

## Concept note

### Accountability mechanism for Myanmar

#### **Background**

In December 2017, the High Commissioner urged the Human Rights Council to consider making a recommendation to the UN General Assembly to establish a new impartial and independent mechanism (IIM), complementary to the work of the Fact-Finding Mission into violations and abuses and to assist individual criminal investigations of those responsible. In her report presented at the 37th session of the Human Rights Council (HRC), the Special Rapporteur on the human rights situation in Myanmar recommended to establish a structure based in Cox's Bazar, Bangladesh under the auspices of the United Nations, supported by various necessary expertise for a duration of three years to investigate, document, collect, consolidate, map, and analyse evidence of human rights violations and abuses; and to maintain and prepare evidence in a master database to support and facilitate impartial, fair and independent international criminal proceedings in national or international courts or tribunals in accordance with international criminal law standards.

The HRC through its March 2018 resolution on Myanmar took note of the Special Rapporteur's recommendation for a field based structure (FBS) based in Cox's Bazar. It further called for, a full and independent investigation of the reports of systematic human rights violations and abuses committed, as reported by various United Nations bodies, including the Human Rights Council independent international fact-finding mission [FFM]. The HRC through the resolution also expressed the urgent need to ensure that all those responsible for crimes related to violations and abuses of international human rights law are held to account through credible and independent national or international criminal justice mechanisms, and stressed the need to pursue practical steps towards this goal while acknowledging the authority of the Security Council under the Charter of the United Nations, including the authority to refer the situation in Myanmar to the International Criminal Court (ICC).

#### **Justification for international accountability mechanism**

*Failure to hold those responsible for violations to account:* The limited and insufficient steps that the Government of Myanmar has taken so far to establish accountability demonstrate that it is unable and unwilling to discharge its obligation to conduct credible, prompt, thorough, independent and impartial investigation into alleged human rights violations and violations of international humanitarian law. The extrajudicial killing of 10 Rohingya villagers in Inn Din village, northern Rakhine State is one among rare cases where Myanmar's military has taken some soldiers to account for alleged violations. The Government and military usually deny that human rights violations and abuses have been committed by the military and other security forces across the country, claiming that they will take action where there is evidence. Under international pressure, the Government established an investigation commission following reports of serious human rights violations allegedly committed during the clearance operations in the aftermath of the 9 October 2016 ARSA attacks that was headed by Vice President (Lt. Gen. ret.) Myint Swe and composed of government officials, a number of whom are former-military. It was not independent or impartial, used flawed methodology and did not make any findings of human rights violations. A military-led investigation conducted in 2017, with regard to the post-25 August 2017 clearance operations in Rakhine, concluded that security forces had not committed any violations of human rights and that there were no deaths of innocent civilians. Most recently, the Government of Myanmar has announced that it has formed an "independent commission of enquiry" which will "investigate the violation of human rights and related issues following the terrorist attacks by ARSA" and will be comprised of three members including an international personality and assisted by national and international legal and technical experts. Given the Myanmar Government's track record, it is highly unlikely that this body will carry out a credible, prompt, thorough, independent and impartial investigation. Myanmar is not a party to the Rome Statute and given the current circumstances

it is unlikely that the Government of Myanmar will accept the jurisdiction of the ICC in near future. The ICC Prosecutor has sought a ruling, pursuant to Article 19(3) and 42 of the Statute on deportation of Rohingya from Myanmar to Bangladesh which is a positive development however, it addresses one specific issue of deportation. In view of the scale and gravity of the allegations of human rights violations and abuses and violations of international humanitarian law around Myanmar, it is imperative to consider a new impartial and independent mechanism going beyond the original Special Rapporteur recommendation of a FBS in Cox's Bazar, complementary to the work of the FFM and the push by the High Commissioner for Human Rights for a IIM-type mechanism. Unless those individuals who perpetrated the crimes under international law are held accountable, violations and abuses will continue to take place.

*Credible findings:* The High Commissioner for Human Rights and the Special Rapporteur on Myanmar have repeatedly reported to the Human Rights Council that the pattern of gross violations of the human rights of the Rohingya suggest a widespread or systematic attack against the community, possibly amounting to crimes against humanity, and warranting the attention of the International Criminal Court. OHCHR, the Special Rapporteur and the FFM have consistently been raising concerns over possible commission of war crimes and crimes against humanity in Kachin and Shan states where a protracted conflict has been taking place since 1961. Accountability must also be established for the widely reported serious violations of international human rights and humanitarian law including extrajudicial killings, enforced disappearances, destruction of property, torture and inhuman treatment, rape and other forms of sexual violence, forced labour, recruitment of children into armed forces, and indiscriminate or disproportionate attacks in Kachin and Shan. In its interim report to the HRC in March 2018, the FFM reported a systematic and very clear pattern of violations of international humanitarian law in Kachin and Shan States. Since 1992, the successive Special Rapporteurs on Myanmar have been reporting consistent and systematic patterns of violations and abuses against minority communities throughout Myanmar. The 2018 report by the UN Secretary-General on conflict-related sexual violence included Myanmar's Armed Forces on an annual list of groups that are "credibly suspected of committing or being responsible for rape or other forms of sexual violence."

*Fill the accountability gap:* The FFM, mandated by the HRC in March 2017 to establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses committed by non-state actors and armed groups, in Myanmar will submit its final report in September 2018. There is no certainty as to whether the mandate of the FFM will be renewed. Non-renewal of the FFM and no introduction of a new mandate would mean that there will be a lack of fully equipped documentation effort and reporting of the alleged human rights violations and abuses as well as violations of international humanitarian law in Myanmar. As the FFM did not have access to Myanmar and has only been able to undertake approximately 600 interviews, there is a need for continuation of documentation of allegations of violations and abuses in Rakhine and violations of international humanitarian law in Kachin and Shan as the number and nature of interviews conducted by the FFM and other OHCHR mechanisms represent only a small fraction of the unprecedented level and complexity of crimes that were committed in Myanmar. Continuation of information collection through interviews and verification will eventually serve the purpose of justice in the future. There is an equal need to consolidate, map, and analyse evidence of human rights violations and abuses; and to maintain and prepare evidence in a master database in order to support the future accountability mechanisms.

### **Main functions of the accountability mechanism**

The concept note does not intend to design the mandate and function of the accountability mechanism it shall be the member states and the United Nations to determine, however it is recommended that the accountability mechanism shall aim to bring justice for the victims of violations and abuses of human

rights and violations of international law committed in Myanmar since the military coup from 1962<sup>1</sup>. It is suggested that the accountability mechanism consist of the following elements:

*Monitoring, documenting and reporting:* For a period of three years, the mechanism will continue to carry out human rights monitoring and document allegations of violations and abuses arising from the various clearance operations in Rakhine and violations of international humanitarian law in Kachin and Shan States. Prior to commencing the monitoring and documentation work, a mapping exercise should be conducted to understand existing efforts made by various stakeholders in information collection, verification and documentation, including the work of the FFM and resume interviews with victims and witnesses who suffered violations and abuses of human rights and violations of international humanitarian law.

*Mechanism for consolidation, analysis, preservation, and repository:* The mechanism shall consolidate information collected by various mechanisms including the FFM, OHCHR rapid response teams and undertake broader and comprehensive information/evidence collection related to the allegations of human rights violations and abuses and violations of international humanitarian law in Myanmar. It shall further undertake to establish modes and liability of crimes under international law that occurred in the past in Myanmar; patterns of violations; structure, participation, command responsibility of the perpetrators; establish evidence management system; and build cases consistent to criminal law standards that can be used by future prosecutorial and judicial mechanisms.

*Victims support, reconciliation and reintegration:* It is important to collect information about the violations and abuses, however utmost care should be given to the victims to prevent from re-victimisation and provide basic support including psychosocial, livelihood and other support at the minimum so that they are able to pursue justice in national and international mechanisms without compromising their basic needs and ensure that they are not harmed. Together with other UN agencies the mechanism shall further develop a framework of reconciliation and reintegration, as well as appropriate mechanisms for inter-communal harmony, livelihood support, and restitution for victims of human rights violations and abuses in Myanmar.

### **Relationship of the mechanism with the United Nations**

The proposed accountability mechanism shall be an independent mechanism, established under the auspices of the United Nations. The mechanism shall be provided with adequate resources in order to operate independently including in the recruitment of staff required to fulfil its mandate. The founding resolution shall stipulate the relationship between the mechanism with United Nations bodies, offices, agencies, funds and programmes, in particular issues related to cooperation, coordination and information sharing.

---

<sup>1</sup> Noting that it may be difficult to obtain information related to the allegations of violations that took place in the early years, the Mechanism may look into options including non-retributive forms of justice to address the accountability gap.