Myanmar, Forced Population Movements

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Crisis and the Risk of Atrocities in Myanmar

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[...]

The Rohingya Crisis

[1] The persecution of the Rohingya Muslim minority at the hands of national and regional government authorities and local actors in western Myanmar's Rakhine State has forcibly displaced hundreds of thousands of people since the outbreak of widespread violence in 2012. Some 150,000 Rohingya Muslims remain in more than 80 internal displacement camps in Rakhine State with limited access to humanitarian aid, while more than 100,000 others have fled by sea to other countries, often at the hands of abusive human traffickers.

[2] […] It is estimated that over 100,000 Rohingya refugees are now living in Malaysia, and several hundred thousand are in Bangladesh, Thailand, and other ASEAN countries combined. State security forces and non-

state actors in Myanmar have already committed serious human rights violations against Rohingya with impunity, some of which have been qualified by human rights groups as crimes against humanity, and indicators of additional atrocity crimes, including genocide, are present.

[3] The United Nations' Framework of Analysis for Atrocity Crimes identifies 14 Common Risk Factors for atrocity crimes, including genocide, and several indicators for each factor. Utilizing this framework, the remainder of this report will outline several of the most relevant risk factors and indicators that can be observed in Myanmar today.

Risk Factors 9 and 10: Intergroup tensions or patterns of discrimination against protected groups; Signs of an intent to destroy in whole or in part a protected group

[4] Among the 14 risk factors laid out in the United Nations' Framework, two apply specifically to the risk of genocide, and both exist prominently in Rakhine State with regard to Rohingya.

[5] A history of restrictive policies targeting Rohingya clearly fits the indicators of "serious discriminatory, segregational, restrictive or exclusionary practices, policies or legislation against protected groups" (9.1) and "widespread or systematic discriminatory or targeted practices or violence… even if not yet reaching the level of elimination" (10.3).

[6] Official government documents obtained by Fortify Rights reveal restrictions against Rohingya, which have given rise to severe violations of human rights, including restrictions on freedom of movement, marriage, and childbirth. Senior government officials have gone on record discussing the restrictions, which amount to the international crime of persecution. On July 31, 2012, Myanmar's Minister of Home Affairs Lieutenant-General Ko Ko told parliament that authorities were "tightening the regulations [against Rohingya] in order to handle travelling, birth, death, immigration, migration, marriage, construction of new religious buildings, repairing and land ownership and [the] right to construct building[s]."

[7] In her latest report, UN Special Rapporteur on human rights in Myanmar, Yanghee Lee, observed that "discriminatory restrictions on freedom of movement for internally displaced Muslims remain in place, severely impacting access to health care, food, water and sanitation, as well as education and livelihoods."

[8] Perhaps most troubling is the Myanmar government's official denial of Rohingya identity, a factor that clearly fits the indicators of the "denial of the existence of protected groups" (9.2) and "an intention to change its identity" (10.5). The right to self-identify is among the most basic human rights, yet it is being denied to Rohingya in Myanmar. President Thein Sein has said that "there are no Rohingya among the races" of Myanmar. The Myanmar government claims that Rohingya are illegal migrants from Bangladesh and consistently uses the term "Bengali" to refer to them, despite the fact that many have lived in Myanmar for several generations.

[9] Denied citizenship, Rohingya are considered stateless and lack the protections and rights afforded to citizens. The Myanmar government has actively encouraged Rohingya to register as "Bengali" or be removed to other countries. In the national census carried out in 2014, the Myanmar government refused to allow people to identify as Rohingya, forcing Rohingya to call themselves "Bengali" or not be registered. More

recently, the Myanmar government has phased out and begun to collect temporary identification cards (also known as white cards), the only form of identification for many Rohingya, adding further uncertainty to their future and jeopardizing their ability to provide proof of citizenship.

[10] Myanmar government policies also fit the specific genocide risk factor indicated by “policies or measures that seriously affect the reproductive rights of women” (10.4). Rohingya women in Rakhine State have been held to a strict two-child policy, with enforcement guidelines that allow authorities to enter private homes unannounced and force Rohingya women to breastfeed infants in their presence “if there is suspicion of someone being substituted in the family registry.”

[...]

[11] There is also a “history of atrocity crimes committed with impunity” (9.3) against Rohingya and “serious tensions or conflicts between protected groups or with the State” (9.4). Government policies of persecution and exploitation have affected both Rohingya Muslims and Rakhine Buddhists in Rakhine State, the second poorest state in the country. The Myanmar government has marginalized both Rakhine and Rohingya and exploited their resources for decades. These grievances provide fertile ground for conflicts. For now, however, Rakhine frustrations are focused on the perceived threat of Rohingya, a fact that many experts see as evidence of a strategy by the central government to distract from grievances against the Burman majority.

[12] Existing tensions between Rakhine Buddhists and Rohingya Muslims led to widespread violence in 2012 that resulted in more than 160 deaths and the displacement of tens of thousands. Despite the fact that the overwhelming majority of victims were Rohingya, many more Rohingya were arrested than Rakhine. The government has also enabled a climate of impunity for atrocities committed by failing to hold any police or military officials accountable for abuses against Rohingya and denying any wrongdoing.

[13] In January 2014, the UN Office of the High Commissioner for Human Rights reported a massacre of 40 Rohingya in the northern Rakhine State village of Du Chee Yar Tan. Médecins Sans Frontières (MSF), or Doctors Without Borders, claimed to have treated several people for gunshot and stab wounds near the location of the reported massacre. The government flatly denied the incident, blocked access for the United Nations to carry out further investigations, and allowed access to the region only in the presence of government officials. The government also evicted MSF from Rakhine State, effectively denying crucial access to health care for hundreds of thousands of Rohingya.

[...]

Anti-Muslim Violence

[14] In addition to the estimated 1.3 million Rohingya Muslims living in Myanmar today, there are several million more non-Rohingya Muslims in the country. While the situation for Rohingya is distinct from that of other Muslims in Myanmar, who have not historically faced the same levels of persecution and statelessness, many of the dynamics that contribute to discrimination against Rohingya also affect the broader Muslim population. The violence in Rakhine State in 2012 helped stoke broader anti-Muslim sentiment, which led to

violence in other parts of the country.

[...]

Risk Factor 7: Enabling circumstances or preparatory action

[15] Widespread use of anti-Muslim rhetoric in rallies, leaflets, and DVDs have incited outbreaks of violence and burning of Muslims shops and mosques from Mandalay and Meiktila in central Myanmar to Lashio in the north of the country. Common patterns leading to violence include the rapid dissemination of unsubstantiated rumors of Buddhist women being raped or burned, and incitement by outside groups. Evidence indicates that these outbreaks have been calculated and well organized—a worrying sign of preparatory action for further violence.

[16] APHR met several civil society representatives in Mandalay in April 2015 who described organized elements of the 2013 violence and the government's complicity in it, whether through direct action or the failure of police to take measures to stop rioters. Witnesses to the violence said outside antagonists spread rumors of rape and murder and attempted to incite local Buddhist monks to join in the riots. One civil society representative, whose name is being withheld for security reasons, told APHR that "people come in from outside in trucks. They are brought to the city as mobs. Those who participate in the violence here are from remote areas; they are not from here."

[...]

[17] The inflammatory rhetoric and propaganda campaigns have also led to two other key indicators of atrocity crimes: the "destruction or plundering … of property related to cultural and religious identity" (7.11) and the "marking of people or their property based on affiliation to a group" (7.12). In cities like Thandwe, Mandalay, and Meiktila "969" stickers and Buddhist flags have been used to delineate Buddhist shops from Muslim ones as part of an intended boycott of Muslim businesses. In the Mandalay riots and Meiktila massacre, as well as in violent episodes in Lashio and Rakhine State, Muslim-owned shops, schools, and mosques have been singled out for destruction.

[...]

[18] The lack of accountability for crimes committed against Muslims has contributed to persistent hate speech. Political support for discriminatory legislation that is inconsistent with international and regional standards has likewise allowed an enabling environment for atrocities.

[...]

Risk of Ethnic Minority Violence

[19] Myanmar has a long history of tensions between the central government and ethnic minorities, including the Kachin, Karen, Rakhine, Shan, and Wa, which has manifested in armed conflict that has raged for decades. Fourteen ethnic armed groups have signed individual ceasefires with the central government since

2011, and efforts have been made toward achieving a nationwide ceasefire agreement.

[20] Nevertheless, fighting has continued in Kachin and northern Shan States, including a recent flare-up in the Kokang region along the border with China [See case: Myanmar, Incidents at Chinese border]. Reports of abuses by the Myanmar Army, including forced labor, torture, and rape have been pervasive, and the military has also bombed civilian areas in Kachin State in January 2013 and in the Kokang region of northern Shan State in February and March 2015.

[21] Some 100,000 people remain displaced in Kachin and northern Shan States, and the recent violence in Kokang has displaced 78,000 people, according to the UN World Food Program. An estimated 120,000 refugees from ethnic minority areas in Myanmar are living in camps in Thailand—part of a total estimated 500,000 refugees from Myanmar in other ASEAN countries.

[22] The history and current dynamics in ethnic minority areas of Myanmar fit several risk factors for atrocity crimes, including two specific to the risk of war crimes.

Risk Factor 2: Record of serious violations of international human rights and humanitarian law

[23] Decades of fighting between the Myanmar Army and various ethnic armed groups have resulted in "serious restrictions to or violations of international human rights and humanitarian law" (2.1). These include extrajudicial killings, torture, forced labor, rape, and arbitrary detention, as documented by numerous independent reports.

[24] A November 2014 report by Fortify Rights documented more than 60 instances of torture committed by the Myanmar Army, Myanmar Police Force, and Military Intelligence in combat zones, places of detention, and villages in Kachin and northern Shan States. Fortify Rights made the case that these abuses constitute war crimes and crimes against humanity. In its report, Fortify Rights also documented numerous attacks by the Myanmar army on civilians and non-military targets in recent years including the razing of civilian homes, attacks on makeshift camps of displaced persons, and extrajudicial killings.

[25] Myanmar Army soldiers have committed torture and rape with impunity, indicating a "policy or practice of impunity for or tolerance of serious violations of international human rights and humanitarian law, of atrocity crimes, or of their incitement" (2.3) and "inaction, reluctance or refusal to use all possible means to stop planned, predictable or ongoing serious violations" (2.4). A January 2014 report by the Women's League of Burma described systematic sexual violence at the hands of the Myanmar Army in ethnic minority areas. The report documents over 100 cases of sexual violence since 2010, including 47 gang rapes perpetrated by the military.

[26] Recorded abuses by non-state actors must also be noted and condemned, but should not serve as justification for abuses on the side of the army.

[...]

Risk Factors 13 and 14: Serious threats to those protected under international humanitarian law; Serious threats to humanitarian or peacekeeping operations

[27] More than 170,000 people have been forcibly displaced by violence in Kachin and northern Shan States. The Myanmar government has obstructed access to many of those displaced, particularly some 40,000 people displaced within rebel controlled areas.

[28] These actions provide "evidence of conduct interfering with or impeding delivery or access to … medical or humanitarian support indispensable to the survival of those protected under international humanitarian law" (13.8). There is further evidence of the "interference, limitation or prohibition of access or movement of humanitarian or peacekeeping operations or their personnel" (14.5).

[29] The recent attacks on civilians in the Kokang region of northern Shan State and the previously mentioned documentation by Fortify Rights of continued abuses in Kachin State provide further evidence of another key indicator: an "increase in the … disproportionate or indiscriminate use of force, or failure to take action to avoid launching such attacks or to conduct military operations in heavily populated areas or to non-military targets" (13.13, 13.14).

[...]

Risk Factor 4: Motives or incentives

[...]

[30] Myanmar is also racked by a host of "economic interests, including those based on … control over the distribution of resources" (4.2). Ethnic areas like Kachin State are rich in resources, including jade, minerals, timber, and hydropower potential. The construction of transnational oil and gas pipelines running from the shores of Rakhine State through Myanmar to China has sparked protests voicing environmental, labor, and land rights concerns. Land grabbing remains a major source of tension throughout many areas in Myanmar and a likely source of future violence and atrocity crimes, demonstrating the existence of "strategic or military interests, including those based on protection or seizure of territory and resources" (4.3).

[...]

Risk Factor 6: Absence of mitigating factors

[...]

[31] Domestically, Myanmar lacks a "free, diverse and independent national media" (6.2). Though the country witnessed significant gains in media freedom after 2011, more recently the trend appears to be reversing. A reporter covering renewed fighting in Mon State was detained in October 2014 and died in military custody. Journalists covering recent student protests have been harassed, beaten, and detained by police.

[32] The Myanmar government has also prevented the introduction of mitigating factors offered by the international community. A “lack of or limited presence of the United Nations, INGOs or other international or regional actors in the country and with access to populations” (6.4) has been a growing problem in Rakhine State.

[...]

[33] But the absence of mitigating factors cannot be attributed to the Myanmar government alone. The international community and ASEAN, in particular, have important mitigating roles to play. Among the specific indicators of this risk factor is a “lack of interest, reluctance or failure of United Nations Member States or international or regional organizations to support a State to exercise its responsibility to protect populations from atrocity crimes, or to take action when the State manifestly fails that responsibility” (6.9) and a “lack of support by neighbouring States to protect populations at risk and in need of refuge, including by closure of borders, forced repatriation or aid restrictions” (6.10).

[34] With over 150,000 Rohingya displaced and hundreds of thousands more who have fled to surrounding countries, there has been a clear failure to protect the population. ASEAN countries have failed to provide refugee status to fleeing Rohingya, and authorities in countries including Myanmar, Malaysia, and Thailand have been found to be complicit in human trafficking.

[...]

Discussion

I. Classification of the Conflict

1. (*Paras [12], [19], [20]*) How would you classify the situation? If there is a conflict, who are the parties to the conflict? Do the ceasefire agreements mentioned in paragraph [19] change anything? What impact would a nationwide ceasefire have on your classification?
2. (*Paras [2], [33]*)Does the information given in paragraph [33] influence your classification of the conflict? Does the fact that many Rohingya fled to neighbouring ASEAN countries have an impact on the classification of the conflict? Under IHL, do neighbouring States have any obligations relating to the situation in Myanmar? Other States? (GC I-IV, Common Art. 1)

II. Violations of IHL

3. Are all practices reported IHL violations? At least if an armed conflict exists and the practices are linked to the conflict? Could some constitute crimes against humanity under international criminal law, and not IHL violations? Or violations of international human rights law, and not IHL violations? If yes, which ones?
4. Paragraph [9] states that "Rohingya are considered stateless and lack the protections and rights afforded to citizens". Does this lack of protection apply to IHL? Does IHL only protect persons who hold a citizenship?
5. What violations of IHL were committed against the Rohingya? Against non-Rohingya Muslims? Does it matter, under IHL, whether the crimes were committed by the government or non-state actors?
6. (*Paras [15]-[18]*) Do incitement to violence, propaganda and hate speech violate IHL? International criminal law? International human rights law?
7. (*Para. [24]*) What rules of IHL are applicable to torture? How do the definitions of torture under IHL, human

rights law and international criminal law compare? Under IHL, does torture always amount to a war crime?
8. (*Paras [10], [15], [16], [25]*) How is sexual and gender-based violence regulated under IHL? Do you consider that the term “sexual and gender-based violence” covers the government policies described in para. [10]? Does IHL cover such acts, and provide protection against them?
9. (*Para. [29]*) Paragraph [29] refers to government "failure to take action to avoid launching such attacks or to conduct military operations in heavily populated areas […]". Does IHL prohibit parties to the conflict from attacking heavily populated areas? What principle or principles of IHL inform your considerations?
10. (*Para. [30]*) Is "land grabbing" regulated by IHL? Could it be covered by the rules on pillage? Why or why not? (CIHL, Rule 52; P II, Arts 4(2)(g), 8; GC I, Art. 15(1); GC II, Art. 18(1); GC IV, Arts 16(2), 33(2); HR, Arts 28, 47, 56)
11. (*Para. [31]*) Are journalists protected by IHL? Does IHL apply equally to the case of the journalist who covered renewed fighting in Mon State, and to those covering the student protests? Even if the protests are far removed from actual hostilities? (CIHL, Rule 34; GC I, Art. 13(4); GC II, Art. 13(4); GC III, Art. 4A(4); P I, Art. 79)
12. Does IHL of non-international armed conflict prohibit the forced movement of civilians? Does IHL of international armed conflict contain such a prohibition? Are any of these rules applicable to the Rohingya? (P II, Art. 17(2); GC IV, Art. 49)

III. Classification of persons

13. How would you classify the persons affected by this crisis under IHL? Are they displaced persons? Refugees? On what would your answer depend? Do both groups of persons benefit from protection under IHL? What IHL provisions protect displaced persons and refugees in a non-international armed conflict? In an international armed conflict? Is your answer different for persons who were already considered refugees before the outbreak of the conflict? (GC I-IV, Common Art. 3; P I, Art. 70, P I, Art. 73; GC IV, Art. 23; GC IV, Arts 35-36, GC IV, Art. 44, GC IV, Art. 70(2))
14. Is the IHL principle of non-adverse distinction the same as the human rights principle of non-discrimination? Does it only prohibit adverse distinctions in the application of substantive rules of IHL? How does the IHL principle of non-adverse distinction apply to the situation of the Rohingya? What actions of the various parties, in your opinion, fall foul of this principle under IHL?

IV. Obligations under IHL

15. *(Para. [13])* Under IHL, is Myanmar obliged to allow Medecins Sans Frontiers to operate in Rakhine State? To allow UN agencies access to the territory of Rakhine state to conduct investigations? (GC I-IV, Common Art. 3; CIHL, Rules 55-56; GC IV, Art. 23, 59)
16. *(Para. [28])* Is the government of Myanmar obliged to allow humanitarian organizations to access displaced persons and others affected by the armed conflict? Even those in rebel-held territory? What about the obligations of armed non-state actors in this regard?
17. *(Para. [17])* Does IHL of NIAC regulate destruction of civilian property? Even outside of the context of military operations? (CIHL, Rules 7, 50)