioner for Chittagong noted that during the 1978 repatriation exercise the government of Bangladesh "... deployed one full battalion of armed police around the camp [of Rohingya refugees], which we revealed after we took back control of the camp. It was easy later to transport the selected repatriates to another camp and take them from there to the designated repatriation outpost. I myself took them across the border and handed them to the Myanmar

Following the release of the Rosenthal report¹⁰ which looked into the UN's involvement in Myanmar from 2010-18, a group of prominent human rights NGOs made the following recommendations to the SG Guterres in a joint letter¹¹:

1. Implement reforms to prevent the recurrence of the “systematic” failures and “obvious dysfunctional performance” and ensure accountability for those failures as required;
2. Re-energize the Human Rights up Front initiative (HRUF)¹² prompted by the Charles Petrie [re Sri Lanka¹³] report;
3. Return to the SG's office a senior staff member dedicated to ensuring HRUF is fully implemented throughout the UN system;
4. Take steps to hold accountable those UN officials responsible for failures before, during, and since the 2017 ethnic cleansing campaign;
5. Support the UN Resident Coordinator to ensure they have authority to implement a comprehensive HRUF strategy that takes into account the views of national and international NGOs, community-based organizations, and the human rights community, and is reflected and implemented at country level;
6. Show leadership to take concrete steps to improve coordination at all levels of the UN on the situation in Myanmar;
7. Commit to publishing annual updates on progress in adopting the recommendations of the Petrie and Rosenthal reports until they are fully implemented;
8. Formally submit Rosenthal's report to the Security Council and invite Rosenthal to brief the Council, the UN General Assembly, and nongovernmental organizations.

One hopes these recommendations will be implemented, but follow up is required.

What can legal practitioners and human rights actors can do to engage the UN in an effort to find solutions?

The ‘good news’ is there is considerable international support for the Rohingya crisis, and the Bangladesh authorities are engaged with international and regional organisations and the NGO community in dealing with it. A great deal of heroic good work is being done on the humanitarian front, and the immediate track is continuing to support the Rohingya with

authorities.” See: <https://www.dhakatribune.com/opinion/op-ed/2019/09/04/the-intractable-rohingya-repatriation>

For an overview of Rohingya influx to Bangladesh see: <https://reliefweb.int/report/bangladesh/historical-review-rohingya-influx-1978>; and *Repatriation of Rohingya Refugees* by Professor CR Abrar of Dhaka University at: <http://www.burmalibrary.org/docs/Abrar-repatriation.htm>. Another helpful reference is *The Rohingya Genocide: Compilation and Analysis of Survivors' Testimonies*, edited by Mohfidul Hoque and published by the Centre for the Study of Genocide and Justice, Liberation War Museum (www.liberationwarmuseumbd.org), September 2018.

¹⁰ <https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/Myanmar%20Report%20-%20May%202019.pdf>

¹¹ <https://www.amnesty.org/en/documents/asa16/1003/2019/en/>

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https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/013_fact_sheet_-_rights_up_frontin_the_field_draft_2014-08-21_2.pdf

¹³ <https://digitallibrary.un.org/record/737299?ln=en>

humanitarian assistance while diplomatic discussions and other efforts advance. The joint humanitarian response has an estimated price tag of approx. US\$ 1 billion per annum, but if the crisis continues without solutions donor interest may gradually evaporate.

Looking ahead, **inclusive and systematic refugee representation in decisions which affect them, especially on repatriation, is a must.** Failure to engage with and include the Rohingya, especially women, will limit or prevent buy-in to whatever is negotiated on their behalf. Rohingya refugee leadership is legitimately demanding a place at the table, but they need support to get there.

Another desirable approach **is to continue supporting international and domestic legal challenges, test case litigation, and law and policy reform efforts.** Whether it is an individual refugee facing a criminal charge for having left a camp without authorization to work and feed her family, a refugee student ‘illegally’ attending university, a group of refugees facing *refoulement*, or lobbying for legislative changes to permit refugees access to public services, these matters can all benefit from legal advice and NGO support.

Refugees and other individuals who may lack power and legal standing need someone to defend their interests, offer advice, and formulate arguments to educate government officials, decision makers and judges. Scarce resources may be better spent on “lawyering up” at the right time and place to make timely interventions and push for change. Pursuing test case litigation and developing a legal aid network with support from local Bar associations has proven successful in Malaysia, for example. Running to court is not always required, but negotiating with prosecutors, the police and local authorities can make a real difference especially with local advocates in the lead.

Organisations like APRRN have the collective expertise and platform through its membership and global network to undertake and support this work. **UNHCR can also be engaged to offer litigation support in addition to any other assistance.**

Apart from material support, advocates should regularly meet UNHCR management and protection staff and support them to be proactive. This may sound obvious, but invite them, especially senior management, to meetings like this one. **At the community level, request UNHCR’s presence in meetings with refugees and community groups to discuss strategies and approaches.**

UNHCR has the constant challenge of changing country team leadership every few years which can result in field operations being in a state of flux. Leadership changes can put a strain on staff and tie them up in internal change processes rather than engaging externally. Policy making inertia may also be present with country operations demonstrating an unwillingness to take decisions without Headquarters or Bureau backing, which sometimes never comes.

Global pressures on UNHCR to engage in more complex operations can spread the organisation thin. Some governments fail to engage in registration, status determination or integration activities, which results in UNHCR filling the gap. Inconsistent or unpredictable funding amongst other reasons makes it difficult to ensure permanent structures, systems or

implementation of policy which only governments can do. How to gain the attention of UN actors and engage in a meaningful way in such circumstances can be a challenge.

These systemic stresses are however no excuse for the UN failing to take up challenging issues, no matter how difficult. Nor should the UN play the blame game of suggesting they are powerless to effect change or engage in dialogue with challenging or at times demanding government partners. **The UN and UNHCR have power and authority which needs to be strategically exercised, whatever the risks.** Doing so requires having courageous and experienced senior staff in place.

UN reform efforts providing the **Resident Coordinator** more authority and accountability for coordinating and implementation of system-wide policy ambitions relating to 'delivering as one', can sometimes bog down UN bureaucracy resulting in inaction or questionable prioritization at the field level. This point was notably highlighted by former Ambassador Rosenthal in his report on Myanmar.

It should be recognised the UN including UNHCR is very hierarchical. Some individuals in senior positions can reflect an elitist, institutionally arrogant or secretive attitude which makes engagement challenging. But like governments and public authorities, the UN exists to serve and assist 'its beneficiaries and the public' and should be accessible at all times. Any reasonable requests for discussions and support, as well as offering or receiving criticism in good faith, should be acknowledged and respectfully addressed.

Lobbying the UN to change an approach or show courage in the face of a difficult government response may be required. The UN cannot be effective without donor, NGO and civil society support, but cooperation with UN partners regularly requires follow up and persistence. Engaging donor countries and UN member states to strategically intervene with the UN can sometimes be helpful. At the same time we need to cooperate and work together to build and maintain open lines of communication in an effort to promote principled, human rights oriented and ethical policies and programmes and develop trusting working relationships.

There is notably new protection leadership in UNHCR. The new Assistant High Commissioner for Protection, Gillian Triggs¹⁴, is the former head of the Australian Human Rights Commission and a professor of international law. Based her experience working on human rights and asylum issues she should become a strong ally in Asia. Ms Triggs recently took up her position so it may be helpful for APRRN and member organisations to reach out early in her tenure. Another recent development that should facilitate access and communication with UNHCR is the recent move of the Asia Bureau to Bangkok.

Apart from institutional relationships, **another important approach is to use a pen and voice to raise issues.** Thoughtful advocacy and delivering clear messages through various means including the arts and public events can be highly effective and will never grow old. If one needs to write the letter or public statement, news article, song or poem, script a documentary or play, choreograph a refugee dance performance, or include elements in a

¹⁴ <https://www.unhcr.org/news/press/2019/8/5d4d13254/gillian-triggs-appointed-unhcrs-assistant-high-commissioner-protection.html>

legal submission identifying responsible officials to hold them accountable, this is all work leading to common goals and objectives.

At another level, **documenting alleged cases of abuse and rights violations, including by government authorities and international organisations, is another tried and tested approach to support human rights work in the field.** Such information is essential to the work of UN human rights treaty bodies¹⁵ and other enforcement mechanisms including national and regional human rights commissions, UN special rapporteurs and representatives and established investigative entities.¹⁶

In Bangladesh, **I know the involvement of interested parties in formulating quality written legal submissions and representations to the FFM and International Criminal Court made a real difference.** As international justice efforts can take years, it is also important to develop and support local capacity and expertise and the next generation of experts to ensure consistent engagement and institutional memory.

As a word of personal advice, don't give up. Never. Ever. **Take good care of yourself.** Be good to yourself and those around you. You cannot do good for others if you are not good to yourself.

The occurrence of “burn out” is a real concern in humanitarian and human rights work and other helping professions, which only fairly recently have we become more aware of.¹⁷

As a very last word never forget that your efforts, however modest, can individually and collectively move mountains. As HH The Dalai Lama memorably said: *“And if you think you're too small to make a difference ... try sleeping with a mosquito in the room.”*

¹⁵ Myanmar is *inter alia* a state party to the UN Convention on the Rights of the Child, Convention on the Elimination of All Forms of Discrimination against Women, and International Covenant on Economic, Social and Cultural Rights. Bangladesh is also a state party to the above treaties in addition to the Convention Against Torture, International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Rights of Persons with Disabilities, and Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. For further information see: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx

¹⁶On the link between international human rights law and refugee protection see for example:

<https://www.refworld.org/docid/435e198d4.html>; and <https://www.unhcr.org/research/working/3ae6a0cf4/human-rights-refugees-enhancing-protection-international-human-rights-law.html>; <https://www.unhcr.org/3ae6bd900.pdf>

¹⁷ See for example: https://www.who.int/mental_health/evidence/burn-out/en/; <http://hrlr.law.columbia.edu/files/2018/07/49.3.4-Knuckey-final.pdf>; <https://www.humanrightscareers.com/magazine/burnout-as-human-rights-worker/>