



**BURMA/MYANMAR'S ONGOING REFUSAL TO PURSUE ACCOUNTABILITY:
TIME FOR AN ICC REFERRAL¹**

The Burmese government has consistently refused to cooperate with independent and impartial investigations into atrocity crimes in Rakhine State. More significantly, it has refused to recognize these crimes and rejected measures to secure justice and accountability at the domestic level – including steps to halt and prevent the recurrence of such crimes. In doing so, it has dismissed evidence of crimes, including allegations of rape and murder, as “fake news”, participated in the destruction of evidence, and justified crimes by categorizing unarmed civilians as “terrorists”.

Since the first wave of anti-Rohingya/anti-Muslim violence hit Rakhine State in 2012, the government has overseen **eight** investigations, most recently the Commission of Enquiry (CoE) initiated by State Counsellor (SC) Aung San Suu Kyi in August 2018. All investigations largely concluded that state forces had not committed crimes or denied that crimes had taken place at all.

These ongoing crimes against Rohingya, Kachin, Shan, and other minorities will continue without international measures to secure accountability. Accountability and measures to halt crimes against unarmed civilians will also ease the severe loss of trust in the country’s peace process. Accountability and the necessary accompanying reforms are key to durable solutions for the crisis of displaced Rohingya, as well as displaced Kachin and Shan populations. But recent statements made by SC Aung San Suu Kyi and members of the recent government-appointed CoE, along with political and constitutional structures embedding the Tatmadaw’s influence over Burmese society, indicate that authorities are unwilling and unable to prevent ongoing atrocity crimes.

Military impunity: Protected by the 2008 constitution

The 2008 military-drafted constitution is among the major hurdles to justice in Burma, as it is used as a tool for impunity for members of the military. In this regard, the clauses of major concern are:

Article 20(b), which ensures that the Tatmadaw retains complete control over its own affairs and remains unanswerable to the civilian government. “The Defence Services has [sic] the right to independently administer and adjudicate all affairs of the armed forces.”

Article 319, which ensures that military crimes should only be prosecuted by the military, military personnel should never appear before a civilian court, and that only Courts-Martial “shall adjudicate Defence Services personnel.”

Article 445, which provides immunity from prosecution to members of the government. “All policy guidelines, laws, rules, regulations, notifications and declarations of the State Law and Order Restoration Council and the State Peace and Development Council or actions, rights and responsibilities of the State Law and Order Restoration Council and the State Peace and Development Council shall devolve on the Republic of the Union of Myanmar. No proceeding shall be instituted against the said Councils or any members thereof or any member of the Government, in respect of any act done in the execution of their respective duties.”

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¹ Parts of this brief were previously published in ALTSEAN’s factsheet: *Dodging Accountability and Whitewashing Crimes: Time for Burma/Myanmar International Investigation Mechanism (Aug 2018)*, *Burma/Myanmar: Comprehensive Action Needed to Halt Ongoing Military Rampage (Apr 2017)*, and *Burma/Myanmar: Flawed Domestic Investigations Necessitate UN Commission of Inquiry on Serious Crimes (Mar 2017)*.

Military budget increased by 171.67% since 2011

The military has enjoyed an **overall budget increase of 171.67% since the 2011/2012 fiscal year**, from 1.2 trillion kyat to 25 trillion kyat (in 2018-2019). In July, the MoD requested a budget of 3.26 trillion kyat (US\$2.2 billion) for the October 2018-September 2019 fiscal year – a 2.19% increase from 2017. The request was equivalent to 13.07% of the annual budget.²

	Overall Budget (Trillion kyat)	Military Budget (Trillion kyat)	Year to Year % Difference	Military % of Overall Budget
2011-2012	K 7.6	K 1.2	N/A	15.79%
2012-2013	K 13.0	K 1.9	+ 58.33%	14.62%
2013-2014	K 16.7	K 2.2	+ 15.79%	13.17%
2014-2015	K 19.5	K 2.3	+ 4.55%	11.79%
2015-2016	K 20.8	K 2.7	+ 17.39%	12.98%
2016-2017	K 23.6	K 3.3	+ 22.22%	13.98%
2017-2018	K 20.6	K 3.19	- 3.33%	15.49%
2018-2019	K 25	K 3.26	+ 2.19%	13.04%

Destruction of evidence

The pattern of failing to preserve evidence, and in many cases, destroying evidence, heightens concerns that the government is unlikely to pursue accountability measures in the near or midterm.

In September 2018, the Independent International Fact-Finding Mission on Myanmar (IFFM) presented its final report, concluding that soldiers burned Rohingya houses in a “systematic fashion” with corpses “thrown into burning houses” during clearance operations. According to the IFFM, the actions of Tatmadaw soldiers suggested a level of “**pre-planning and an intention to destroy criminal evidence**” that was consolidated by “subsequent terrain clearance through bulldozing, removing evidence of burned bodies and graves.”³ The IFFM final report also noted that analysis of satellite imagery indicated that in March 2018 the Burmese government was building military bases and other security outposts over vacated and torched Rohingya villages.⁴

Investigative whitewashing

Since 2012, eight official investigations into violence in Arakan/Rakhine State have been overseen by the government and/or security forces. These fundamentally flawed mechanisms served primarily to absolve government forces of responsibility for crimes, and in some cases, denied the crimes even happened. Recommendations have avoided measures to halt or prevent the recurrence of such crimes, but instead usually recommended more weapons for security forces and increased militarization. This established pattern shows that there is no capacity nor will to pursue accountability and ensure non-recurrence. The Commission of Enquiry (CoE) on Rakhine State established by SC Aung San Suu Kyi in July 2018 is merely the latest in a long tradition of flawed internal investigations.

2018 COMMISSION OF ENQUIRY: ACCOUNTABILITY NOT ON AGENDA	
Biased & inappropriate members of the inquiry	CoE Chair, Rosario Manalo , declared in August 2018 that accountability was not on the CoE’s agenda: “[...] there will be no blaming of anybody, no finger-pointing.” ⁵ Japanese member of the CoE, Kenzo Oshima , said in August 2018 that the

² Irrawaddy (25 Jul 18) Education Ministry Suspends Construction of 6,000 New Schools

³ Independent International Fact-Finding Mission on Myanmar (17 Sep 18) Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, paragraph 838 and 1002

⁴ Independent International Fact-Finding Mission on Myanmar (17 Sep 18) Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, paragraph 1233-1238

⁵ Coconuts Yangon (17 Aug 18) Suu Kyi’s Rakhine Enquiry Commission says will not seek accountability for rights abuses

	<p>commission had been brought in to “bring in more balance, set the record straight” against existing narratives shaped by many reports that are “too one-sided.”⁶</p> <p>Aung Tun Thet said “there’s no desire to get rid of the so-called evidence” when responding to reports in February 2018 that Rohingya villages were bulldozed to eliminate evidence of rights abuses.⁷ In March 2018, he said “there is no ethnic cleansing or genocide” when responding to a UN report implicating Burmese officials in genocide.⁸ In April 2018, he admitted that “tortures happened” to the Rohingya but that it was not his concern if it amounted to ethnic cleansing or war crimes. He also said the repatriation of Rohingya demonstrates “there was no intention of ethnic cleansing.”⁹</p>
Refusal to cooperate with existing inquiries	<p>The Burmese government refused to cooperate with the UN’s Human Rights Council Independent International Fact-Finding Mission on Myanmar established in March 2017, banning members from entering Burma to investigate rights abuses.</p> <p>Since July 2017, the Burmese government has also refused to cooperate with Special Rapporteur on the situation of human rights in Myanmar Yanghee Lee after it objected to her end-of-mission statement, and barred her from entering the country.¹⁰</p>
Assessment of the CoE by the UN FFM on Myanmar	<p>In September 2018, the UN FFM on Myanmar released its final report concluding:</p> <p>“The government’s recently-created Commission of Inquiry will not and cannot provide a real avenue for accountability, even with some international involvement. The impetus for accountability must come from the international community.”¹¹</p>

RAKHINE STATE INVESTIGATIONS 2012-2017	
October 2017 Tatmadaw internal inquiry¹²	
Main flaws	Main recommendations
<ul style="list-style-type: none"> ✓ The inquiry concluded that there were “no deaths of innocent people” and all security forces “strictly abided by orders”. 	<ul style="list-style-type: none"> ✓ The Tatmadaw absolved themselves of all responsibility.
February 2017 Police Departmental Inquiry (on violence in Maungdaw)¹³	
Main flaws	Main recommendations
<ul style="list-style-type: none"> ✓ Police investigated themselves: the Inquiry was formed by the Ministry of Home Affairs and led by Brig Gen Win Htun. ✓ Policemen caught beating defenseless villagers sentenced to only two months imprisonment under the Police Disciplinary Law. 	<ul style="list-style-type: none"> ✓ No conclusive final report was published.

⁶ Coconuts Yangon (17 Aug 18) Suu Kyi’s Rakhine Enquiry Commission says will not seek accountability for rights abuses

⁷ Reuters (26 Feb 18) Bulldozing Rohingya villages was not ‘demolition of evidence’, Myanmar official says

⁸ New York Times (14 Mar 18) Myanmar Rejects U.N. Findings: ‘No Ethnic Cleansing or Genocide in Our Country’

⁹ Daily Star (20 Apr 18) ‘Not my concern’

¹⁰ OHCHR (20 Dec 17) Myanmar refuses access to UN Special Rapporteur

¹¹ Independent International Fact-Finding Mission on Myanmar (17 Sep 18) Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, paragraph 1619

¹² Human Rights Watch (14 Nov 17) Burma: Army Report Whitewashes Ethnic Cleansing

¹³ Arakan Project (15 Mar 17) Investigation Commissions to whitewash atrocities?

February 2017 Military Inquiry Board (on violence in Maungdaw)¹⁴	
Main flaws <ul style="list-style-type: none"> ✓ Military investigated themselves. ✓ Sr Gen Min Aung Hlaing: “accusations are very wrong in comparison to the situation on the ground”. 	Main recommendations <ul style="list-style-type: none"> ✓ The Board concluded in May 2017 that a UN report alleging military rights abuses was “totally wrong”.
October 2016 State-level Committee (on violence in Maungdaw)¹⁵	
Main flaws <ul style="list-style-type: none"> ✓ Chair Aung Win said it was impossible that soldiers had raped Rohingya women because “<i>they are very dirty... They are not attractive.</i>” ✓ Human rights violations denied. Violence blamed exclusively on Rohingya. 	Main recommendations <ul style="list-style-type: none"> ✓ The final report in December 2016 found that attacks on police posts and subsequent clashes were “pre-planned” ✓ Called for tighter security “at schools and ethnic Rakhine villages were Buddhists live, as well as along security patrol routes beside the Naf River.”
December 2016 Maungtaw Region Investigation Commission¹⁶	
Main flaws <ul style="list-style-type: none"> ✓ Composition: Former military general-led commission tasked with investigating the military. Former army Gen Aung Kyi and police chief Gen Zaw Win also members. ✓ Human rights violations continuously rejected as “fabricated rumors and news” to discredit the government. ✓ No witness protection, manipulation of witness accounts (state media broadcast witness interview). ✓ Interim report methodologically flawed: based on broad assumptions, rather than accurate investigation (e.g. No genocide because there were still mosques in area). 	Main recommendations <ul style="list-style-type: none"> ✓ 3 Jan 2017, interim report: Dismissal of rape allegations due to “lack of evidence”; rejection of genocide/persecution. ✓ 21 Feb 2017, response to UN report: “... the OHCHR report [was] far from the situation on the ground”. ✓ Head of the Commission, Vice President Myint Swe, concluded in final report in August 2017: “There is no possibility of crimes against humanity, no evidence of ethnic cleansing, as per UN accusations.”
2014 Inquiry Commission for Du-Chee-Yar-Tan incident and related events¹⁷	
Main flaws <ul style="list-style-type: none"> ✓ Reports of violence rejected as false allegations to destabilize Burma. UN and Medecins Sans Frontieres (MSF) blamed, with temporary suspension of MSF activities. ✓ Denial of killings based on broad and pre-baked assumptions (e.g. No evidence of Rohingya deaths because their names did not match the immigration records). ✓ No investigation of human rights abuses. 	Main recommendations <ul style="list-style-type: none"> ✓ Increase police weapons capacity. ✓ Adopt measures to counter the “false” allegations by the media. ✓ Implement controversial Rakhine State Action Plan (segregation and discrimination of Muslims).

¹⁴ Human Rights Watch (24 May 17) Burma: Army Investigation Denies Atrocities

¹⁵ BBC (07 Nov 16) Muslim civilians killed by Burmese army; The New York Times (13 Nov 17) Violence escalates between Myanmar forces and Rohingya; Human Rights Watch (Sep 18) Myanmar’s Investigative Commissions: A History of Shielding Abusers

¹⁶ Global New Light of Myanmar (04 Jan 17) Interim Report of the Investigation Commission on Maungtaw; Human Rights Watch (07 Aug 17) Burma: National Commission Denies Atrocities

¹⁷ DVB (11 Mar 14) Duchira Dan commission slams UN, media; denies massacre; Mizzima News (12 Mar 14) Panel recommends citizenship for eligible Muslims in Rakhine State; RFA (11 Mar 14) Myanmar Panel Rejects Claims of Rohingya Killings, Recommends Citizenship; Irrawaddy (11 Mar 14) Govt Investigation Dismisses Allegations of Rohingya Killings

2012 Commission on Sectarian Violence in Rakhine State¹⁸

Main flaws	Main recommendations
<ul style="list-style-type: none"> ✓ Allegations of human rights violations constantly rejected as part of a “smear campaign” against the government. ✓ Independent reports dismissed as false evidence fabricated by national and international organizations. ✓ No investigation of human rights abuses. ✓ Included members with extremist Buddhist views. Two Muslim members were purged. 	<ul style="list-style-type: none"> ✓ Increase military presence. ✓ Implement discriminatory Muslim birth control programs. ✓ Segregate the Muslim communities – forcibly resettle them ✓ Use controversial citizenship verification process – which does not guarantee restoration of citizenship – to target Muslims and institutionalize statelessness of ethnic minorities.

In their words

“I firmly believe that accountability for the crimes committed is the only way to end the cycles of violence...I strongly recommend the persons allegedly responsible for the violations of international human rights law and international humanitarian law be investigated and prosecuted by the ICC or a credible mechanism.” – Yanghee Lee, UN Special Rapporteur on Human Rights in Myanmar, 27 Jun 2018.¹⁹

“I will assure you that there will be no blaming of anybody, no finger-pointing of anybody, because we don’t achieve anything by that procedure.” – Rosario Manalo, Filipino diplomat and Chair of the latest CoE into Rakhine State, on 16 Aug 2018, confirming that no one will be held accountable.²⁰

“This just goes on and on. Next year, it will be another commission, another board. It is all for show — there is nothing real. It is a hoax.” – Kobsak Chutikul, Retired Thai diplomat, 20 Aug 2018, referring to the Myanmar Advisory Panel, which he quit following months of frustration.²¹

“Bring the condemned perpetrators to justice. Let the Rohingya return to peace and a life of dignity,” – Saifuddin Abdullah, Malaysia Foreign Minister, 30 Aug 2018.²²

“We might think that the situation could have been handled better, but we believe that for the sake of long-term stability and security, we have to be fair to all sides.” – Aung San Suu Kyi, 13 Sep 2018, seemingly justifying the genocide of the Rohingya.²³

“I’m a bit surprised by this quote, because I do not know to what it is referring. I didn’t at any time see that the situation...could have been handled better, and I don’t quite understand the reference.” – Aung San Suu Kyi, 9 Oct 2018, backtracking on her statement of 13 Sep 2018, and confirming that she agreed with the original “handling” of atrocity crimes against Rohingya.²⁴

¹⁸ AFP (19 Jul 13) Myanmar Leader Says Ethnic Cleansing Claims are “Smear Campaign”

¹⁹ OHCHR (27 Jun 2018) Myanmar: UN expert calls for ICC to probe “decades of crimes”

²⁰ Coconuts Yangon (17 Aug 18) Suu Kyi’s Rakhine Enquiry Commission says will not seek accountability for rights abuses

²¹ Washington Post (21 Aug 18) A year after the assault on the Rohingya, Myanmar’s generals are unapologetic

²² The Star (30 Aug 18) ‘Act against Myanmar perpetrators’

²³ The New York Times (13 Sept 18) Rohingya Crisis ‘Could Have Been Handled Better,’ Aung San Suu Kyi Says

²⁴ Coconuts (11 October 18) Suu Kyi does not remember why she criticized the military a month ago