

A woman with dark hair, wearing a light blue traditional Burmese blouse (jacket) and a grey shawl, is seated in the lower right corner. She is looking slightly to her left. Behind her and the rest of the image are several ASEAN member state flags, including those of Myanmar, Laos, Cambodia, and Thailand, set against a pink background with a white geometric pattern at the bottom.

# ASEAN'S RAKHINE CRISIS

Assessing the regional response to atrocities  
in Myanmar's Rakhine State

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**LAPHR** ASEAN PARLIAMENTARIANS  
FOR HUMAN RIGHTS



# ASEAN PARLIAMENTARIANS FOR HUMAN RIGHTS

APHR is a regional network of current and former parliamentarians who use their unique positions to advance human rights and democracy in Southeast Asia. We seek to help create a region where people can express themselves without fear, live free from all forms of discrimination and violence, and where development takes place with human rights at the forefront.

Our members use their mandate to advocate for human rights inside and outside of parliaments, regionally and globally. They work closely with civil society, conduct fact-finding missions, and publish recommendations and opinions on the important issues affecting the region.

APHR was born out of the recognition that human rights issues in Southeast Asia are interconnected, and from the desire of progressive legislators to work together across borders to promote and protect human rights.

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Cover page: Myanmar's State Counselor Aung San Suu Kyi at the 35th ASEAN Summit in Bangkok. ©EPA-EFE.

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# LIST OF ACRONYMS

<b>AA</b>	Arakan Army
<b>AADMER</b>	ASEAN Agreement on Disaster Management and Emergency Response
<b>APHR</b>	ASEAN Parliamentarians for Human Rights
<b>ASEAN</b>	Association of Southeast Asian Nations
<b>AHA Centre</b>	ASEAN Coordinating Centre for Humanitarian Assistance
<b>AHAST</b>	Ad-hoc Support Team
<b>AICHR</b>	ASEAN Intergovernmental Commission on Human Rights
<b>APG</b>	AADMER Partnership Group
<b>ARSA</b>	Arakan Rohingya Salvation Army
<b>ASEAN-ERAT</b>	ASEAN-Emergency Response and Assessment Team
<b>ASEAN-IPR</b>	ASEAN Institute for Peace and Reconciliation
<b>ASG</b>	ASEAN Secretary General
<b>CNA</b>	Comprehensive Needs Assessment
<b>ICC</b>	International Criminal Court
<b>ICJ</b>	International Court of Justice
<b>ICOE</b>	Independent Commission of Enquiry
<b>IIFMM</b>	Independent International Fact-Finding Mission on Myanmar
<b>IIMM</b>	International Investigative Mechanism for Myanmar
<b>NLD</b>	National League for Democracy
<b>NVC</b>	National Verification Card
<b>OIC</b>	Organization of Islamic Cooperation
<b>PNA</b>	Preliminary Needs Assessment
<b>UEHRD</b>	Union Enterprise for Humanitarian Assistance, Resettlement and Development in Rakhine State

# ASEAN BODIES

## **AMM**

### **ASEAN Foreign Ministers Meeting**

The annual AMM is responsible for political-security cooperation and external relations in ASEAN. ASEAN Foreign ministers also meet informally on the sidelines of the UN General Assembly in New York, and under the ASEAN Charter, meetings may be convened when necessary.

## **AHA Centre**

### **ASEAN Coordinating Centre for Humanitarian Assistance**

An inter-governmental organisation established in 2011 to facilitate cooperation and coordination of disaster management and emergency response in the region. The AHA Centre reports to the ASEAN Committee on Disaster Management (ACDM) and the AHA Centre's Governing Board, which consists of representatives of all ASEAN Member States.

## **AHAST**

### **Ad-hoc Support Team**

A team of the ASEAN Secretariat to strengthen the role of the ASEAN Secretary-General on Rakhine State, including through implementation of the recommendations of the Preliminary Needs Assessment (PNA). ASEAN leaders agreed to establish the team at the 35<sup>th</sup> ASEAN Summit in November 2019.

## **AICHR**

### **ASEAN Intergovernmental Commission on Human Rights**

A consultative body established in 2009 to promote human rights in the ASEAN region. AICHR Representatives are appointed by their respective governments. Although the primary body tasked with monitoring human rights in the region, the body lacks a full protection and promotion mandate.

## **ASEAN-ERAT**

### **ASEAN-Emergency Response and Assessment Team**

ASEAN-ERAT supports ASEAN Member States affected by disasters by conducting rapid assessments, coordinating disaster management and providing humanitarian assistance support. The team is managed by the AHA Centre.

## **ASEAN-IPR**

### **ASEAN Institute for Peace and Reconciliation**

ASEAN institution for research and capacity building activities supporting ASEAN bodies on peace, reconciliation, conflict management and conflict resolution in the ASEAN region. The Institute was established in 2012.

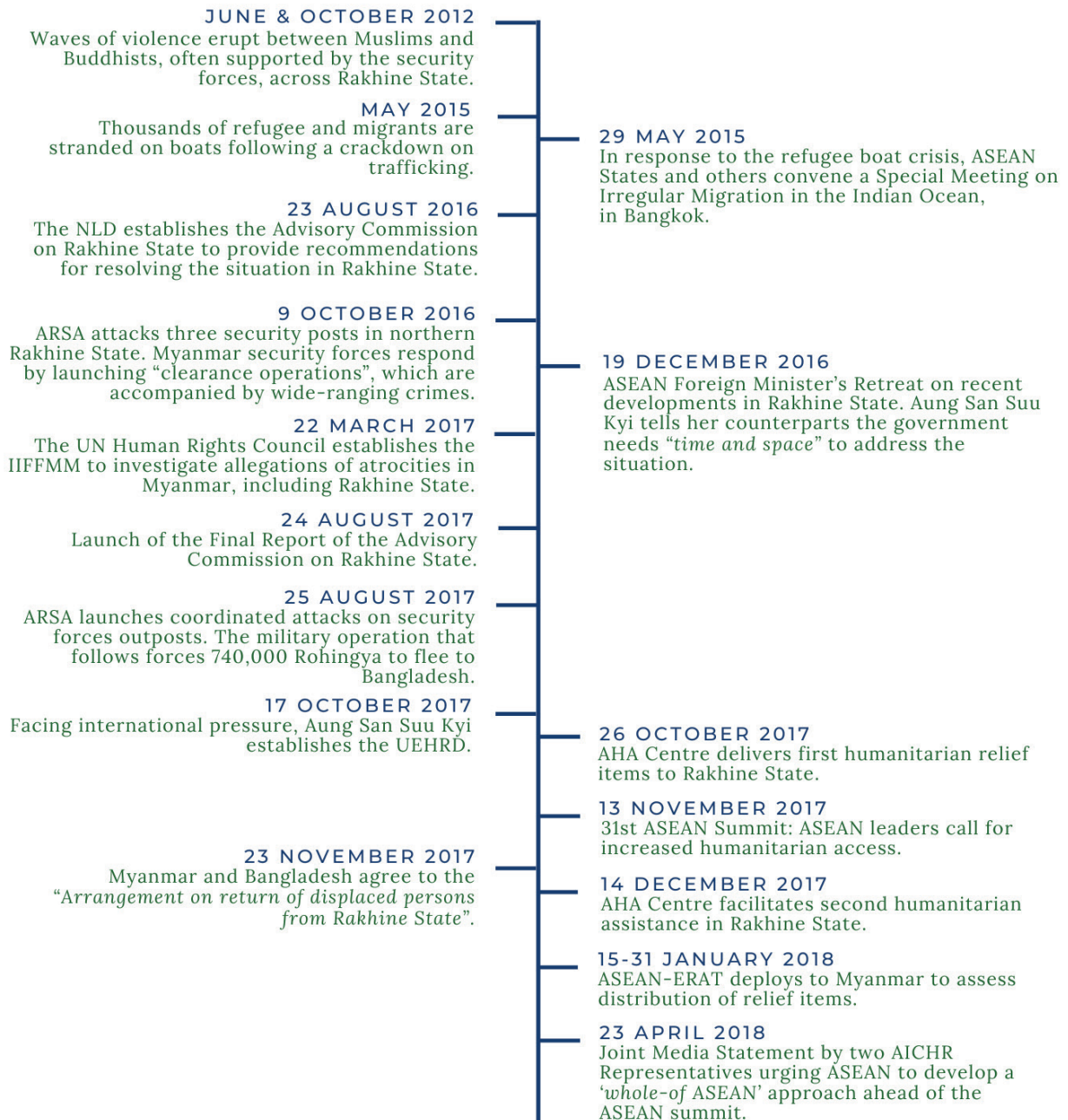
## **ASEAN Secretariat**

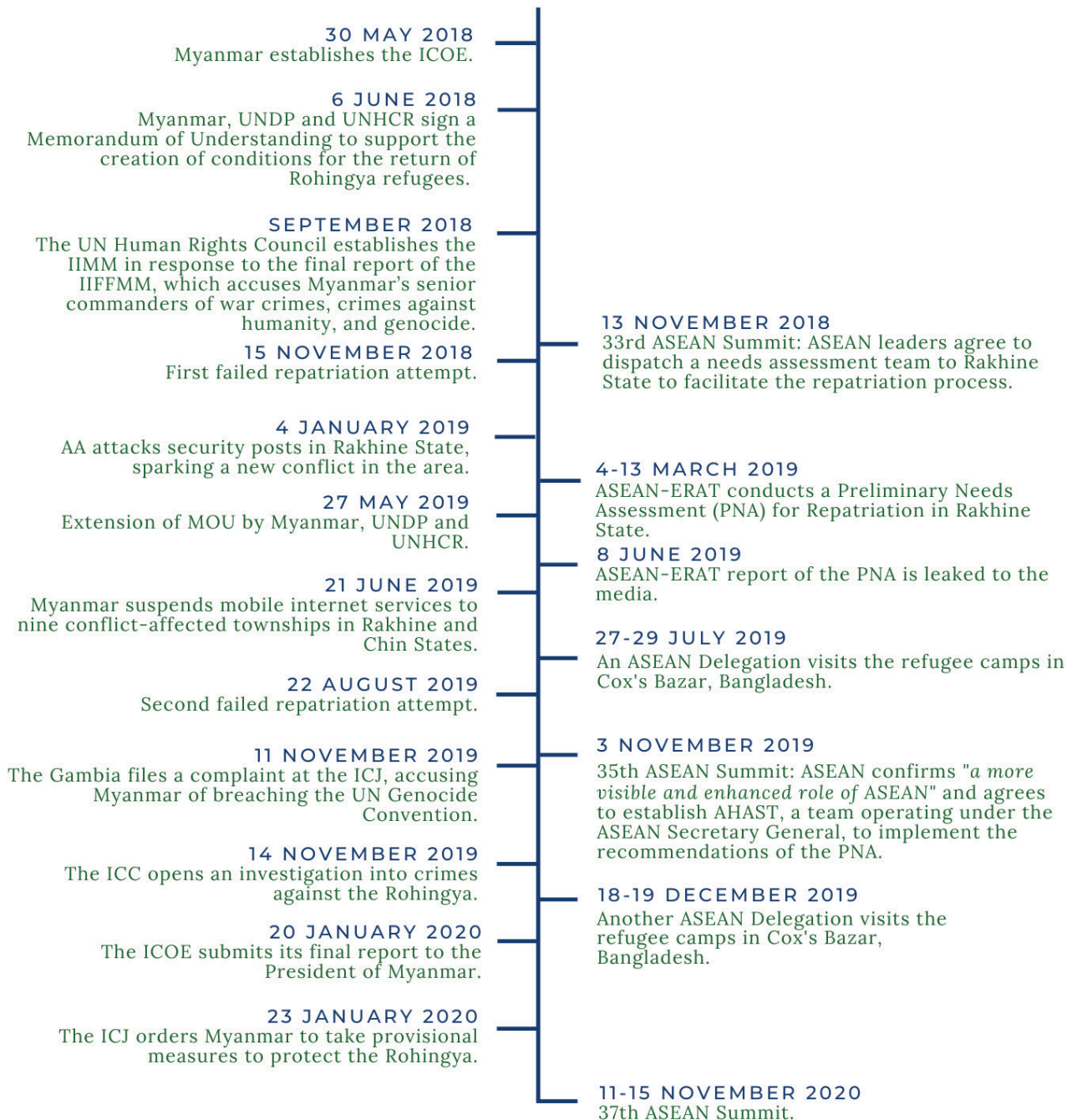
The ASEAN Secretariat provides coordination of ASEAN organs and implementation of ASEAN projects and activities. It is based in Jakarta, Indonesia, and headed by the ASEAN Secretary-General.

## **ASEAN Summit**

The highest policy-making body of ASEAN. The biannual meeting is attended by the leaders of all ASEAN governments. The Chair of ASEAN (rotated alphabetically on an annual basis) chairs the ASEAN Summit.

# TIMELINE OF KEY EVENTS







ASEAN Leaders at the 34<sup>th</sup> ASEAN Summit in Bangkok. ©EPA-EFE.

## EXECUTIVE SUMMARY

***“The purposes of ASEAN are to ensure that the peoples of ASEAN live in peace... in a just, democratic, and harmonious environment.”***

*ASEAN Charter, Article 1(4).*

***“ASEAN has a responsibility to protect people in the region. They have a responsibility to protect Rohingya no matter where they are. Collectively ASEAN can be and should be stronger.”***

*Wai Wai Nu, Founder and Director of the Women’s Peace Network, Rohingya activist.<sup>1</sup>*

On 25 August 2017, Myanmar’s security forces launched a devastating attack on the Rohingya community living in Rakhine State, in the western part of Myanmar. In the weeks that followed, thousands were killed, women and girls were raped, hundreds of homes and entire villages burned to the ground, and more than 740,000 women, men and children forced to flee to neighboring Bangladesh. The attacks took place against a background of decades-long discrimination, persecution, and violence against the Rohingya, a situation that continues today.

This report examines the Association of Southeast Asian Nations’ (ASEAN) response to this crisis, from the initial outbreak of violence in August 2017 to the present day. It is based on 45 interviews with Rohingya representatives, NGO workers, diplomats, ASEAN Parliamentarians, political analysts, and current and former ASEAN officials. It also draws on extensive review of official statements and other documents, as well as NGO and media reports.

<sup>1</sup> Interview with Wai Wai Nu on 17 June 2020.



The findings show how, caught between respect for its key principles of consensus and non-interference on the one hand, and international and domestic outcry on the other, the regional bloc has struggled to respond to the crisis and articulate a clear vision and strategy that would help end the cycle of violence and displacement. The report examines some of the reasons behind ASEAN's so far weak response. These include a lack of leadership both within the Secretariat and among Member States, giving space for the Myanmar government to set the parameters of ASEAN's engagement. ASEAN's reluctance to acknowledge the underlying human rights dimensions of the crisis has also meant that the bloc has focused only on the "less controversial" issues, risking being at best counter-productive and at worst actively contributing to human rights abuses. ASEAN's lack of transparency, reluctance to engage with actors other than the Myanmar government, and the weaknesses inherent in its own institutions have further undermined its response.

### **Leadership**

Initially the crisis exposed significant divisions among ASEAN Member States, which were exacerbated by a lack of leadership at the ASEAN Secretariat, and led some States to take individual action. "*Domestic politics so clearly trumped a regional ASEAN approach,*" noted one analyst. Fears about the role of China, which has used the crisis to expand its influence over Myanmar, have also meant the bloc has been reluctant to take a confrontational approach, and has placed a strong emphasis on maintaining engagement with the Myanmar authorities.

This lack of cohesion and long-term vision for ASEAN in Rakhine State, coupled with its unwavering commitment to consensus among its members, has allowed the Myanmar authorities to step-in, control the ASEAN narrative, and dictate what the ASEAN officials engage on, how and with whom. The result is that ASEAN's interventions have often focused on "*low-hanging fruit*", and failed to address fundamental issues. "*Instead of ASEAN lifting up the region, it's being dragged down by its members,*" said an NGO worker.

However, as the crisis continued and the regional and international outcry showed no sign of abating, ASEAN's own credibility was increasingly being questioned, and leaders realized they had to take action. As a result, it embarked on a series of initiatives, which it hoped would help address the situation.

### **Understanding and addressing root causes**

Unfortunately, when ASEAN has been proactive, it has focused on specific issues only, in particular the repatriation of refugees and humanitarian assistance, limiting itself to those the Myanmar government has agreed upon and leaving out politically sensitive issues such as the restoration of citizenship rights, restrictions on movement, enforced ethnic segregation, or the intensifying conflict between the Myanmar military and the Arakan Army. As one interviewee noted, "*How can you talk about repatriation when [Rakhine] is a war zone?*"

In some cases, ASEAN has also appeared, at least in principle, to support some of Myanmar's policies of segregation and persecution against the Rohingya. For instance, ASEAN's Preliminary Needs Assessment for Repatriation (PNA) in Rakhine State appears to legitimize continuing restrictions on the movement of the Rohingya. When ASEAN delegations visited the refugee camps in Cox's Bazar, Bangladesh, in 2019, they promoted the National Verification Card (NVC), which is viewed by the Rohingya as a tool of their persecution. ASEAN and its Member States are also providing financial aid and assistance in Rakhine State for infrastructure projects, such as schools and hospitals, seemingly without ensuring that all communities can access them.

Ultimately, if ASEAN wants to have an impact and be effective in Rakhine State, it needs to properly understand and acknowledge all aspects of the crisis, whether human rights, political, humanitarian, social, or economic. Otherwise, its attempts at intervening will be counter-productive, and risk contributing to entrenching segregation, perpetuating serious human rights violations, and pushing more Rohingya to seek safety in neighboring countries.

## Transparency and engagement

ASEAN's response has also been characterized by a lack of transparency and engagement with civil society groups, humanitarian organizations and, crucially, Rohingya themselves. The extreme sensitivity around the Rakhine crisis, in particular as a result of the Myanmar government's refusal to even recognize the Rohingya as citizens, has meant that ASEAN has been unwilling to provide information about its discussions and activities. Illustrative of this is the failure of multiple ASEAN bodies and entities to respond to APhR's requests for interviews and information for this report.

Another key weakness with ASEAN's response has been its failure to meaningfully engage with civil society, and in particular with Rohingya themselves. While there have been efforts to meet with the Rohingya refugees and their representatives, many felt that they were not meaningfully consulted, and that ASEAN representatives were simply echoing Myanmar's government narratives. For many people APhR interviewed, whether Rohingya refugees, their representatives or non-governmental actors, accessing ASEAN officials also presents serious challenges. *"We have tried, but there are not many opportunities to access [ASEAN]. Everything is closed-door and behind the scenes,"* explained one Rohingya activist.

These criticisms are not new, nor are they limited to the Rakhine crisis. For years civil society actors and others have complained about a lack of information and feedback from official ASEAN meetings and challenges in accessing and engaging with ASEAN representatives.

## Weak institutions

ASEAN'S response has also been hampered by a lack of institutions with the mandate and expertise to respond to a crisis like the one in Rakhine State. Its focus on humanitarian assistance led to the mobilization of the ASEAN Coordinating Centre for Humanitarian Assistance (AHA Centre), however it is primarily a humanitarian response and disaster management agency, which is ill-equipped to handle a so-called *"man-made"* disaster like the one in Rakhine State. The AHA Centre also lacks independence and there are serious concerns about its ability to adhere to the key humanitarian principle of *"do no harm"*. Despite being the main regional body tasked with protecting and promoting human rights, the ASEAN Intergovernmental Human Rights Commission (AICHR) also lacks the mandate to respond to the crisis, and has also been hampered by a lack of independence and the need to ensure consensus among members.

Many of the institutional weaknesses in ASEAN's response are not isolated to the situation in Rakhine State, and reflect wider institutional deficiencies, which are embedded within and intrinsic to the structure of ASEAN, and which need to be addressed for the grouping to become truly people-centered.

## A way forward

While ASEAN's response to the crisis has been weak and, in many respects, ineffective, it is important to acknowledge that the bloc has pushed internal boundaries, especially its founding principle of non-interference. By maintaining strict adherence to its other key principle of consensus among Members States, it has kept Myanmar at the table, maintaining access with and arguably gaining influence with the country's leaders.

The question now is whether ASEAN is able to capitalize and build on this to push for real and meaningful progress. With little change for the Rohingya in Myanmar, almost a million refugees stranded in Bangladesh, and a new conflict threatening the safety of all communities living in Rakhine State, there is an urgent need for a holistic, people-centered strategy. ASEAN has an important, and potentially positive, role to play and this report therefore concludes with a series of wide-ranging and detailed recommendations to ASEAN to ensure that its efforts do not cause further harm, but instead contribute to and promote lasting solutions.

What has happened to the Rohingya, and continues to occur to communities in Rakhine State, is a stain on the conscience of humanity. The crisis is not an internal one, despite what the Myanmar authorities say, and its impacts are felt far beyond Myanmar's shores. ASEAN has an obligation to serve and protect the people of the region, and has the potential to play a positive role in resolving the situation. However, it must examine and address its own weaknesses. Failure to do so will not only harm the bloc's credibility and legitimacy, but will likely cause further harm and suffering to the Rohingya and others who call Rakhine State, and indeed the ASEAN region, home.

#### **KEY RECOMMENDATIONS:**

- Recognize that the crisis in Rakhine State is not simply a humanitarian one, and instead develop a holistic strategy guided by the principles of “do no harm” and non-discrimination. Ensure that ASEAN's interventions on Rakhine State address all aspects of the crisis, including its human rights dimensions, and take effective measures to ensure that all projects are subject to rigorous and ongoing human rights risk and mitigation assessments;
- Use all available political and diplomatic tools to push the Government of Myanmar to create conditions conducive to the safe, voluntary and dignified return of displaced communities, regardless of ethnic or religious identity, and request regular progress updates in this regard. Halt any steps to facilitate the repatriation of Rohingya refugees to Myanmar, unless and until violence in Rakhine State has ceased, and the conditions are conducive for a safe return in dignity; and
- Acknowledge the Rohingya's identity, and ensure meaningful consultation with and participation of Rohingya in Myanmar, the refugee camps in Bangladesh, and their representatives in all decisions concerning their future. Take effective measures to ensure the inclusion of diverse voices, including in particular women, children, older people, and people with disabilities.

# METHODOLOGY

This research assessed ASEAN’s response to the crisis in Rakhine State since August 2017. It is based on extensive desk research and literature reviews. APCR reviewed reports by the United Nations, international, regional and local human rights and humanitarian organizations, academics, think tanks, and credible media reports, as well as reports and official statements released by ASEAN and its member States.

In addition, between May and July 2020, APCR also conducted 45 interviews with Rohingya refugees and representatives, staff from regional, local and international human rights and humanitarian organizations, current and former representatives from ASEAN bodies, the AHA Centre, Myanmar analysts, former diplomats, and Members of Parliament from countries in the ASEAN region. The names of interviewees are only included if consent was given. For security reasons, some interviewee’s identities have been withheld.

APCR sent official interview request letters and written questions to all Ministries of Foreign Affairs of all ASEAN countries in June 2020. We extend our appreciation to the Myanmar Ministry of Social Welfare, Relief and Resettlement for responding with written answers and a timeline, which are included in an Annex to this report. We also thank the Myanmar Ministry of Foreign Affairs for sharing their document “*A Snapshot of Myanmar’s current efforts for peace and reconciliation*”.<sup>2</sup> No responses from other governments were received by the time of publication. APCR regrets that the ASEAN Secretariat declined an interview.

APCR wishes to sincerely thank all those who contributed their time, knowledge, and feedback to this report, and hopes that the information and recommendations may prove to be useful for all interested parties.

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<sup>2</sup> The Republic of the Union of Myanmar, Ministry of Foreign Affairs, *A Snapshot of Myanmar’s current efforts for peace and reconciliation*, available at: <https://www.myanmarembassy-vte.org/index.php/ar/announcement/146-a-snapshot-of-myanmar-s-current-efforts-for-peace-and-reconciliation>.



Rohingya refugees in Bangladesh, 9 October 2017. ©EPA-EFE.

## 1.1 THE ESTABLISHMENT OF ASEAN AND THE “ASEAN WAY”

ASEAN was founded in 1967. Originally, it consisted of five member states: Indonesia, Malaysia, the Philippines, Singapore, and Thailand. However, it expanded in 1984 to include Brunei Darussalam, and again in the 1990s when Cambodia, Laos, Myanmar, and Vietnam were accepted into the fold. While the primary aim was to prevent the spread of communism and increase regional cooperation through dialogue, the bloc has evolved considerably and today deals with economic, security, and humanitarian issues across the region. It became a formal legal entity in 2008, when the first ASEAN Charter came into force.<sup>3</sup>

Much of the work of the regional grouping is coordinated out of the ASEAN Secretariat, which is located in Jakarta, Indonesia. However, Chairmanship of the bloc rotates among Member States on an annual basis, and each Chair is responsible for holding the ASEAN Summit and other meetings. Vietnam is the current chair, with Brunei Darussalam set to assume the role in 2021.<sup>4</sup> Areas of ASEAN’s work fall broadly in to “*three-pillars*”: the (1) Political-Security Community; (2) Economic Community; and (3) Socio-Cultural Community.<sup>5</sup>

The supreme policy-making body is the ASEAN Summit, which is held twice annually and is attended by the Heads of State or Government of all the Member States. At these meetings, ASEAN leaders deliberate, provide policy guidance, and take decisions on “*key issues pertaining to the realization of the objectives of ASEAN*” as well as matters referred to it by subsidiary ASEAN bodies.<sup>6</sup>

<sup>3</sup> The ASEAN Charter was adopted at the 13<sup>th</sup> ASEAN Summit in November 2007 and came in to effect in December 2008, available at: <https://asean.org/wp-content/uploads/images/archive/publications/ASEAN-Charter.pdf>, [Hereinafter: The ASEAN Charter].

<sup>4</sup> Chairmanship is rotated based on the alphabetical order of the English names of Member States.

<sup>5</sup> ASEAN overview, available at: <https://asean.org/asean/about-asean/overview/>.

<sup>6</sup> The ASEAN Charter, Article 7(2)(b).

It is also a forum in which the bloc can discuss emergency situations affecting ASEAN.<sup>7</sup> The ASEAN Summit is also where leaders appoint the ASEAN Secretary General, a role that is held for a non-renewable term of five years. The current Secretary General is Dato Lim Jock Hoi of Brunei Darussalam, who was appointed to the position in January 2018.<sup>8</sup>

From its earliest days, ASEAN has been guided by the principles of sovereignty, non-interference, and consensus. These values were first articulated in the Bangkok Declaration of 1967, which established the group,<sup>9</sup> and their importance further confirmed in the ASEAN Charter, which recognizes “*non-interference in the internal affairs of ASEAN Member States*” as one of its key ideologies, along with respect for “*independence, sovereignty... [and] territorial integrity*”.<sup>10</sup> The principles of non-interference and consensus are embedded in all ASEAN entities and institutions.

Often referred to as the “ASEAN Way”, this approach also places an emphasis on consensus and engagement over criticism and isolation.<sup>11</sup> The result is that any actions or decisions taken by the bloc require all Member States to agree. In practice, this has often meant that ASEAN responses to pressing human rights issues in the region or individual Members States have been watered down, if indeed they are acknowledged at all.

The principle of non-interference has been heavily criticized, in particular by civil society groups, who accuse ASEAN and its Member States of invoking sovereignty and non-interference as an excuse for not engaging human rights and other sensitive issues in the region. This is not only true of the crisis in Rakhine State, which is the subject of this report, but in ASEAN’s response to other crises, for example Hun Sen’s crackdown on political opposition in Cambodia, President Rodrigo Duterte’s so-called “*war on drugs*” in the Philippines, and the 2014 military coup and associated restriction of freedoms in Thailand.

The reluctance to intervene on regional human rights issues was also clearly illustrated in the ASEAN Human Rights Declaration, which was adopted by the bloc in 2012.<sup>12</sup> Many had hoped the declaration would pave the way for ASEAN to have a stronger human rights framework, however, the final draft includes provisions that would allow Member States to restrict rights on vague and arbitrary grounds.<sup>13</sup>

For some, the result is that the bloc operates on the basis of the “*lowest common denominator*”. Others, however, defend ASEAN’s strict adherence to the principle of non-interference, arguing that it is essential to ensuring harmony among states and securing continued regional dialogue and cooperation.<sup>14</sup>

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7 The ASEAN Charter, Article 7(2)(d).

8 The Secretary General is selected from Member States based on alphabetical rotation.

9 The ASEAN Declaration (Bangkok Declaration), Bangkok, 8 August 1967, available at: <https://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/>.

10 ASEAN Charter, “Principles”, Article 2.

11 See for example, Masilamani, Logan and J. Peterson, “The “ASEAN Way”: The Structural Underpinnings of Constructive Engagement. (2014); Ramcharan, R, AMCHARAN, R., ASEAN and Non-interference: A Principle Maintained, (2000) Contemporary Southeast Asia, 22(1), 60-88; and Haacke, Jürgen, The concept of flexible engagement and the practice of enhanced interaction: Intramural challenges to the ‘ASEAN way’, (1999) The Pacific Review, 12:4, 581-611.

12 ASEAN Human Rights Declaration, adopted 18 November 2012, available at: <https://asean.org/asean-human-rights-declaration/>. The Declaration was, and remains, deeply problematic and fails to comply with international human rights law and standards. While it recognizes that every person is born free and equal in dignity and rights (Article 1), it asserts that human rights must be “*balanced with the performance of corresponding duties*” (Article 6), and “*considered in... regional and national context bearing in mind different [...] social, cultural... and religious backgrounds*” (Article 7). It allows Member States to restrict human rights on vague and arbitrary grounds, including “*national security*”, “*public order*” and “*public morality*” and bearing in mind “*regional and national context[s]*” (Article 8).

13 National, regional, and international civil society groups have rejected the Declaration, declaring it “*not worthy of its name*”. See Civil society rejects flawed ASEAN Human Rights Declaration, Joint statement by 64 grassroots, national, regional, and international civil society groups, 15 November 2012, available at: <https://www.fidh.org/en/international-advocacy/other-regional-or-organisations/asean/Civil-society-rejects-flawed-ASEAN-12429>.

14 Kishore Mahbubani and Jeffrey Sng, The ASEAN Miracle: A Catalyst for Peace (NUS Press, 2017).

## 1.2 ASEAN AND MYANMAR

ASEAN's relationship with Myanmar is a complex one. When Myanmar joined the grouping in 1997, the country was widely regarded as a pariah state, owing in large part to its appalling human rights record.<sup>15</sup> The then-military junta routinely arrested and imprisoned opposition leaders, including Aung San Suu Kyi, and human rights defenders, and was waging devastating wars against ethnic minority communities across the country. As a result, the decision to accept Myanmar into the fold was controversial.<sup>16</sup>

For ASEAN leaders at the time, the move was geopolitically strategic, which they hoped would counter the influence of China, and to a lesser extent India, in the country, and thus in the region as a whole. Some, perhaps generously, credit this policy of engagement over isolation with having played a significant role in Myanmar's political transition since 2011.<sup>17</sup> For its part, Myanmar, which had become increasingly economically reliant on China, welcomed the opportunity to pull away from its neighbor's sphere of influence; however China's role in the country, politically and economically, remains significant.

ASEAN's principle of non-interference has not always been borne out in practice, particularly when it comes to Myanmar. During much of the 1990s, 2000s, and early 2010s, the country's dismal human rights record was a dark spot on the group's international reputation, especially as western states began to impose severe economic sanctions on the then-ruling junta in the early 2000s.

In 2005, ASEAN leaders pressured Myanmar to forfeit its role as Chair of the bloc the following year after the US and EU governments threatened to boycott ASEAN meetings.<sup>18</sup> Then, in 2007, as Myanmar was facing major anti-government demonstrations known as the "Saffron Revolution", the nine other ASEAN Foreign Ministers expressed their "revulsion" over Myanmar's crackdown on peaceful protesters and called on the authorities to "immediately desist from the use of violence".<sup>19</sup>

ASEAN was also spurred to intervene in 2008, when Cyclone Nargis struck Myanmar's Ayeyarwady Delta, killing an estimated 140,000 people and displacing millions. Despite the widespread devastation, the Myanmar authorities rejected international assistance, blocking access to the affected area. The move sparked an international outcry and pressure quickly grew on ASEAN to step in and find a way to end the deadlock. Within a week, the bloc had dispatched an Emergency Rapid Assessment Team (ERAT) to Myanmar to assess the situation and provide recommendations for action.<sup>20</sup>

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15 The country had applied for observer status in 1995 and applied for membership the following year.

16 The Bangkok Post, ASEAN and the SLORC Conundrum, 22 May 1997, available at: <https://www.burmalibrary.org/reg.burma/archives/199705/msg00432.html>;

17 Kishore Mahbubani and Jeffrey Sng, *The ASEAN Miracle: A Catalyst for Peace* (NUS Press, 2017), p. 156.

18 Myanmar acquiesced, and it wasn't until 2014 that it was able to assume the Chair of the regional grouping for the first time.

19 Reuters, ASEAN voices 'revulsion' at Myanmar violence, 28 September 2007, available at: <https://www.reuters.com/article/idUSN27379289>.

20 See ASEAN Secretariat, *A Humanitarian call: The ASEAN Response to Cyclone Nargis*, July 2010, <https://www.asean.org/storage/images/2012/publications/A%20Humanitarian%20Call%20The%20ASEAN%20Response%20to%20Cyclone%20Nargis.pdf>.

Soon after, and based on the ERAT's recommendations, an emergency meeting of ASEAN Foreign Ministers held in Singapore agreed to establish an ASEAN mechanism to "*facilitate effective distribution and utilisation of assistance from the international community, including the expeditious and effective deployment of relief workers, especially health and medical personnel*".<sup>21</sup> What followed was a two-year mechanism.<sup>22</sup> While imperfect, it showed that ASEAN could act if pushed to, and underscored the fact that "*interference*" can be interpreted subjectively, as the situation, and in particular as political and economic interests, demand.

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<sup>21</sup> ASEAN Secretariat, A Humanitarian call: The ASEAN Response to Cyclone Nargis, July 2010, pp. 20.

<sup>22</sup> For further information, in particular the developments of ASEAN's role in humanitarian situations, see Fan, Lillianne, and Krebs, Hanna B., Regional organizations and humanitarian action: the case of ASEAN, Overseas Development Institute (ODI), September 2014, available at: <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9207.pdf>.





## 2. THE EVOLUTION OF THE CRISIS IN RAKHINE STATE

### 2.1 A HISTORY OF DISCRIMINATION AND VIOLENCE

The Rohingya are a majority Muslim ethnic minority living mainly in the north of Rakhine State, western Myanmar. The community has been subjected to decades of discrimination and persecution at the hands of the Myanmar state,<sup>23</sup> which denies their ethnic identity and refuses to acknowledge their status as Myanmar citizens, instead asserting that they are migrants from Bangladesh.<sup>24</sup>

In June and October 2012, waves of violence erupted in Rakhine State between the predominantly Buddhist Rakhine and the Rohingya and other Muslim groups, following the rape and murder of an ethnic Rakhine woman by Muslim men and the retaliatory murder of 10 Muslim men.

<sup>23</sup> Amnesty International, Human Rights Violations against Muslims in the Rakhine, May 1992; Human Rights Watch (HRW), The Rohingya Muslims: Ending a Cycle of Exodus?, September 1996; Amnesty International, Rohingya: the Search for Safety, September 1997; Amnesty International, The Rohingya Minority: Fundamental Rights Denied, May 2004; HRW, Perilous Plight: Burma's Rohingya Take to the Seas, May 2009; and the Irish Center for Human Rights, Crimes against Humanity in Western Burma: The Situation of the Rohingyas, 2010.

<sup>24</sup> Central to the discrimination against the Rohingya is their lack of legal status in Myanmar. From the 1980s, the Myanmar authorities have stripped the community of their citizenship rights, employing a range of discriminatory laws and practices, notably the 1982 Citizenship Law, to deny them their right to a nationality. See Amnesty International, "Caged without a Roof": Apartheid in Myanmar's Rakhine State, 21 November 2017, pp. 28-41, available at: <https://www.amnesty.org/en/latest/news/2017/11/myanmar-apartheid-in-rakhine-state/.28-41>.

The rounds of violence left scores of people from all communities killed, and hundreds of homes burned to the ground.<sup>25</sup> Around 140,000 people were displaced from their homes, the vast majority of them Rohingya, who were corralled into supposedly temporary displacement camps. More than eight years later, these camps remain.

The plight of the Rohingya deteriorated significantly after the 2012 violence. Myanmar tightened restrictions on movement, and heavily limited their access to essential services such as healthcare, education, and livelihoods, as well as their rights to exercise their fundamental freedoms such as freedom of religion or belief, association, expression and peaceful assembly. These state-imposed restrictions have effectively established an apartheid system that segregates the Rohingya from the rest of Myanmar.<sup>26</sup> Rohingya were also barred from voting or standing as candidates in the 2015 general election, despite having been able to do so in previous years.

Meanwhile, in recent years anti-Rohingya and anti-Muslim rhetoric has spread offline and online across the country and in some instances led to deadly attacks on Muslim communities and religious buildings.<sup>27</sup> Government officials have failed to take effective action against this advocacy of hatred.

## 2.2 MARITIME MOVEMENTS

The appalling situation in Rakhine State led tens of thousands of Rohingya to flee the country. Many boarded rickety boats risking their lives to journey to Malaysia, Indonesia, or other countries in search of work, education, and the chance of a better life for themselves and their families.<sup>28</sup>

The plight of those who attempted to escape Myanmar made headlines when in early May 2015 Thai authorities uncovered the graves of dozens of Rohingya and Bangladeshis on the border with Malaysia in sites believed to have been used as camps by human traffickers.<sup>29</sup> The discovery prompted governments in the region to announce a crackdown on human trafficking. Unable to disembark their human cargo, traffickers abandoned the boats, leaving hundreds of desperate women, men, and children adrift in the Andaman Sea and the Straits of Malacca for months, with limited food, water, and fuel.

When the boats began to drift into territorial waters, Thai, Malaysian, and Indonesian authorities initially refused to allow the passengers to disembark, instead pushing them back to sea, in violation of the principle of non-refoulement and international obligations to assist boats in distress.<sup>30</sup>

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25 HRW, All you can do is pray: Crimes against humanity and ethnic cleansing of Rohingya Muslims in Burma's Arakan State, 2013, available at: [https://www.hrw.org/reports/burma0413\\_FullForWeb.pdf](https://www.hrw.org/reports/burma0413_FullForWeb.pdf).

26 Amnesty International, "Caged without a Roof": Apartheid in Myanmar's Rakhine State, 21 November 2017; HRW, "An Open Prison without End": Myanmar's Mass Detention of Rohingya in Rakhine State, 8 October 2020, available at: [https://www.hrw.org/sites/default/files/media\\_2020/09/myanmar1020\\_web.pdf](https://www.hrw.org/sites/default/files/media_2020/09/myanmar1020_web.pdf).

27 Physicians for Human Rights, Massacre in Central Burma, May 2013 and Patterns of Anti-Muslim Violence in Burma, August 2013, available at: <https://phr.org/our-work/resources/massacre-in-central-burma/>; Burma Human Rights Network (BHRN), The Persecution of Muslims in Burma, 5 September 2017, available at: <https://progressivevoicemyanmar.org/wp-content/uploads/2017/09/BHRN-Research-Report-.pdf>.

28 HRW, Perilous Plight: Burma's Rohingya Take to the Seas, May 2009, available at: <https://www.hrw.org/report/2009/05/26/perilous-plight/burmas-rohingya-take-seas>.

29 Later that month, authorities in Malaysia would find similar camps and mass graves across the border.

30 Non-refoulement is a fundamental principle of international refugee law. It prohibits states from sending any person against their will to a country where their life would be at serious risk of human rights violations. Non-refoulement is a norm of customary international law, which is binding on all states regardless of whether they have signed relevant international treaties such as the UN Refugee Convention. The UN Convention on the Law of the Sea (UNCLOS), which has been ratified by all ASEAN states except for Cambodia, which has signed the treaty, places international obligations on states to rescue boats in distress.

When they eventually were able to come to shore, the victims were severely malnourished, and told of their horrific experiences at sea where they were beaten, verbally abused, and often held to ransom.<sup>31</sup> UNHCR estimates that between 2012 and 2015, around 112,500 Rohingya travelled by boat across the Bay of Bengal and Andaman Sea; an unknown number died at sea.<sup>32</sup>

The crisis generated significant international attention, and criticism of the treatment of refugees by governments in the region, prompting the convening of a Special Retreat on Irregular Migration in the Indian Ocean in Bangkok in late May 2015. The Summit, which was attended by representatives from 17 countries, including Myanmar, was aimed at addressing the crisis. However, while states committed to allowing disembarkation, providing humanitarian aid, and protecting the rights of victims of human trafficking and migrants, it did not address Myanmar's role in creating the situation, nor did the final statement refer to the Rohingya by their name.<sup>33</sup>

Since then, there has been little follow-up.<sup>34</sup> There were hopes that the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, a forum for dialogue, information sharing and practical cooperation in the region,<sup>35</sup> might offer an avenue to address the situation, however to date it has been largely ineffective.<sup>36</sup>

Meanwhile, refugees have continued to make perilous journeys by sea. So far in 2020, around 2,000 refugees are believed to have attempted journeys from Bangladesh across the Bay of Bengal.<sup>37</sup> Amid the COVID-19 pandemic, governments in the region have once again refused to allow refugees to disembark in violation of their international obligations, leaving them to a terrible fate at sea.<sup>38</sup>

## 2.3 2016 “CLEARANCE OPERATIONS”

When the National League for Democracy (NLD), headed by Aung San Suu Kyi, came to power following a landslide election win in November 2015, there was hope that the situation might improve for the Rohingya. In August 2016, Aung San Suu Kyi announced the establishment of the Advisory Commission on Rakhine State, tasked with finding solutions to the situation in the state.<sup>39</sup>

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31 Amnesty International, Deadly journeys: The refugee and trafficking crisis in Southeast Asia, 21 October 2015, available at: <https://www.amnesty.org/en/documents/ASA21/2574/2015/en/>.

32 UNHCR, Over 168,000 Rohingya likely fled Myanmar since 2012, 3 May 2017, available at: <http://www.unhcr.org/en-us/news/latest/2017/5/590990ff4/168000-rohingya-likely-fled-myanmar-since-2012-unhcrreport.html>.

33 Summary Special Meeting on Irregular Migration in the Indian Ocean, 29 May 2015, Bangkok, Thailand, available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/media-center-20150529-175942-231858.pdf>

34 ASEAN Ministers established a Trust Fund to Support Emergency Humanitarian and Relief Efforts in the Event of the Irregular Movement of Persons in Southeast Asia, however, despite donations from some states, it is unclear whether the fund has been used, [https://asean.org/storage/2018/01/DOC-5-ToR-of-the-Trust-Fund-for-Humanitarian-Relief-Efforts\\_ADOPTED-ad-ref-on-....pdf](https://asean.org/storage/2018/01/DOC-5-ToR-of-the-Trust-Fund-for-Humanitarian-Relief-Efforts_ADOPTED-ad-ref-on-....pdf).

35 The Bali Process, which is co-chaired by Australia and Indonesia, has 49 members, including all ASEAN Member States and several UN and intergovernmental agencies. See: <https://www.baliprocess.net/>.

36 Amnesty International, To save Rohingya people stranded at sea, the Bali Process mustn't delay any longer, 20 June 2020, available at: <https://www.amnesty.org/en/latest/news/2020/06/save-rohingya-bali-process/>.

37 Save the Children and Care, Rohingya are being left to die at sea. Who cares?, 17 September 2020, available at: <https://www.savethechildren.net/blog/rohingya-are-being-left-die-sea-who-cares>.

38 ASEAN Parliamentarians for Human Rights (APHR), Leaders must address COVID-19 human rights concerns at 36<sup>th</sup> ASEAN Summit, Open Letter, 25 June 2020, available at: <https://aseanmp.org/2020/06/25/open-letter-asean-summit/>; HRW, Malaysia/Thailand: Allow Rohingya Refugees Ashore, 12 June 2020, available at: <https://www.hrw.org/news/2020/06/12/malaysia/thailand-allow-rohingya-refugees-ashore>. In September 2020, a boat carrying 296 Rohingya refugees, the majority of them children, landed on the shores of Indonesia's Aceh province, having spent almost seven months at sea. Speaking on the sidelines of the 53<sup>rd</sup> ASEAN Foreign Ministers Meeting the same month, the Indonesian Foreign Minister called on Myanmar to resolve the situation, while Malaysia's Foreign Minister warned that a prolonged crisis in Rakhine State would jeopardize regional security and stability. The Jakarta Post, Indonesia appeals for end to Rohingya crisis, 11 September 2020, available at: <https://www.thejakartapost.com/seasia/2020/09/11/indonesia-appeals-for-end-to-rohingya-crisis.html>.

39 Ministry of the Office of the State Counsellor, Establishment of the advisory commission on Rakhine State, 23 August 2016, available at: [www.statecounsellor.gov.mm/en/node/228](http://www.statecounsellor.gov.mm/en/node/228).

The commission, which was headed by former UN Secretary General Kofi Annan, was made up of three international members and six national members, and was asked to present a report on its findings and recommendations in August 2017.

Then, on 9 October 2016, an armed Rohingya group, the Arakan Rohingya Salvation Army (ARSA),<sup>40</sup> attacked three police posts in northern Rakhine State, killing nine police officers and wounding others. The Myanmar security forces responded by launching what it described as “clearance operations”, which they claimed were aimed at apprehending ARSA fighters and recovering stolen weapons.

In reality, what followed was an indiscriminate brutal attack on the Rohingya community in northern Rakhine State. Security forces, including the military and the Border Guard Police, perpetrated killings, enforced disappearances, arbitrary arrests, torture and ill-treatment, rape and sexual violence, and destroyed homes and property.<sup>41</sup> Around 87,000 women, men, and children were forced to flee to Bangladesh.<sup>42</sup> In response to allegations of crimes against humanity, the UN Human Rights Council established a Fact-Finding Mission (IFFMM) in March 2017, mandated to investigate allegations of violations of violations in the country, including in Rakhine State.<sup>43</sup>

## 2.4 2017 ATROCITIES AND AFTERMATH

The situation remained grave throughout 2017. Humanitarian access to northern Rakhine State was severely restricted, and Rohingya men and boys were routinely arbitrarily arrested and tortured.<sup>44</sup> On 24 August, the Advisory Commission on Rakhine State published its final report, which included wide-ranging recommendations to restore freedom of movement, ensure equal access to healthcare, education, and livelihood opportunities for all communities living in the state, and a call for the government to review the country’s controversial 1982 Citizenship Law, which denies the Rohingya legal identity.<sup>45</sup> However, just hours after the report’s publication, ARSA fighters launched coordinated attacks on an estimated 30 security posts in northern Rakhine State.

What came next has been extensively documented by the UN, human rights groups and the media. The Myanmar security forces launched a major attack on the entire Rohingya community in northern Rakhine State, killing an estimated 10,000 people, raping hundreds of women, and burning homes and, in some areas, entire villages to the ground. The violence forced more than 740,000 Rohingya to flee to neighboring Bangladesh.<sup>46</sup> In a report in September 2018, the UN Fact-Finding Mission called for Myanmar senior military officials to be investigated for war crimes, crimes against humanity, and the crime of genocide in relation to the attacks.<sup>47</sup>

40 Following the October 2016 attacks, the group identified itself as Harakah al-Yaqin (meaning ‘Faith Movement’ in English). In a March 2017 statement, the group announced it had changed its name to the Arakan Rohingya Salvation Army (ARSA), which is how the group is referred to in this report. See Voice of America (VOA), Myanmar’s Rohingya Insurgency Strikes Pragmatic Note, 30 March 2017, available at: [www.voanews.com/a/myanmar-rohingya-insurgency-strikes-pragmatic-note/3788483.html](http://www.voanews.com/a/myanmar-rohingya-insurgency-strikes-pragmatic-note/3788483.html).

41 Office of the High Commissioner for Human Rights (OHCHR), Flash Report: Report of OHCHR mission to Bangladesh, Interviews with Rohingyas fleeing from Myanmar since 9 October 2016, 3 February 2017, available at: [www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf](http://www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf); Amnesty International, “We are at breaking point”: Persecuted in Myanmar, neglected in Bangladesh, 19 December 2016, available at: <https://www.amnesty.org/en/documents/asa16/5362/2016/en/>.

42 International Organization for Migration (IOM), Bangladesh: Needs and Population Monitoring Undocumented Myanmar Nationals in Teknaf and Ukhiya, Cox’s Bazar, July 2017, available at: [reliefweb.int/sites/reliefweb.int/files/resources/170814\\_NPM\\_RIV\\_Final.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/170814_NPM_RIV_Final.pdf).

43 UN Human Rights Council (HRC) 34<sup>th</sup> session, Agenda item 4 Human rights situations that require the Council’s attention: Situation of human rights in Myanmar, UN Doc: A/HRC/34/L.8/Rev.1, 22 March 2017, para. 11, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G17/073/88/PDF/G1707388.pdf?OpenElement.11>

44 Amnesty International, “We will destroy everything”: Military responsibility for crimes against humanity in Rakhine State, Myanmar, 26 June 2018, pp. 27-30, available at: <https://www.amnesty.org/en/documents/asa16/8630/2018/en/>.

45 Advisory Commission on Rakhine State, Final Report, pp 26-17, available at: [www.rakhinecommission.org](http://www.rakhinecommission.org).

46 2019 Joint Response plan for Rohingya Humanitarian Crisis, February 2019, p.10, available at: <https://reliefweb.int/report/bangladesh/2019-joint-response-plan-rohingya-humanitarian-crisis-january-december-enbn>.

47 Independent International Fact-Finding Mission on Myanmar (IFFMM), Report of the detailed findings of the Independent

The Myanmar government denied allegations of human rights violations, initially accusing the Rohingya of burning down their own homes. However, when international outcry showed no sign of abating, the authorities announced the establishment of the Union Enterprise for Humanitarian Assistance, Resettlement and Development in Rakhine (UEHRD). Chaired by State Counsellor Aung San Suu Kyi, it is tasked with coordinating relief and resettlement efforts, carrying out development work in the state, and coordinating with the private sector, UN agencies and other actors.<sup>48</sup>

Then in November 2017, Myanmar and Bangladesh agreed upon an “Arrangement on return of displaced persons from Rakhine State”.<sup>49</sup> The agreement was made without the consultation or input of the refugees themselves and to date has still not been made public. In June 2018, Myanmar also signed a MoU with the UN Development Programme and the UN High Commissioner for Refugees, to “establish a framework for cooperation... aimed at creating conducive conditions for the voluntary, safe, dignified and sustainable repatriation of refugees.”<sup>50</sup> The final agreement, which has not officially been made public, was extended for a second time in May 2020.<sup>51</sup> Two attempts at repatriation in November 2018 and August 2019, however, failed after refugees said it was not safe to return.<sup>52</sup>

The Myanmar government also attempted to counter international calls for accountability. On 30 May 2018 it announced the establishment of an Independent Commission of Enquiry (ICOE) mandated to investigate allegations of human rights violations and abuses in Rakhine State from 25 August 2017.<sup>53</sup> From the onset, there were serious concerns about the commission’s independence, impartiality, and the competence of its members to investigate such serious crimes.<sup>54</sup> The Commission submitted its final report to the President of Myanmar on 20 January 2020.<sup>55</sup> It surprised many by admitting to serious crimes, including possible war crimes, however, categorically denied there was genocidal intent, and made no reference to rape and others crimes of sexual violence, which have been extensively documented by the UN and human rights organizations.

In parallel, several international justice processes started. In September 2018, the UN Human Rights Council established the Independent Investigative Mechanism on Myanmar (IIMM), which is mandated with collecting and preserving evidence of serious crimes and preparing casefiles for criminal prosecution.<sup>56</sup>

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International Fact-Finding Mission on Myanmar, A/HRC/39/64, 17 September 2018, available at: <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23575&LangID=E>.

48 Office of the President, Establishment of the Committee for the Union Enterprise for humanitarian Assistance, Resettlement and Development in Rakhine, Order No. 86/2017, 17 October 2017, available at: <https://www.statecounsellor.gov.mm/en/node/1102>. Further information about the UEHRD, its aims and activities, can be found at <https://www.uehrd.org/about-us>.

49 Arrangement on return of displaced persons from Rakhine State between the Government of the People’s Republic of Bangladesh and the Government of the Republic of the Union of Myanmar, 23 November 2017.

50 UNHCR and UNDP agree on text of MoU with Myanmar to support the creation of conditions for the return of Rohingya refugees, 6 June 2018, available at: <https://www.unhcr.org/ph/13763-unhcr-undp-agree-text-mou-myanmar-support-creation-conditions-return-rohingya-refugees.html>.

51 UNHCR, UNDP, UNHCR and the Government of the Union of Myanmar extend Memorandum of Understanding, 11 May 2020, available at: <https://www.unhcr.org/asia/news/press/2020/5/5eb8fe484/undp-unhcr-and-the-government-of-the-union-of-myanmar-extend-memorandum.html>.

52 The Guardian, Rohingya refugees turn down second Myanmar repatriation effort, 22 August 2019, available at: <https://www.theguardian.com/world/2019/aug/22/rohingya-refugees-turn-down-second-myanmar-repatriation-effort>.

53 Office of the President, Government of the Republic of the Union of Myanmar Will Establish an Independent Commission of Enquiry, Announcement 3/2018, 31 May 2018, available at: [www.moi.gov.mm/moi:eng/?q=announcement/1/06/2018/id-13694](http://www.moi.gov.mm/moi:eng/?q=announcement/1/06/2018/id-13694).

54 International Commission of Jurists (ICJ), Myanmar: New Commission of Inquiry cannot deliver justice of accountability, international response required, 7 September 2018, available at: <https://www.icj.org/myanmar-governments-commission-of-inquiry-cannot-deliver-justice-or-accountability/>; Global Justice Center, Myanmar’s Independent Commission of Enquiry: Structural Issues and Flawed Findings, February 2020, available at: [https://www.globaljusticecenter.net/files/20200203\\_ICOEFact\\_sheet.pdf](https://www.globaljusticecenter.net/files/20200203_ICOEFact_sheet.pdf).

55 Independent Commission of Enquiry (ICOE), Press Release, 20 January 2020, available at: <https://www.icoe-myanmar.org/icoe-pr-final-report>.

56 Human Rights Council, Situation of human rights of Rohingya Muslims and other minorities in Myanmar, UN Doc: A/HRC/RES/39/2, 3 October 2018, available at: <https://undocs.org/A/HRC/res/39/2>.

Myanmar authorities, however, have refused to cooperate with the mechanism. Meanwhile, the prosecutor of the International Criminal Court (ICC) has opened an investigation into crimes against the Rohingya, after the Court ruled that it had jurisdiction over crimes where at least one element took place on the territory of Bangladesh, which is a state party to the Rome Statute.<sup>57</sup> The investigation is ongoing.

Then, in November 2019, the Gambia filed a complaint at the International Court of Justice (ICJ), accusing Myanmar of breaching its obligations as a state party to the UN Genocide Convention.<sup>58</sup> In its filing, the Gambia requested the court to order Myanmar to take special measures (known as provisional measures) to protect the Rohingya from acts of genocide. On 23 January 2020, the Court granted the Gambia's request and ordered Myanmar to take immediate action to protect the Rohingya from acts of genocide, to preserve evidence of crimes, and to provide reports on the implementation of the measures until the completion of the case, which is expected to take several years.<sup>59</sup> Since the order, the Myanmar government has made several token efforts to show its compliance, yet the situation of the Rohingya who remain in Myanmar remains perilous.<sup>60</sup>

## 2.5 RAKHINE STATE TODAY

Three years after the military's brutal operations there has been no change for the estimated 600,000 Rohingya still in Rakhine State, who remain deprived of their rights to a nationality and citizenship, freedom of movement, and access to essential services.<sup>61</sup> Attempts at repatriation have stalled, while the authorities are pushing forward with a deeply problematic citizenship "verification" process, in which Rohingya are required to "apply" to be verified as citizens, and made to identify as "Bengali".<sup>62</sup> The process has been accompanied by reports of threats, intimidation, coercion, and, at times, physical violence.<sup>63</sup>

The authorities have also taken several steps that seem designed to cement the expulsion of the Rohingya from Myanmar: bulldozing villages and building new structures and security forces bases instead.<sup>64</sup> Some former Rohingya villages are also being removed from official maps, literally erasing Rohingya's existence and history.<sup>65</sup> The UN Fact-Finding Mission has warned that the Rohingya in Rakhine State remain at "ongoing risk of genocide".<sup>66</sup>

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57 International Criminal Court, ICC judges authorise opening of an investigation into the situation in Bangladesh/Myanmar, 14 November 2019, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>.

58 International Court of Justice, The Republic of The Gambia institutes proceedings against The Republic of the Union of Myanmar and asks the Court to indicate provisional measures, 11 November 2019, available at: <https://www.icj-cij.org/files/case-related/178/178-20191111-PRE-01-00-EN.pdf>. The governments of Canada, the Maldives, and the Netherlands have since announced their intention to join the dispute.

59 International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Order, 23 January 2020, available at: <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>.

60 In April 2020, the President's Office issued three directives: Compliance with the Convention on the Prevention and Punishment of the Crime of Genocide, Directive No. 1/2020, 8 April 2020; Preservation of evidence and property in areas of northern Rakhine State, Directive No. 2/2020, 8 April 2020, and Prevention of incitement to hatred and violence (or) Prevention of proliferation of hate speech, Directive No. 3/2020, 20 April 2020.

61 HRW, "An Open Prison without End": Myanmar's Mass Detention of Rohingya in Rakhine State, 8 October 2020.

62 In Myanmar, the term "Bengali" is often used to imply that Rohingya are migrants from Bangladesh.

63 Fortify Rights, "Tools of genocide": National Verification Cards and the Denial of Citizenship of Rohingya Muslims in Myanmar, September 2019, available at: <https://www.fortifyrights.org/downloads/Tools%20of%20Genocide%20-%20Fortify%20Rights%20-%20September-03-2019-EN.pdf>.

64 See for example, Australian Strategic Policy Institute, Mapping conditions in Rakhine State, 24 July 2019, available at: <https://pageflow.aspi.org.au/rakhine-state/#211793>; Amnesty International, Myanmar: Remaking Rakhine State, 12 March 2018, available at: <https://www.amnesty.org/en/documents/asa16/8018/2018/en/>.

65 Reuters, Three years after exodus, Myanmar erases names of Rohingya villages, U.N. map makers follow suit, 11 September 2020, available at: <https://www.reuters.com/article/us-myanmar-rohingya-insight-idUSKBN262058>.

66 IIFMM, Myanmar's Rohingya Persecuted, Living under Threat of Genocide, UN Experts Say, 16 September 2019, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24991&LangID=E>.

At the same time, the state is now the site of an internal armed conflict between the Myanmar military and the Arakan Army (AA), an ethnic Rakhine-led armed group. The situation escalated significantly after the AA launched several attacks on security posts on 4 January 2019. Since then, human rights groups have reported indiscriminate artillery attacks, often killing or injuring civilians, torture and ill-treatment, deaths in custody, and displacement of civilians.<sup>67</sup> At the time of writing, the UN estimates that around 90,000 people have been displaced.<sup>68</sup>

Getting information about the situation in Rakhine State is extremely difficult and made worse by the fact that in June 2019, authorities suspended mobile Internet services to nine conflict-affected townships in Rakhine and Chin States,<sup>69</sup> denying people access to information, and hampering the provision of humanitarian aid.<sup>70</sup> At the time of writing, 2G services have resumed, however, services are intermittent and connections poor.

Since mid-August 2020, there has been a significant outbreak of COVID-19 in Myanmar, in particular in Rakhine State. The government has responded by putting several measures in place: people living in all townships in Rakhine State are subject to “stay-at-home” orders, while a curfew from 9pm-4am is in effect.<sup>71</sup> While all communities are at risk, there are concerns for the well-being of already vulnerable populations, in particular the tens of thousands of civilians displaced by fighting between the military and AA, as well as the Rohingya and other Muslims detained in camps since 2012.

The COVID-19 outbreak and ongoing fighting are taking place as the country gears up for a general election scheduled for 8 November. It is already clear that the Rohingya will once again be excluded from the vote<sup>72</sup> and that the security situation will prevent voting from taking place in several conflict-affected parts of the state, leaving other communities similarly politically disenfranchised.<sup>73</sup>

Despite the international attention and outcry of the last three years, Myanmar has failed to take meaningful steps to address the situation of the Rohingya, whether by restoring their rights, creating conditions conducive to the return of refugees, or ensuring accountability for atrocities. On the contrary, in many areas authorities appear to be exacerbating the situation, entrenching discrimination and segregation while whitewashing military crimes. Efforts that have been taken have been tokenistic, and appear designed to appease international pressure rather than addressing the root causes of the crisis.

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67 Amnesty International, “No one can protect us”: War crimes and abuses in Myanmar’s Rakhine State, 29 May 2019, available at: <https://www.amnesty.org/en/documents/asa16/0417/2019/en/>; HRW, Myanmar: Imagery Shows 200 Buildings Burned, 26 May 2020, available at: <https://www.hrw.org/news/2020/05/26/myanmar-imagery-shows-200-buildings-burned>.

68 Office for the Coordination of Humanitarian Affairs (OCHA), Myanmar: Myanmar Armed Forces & Arakan Army conflict-generated displacement in Rakhine and Chin States (As of 7 September 2020), 14 September 2020, available at: <https://reliefweb.int/map/myanmar/myanmar-myanmar-armed-forces-arakan-army-conflict-generated-displacement-rakhine-and-3>.

69 7 Day Daily, Internet services temporarily suspended in some townships in Rakhine and Chin States, 22 June 2019, available at: <http://7daydaily.com/story/159228>. The shutdown was imposed in Buthidaung, Kyauktaw, Maungdaw, Minbya, Mrauk-U, Myebon, Ponnagyun, and Rathedaung townships in Rakhine State and Paletwa township in Chin State. It was lifted temporarily in five townships (Buthidaung, Maungdaw, Myebon, Paletwa, and Rathedaung townships) on 1 September 2019 before being reimposed on 3 February 2020.

70 Asian Forum for Human Rights and Development (FORUM-ASIA), Equality Myanmar, Progressive Voice, and Women’s League of Burma, Myanmar: Restore Internet Services in Rakhine and Chin States, promote access to information for all, 25 March 2020, available at: <https://www.forum-asia.org/?p=31371>; Myanmar: End Internet Restrictions in Rakhine and Chin States, Joint statement by 29 international and Myanmar-based organizations, 13 February 2020, available at: <https://www.fortifyrights.org/myanmar-end-internet-restrictions-in-rakhine-and-chin-states/>.

71 Frontier Myanmar, “The second wave has started”: COVID-19 cases skyrocket in Rakhine, 26 August 2020, available at: <https://www.frontiermyanmar.net/en/the-second-wave-has-started-covid-19-cases-skyrocket-in-rakhine/>.

72 Myanmar Now, Election commission accused of discrimination after rejecting Rohingya candidates, 20 August 2020, available at: <https://myanmar-now.org/en/news/election-commission-accused-of-discrimination-after-rejecting-rohingya-candidates>.

73 Reuters, Myanmar may postpone election in war-torn Rakhine state: official, 30 July 2020, available at: <https://www.reuters.com/article/us-myanmar-election-idUSKCN24VIVL>.



ASEAN Secretary-General Lim Jock Hoi visits Rakhine State, 17 December 2018. ©EPA-EFE.

### 3. ASEAN'S RESPONSE: A CRITICAL ASSESSMENT

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The scale of the crisis in Rakhine State created a major challenge for ASEAN. Caught between respect for its key principles of consensus and non-interference on the one hand, and international and domestic outcry on the other, the group has struggled to respond effectively. As detailed below, some of these failures stem from wider issues around leadership and the balance between domestic and regional priorities. Other challenges arise from a lack of knowledge of the context and a piecemeal rather than holistic approach to the situation, a failure to engage with external actors and promote transparency, and the weaknesses inherent in many of the grouping's institutions.



## 3.1 ABSENCE OF COHESIVE AND STRATEGIC LEADERSHIP

***“The ASEAN response was tepid and nobody knew what to do. They were complacent and drifting. There was no coordination... Individual constrained situations, all combined in a big disservice to the Rohingya.”***

*A former ASEAN government official.<sup>74</sup>*

### A SLOW AND TEPID INITIAL RESPONSE: 2016/2018

A key theme that emerged from interviews is a sense that ASEAN lacks a clear strategy for dealing with the crisis. ASEAN’s response appeared to many of the interviewees as “*weak*”, “*muddled*”, “*incoherent*”, and “*lacking leadership and vision*”.<sup>75</sup> Some interviewees even noted that at the beginning of the crisis, it was hard to discern an ASEAN response at all.<sup>76</sup>

This can in large part be explained by the groups’ adherence to the principle of non-interference. Myanmar consistently asserted that the situation was an “*internal*” one, even before the events of October 2016 and August 2017, meaning that any regional response risked undermining one of the bloc’s key tenets.

It can also be explained by a lack of cohesion amongst Member States. “*Domestic politics so clearly trumped a regional ASEAN-approach,*” noted one analyst.<sup>77</sup> Some member states, such as Malaysia and Indonesia, appalled by the violence and aware of the regional implications of the exodus of the Rohingya, wanted to see a strong response while others, such as Cambodia, Laos, the Philippines, Vietnam and Myanmar included, asserted that the situation was an internal one, and thus adopted the approach of non-interference. Interviewees noted that many of these countries have poor human rights records, and likely felt that speaking out would have drawn attention to problems in their own backyards. As one former ASEAN government official said, “*People living in glass houses are wary of throwing stones*”.<sup>78</sup>

According to others, part of the challenge was the weakness of the ASEAN Secretariat itself.<sup>79</sup> A former ASEAN Member State government official said: “*ASEAN is lacking a Secretary General*”, who could have led a more coordinated approach and shown leadership and diplomatic skills in engaging Myanmar.<sup>80</sup>

With ASEAN as a bloc showing little leadership or taking the initiative, Member States began acting more unilaterally. Malaysia has perhaps been most vocal and openly critical of the situation in Rakhine State. Interviewees told APhR that since 2012 Malaysia has been pushing to raise the situation of the Rohingya,<sup>81</sup> and after the October 2016 ARSA attacks and disproportionate military response, proposed an ASEAN Foreign Ministers meeting to discuss the situation. Myanmar eventually agreed to host a Retreat of ASEAN Foreign Ministers on 19 December 2016, with Aung San Suu Kyi briefing her counterparts on the need to give Myanmar “*time and space*” in what was described as a “*candid and transparent exchange of views based on the spirit of ASEAN family and ASEAN Community*”.<sup>82</sup>

<sup>74</sup> APhR interview, 24 June 2020.

<sup>75</sup> APhR interviews, May-July 2020.

<sup>76</sup> APhR interviews, May-July 2020.

<sup>77</sup> APhR interview, 4 June 2020.

<sup>78</sup> APhR interview, 24 June 2020.

<sup>79</sup> APhR interviews, May-July 2020.

<sup>80</sup> APhR interview, 24 June 2020.

<sup>81</sup> APhR interviews, May-July 2020.

<sup>82</sup> Myanmar Ministry of Foreign Affairs, State Counsellor briefed ASEAN Foreign Ministers on recent developments in Rakhine State, 19 December 2016, available at: <https://reliefweb.int/report/myanmar/state-counsellor-briefed-asean-foreign-minis->

**Malaysia** was similarly engaged from August 2017. Soon after reports of atrocities began to emerge, the country summoned Myanmar's Ambassador to voice its displeasure at the situation.<sup>83</sup> In an unusual departure from ASEAN's emphasis on non-intervention, Foreign Minister Anifah Aman stated that the matter "*should be elevated to a higher international forum*".<sup>84</sup>

The same month, and in the first sign of internal disagreement within ASEAN, Malaysia disassociated itself from a statement made by the Philippines, the then ASEAN chair, saying it misrepresented the "*reality of the situation*" by failing to refer to the Rohingya as one of the communities affected.<sup>85</sup>

In December that year, Malaysia's then-Prime Minister Najib Razak led a protest rally describing the situation as a "*genocide*" and an insult to Islam, and called on the UN to act.<sup>86</sup> Analysts and observers, including several interviewed for this report, have noted that Prime Minister Najib's comments were made at a time of waning popularity, suggesting he had used the crisis for domestic political purposes.<sup>87</sup> For some, this made the intervention counter-productive, because it was more easily dismissed by the Myanmar authorities.<sup>88</sup> Some have also reported that Malaysia's outspoken position, and its disassociation with the September 2017 statement, hampered ASEAN efforts to agree on a way forward, though of course, Myanmar's own actions and atrocities should have been the primary focus of any disagreement.<sup>89</sup>

Malaysia continued to speak out against Myanmar's treatment of the Rohingya, even after Prime Minister Najib left office. In November 2018, his successor, Mahathir Mohamad accused State Counsellor Aung San Suu Kyi of "*defending the indefensible*" over military atrocities, and in another break with ASEAN unity, in September 2019, praised the Organisation of Islamic Cooperation (OIC) for its role in taking Myanmar to the ICJ.<sup>90</sup>

In June 2020, as reports of new boat arrivals were emerging, current Prime Minister Muhyiddin Yassin complained that Malaysia did not have the capacity to accept more refugees, and called on Myanmar to "*do more to help itself for this crisis to be put behind us*".<sup>91</sup>

**Indonesia**, the largest ASEAN state and the home of the ASEAN Secretariat, appears to have favored a "*middle of the road*" approach. At the height of the crisis in early September 2017, President Joko "*Jokowi*" Widodo dispatched Foreign Minister Retno Marsudi to Naypyidaw, the Myanmar capital, where she met with State Counsellor Aung San Suu Kyi and military Commander-in-Chief Senior General Min Aung Hlaing to express concern about the situation and offer assistance.<sup>92</sup>

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ters-recent-developments-rakhine-state.

83 Reuters, Malaysia summons Myanmar ambassador over violence in Rakhine State, 5 September 2017, available at: <https://www.reuters.com/article/us-myanmar-rohingya-malaysia/malaysia-summons-myanmar-ambassador-over-violence-in-rakhine-state-idUSKCN1BG1AH>.

84 Reuters, Malaysia summons Myanmar ambassador over violence in Rakhine State, 5 September 2017, available at: <https://www.reuters.com/article/us-myanmar-rohingya-malaysia/malaysia-summons-myanmar-ambassador-over-violence-in-rakhine-state-idUSKCN1BG1AH>.

85 Reuters, Malaysia's dissent on Myanmar statement reveals cracks in ASEAN façade, 25 September 2017, available at: <https://www.reuters.com/article/us-myanmar-rohingya-malaysia/malaysias-dissent-on-myanmar-statement-reveals-cracks-in-asean-facade-idUSKCN1C0124>.

86 VOA, Malaysia's Najib Leads Rally Against Rohingya 'Genocide', 4 December 2016, available at: <https://www.voanews.com/east-asia-pacific/malaysias-najib-leads-rally-against-rohingya-genocide>.

87 APHR interview, 4 June 2020.

88 APHR interview, 4 June 2020.

89 Kavi Chongkittavorn, ASEAN Rakhine approach: Slow but sure, Bangkok Post, 19 February 2019, available at: <https://www.bangkokpost.com/opinion/opinion/1631302/asean-rakhine-approach-slow-but-sure>.

90 Associated Press (AP), Mahathir slams Myanmar's Suu Kyi for handling of Rohingya, 13 November 2018, available at: <https://apnews.com/33243deac1e64291922d332eab44683a>, and South China Morning Post, Mahathir blasts Myanmar and United Nations over Rohingya 'genocide', 25 September 2019, available at: <https://www.scmp.com/news/asia/southeast-asia/article/3030350/mahathir-blasts-myanmar-and-united-nations-over-rohingya>.

91 The Bangkok Post, Malaysian PM: No more Rohingya refugees, 26 June 2020, available at: <https://www.bangkokpost.com/world/1941588/malaysian-pm-no-more-rohingya-refugees>.

92 Cabinet Secretariat of the Republic of Indonesia, Foreign Affairs Minister Meets with Aung San Suu Kyi to Discuss Rakhine Humanitarian Crisis, 4 September 2017, available at: <https://setkab.go.id/en/foreign-affairs-minister-meets-with-aung-san-suu-kyi-to-discuss-rakhine-humanitarian-crisis/>; Jakarta Globe, FM Retno Visits Myanmar Amid Increasing Violence in Rakhine

The main strategy appears to have been to keep a dialogue open with the Myanmar authorities and ensure there was a consistent channel of communication.

While this has been successful, tangible impact beyond that has, to date, been limited. “[President] Jokowi gave [Foreign Minister] Retno [Marsudi] a fair amount of latitude to work on this, but ultimately it didn’t go anywhere,” noted one analyst. “Indonesia overestimated its leverage in Naypyidaw, and in particular, overestimated the influence of personal relationships with Aung San Suu Kyi.”<sup>93</sup> With little progress bilaterally, Indonesia has instead focused its efforts on building consensus and taking the lead politically within ASEAN for action.<sup>94</sup>

As one of ASEAN’s main investors in Myanmar, **Singapore** has adopted a more cautious approach, keen to maintain economic ties and relationships. However, when the country assumed the chair of ASEAN in 2018, the government, aware that the crisis was having a negative impact on ASEAN’s international image, began to push for a stronger regional response.

In October 2018 Singapore’s Foreign Minister Vivian Balakrishnan told the Singaporean Parliament that ASEAN Foreign Ministers had discussed the crisis on the sidelines of the UN General Assembly in New York, expressing their “grave concern” about the loss of life, injuries, destruction and displacement. In unusually frank language, the Minister made explicit reference to Myanmar’s role in the crisis, saying: “To be brutally honest, this is a man-made humanitarian disaster and something which should not be happening in this day and age.”<sup>95</sup>

**Thailand**, which retains strong military ties with Myanmar, has largely stayed on the fence, although has been more engaged, and often not constructively, on issues around maritime movements which it, like Malaysia and Indonesia, is most affected by. In 2018 and again while ASEAN Chair in 2019, state officials pushed for a greater role for ASEAN in resolving the crisis, however these calls have been undermined by Thailand’s own abusive policies towards Rohingya refugees.<sup>96</sup>

**Brunei Darussalam** has so far not played an active role in the crisis, possibly because current ASEAN Secretary General Dato Lim Jock Hoi is a Brunei national, and to do so could risk undermining him.

While regionally Brunei has held with ASEAN consensus, in UN fora it has voted alongside other OIC countries on resolutions condemning atrocities, showing once again the split among ASEAN Member States. In a meeting with Bangladeshi premier Sheikh Hasina in April 2019 Sultan Haji Hassanal Bolkiah stressed the need for a “just and permanent solution” to the crisis.<sup>97</sup> Brunei is due to assume the Chair of ASEAN in 2021, and while some interviewees expressed low expectations of what might be achieved, there may be opportunities to push for more proactive engagement.

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State, 4 September 2017, available at: <https://jakartaglobe.id/context/fm-retno-visits-myanmar-amid-increasing-violence-rakhine-state/>.

93 APHR interview, 4 June 2020.

94 APHR interviews, May-July 2020.

95 Agence-France Presse (AFP), Southeast Asia urges Myanmar to hold military accountable for Rohingya crisis, 3 October 2018, available at: <https://www.frontiermyanmar.net/en/southeast-asia-urges-myanmar-to-hold-military-accountable-for-rohingya-crisis/>.

96 The Nation Thailand, Thailand to push for bigger Asean role in Rohingya crisis, 14 November 2018, available at: <https://www.nationthailand.com/ann/30358556>; and HRW, Thailand Offers Persecuted Rohingya Little Hope, 31 July 2019, available at: <https://www.hrw.org/news/2019/07/31/thailand-offers-persecuted-rohingya-little-hope>.

97 Dhaka Tribune, Rohingya crisis: Brunei Sultan for ‘just and permanent solution’, 22 April 2019, available at: <https://www.dhaka-tribune.com/bangladesh/foreign-affairs/2019/04/22/rohingya-crisis-brunei-sultan-for-just-and-permanent-solution>.

### ***“How can you uphold human rights if you do not interfere?”***

*A Rohingya activist.*<sup>98</sup>

As the crisis and international attention continued, inaction on the part of ASEAN became increasingly untenable. At the same time, and as Western governments began withdrawing support for Aung San Suu Kyi and imposing sanctions on military officials, the country was becoming increasingly isolated internationally, raising concerns that it was being pulled further into China's sphere of influence.<sup>99</sup> Keen to counter this, and also aware that the credibility of the bloc was increasingly under question, ASEAN leaders adopted a more proactive approach.

The growing engagement on the crisis can perhaps most clearly be seen in the bloc's end of Summit Statements. As described earlier, the ASEAN Summit, which is held twice annually, is the groups' supreme decision and policy-making body. There was no reference to the situation in Rakhine State in the April 2017 end of Summit statement, despite allegations of crimes against humanity and the displacement of tens of thousands of Rohingya to Bangladesh from October 2016.<sup>100</sup>

In November 2017, the final ASEAN Summit statement called for increased humanitarian access, while welcoming Myanmar's engagement with the Red Cross Movement.<sup>101</sup> The statement called on Myanmar to implement recommendations by the Kofi Annan Advisory Commission on Rakhine State and welcomed the government's commitment to end the violence and *“address the refugee problem”*.

By 2018, the ASEAN Summit Chairman described the situation in Rakhine as a *“matter of concern”*.<sup>102</sup> While it continued to offer its assistance to Myanmar, for example through support to the repatriation process and deployment of a needs assessment team to Rakhine State, the bloc also stressed the need to find a *“comprehensive and durable solution”* to address the *“root causes”* of the crisis and touched on the issue of accountability for the first time, albeit with reference to Myanmar's own domestic accountability initiatives.

By 2019, under Thailand's Chairmanship, it was clear that ASEAN was taking an increasingly proactive role in the crisis.<sup>103</sup> In addition to reiterating concerns and calls made after earlier Summits, the statement reaffirmed support for *“a more visible and enhanced role of ASEAN”* in areas of humanitarian assistance, facilitating the repatriation process of refugees, and promoting sustainable development in Rakhine State.

The statement noted the role of the ASEAN Secretary General (ASG) and AHA Centre in conducting a Preliminary Needs Assessment for Repatriation in Rakhine State (PNA), and announced that the ASG *“will go further with the recommendations contained in the PNA”*, although it did not provide further details on the timeframe and resources allocated for implementation.

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<sup>98</sup> APHR interview, 9 June 2020.

<sup>99</sup> For its part, China has taken several steps to support Myanmar or otherwise shield it from international criticism and censure. For example, China is believed to have pressured the Myanmar and Bangladesh governments to sign the “Arrangement on repatriation” in November in 2017, and has provided development infrastructure and assistance, including prefabricated shelters, to repatriation centres. China has also blocked or attempted to block resolutions and other initiatives at the UN Human Rights Council, as well as the Security Council where it holds veto powers.

<sup>100</sup> Chairman's Statement 30<sup>th</sup> ASEAN Summit, Manila, 29 April 2017, available at: [https://asean.org/storage/2017/04/Chairs-Statement-of-30th-ASEAN-Summit\\_FINAL.pdf](https://asean.org/storage/2017/04/Chairs-Statement-of-30th-ASEAN-Summit_FINAL.pdf).

<sup>101</sup> Chairman's Statement of the 31<sup>st</sup> ASEAN Summit, 13 November 2017, Manila, Philippines, available at: <https://asean.org/storage/2017/11/final-chairmans-statement-of-31st-asean-summit.pdf>.

<sup>102</sup> Chairman's Statement of the 33<sup>rd</sup> ASEAN Summit Singapore, 13 November 2018, available at: [https://asean.org/storage/2018/11/33rd\\_ASEAN\\_Summit\\_Chairman\\_s\\_Statement\\_Final.pdf](https://asean.org/storage/2018/11/33rd_ASEAN_Summit_Chairman_s_Statement_Final.pdf).

<sup>103</sup> Chairman's Statement of the 35<sup>th</sup> ASEAN Summit, Bangkok/Nonthaburi, 3 November 2019, available at: <https://asean.org/storage/2019/11/Chairs-Statement-of-the-35th-ASEAN-Summit-FINAL.pdf>.

## PUSHING INTERNAL BOUNDARIES BUT MISSING A VISION

While not all ASEAN actions have been adequate, or effective, and despite a slow and uncoordinated initial response, over the past three years it has acted in ways that have challenged its most central principle of non-interference, while still largely maintaining consensus (Myanmar has agreed to all statements and actions to date). It has also managed to position itself as a unique dialogue partner with Myanmar, keeping Naypyitaw's door open and engaging the government on some of the issues affecting Rakhine State.

One interviewee observed that, while ASEAN had limited relevance in Myanmar prior to the crisis, its influence has arguably increased since. Faced with western sanctions and needing to balance reliance on China, the Myanmar government was now looking to develop other regional partnerships: *"Before the crisis Aung San Suu Kyi didn't attend [ASEAN Foreign Minister] meetings. She didn't see them as important. Now she goes. It's not leverage, but its access and possibly influence."*<sup>104</sup>

However, despite ASEAN's relative success in maintaining access with and gaining influence over Myanmar, the bloc's intervention to date has been seriously undermined by a lack of a principled leadership, which could have allowed for a much more coordinated, cohesive and strategic approach.

Instead, Myanmar has been allowed to dictate the terms of ASEAN engagement and control the information received by the ASEAN Secretariat and Member States. As one analyst pointed out *"ASEAN is repeating [Myanmar]'s government fictions, and not making their own assessments"*.<sup>105</sup> Others told APHR that by allowing Myanmar to set the parameters of ASEAN engagement, the bloc was eroding its own credibility and undermining any notion that it is committed to a rule-based system. *"Instead of ASEAN lifting up the region, it's being dragged down by its members,"* said an NGO worker.<sup>106</sup> More importantly, ASEAN's reliance on Myanmar's narrative has meant that its response has been biased and, in some cases, could have led to more harm than good.

Now that ASEAN has started engaging more actively on the situation in Rakhine State, the question it must answer is whether it wants to capitalize on the influence it has gained over Myanmar and create positive and sustainable change there. This can be achieved by showing greater leadership, and through a coordinated and holistic strategy, which addresses the root causes of the crisis.

<sup>104</sup> APHR interview, 4 June 2020.

<sup>105</sup> APHR interview, 4 June 2020.

<sup>106</sup> APHR interview, 18 May 2020.

## 3.2 A MYOPIC APPROACH

***“The main problem is that ASEAN is treating this like a humanitarian crisis when it’s a human rights and political crisis.”***

*A humanitarian worker who operates in Rakhine State.<sup>107</sup>*

***“ASEAN’s efforts seem a tick-box approach. If you look at it from the principle of ‘first do no harm’ you shudder.”***

*A former diplomat with extensive experience working on Rakhine State.<sup>108</sup>*

### PREMATURE FOCUS ON REFUGEES REPATRIATION

When ASEAN has been proactive, it has focused on specific issues only, in particular the repatriation of refugees and humanitarian assistance, limiting itself to those the Myanmar government has agreed upon.

From the earliest days of the crisis, ASEAN leaders continually reiterated the need to ensure the safe, voluntary, and dignified return of refugees from Bangladesh, and after Myanmar and Bangladesh signed the “Arrangement on return of displaced persons from Rakhine State”, consistently called for its implementation.<sup>109</sup>

However, many of these calls were made without reference to the appalling situation of the Rohingya who remain in Rakhine State, and as a result, were considered to be counter-productive. As one humanitarian worker noted, “There was a singular focus on repatriation for well over a year when it wasn’t helpful or realistic. It felt really unconstructive.”<sup>110</sup> Indeed, for many Rohingya refugees in Bangladesh, as well as those in other countries, as long as there is no real change in the situation of the Rohingya remaining in Rakhine State, including the 126,000 confined in internment camps, they will not go home.<sup>111</sup>

When several attempts at repatriating Rohingya refugees failed in November 2018 and August 2019, ASEAN began to take a different approach, and started looking at ways it could support the return process, in particular by ensuring Myanmar had the necessary infrastructure in place to process returnees. In 2018 Myanmar invited ASEAN to play a more formal role in the process through the AHA Centre’s dispatch of a needs assessment team to identify potential cooperation opportunities in Rakhine State to facilitate the repatriation process of the Rohingya refugees. ASEAN leaders accepted the invitation during the 33<sup>rd</sup> ASEAN Summit in Singapore on 13 November 2018. This was the first time that the AHA Centre received instructions to engage on the issue from ASEAN leaders directly.<sup>112</sup>

In March 2019, an ASEAN-established ASEAN-ERAT, comprising 10 members from Indonesia, Malaysia, Myanmar, Singapore, Thailand, the AHA Centre and the ASEAN Secretariat, visited Rakhine State to conduct a Preliminary Needs Assessment mission “to support the Myanmar Government in its efforts regarding the repatriation process”.<sup>113</sup>

<sup>107</sup> APHR interview, 21 May 2020.

<sup>108</sup> APHR interview, 10 June 2020.

<sup>109</sup> Arrangement on return of displaced persons from Rakhine State between the Government of the People’s Republic of Bangladesh and the Government of the Republic of the Union of Myanmar, 23 November 2017.

<sup>110</sup> APHR interview, 25 May 2020.

<sup>111</sup> APHR interviews, May-July 2020.

<sup>112</sup> APHR interview, 22 July 2020.

<sup>113</sup> ASEAN Enhances Its Role on the Situation in Rakhine State, 14 March 2019, available at: <https://www.asean2019.go.th/en/news/.asean-enhances-its-role-on-the-situation-in-rakhine-state/>.

The visit was described as the “*first ever mission of ASEAN to Rakhine State*”, and was envisaged as the first step towards undertaking a Comprehensive Needs Assessment (CNA).<sup>114</sup>

The PNA was never officially released to the public, however a copy of the report was leaked in June 2019, and was heavily criticized by Rohingya activists, human rights and humanitarian organizations.<sup>115</sup> The report itself focuses primarily on a technical assessment of the facilities in the reception and transit centers, in particular the capacity and speed with which the centers can process returnees, procedures for registration, and provision of water, sanitation, healthcare and other assistance.

However, there were concerns about the PNA’s methodology, in particular as the team’s visits were facilitated by the Myanmar authorities, which essentially had the power to show them what they wanted them to see. The report was also heavily criticized for omitting any reference to the reason the Rohingya fled Myanmar and failing to acknowledge the Rohingya’s lack of citizenship or the severe, discriminatory, and state-imposed restrictions on freedom of movement that refugees would face upon return. The NVC is also presented without discussion, described simply as part of the repatriation process, while most Rohingya see it as a tool of their oppression. Incredibly, the report makes no reference to the conflict between the Myanmar military and the AA, which directly impacted the ASEAN-ERAT team’s mission when they went in 2019.<sup>116</sup> Finally, and perhaps most problematically, at no point did the team engage with or consult Rohingya refugees when undertaking the assessment.<sup>117</sup>

Adelina Kamal, AHA Centre’s Executive Director, has defended the report, asserting that ASEAN-ERAT focused on a technical assessment of factual information while working within its mandate, which did not include investigating or assessing allegations of human rights violations.<sup>118</sup> The limited scope of the PNA is even referenced in the report itself, which concludes that ASEAN-ERAT was unable to assess whether “*conditions are conducive for return*” as this was “*beyond the scope of the terms of reference*”.<sup>119</sup>

Several interviewees agreed that, while the PNA was extremely problematic for the reasons outlined above, technically the team did what they were mandated to do, and it would have been extremely difficult to stray away from that task.<sup>120</sup> Nonetheless, they and others expressed concern that by operating within the frameworks set and agreed to by Myanmar, the AHA Centre, and ASEAN more broadly, was instrumentalized by Myanmar to give the impression of progress where there is none.<sup>121</sup> Others, in particular Rohingya, felt the report either misrepresented or ignored key issues. “*That report ignored all the facts and transformed the situation into a humanitarian crisis when it’s not,*” one Rohingya activist said.<sup>122</sup> “*They knew that what they did was not up to standard but they did not want to admit it,*” said another interviewee.<sup>123</sup>

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114 ASEAN Enhances Its Role on the Situation in Rakhine State, 14 March 2019.

115 Straits Times, Outcry as Asean report predicts ‘smooth’ return of Rohingya to Myanmar, 8 June 2019, available at: <https://www.straitstimes.com/asia/se-asia/outcry-as-an-asean-report-predicts-smooth-return-of-rohingya-to-myanmar>.

116 There was intense fighting, in particular in central Rakhine State, in March 2019. See for example, Amnesty International, “No one can protect us”: War crimes and abuses in Myanmar’s Rakhine State, 29 May 2019.

117 PNA on file with APCR.

118 Channel News Asia, AHA Centre defends leaked report on Rohingya refugees, 10 June 2019, available at: <https://www.channelnewsasia.com/news/asia/aaha-centre-defends-leaked-report-on-rohingya-refugees-11613142>.

119 PNA p. 19.

120 APCR interviews, May-July 2020.

121 APCR interviews, May-July 2020.

122 APCR interview, 9 June 2020.

123 APCR interview, 27 May 2020.

## INTERNATIONAL HUMAN RIGHTS AND REFUGEE RETURNS

International human rights law establishes the right of everyone to return to his or her own country.<sup>124</sup> Before promoting or facilitating the return of refugees to the places of origin, it is essential that several key criteria should be assessed and met.<sup>125</sup>

**Safety:** Returning refugees should not fear persecution or punishment upon their return, and a place is only considered safe if it is unlikely that returnees would be subjected to human rights violations. Safety includes the absence of conflict and violence, as well as the presence of structures and institutions that would protect returnees and ensure accountability for abuses against them.

**Voluntary:** For the return of refugees to their country of origin to be truly voluntary, it must be based on their free and informed consent. This requires having access to information about the situation in the area of return, as well as other options to repatriation, namely resettlement in another country or local integration in the host community. Voluntary returns also require the absence of pressure, whether physical, psychological, or material, to force or coerce refugees to return.

**Dignified:** Returning refugees need to have access to means of subsistence, which are sufficient to maintain an adequate standard of living. This would include, for example, adequate housing, access to essential services such as healthcare and education, livelihood and work opportunities, and legal protection including legal status.

**Sustainable:** The sustainability of returns is essential for any repatriation process, which is why it is essential to ensure the safety, dignity, and voluntariness of any returns. Failure to do so risks further conflict and displacement. Assessing and monitoring the sustainability of refugee returns requires the involvement of the UN Refugee agency, as well as access for other humanitarian agencies and independent monitors.

By January 2020, a new Ad-hoc Support Team (AHAST) was established under the ASG to support the implementation of the recommendations of the PNA, and identify further projects through which ASEAN could help improve conditions in Rakhine State.<sup>126</sup> “*The center of gravity is no longer with the AHA Centre, it has now shifted to the Secretary General*,”<sup>127</sup> explained an ASEAN official. The Myanmar Government also formed a Technical Working Group with counterpart Ministries, UEHRD, ASEAN Secretariat, and the AHA Centre, which has “*worked on the development of tools and procedures for executing Comprehensive Needs Assessment and implementation of the PNA’s recommendations*” with the guidance of a High-Level Strategic Coordination Group. The CNA is now being developed.<sup>128</sup>

124 International Covenant on Civil and Political Rights, Article 12(4); Convention on the Elimination of all Forms of Racial Discrimination. Article 5(d)(ii).

125 For further information see UNHCR, Handbook on voluntary repatriation: International protection, 1996, available at: <https://www.unhcr.org/publications/legal/3bfe68d32/handbook-voluntary-repatriation-international-protection.html>.

126 Press Statement by the Chairman of the ASEAN Foreign Ministers’ Retreat, (Nha Trang, 16-17 January 2020), available at: <https://asean.org/storage/2020/01/17.1.2020-AMMR-Press-Statement-Final.pdf>.

127 APCR interview, 22 July 2020.

128 APCR interview, 22 July 2020.



While some interviewees raised concerns about the initiative, others, in particular those with experience working with ASEAN, saw the move as a positive one: “I think we have an opportunity with ASEAN now that we have a task force, which is under the Secretary General, which is the right level of authority. The question now, they observed was “do we have the right people there? Do we have the right approach? Do we have the ability to really understand what opportunities are, what the context is, and how to engage with people?”<sup>129</sup>

To date, it is unclear precisely what the work of AHAST will involve, although it is understood to be focusing on socio-economic development in Rakhine State and is looking for projects that ASEAN can support.

What is clear is that ASEAN is increasing its capacity and resources to respond to the crisis in Rakhine State. To ensure such efforts spent building and assessing repatriation capabilities are not wasted, ASEAN needs to acknowledge and address the situation that led the Rohingya to flee in the first place. By confronting these issues, ASEAN will both ensure its interventions do not do harm but also have a greater impact, as refugees will only return to a situation where they do not face entrenched discrimination, violence, and restrictions on their lives and liberty.

## TIME TO ADDRESS ROOT CAUSES AND “SENSITIVE ISSUES”

Since the most recent iteration of the Rohingya crisis began in August 2017, ASEAN has often made reference to the need to “address root causes” and “create a conducive environment so that affected communities can rebuild their lives”.<sup>130</sup> In particular, the bloc has called for the full implementation of recommendations made by the Advisory Commission on Rakhine State, which provide a blueprint for addressing the situation for all communities, and have been accepted by the government of Myanmar.

However, despite such calls, ASEAN and its Member States have mainly taken action around repatriation and humanitarian assistance. Multiple interviewees said that these issues were often “low-hanging fruit”, and that the bloc was not engaging Myanmar on key, and politically sensitive issues, such as restoration of citizenship rights, restrictions on movement, enforced ethnic segregation, and hate speech. “They continue to push aside underlying problems,” noted a human rights activist from Myanmar.<sup>131</sup> A Rohingya activist expressed similar frustrations: “We appreciate humanitarian aid but it’s not enough.”<sup>132</sup>

One example cited is the failure to confront Myanmar on the severe restrictions on movement which are imposed by its authorities on Rohingya communities solely on the basis of their ethnic and religious identity. Such restrictions have been well documented, and remain deeply entrenched.<sup>133</sup> Instead, ASEAN appears to have supported, at least in principle, continuing restrictions on Rohingya’s movement. For example, the PNA states:

“Security measures set in place may potentially cause inconvenience to the returnees e.g. [...] curfews and recording of movement... However, it is important to note that such measures are ultimately established for the safety and long-term benefit of all [...]”<sup>134</sup>

<sup>129</sup> APHR interview, 27 May 2020.

<sup>130</sup> All end of Summit statements since 2018. See <https://asean.org/wp-content/uploads/2018/04/Chairmans-Statement-of-the-32nd-ASEAN-Summit.pdf>, [https://asean.org/storage/2018/11/33rd\\_ASEAN\\_Summit\\_Chairman\\_s\\_Statement\\_Final.pdf](https://asean.org/storage/2018/11/33rd_ASEAN_Summit_Chairman_s_Statement_Final.pdf), [https://asean.org/storage/2019/06/Final\\_Chairs-Statement-of-the-34th-ASEAN-Summit\\_as-of-23-June-2019-12....pdf](https://asean.org/storage/2019/06/Final_Chairs-Statement-of-the-34th-ASEAN-Summit_as-of-23-June-2019-12....pdf), <https://www.asean2019.go.th/wp-content/uploads/2019/11/ca06bbf8b350067e0d97f4313b59476c.pdf>, <https://asean.org/storage/2020/06/Chairman-Statement-of-the-36th-ASEAN-Summit-FINAL.pdf>.

<sup>131</sup> APHR interview, 27 May 2020.

<sup>132</sup> APHR interview, 7 July 2020.

<sup>133</sup> Amnesty International, Caged without a roof: Apartheid in Myanmar’s Rakhine State, 21 November 2017; Independent Rakhine Initiative (IRI), Freedom of Movement in Rakhine State, March 2020, <https://spark.adobe.com/page/2yY6hUP7Q48bb/>.

<sup>134</sup> PNA, paras. 20 and 44.

The PNA goes on to describe movement restrictions as a “short-term inconvenience”, despite the fact that discriminatory restrictions on Rohingya movement have been in effect for decades and have had wide-ranging impact on their physical safety and well-being.<sup>135</sup>

ASEAN and its Member States are also providing financial aid and assistance to Rakhine State for infrastructure projects, such as schools and hospitals, seemingly without ensuring that all communities can access them.<sup>136</sup> ASEAN has sought to provide assistance to communities in need, and twice delivered humanitarian aid to Rakhine State in October and December 2017 through the AHA Centre. Since then, however, no humanitarian aid has been delivered. While the Centre has tried to monitor and verify that aid was distributed fairly, and without discrimination, an interviewee with knowledge of the AHA Centre’s work explained: “*Guaranteeing that all recipients will be getting [aid] is challenging ... [The AHA Centre] operates on basis of trust with [the authorities]. [They have to] believe and trust that [Myanmar] is going to implement [aid delivery] ... and follow principles of impartiality*”.<sup>137</sup>

Similarly, several interviewees referenced Indonesia donating money to build a hospital in Rakhine State.<sup>138</sup> However, they pointed out that there was very little information about the hospital, including whether it was accessible by people from all ethnic and religious communities.<sup>139</sup> The result is that such engagement risks doing harm and entrenching discrimination and segregation rather than addressing concerns. A humanitarian working on Rakhine State explained the frustrations:

*“It’s hard to see the impact of assistance, however great it may be, in a context where Rohingya have no ability to access livelihoods, can’t go to the market or health clinic, and can’t pursue education beyond primary education. You might be able to help with lifesaving support but ultimately, it’s hard to see real impact when structural restrictions remain in place.”*<sup>140</sup>

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135 PNA, paras. 20 and 44.

136 Malaysian aid for Rakhine arrives in Rakhine, 10 Feb 2017, available at: <https://reliefweb.int/report/myanmar/malaysian-aid-rakhine-arrives-myanmar>; Indonesia funds US\$500,000 to support ASEAN efforts in the repatriation of displaced persons in Myanmar 20 December 2019, available at: <https://asean.org/indonesia-funds-us500000-support-asean-efforts-repatriation-displaced-persons-myanmar/?highlight=rakhine>; Vietnam decided to offer Myanmar 100,000 USD for humanitarian aid, reconstruction and development in Rakhine, January 2018 2019, available at: <https://vnembassy-yangon.mofa.gov.vn/en-us/News/EmbassyNews/Pages/Special-Envoy-of-the-Vietnamese-Prime-Minister-Nguyen-Quoc-Dung-visit-Myanmar.aspx>.

137 APCR interview, 22 July 2020. See also AHA Centre, AHA Centre Delivers 80 Tons of Relief Materials to Rakhine State, Myanmar, 26 October 2017, available at: <https://ahacentre.org/press-release/aha-centre-delivers-80-tons-of-relief-materials-to-rakhine-state-myanmar/>; and AHA Centre Facilitates Humanitarian Assistance between Singapore and Myanmar for Displaced Communities in Rakhine State, 14 December 2017, available at: <https://ahacentre.org/press-release/press-release-aha-centre-facilitates-humanitarian-assistance-between-singapore-and-myanmar-for-displaced-communities-in-rakhine-state/>.

138 APCR interviews, May-July 2020. See also Indonesian Ministry of Foreign Affairs, Construction of Indonesian Hospital in Rakhine State Begins”, 20 November 2017, available at: <https://reliefweb.int/report/myanmar/construction-indonesian-hospital-rakhine-state-begins>.

139 According to the statement by Indonesian’s Ministry of Foreign Affairs, the hospital will “provide health services for all communities in Myaung Bwe inclusively, regardless of their race, religion and background.” However, a 2017 report by Amnesty International, while discussing access to medical facilities, noted: “When Muslims are able to get to Sittwe General Hospital or Myaung Bway hospital they are kept on separate, segregated wards. Amnesty International’s interviews confirm that these hospitals have only been segregated since after the 2012 violence, with health officials citing security concerns.” Amnesty International, Caged without a roof: Apartheid in Myanmar’s Rakhine State, 21 November 2017, p. 63.

140 APCR interview, 25 May 2020.

## DO NO HARM

The principle of “Do no harm” is a central tenet of humanitarian and development action and engagement. At its simplest, it requires all humanitarian and development workers, their organization and agencies, to take measures to ensure that they do not cause further harm and suffering, whether direct or indirect, as a result of their actions. It recognizes that humanitarian aid and development assistance is not neutral, and depending on how it is administered and distributed, has the potential to strengthen or weaken specific groups and communities, including by creating or perpetuating power imbalances and stereotypes, entrenching inequalities, or placing people at risk of physical, psychological, emotional, or other harm.

Key to “doing no harm” is developing a deep analysis and understanding of the context, including the political, economic, social, legal, technological, environmental contexts. This should be undertaken in close consultation with affected communities and subject to rigorous and ongoing monitoring and updating.

Another area where ASEAN has failed to engage Myanmar on key human rights issues, and has alarmingly propped up government narratives and policies of discrimination and persecution, is citizenship for the Rohingya. A clear example is their endorsement of the NVC, which forms a central part of Myanmar’s plans for repatriation, and features heavily in the PNA.

When ASEAN delegations have visited the refugee camps in Cox’s Bazar, they promoted the NVC, which they claim is simply part of the repatriation process. Yet for Rohingya, NVCs are part of the problem, a tool of their persecution and another way the Government of Myanmar refuses to recognize and respect their right to self-identify, and implies that they are actually “foreigners”.<sup>141</sup> Moreover, as described earlier, in Rakhine State itself, NVCs are closely linked with violence and oppression as the Myanmar authorities have at times used forced and other forms of coercion in order to pressure Rohingya into accepting the card.<sup>142</sup>

ASEAN has also been notably quiet regarding the intensifying conflict between the Myanmar military and the AA. As discussed earlier, human rights groups have documented how the Myanmar military, and to a lesser extent the AA, have committed serious violations against all communities living in the state. In a report to the UN Human Rights Council in September 2020, the Office of the High Commissioner for Human Rights said the security forces may be committing war crimes and crimes against humanity during the conflict.<sup>143</sup> The situation raises serious concerns about the feasibility of refugee returns. As one interviewee asked: “How can you talk about repatriation when [Rakhine] is a war zone?”<sup>144</sup> Addressing the situation in Rakhine State requires taking a “whole of Rakhine” approach. As a former diplomat and expert on Rakhine State noted: “If they are going to look only at the situation of the Rohingya, they’re missing the point. There is no solution to the problems of Rakhine State until you can address the well-being of all in Rakhine who call it home.”<sup>145</sup>

141 Fortify Rights, “Tools of genocide”: National Verification Cards and the Denial of Citizenship of Rohingya Muslims in Myanmar, September 2019.

142 The Arakan Project, United Nations Human Rights Council: Submission to the UN Universal Periodic Review 37th Session of the UPR Working Group January/February 2021, 9 July 2020, para. 12; “Tools of genocide”: National Verification Cards and the Denial of Citizenship of Rohingya Muslims in Myanmar, September 2019.

143 Situation of human rights of Rohingya Muslims and other minorities in Myanmar, Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc: A/HRC/45/5, 3 September 2020, para. 18.

144 APCR interview, 27 May 2020.

145 APCR interview, 10 June 2020.

Over the past three years, the Myanmar government has taken no meaningful steps to address the “root causes” of the crisis. The apartheid system remains unchallenged, discriminatory policies regarding citizenship, and restrictions on movement and access to services are still in effect and actively enforced. Rohingya forced from their homes in 2012 remain detained in camps, and Myanmar’s security forces continue to commit conflict-related abuses against civilians. It is clear that unless directly challenged and engaged on those issues, the Myanmar government will not take any meaningful steps towards restoring the rights of the Rohingya, ensuring accountability for atrocities, and establishing peace in Rakhine State.

Ultimately, if ASEAN wants to have an impact and be effective in Rakhine State, it needs a proper understanding and acknowledgment of all aspects of the crisis, whether human rights, political, humanitarian, social, or economic, as well as proper mechanisms to assess and mitigate the risk of causing harm. Otherwise, its attempts at intervening will be counter-productive and risk contributing to entrenching segregation, perpetuating serious human rights violations, including crimes under international law and pushing more Rohingya to seek safety in neighboring countries.



With a comprehensive and holistic strategy, guided by the principle of doing no harm and ensuring the restoration of Rohingya’s rights, including their right to a remedy for the harm they have suffered, ASEAN has the opportunity to play a positive role in Rakhine State. It could use its unique relationship with Myanmar to effectively promote lasting solutions for Rakhine State and the region as a whole.

## REPARATIONS AND THE RIGHT TO AN EFFECTIVE REMEDY

Under international human rights law and standards, any person whose rights or freedoms are violated has the right to an effective remedy. States are required to ensure the realization of this right, including when the perpetrator was acting in an official capacity. As a result, Rohingya in Myanmar, those who fled, and other communities subjected to human rights violations have the right to a remedy for the harm they have suffered. One aspect of the right to a remedy is the prompt, independent, impartial, and effective investigation of the violation, and the prosecution and punishment of those responsible in fair trials before independent courts. Another important aspect is effective reparation to victims for the harm suffered. This can take different forms, and in the case of the Rohingya should include:<sup>146</sup>

**Restitution:** This should, as much as possible, restore the victim(s) to their original situation before the gross violation of their rights. Given the decades of state-sponsored discrimination and persecution of the Rohingya, this does not mean returning them to the situation just prior to October 2016, or indeed 2012, which was already unacceptable. It would mean restoring their citizenship rights and freedom of movement, as well as allowing displaced Rohingya to return to their original place of residence, among others.

**Compensation:** This includes compensation for physical or mental harm, lost opportunities, and legal and medical costs.

**Rehabilitation:** Including medical and psychological care, legal and social services, and social reintegration.

**Satisfaction:** This would include the cessation of ongoing violations, judicial and administrative sanctions against those responsible for the violations, public disclosure of the truth (without causing further harm), and apology.

**Guarantees of non-repetition:** This includes effective civilian control of military and security forces, ensuring trials meet international standards of due process, fairness and impartiality, and reviewing and reforming laws contributing to or allowing gross violations of international human rights and humanitarian law.

Reparations should in each case be proportional to the gravity and seriousness of the violation.

<sup>146</sup> See, for example, UN Commission on Human Rights, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

## THE CORE QUESTION OF ACCOUNTABILITY

ASEAN has also been supportive of Myanmar's domestic accountability initiatives. As previously noted, in May 2018, the Myanmar government established the Independent Commission of Enquiry (ICOE), mandated to investigate allegations of human rights violations from August 2017. The Commission submitted its final report to the President in January 2020; although the executive summary and some of the annexes were released, the full report has yet to be made public.<sup>147</sup>

ASEAN indicated its support for the ICOE soon after the Commission was established. In its November 2018 end of Summit Statement, the bloc expressed its expectation that the ICOE would “seek accountability by carrying out an independent and impartial investigation of the alleged human rights violations and related issues”.<sup>148</sup>

This language has been replicated in further ASEAN statements, including end of Summit Statements in 2019. It was the first time ASEAN had broached the issue of accountability, usually a thorny one in a region where impunity for human rights violations often reigns supreme.

However, it appears that the bloc had originally wanted to take a stronger stance. According to Reuters, which obtained a draft of the 2018 statement before it was delivered, the initial language was somewhat stronger, “calling” on the ICOE to carry out an independent and impartial investigation (as opposed to expressing an expectation) and to “hold those responsible fully accountable” (as opposed to “seeking accountability”).<sup>149</sup> Reporting at the time indicates that the strengthened tone and language was in part due to Singapore, which held the ASEAN Chair in 2018 and had been pushing for a stronger regional stance.<sup>150</sup> However, ultimately, weaker language was adopted, as all statements must be agreed on by consensus: “If less than 10 members agree [on something], it can't recognize something as an ASEAN position”, explained an ASEAN official.<sup>151</sup> Interestingly, in its end of Summit statement in June 2020, ASEAN simply “notes” the submission of the ICOE report, indicating that there is reluctance among some Member States to welcome or praise it.<sup>152</sup>

While ASEAN has acknowledged the government-established ICOE, it is unclear what position, if any, it takes on the various military investigations and domestic justice processes that are underway.

As a body, ASEAN has also not taken a position on international justice, and public statements as well as voting patterns in UN fora indicate a split in the region. When the UN Human Rights Council voted to establish the IIMM in September 2018, the Philippines was the only ASEAN State with a seat on the Council, and voted against the resolution.<sup>153</sup>

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147 Office of the President, Executive Summary Of Independent Commission of Enquiry-ICOE: Final Report, available at: <https://www.president-office.gov.mm/en/?q=briefing-room/statements-and-releases/2020/01/21/id-9839>.

148 Chairman's Statement of the 33rd ASEAN Summit, Singapore, 13 November 2018, available at: [https://asean.org/storage/2018/11/33rd\\_ASEAN\\_Summit\\_Chairman\\_s\\_Statement\\_Final.pdf](https://asean.org/storage/2018/11/33rd_ASEAN_Summit_Chairman_s_Statement_Final.pdf), para 37.

149 Reuters, Myanmar's neighbors to call for 'accountability' in Rakhine crisis: draft statement, 13 November 2018, available at: <https://fr.reuters.com/article/idUSKCN1N10I2>. <https://fr.reuters.com/article/idUSKCN1N10I2>.

150 AFP, Southeast Asia urges Myanmar to hold military accountable for Rohingya crisis, 3 October 2018, available at: <https://www.frontiermyanmar.net/en/southeast-asia-urges-myanmar-to-hold-military-accountable-for-rohingya-crisis/>; and Reuters, Myanmar's neighbors to call for 'accountability' in Rakhine crisis: draft statement, 13 November 2018, available at: <https://fr.reuters.com/article/idUSKCN1N10I2>. <https://fr.reuters.com/article/idUSKCN1N10I2>.

151 APHR interview, 11 June 2020.

152 Chairman's Statement of the 36th ASEAN Summit, 26 June 2020, available at: <https://asean.org/storage/2020/06/Chairman-Statement-of-the-36th-ASEAN-Summit-FINAL.pdf>. <https://asean.org/storage/2020/06/Chairman-Statement-of-the-36th-ASEAN-Summit-FINAL.pdf>.

153 Human Rights Council adopts 10 Resolutions and one Presidential Statement, 28 September 2018, available at: <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23652&LangID=E>.

By contrast, Malaysia, Indonesia, and Brunei Darussalam, all of whom are members of the OIC, which co-sponsored the resolution, supported the text.<sup>154</sup> It is important to note, however, that interviewees with knowledge of behind-the-scenes negotiations told APHR that Indonesia in particular pushed for watered-down language on accountability.<sup>155</sup>

The split among ASEAN states is more easily discernible in the voting patterns at the UN General Assembly (UNGA). A resolution led by the OIC in late 2018 “welcomed” the establishment of the IIMM and made reference, albeit veiled, to the UN security Council’s authority to refer the situation to the ICC.<sup>156</sup> Of the ten ASEAN States, three voted in favor (Brunei Darussalam, Indonesia, and Malaysia), five voted against (Cambodia, Laos, Myanmar, the Philippines, and Vietnam), and two abstained (Singapore and Thailand).<sup>157</sup> Voting on a subsequent resolution in late 2019 followed the same pattern.<sup>158</sup>

The voting doesn’t just indicate a split among ASEAN Members States, it shows a split across religious lines, as the three states supporting the resolution are Muslim majority countries and members of the OIC. An analyst interviewed for this report noted that one of the reasons for ASEAN’s sensitivity around the Rakhine crisis is that it has the potential to polarize the bloc along religious lines, something ASEAN has tried to avoid since its establishment, as it could spark an existential crisis.<sup>159</sup>

In its 2018 report, the UN Fact-Finding Mission made clear that it did not believe Myanmar was capable of independently or credibly investigating allegations of serious crimes in the country, or of holding the perpetrators to account.<sup>160</sup>

To APHR, like the IIFFMM and many other civil society organizations, it is clear that Myanmar has neither the ability, willingness, competence, nor credibility to hold perpetrators to account. As a matter of principle, in particular since atrocities against the Rohingya continue,<sup>161</sup> as do war crimes and other abuses against ethnic minorities in Rakhine, Chin, Shan, and Kachin States,<sup>162</sup> APHR calls for all states, including ASEAN Member States, to support a referral of the situation in Myanmar to the ICC. This position is also shared by more than 120 Parliamentarians from the region.<sup>163</sup>

APHR acknowledges that support for such a referral by any ASEAN member is unlikely at this time. However, given ASEAN’s engagement on the crisis, it is essential that ASEAN Member States ensure that, at minimum, they do not support or legitimize domestic accountability processes which do not comply with international human rights law and standards and which deny victims their rights to justice, truth, and reparation. The right to an effective remedy is a fundamental tenet of international human rights law.

154 None of these three states had a seat on the Human Rights Council at the time, and so were unable to cast a vote, however all OIC members had to agree to and support the text in order for the resolution to be cosponsored by the OIC.

155 APHR interviews, May-July 2020.

156 Situation of human rights in Myanmar, Resolution adopted by the General Assembly on 22 December 2018, UN Doc: A/73/589/Add.3, 22 January 2019, available at: <https://undocs.org/en/A/RES/73/264>.

157 To view the voting record, see: <https://digitallibrary.un.org/record/1657120?ln=en>. <https://digitallibrary.un.org/record/1657120?ln=en>.

158 Situation of human rights of Rohingya Muslims and other minorities in Myanmar, Resolution adopted by the General Assembly on 27 December 2019, UN Doc: A/RES/74/246, 15 January 2020, available at: <https://undocs.org/en/A/RES/74/246>. To view the voting record, see: <https://digitallibrary.un.org/record/3841021?ln=en>. <https://digitallibrary.un.org/record/3841021?ln=en>.

159 APHR interview, 4 June 2020.

160 Independent International Fact-Finding Mission on Myanmar (IIFFMM), Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/64, 17 September 2018,

161 IIFFMM, Detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc: A/HRC/42/CRP.5, 16 September 2019, HRW, “An Open Prison without End”: Myanmar’s Mass Detention of Rohingya in Rakhine State, 8 October 2020.

162 See for example IIFFMM, Detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc: A/HRC/42/CRP.5, 16 September 2019, Amnesty International, “No one can protect us”: War crimes and abuses in Myanmar’s Rakhine State, 29 May 2019; and Amnesty International “Caught in the middle”: Abuses against civilians amid conflict in Myanmar’s northern Shan State, 24 October 2019, available at: <https://www.amnesty.org/en/documents/asa16/1142/2019/en/>

163 APHR, Southeast Asian lawmakers call for international justice for Rohingya atrocities, 24 August 2018, available at: [https://aseanmp.org/wp-content/uploads/2018/08/APHR\\_JointMPStatement\\_RohingyaCrisisAnniversary\\_2018-08-24](https://aseanmp.org/wp-content/uploads/2018/08/APHR_JointMPStatement_RohingyaCrisisAnniversary_2018-08-24).

## INTERNATIONAL STANDARDS FOR INVESTIGATING AND PROSECUTING HUMAN RIGHTS VIOLATIONS AND SERIOUS CRIMES

International human rights law and standards identify key criteria that should underpin any investigation into human rights violations and serious crimes. These include:<sup>164</sup>

**Prompt:** States should initiate an investigation into an alleged human rights violation at the earliest opportunity; investigations should be processed without unreasonable delay.

**Thorough and effective:** Investigations should be conducted in a manner that allows for or could lead to the identification, prosecution, and punishment of those responsible for violations, including those with command or superior responsibility. As well as identifying perpetrators, investigations should seek to identify patterns where possible, as well as any policies or systemic failures that allowed for or contributed to the commission of the violation.

**Independent and impartial:** The investigation process, including investigators, must be independent from individuals and institutions implicated in the violation. All individuals involved in an investigation must be impartial, objective, and free from bias.

**Transparent:** The investigation, including the process of investigation and its outcome, should be transparent and accessible to the public as well as victims' families. While authorities can limit access to some information about an investigation (for example, to protect privacy or security of individuals, or to protect the integrity of ongoing investigations or other justice processes), these limitations can only be for a legitimate purpose, and only when strictly necessary for that purpose.

Investigations should be well-resourced and have the ability to ensure the protection of witnesses and their family members. Where they progress to trial, these should be conducted before independent, civilian courts, in accordance with international fair trial standards, and without the imposition of the death penalty. Victims should receive reparations for the harm suffered (see Box on p.39 for more information about reparations and other remedies).

<sup>164</sup> See for example, The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), Office of the United Nations High Commissioner for Human Rights, New York/Geneva, 2017; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Recommended by General Assembly resolution 55/89 of 4 December 2000; Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol"), 2004; and Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989.



## 3.3 NEED FOR TRANSPARENCY AND ENGAGEMENT

***“Rohingya should decide their future. We should be involved in the discussion.”***

*Sharifah Shakirah, Founder and Director of Rohingya Women Development Network.<sup>165</sup>*

A major theme that emerged time and again from interviewees, whether from Rohingya themselves, humanitarians, civil society actors, analysts, or members of the diplomatic community, is a lack of transparency and engagement on the part of ASEAN bodies. This is not a new criticism, nor is it one that is limited to the Rakhine crisis. For years civil society actors and others have complained about a lack of information and feedback from official ASEAN meetings and challenges in accessing and engaging with ASEAN representatives.<sup>166</sup>

However, the extreme sensitivity around the Rakhine crisis, in particular as a result of the Myanmar government’s refusal to even recognize the Rohingya as citizens, has meant that ASEAN has been unwilling to provide information about its discussions and activities. Illustrative of this is the failure of multiple ASEAN bodies and entities to respond to APhR’s requests for interviews and information for this report.

Some have argued that keeping discussions private and behind closed doors, in line with the “ASEAN Way”, allows Member States to speak more frankly and robustly about the situation in Rakhine State.<sup>167</sup> While this may be true to some extent, for those on the outside it makes it extremely difficult to know if an issue was even discussed among ASEAN members states, and if it was, whether there was any decision taken or commitment made. *“We hear that they discuss [Rakhine] issues during ASEAN retreats over the past few years, but what are the results of these discussions? How can we follow-up?”* asked one regional NGO worker.

Without this information, civil society actors and others are unable to hold ASEAN and its Members States to their commitments, or to ensure they are accountable for their decisions.

The lack of transparency, in particular the provision of information about ASEAN discussions, agreements, and plans, is also deeply problematic for Rohingya communities, who already find it difficult to get a seat at the table to discuss their futures. Even meeting with ASEAN representatives can be difficult, as one Rohingya activist explained: *“We have tried, but there are not many opportunities to access [ASEAN]. Everything is closed-door and behind the scenes... We need to have our voices as the Rohingya community heard in their discussions.”*<sup>168</sup>

In response to criticism, ASEAN made some efforts to engage with Rohingya communities. However, these have been problematic. An ASEAN team comprised of representatives from the ASEAN Secretariat, the AHA Centre, and the ASEAN-ERAT team conducted two high-level visits to the refugee camps in 2019, one in July, the other in December.<sup>169</sup>

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<sup>165</sup> APhR interview with Sharifah Shakirah on 2 July 2020.

<sup>166</sup> APhR interviews, May-July 2020.

<sup>167</sup> APhR interview, 9 June 2020. Kishore Mahbubani and Jeffrey Sng, *The ASEAN Miracle: A Catalyst for Peace* (NUS Press, 2017).

<sup>168</sup> APhR interview, 9 June 2020.

<sup>169</sup> ASEAN team joined the second high-level visit in Cox’s Bazar to facilitate repatriation, 20 December 2019, available at: <https://ahacentre.org/press-release/asean-team-joined-the-second-high-level-visit-in-coxs-bazar-to-facilitate-repatriation/>.

The first was aimed at understanding the needs of refugees and sharing plans for repatriation, as well as discussing the findings of the ASEAN-ERAT team's PNA. The second focused on the repatriation process and progress on returning refugees to Myanmar.

For both meetings some refugee representatives complained that the teams did not listen to their concerns, and tried to promote the NVC, which the Rohingya categorically reject.<sup>170</sup>

*"It was positive that ASEAN consulted with Rohingya refugees in Cox's Bazar, but the substance of the consultation was so limited,"* noted one humanitarian worker.<sup>171</sup> A Rohingya refugee who was present at one of the meetings explained his frustration: *"They met with us... but there was no follow-up. They never came back."*<sup>172</sup>

Interviewees underscored the importance of sustained ASEAN engagement and consultation with Rohingya communities, with those inside Rakhine State, in the refugee camps in Bangladesh, as well as in the diaspora.<sup>173</sup> This is important not just to ensure Rohingya's voices and experiences are heard, but to ensure that the key issues affecting them are understood and addressed. Ensuring a diversity of voices, including women, children, older people, and people with disabilities, in discussions is also essential.

Failure to do so risks undermining the whole process of ASEAN engagement on the crisis and stripping Rohingya of agency, warned one Rohingya activist: *"There needs to be an ongoing process... Otherwise it will become a media show... [delegations] go there and say 'yes we met [with the communities]' ... but what was discussed? Have people been able to bring up the issues that are important to them?"*<sup>174</sup> Without meaningful and sustained inclusion of Rohingya in discussions about their future, any plans, whether for return, resettlement, or integration within Bangladesh, are likely to fail.

Civil society activists and representatives from non-governmental organizations also expressed frustration about the difficulty of accessing ASEAN representatives and engaging with ASEAN bodies.<sup>175</sup> *"It's difficult to get an entry point for engagement,"* explained one interviewee.<sup>176</sup> Regional and national human rights activists told APHR that they found it very difficult to meet with ASEAN representatives or officials from ASEAN Member States in Southeast Asia. As a result, some do not engage at all.

Others explained that it was usually easier and more effective to engage in UN fora in New York and Geneva. However, such engagement is extremely difficult for organizations without offices in these locations or the resources to travel.<sup>177</sup>

Humanitarian workers also expressed frustration with the lack of access and engagement with ASEAN. Several explained that it was extremely difficult to obtain information about what ASEAN is doing in Rakhine State. While there is some high-level engagement between ASEAN and humanitarian organizations, for example through established mechanisms like the AADMER Partnership Group (APG), much of this is focused on operational issues and capacity building, and participation is limited to a select few organizations.<sup>178</sup> Discussion and advocacy around "sensitive" issues, such as citizenship and accountability, in these fora is deemed impossible.<sup>179</sup>

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170 APHR interviews, May-July 2020.

171 APHR interview, 25 May 2020.

172 APHR interview, 23 June 2020.

173 APHR interviews, May-July 2020.

174 APHR interview, 9 June 2020.

175 APHR interview, 18 May 2020.

176 APHR interview, 21 May 2020.

177 APHR interviews, May 2020.

178 APHR interviews, May-July 2020.

179 APHR interviews, May-July 2020.

Despite the challenges of engaging with ASEAN, some humanitarian workers said they had observed an increasing openness on the part of the regional grouping to discuss general humanitarian principles and technical assistance. This particularly appeared to be the case for organizations that have dedicated specific resources, whether human, financial, or otherwise, to engaging with ASEAN. Representatives from these organizations said they felt there was a potential to further increase engagement, but it would require investing time and effort to build trust and establish good working relationships.

A consequence of a lack of transparency and engagement is how it contributes to and perpetuates a sense of mistrust. For Rohingya and their representatives, civil society and others, this mistrust stems from lack of access, information, and consultation. Discussions take place behind closed doors and decisions are made with little input from external actors. Such opacity makes it extremely difficult for civil society and other actors to provide critical and constructive feedback. It also means civil society groups are generally only able to comment on ASEAN initiatives once they have been agreed upon or are already underway, and are often accused by ASEAN of being unconstructive or unhelpful. *“A lot of ASEAN structures don’t want to engage with civil society because they think they are too critical,”* confirmed one ASEAN official.<sup>180</sup>

ASEAN would gain significantly from being more transparent and inclusive in its engagement. It would allow the grouping to have a more comprehensive, holistic understanding of the situation in Rakhine State, and thus develop and implement solutions for the benefit of all people living there. It would also allow ASEAN to showcase some of the work it is doing, take credit for positive initiatives, and demonstrate the region’s capacity and competence to deal with multi-layered, multifaceted crises. Greater coordination with external actors and affected communities would also help ASEAN maximize its resources, avoid duplication, and instead potentially enhance impact.

Most external actors would welcome such engagement. One thing that was common to almost all interviewees was the sense that ASEAN did have a role to play in resolving the crisis in Rakhine State, and one that has the potential to be a positive one. Interviewees, whether from the Rohingya community, civil society, or the humanitarian sector, expressed their desire and willingness to engage with ASEAN and its institutions.

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<sup>180</sup> APHR interview, 12 June 2020.

## 3.4 INSTITUTIONAL WEAKNESSES

***“ASEAN as a regional body has insufficient frameworks, concepts, mechanisms to deal with conflict or crisis that is caused by human beings, whether it’s called conflict, mass atrocities, or genocide... it can only understand issues it has a framework for and language for.”***

*Liliane Fan, International Director and Co-Founder of the Geutanyoe Foundation.<sup>181</sup>*

One of the central challenges that has hampered ASEAN’s ability to respond to the crisis in Rakhine State is its lack of institutions mandated or equipped to deal with such crises. An expert on ASEAN summed up the issue succinctly: *“ASEAN can only use the frameworks it has... As it stands, it lacks sufficient concepts and mechanisms to deal with the crisis in Rakhine State. It doesn’t even have the language needed to even talk about some of the issues.”<sup>182</sup>*

However, even with the lack of institutions mandated to deal with a crisis such as the one in Rakhine State, it was increasingly clear that ASEAN needed to mobilize in some way. With few other options, and possibly seeking to emulate the regional response to Cyclone Nargis in 2008, ASEAN leaders decided early on to deploy the AHA Centre to assist with the humanitarian dimensions of the crisis.

### THE AHA CENTER

In the first months of the crisis in 2017, the AHA Centre was mobilized to deliver humanitarian aid to communities in Rakhine State. However, among civil society activists, humanitarian workers and analysts, the mobilization of the AHA Centre is problematic. A major concern is its limited mandate.<sup>183</sup> The Centre is first and foremost a humanitarian response and disaster management agency. While it has significant experience dealing with natural disasters, it lacks the mandate, experience, and expertise to respond to so-called “man-made” disasters like the one in Rakhine State.

An expert with in-depth knowledge of ASEAN, and in particular its humanitarian work, explained: *“The fact that the AHA Centre has been brought in to play a role says two things: First, ASEAN has really tried to find a way to play more of a role in the Rakhine crisis but is struggling to find the ‘right’ and ‘acceptable’ way. Second, ASEAN does not have the right institutions to deal with this type of crisis, that is, a human rights crisis that involves state discrimination, state violence, statelessness and mass atrocities.”<sup>184</sup>*

Another major concern about the AHA Centre is its lack of independence. Like all ASEAN Member States, Myanmar has a role on the Governing Board of the AHA Centre, which gives it significant power to dictate the terms under which the AHA Centre can operate.<sup>185</sup> “[The AHA Centre] reports directly to ASEAN Member States”, explained one interviewee, noting that as a result it could not be totally independent or autonomous from them.<sup>186</sup> An ASEAN official similarly noted, *“The AHA Centre was under pressure to keep a low profile... they had no independence, and were working under the thumb of the Myanmar Government.”<sup>187</sup>*

<sup>181</sup> APHR interview with Lilianne Fan on 27 May 2020.

<sup>182</sup> APHR interview with Lilianne Fan on 27 May 2020.

<sup>183</sup> APHR interviews, May-July 2020.

<sup>184</sup> APHR interview with Lilianne Fan on 27 May 2020.

<sup>185</sup> Governing Board of the AHA Centre, <https://ahacentre.org/governing-board-of-the-aha-centre/>.

<sup>186</sup> APHR interview, 22 July 2020.

<sup>187</sup> APHR interview, 12 June 2020.

In addition to directing where the AHA Centre can go and what it can do, Myanmar's role on the Governing Board has also meant the authorities have been able to dictate who the Centre can engage with. One interviewee, with in-depth knowledge of the situation and the circumstances in which the PNA was conducted, explained: "They [AHA Centre] were very limited in their ability to be able to speak to other organizations and completely banned from talking to the UN and INGOs, or to use secondary materials from those institutions."<sup>188</sup>

A related concern is how closely the AHA Centre works with the Myanmar Government in implementing projects. One interviewee with knowledge of the AHA Centre's involvement explained that when the Centre provided relief items to communities in Rakhine State, these were given to the Myanmar authorities for distribution: "[The AHA Centre] doesn't provide assistance directly," they explained.<sup>189</sup> Independence, impartiality, neutrality, and non-discrimination are central humanitarian principles. Providing aid to government officials to distribute clearly compromises these principles, and risks doing harm to communities who most need it. Multiple interviewees expressed concerns that the AHA Centre's lack of experience and expertise on crises like the one in Rakhine State meant that the organization risked doing more harm than good.<sup>190</sup>

## THE ASEAN INTER-GOVERNMENTAL COMMISSION ON HUMAN RIGHTS (AICHR)

Another body that could have been activated to deal with the crisis is the AICHR. AICHR was established in 2009, and tasked with overall responsibility for protecting and promoting human rights in the region, including by strengthening cooperation among ASEAN States.<sup>191</sup>

Unfortunately, the Commission lacks a mandate to investigate individual complaints of human rights violations, meaning in practice, it has remained largely ineffective and has been heavily criticized by national and regional civil society organizations.<sup>192</sup> "AICHR does all promotional work, no protection work," explained an ASEAN official.<sup>193</sup> In addition, representatives who sit on the Commission are appointed by each Member State, who often nominate political appointees closely aligned with their governments. As a result, the body is not independent. The Commission has also been criticized over its lack of meaningful engagement with civil society.<sup>194</sup>

These structural weaknesses have prevented AICHR from taking any significant role in the crisis in Rakhine State. Despite the gravity of the situation, to date the Commission has failed to make any official statement about the crisis, including calls for a cessation of violence and respect for human rights.<sup>195</sup> APHR interviews confirm that some AICHR representatives tried to push the body to engage in the situation, however were blocked, often by their Myanmar counterpart.

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188 APHR interview with Lilianne Fan on 27 May 2020.

189 APHR interview, 22 July 2020.

190 APHR interviews, May-July 2020.

191 ASEAN Inter-governmental Commission on Human Rights (Terms of Reference), 2009, available at: <https://www.asean.org/storage/images/archive/publications/TOR-of-AICHR.pdf>.

192 The Asian Forum for Human Rights and Development (FORUM-ASIA) and Solidarity for ASEAN People's Advocacy (SAPA), A Decade in Review: Assessing the Performance of the AICHR to Uphold the Protection Mandates (Volume 1), May 2019 (FORUM-ASIA and SAPA, A Decade in Review), available at: <https://www.forum-asia.org/?p=30250>; Kasit Piromya, Time to rethink ASEAN's rights body, The Jakarta Post, 12 June 2019, available at: <https://www.thejakartapost.com/academia/2019/06/12/time-to-rethink-aseans-rights-body.html>, Bangkok Post, Activists slam Asean's lack of commitment to human rights, 9 January 2013, available at: <https://www.bangkokpost.com/thailand/politics/329988/activists-slam-asean-lack-of-commitment-to-human-rights>.

193 APHR interview, 12 June 2020.

194 FORUM-ASIA and SAPA, A Decade in Review, pp. 51-55.

195 The group has a long history of failing to reach consensus to issue public statements on human rights topics. Indeed, it was only on 1 May 2020 for the first time in its history that the Commission issued a public statement addressing human rights concerns in the region, in response to the COVID-10 pandemic. Eric Paulsen, AICHR ready to become a stronger human rights mechanism, The Jakarta Post, 13 June 2020, available at: <https://www.thejakartapost.com/academia/2020/06/13/aicmr-ready-to-become-stronger-human-rights-mechanism.html>.

When AICHR representatives tried to engage with the AHA Centre, they were similarly blocked by Myanmar's representative, revealing a lack of coordination not only among ASEAN Member States, but also among ASEAN institutions themselves.<sup>196</sup>

Despite AICHR's overall reluctance, or inability, to take a stand on the crisis, two representatives for Indonesia and Malaysia issued a joint statement on the eve of the 32<sup>nd</sup> ASEAN Summit in April 2018 in which they called for urgent action *"to develop a 'whole of ASEAN approach... to deal more effectively with the human rights and refugee crises emerging from Rakhine State"*.<sup>197</sup> The representatives went on to make several recommendations, in language believed to be more in-line with the "ASEAN Way" that might be more palatable to the bloc.<sup>198</sup> Some interviewees told ACHR that this statement pushed the boundaries of what AICHR representatives could do, however others saw it as confirmation of AICHR's wider institutional weaknesses and failings. As noted in an assessment of AICHR by regional civil society organizations:<sup>199</sup>

*"The fact that even with its tardiness and glaring omissions, this joint statement is considered the most radical effort by AICHR representatives in the last decade towards protecting human rights, attests to the sorry state of this body"*.<sup>200</sup>

For their part, even the two Representatives explicitly acknowledged the difficulties of raising the situation internally, stating that despite efforts, no consensus had been achieved. They concluded: *"We have exhausted the possible avenues presently available within the AICHR"*.<sup>201</sup>

## THE ASEAN INSTITUTE FOR PEACE AND RECONCILIATION

Some interviewees speculated that the ASEAN Institute for Peace and Reconciliation (ASEAN-IPR), established following the 18<sup>th</sup> ASEAN Summit on 8 May 2011, could play a role in helping to resolve the crisis.<sup>202</sup> The body is tasked with serving as the ASEAN institution *"for research and capacity building activities on peace, conflict management and conflict resolution in the region as requested by ASEAN Member States"*. However, it is unclear what role, if any, the body has or may have with regards to the situation in Rakhine State.

As with other ASEAN institutions, a weak and limited mandate combined with a lack of independence, is likely to prevent the body from taking up the issue. As an expert on ASEAN explained: *"It is not empowered to do much beside doing research and capacity building... It is dictated by what the Member States allow on the research agenda so monitoring and looking at hot spots [like Rakhine] would be quite difficult"*.<sup>203</sup>

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196 ACHR interviews, May-July 2020.

197 Joint Media Statement by H.E. Associate Prof. Dinna Wisnu and H.E. Mr Edmund Bon Tai Soon, Representatives to the ASEAN Intergovernmental Commission on Human Rights (AICHR), 25 April 2018, available at: <https://humanrightsinasean.info/state-ments/joint-media-statement-by-h-e-associate-prof-dinna-wisnu-and-h-e-mr-edmund-bon-tai-soon-representatives-to-the-asean-intergovernmental-commission-on-human-rights-aichr/>.

198 Adopting the Myanmar government's denial of Rohingya identity, the statement does not use the word "Rohingya" and fails to make any reference to human rights violations of any kind.

199 ACHR interviews, May-July 2020.

200 FORUM-ASIA and SAPA, A Decade in Review, Assessing the Performance of the AICHR to Uphold the Protection Mandates (Volume 2), p. 47.

201 Joint Media Statement by H.E. Associate Prof. Dinna Wisnu and H.E. Mr Edmund Bon Tai Soon, Representatives to the ASEAN Intergovernmental Commission on Human Rights (AICHR), 25 April 2018, available at: <https://humanrightsinasean.info/state-ments/joint-media-statement-by-h-e-associate-prof-dinna-wisnu-and-h-e-mr-edmund-bon-tai-soon-representatives-to-the-asean-intergovernmental-commission-on-human-rights-aichr/>.

202 ACHR Interviews, May-July 2020, ASEAN Leaders' Joint Statement on the Establishment of an ASEAN Institute for Peace and Reconciliation, 18 May 2011, available at: <https://asean-aipr.org/wp-content/uploads/2018/07/4.-ASEAN-Leaders-Joint-Statement-on-Establishment-of-an-AIPR-2011.pdf>.

203 ACHR interview with Lilianne Fan on 27 May 2020.

Engaging on conflict issues in Myanmar would also be new territory for ASEAN. In line with its principles of non-interference and sovereignty, the bloc has largely stayed away from the country's multiple internal armed conflicts and has not been actively involved in the now stalled peace process. Any involvement of ASEAN-IPR in the situation in Rakhine State would raise questions about wider ASEAN engagement on peace and reconciliation across the country and the region.

Fundamentally, some of ASEAN's limitations to respond to the situation in Rakhine State come down to structural and institutional weaknesses embedded within ASEAN itself. Former ASEAN-Secretary Generals are said to have lamented the weakness of ASEAN institutions, as noted by Kishore Mahbubani and Jeffrey Sng: "*The biggest issue with ASEAN was that there was no enforcement of decisions, no monitoring of compliance, and no sanctions*".<sup>204</sup>

Until there is a stronger culture of decision making, benchmarks, monitoring and repercussions for inaction, ASEAN's inability to fully, comprehensively and competently deal with crises and pressing issues will be extremely limited, whether regarding Rakhine State or other crisis and emergencies.

Addressing the weaknesses embedded into ASEAN's institutions is not an easy task, it would require significant political will, resources, and the revision of the mandates of a number of bodies, in particular AICHR and the AHA Centre. However, the result would not only strengthen ASEAN's response to the crisis in Rakhine State, it could increase the bloc's ability to address and advise on all crises across the region, whether a conflict, a natural disaster, or a global pandemic.

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204 Kishore Mahbubani and Jeffrey Sng, *The ASEAN Miracle: A Catalyst for Peace* (NUS Press, 2017), p.188.



## 4. THE WAY FORWARD

***“This policy of non-interference is just an excuse for not helping. In this day and age, you cannot avoid interference in the matters of other countries.”***

*Aung San Suu Kyi, urging ASEAN to take action to help the people of Myanmar in 1999.<sup>205</sup>*

Three years since the Myanmar security forces unleashed a campaign of death and destruction against the Rohingya in northern Rakhine State the situation remains grave. Despite significant international pressure and attention, Myanmar’s authorities have done virtually nothing to end the discriminatory laws, policies, and practices that have for decades been used to segregate and marginalize the community. Nor have they taken meaningful steps to ensure accountability for atrocities, refusing to cooperate with international justice mechanisms, while promoting their own deeply flawed domestic investigations. As a new conflict escalates in the state between the Myanmar military and the AA, the need to address the multiple crises in Rakhine is as pressing as ever.

From the outset of the current iteration of the crisis in August 2017, ASEAN has struggled to grapple with the situation, initially underestimating the magnitude of what was happening while hiding behind its long-standing adherence to the principles of consensus and non-interference. However, as the catastrophe has continued, the bloc’s initially timid response has given way to a more proactive approach. This includes engaging humanitarian assistance and efforts aimed at the repatriation of refugees, and more recently looking at economic and development projects to support.

<sup>205</sup> Aung San Suu Kyi, *Voicing my thoughts: Nudge Burma towards democracy*, The Nation, 13 July 1999, <https://www.burmalibrary.org/reg.burma/archives/199907/msg00377.html>.



These actions have not always been effective, and in several cases have been deeply problematic. However, they mark a significant departure from the bloc's usual insistence on non-interference. They have also ensured ASEAN has been able to maintain a dialogue with the Myanmar authorities.

Unfortunately, these efforts risk being undermined by a chronic lack of leadership and an ongoing failure to acknowledge the gravity and scale of the human rights crisis and the Myanmar authorities' role in creating it. ASEAN efforts are further undermined by a lack of transparency and engagement, in particular with Rohingya communities, as well as weak institutions, which lack the mandates and expertise to respond to crises like the ones in Rakhine State.

What has happened to the Rohingya, and continues to occur to communities in Rakhine State, is a stain on the conscience of humanity. The crisis is not an internal one, despite what the Myanmar authorities say, and its impacts are felt far beyond Myanmar's shores. ASEAN has an obligation to serve and protect the people of the region, and has the potential to play a positive role in resolving the situation. However, it must examine and address its own weaknesses. Failure to do so will not only harm the bloc's credibility and legitimacy, but will likely cause further harm and suffering to the Rohingya and others who call Rakhine State, and indeed the ASEAN region, home.

## RECOMMENDATIONS

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### TO ASEAN AND ASEAN MEMBER STATES:

- Recognize that the crisis in Rakhine State is not simply a humanitarian one, and instead develop a holistic strategy guided by the principles of “do no harm” and non-discrimination. Ensure that ASEAN's interventions on Rakhine State address all aspects of the crisis, including its human rights dimensions, and take effective measures to ensure that all projects are subject to rigorous and ongoing human rights risk and mitigation assessments;
- Encourage the Myanmar authorities to establish a follow-up mechanism to the Advisory Commission on Rakhine State in order to ensure full implementation of the Commission's recommendations. Request regular public reporting on progress;
- Halt any steps to facilitate the repatriation of Rohingya refugees to Myanmar, unless and until violence in Rakhine State has ceased, and the conditions in Myanmar are conducive for a safe return in dignity;
- Use all political and diplomatic tools at your disposal to push the Government of Myanmar to create conditions conducive to the safe, voluntary and dignified return of displaced communities, regardless of ethnic or religious identity, and request regular progress updates in this regard;
- Publish the terms of reference of the Comprehensive Needs Assessment and ensure it is conducted in a neutral and impartial manner, that the assessment team is mandated to assess all aspects of the situation in Rakhine State, and that it includes meaningful consultation and participation of Rohingya communities and their representatives. Ensure that the final report is made public and published in full;

- Use your bilateral and multilateral engagement with Myanmar to systematically call on the authorities to grant humanitarian organizations free, unimpeded, and sustained access to Rakhine State;
- Encourage the Government of Myanmar to publish the full final report of the Independent Commission of Enquiry (ICOE), and make publication of the report a prerequisite for the bloc to take any action which could support, or be seen to support, its conclusions and recommendations;
- Cooperate fully with international efforts to ensure accountability for serious crimes in Myanmar, including the Independent Investigative Mechanism for Myanmar (IIMM), the International Criminal Court (ICC), and the International Court of Justice (ICJ);
- Support the referral of the situation in Myanmar by the UN Security Council to the ICC to ensure that all international crimes in Myanmar can be fully, independently, and impartially investigated and perpetrators of all ranks held to account in fair trials;
- Support and where relevant vote in favor of resolutions at the UN General Assembly, UN Human Rights Council, and other international fora on the human rights situation in Myanmar;
- Ensure greater transparency in and accountability for ASEAN's operations and decision-making, including with regard to Rakhine State, by allowing public access to records of meetings, activity plans and reports, budget and other financial documentation. Make meetings accessible to public observers, unless there are legitimate security or privacy reasons not to;
- Acknowledge the Rohingya's identity and ensure meaningful consultation with and participation of Rohingya in Myanmar, the refugee camps in Bangladesh, and their representatives, in all decisions concerning their future. Take effective measures to ensure the inclusion of diverse voices, including in particular women, children, older people, and people with disabilities;
- Recognize the role that civil society organizations play in protecting and promoting human rights in the region, and take effective and proactive steps to engage with these groups, including by increasing formal and informal spaces for meaningful consultation and dialogue;
- Ensure all ASEAN institutions and entities operating in or on Rakhine State have sufficient resources, including human and financial resources, to undertake their mandates;
- Ensure that all ASEAN staff and representatives have basic training in principles of neutrality, impartiality, and "do no harm";
- Include experts on human rights, including child rights, women and girls' rights, and the rights of vulnerable groups in ASEAN's emergency response network, and in particular all ASEAN and other regional coordinating bodies tasked with planning, implementing, monitoring, and evaluating projects in and on Rakhine State;
- Do not deploy the AHA Centre in an ad hoc way and to situations beyond the scope of its original mandate. Where the Centre is asked to respond to "man-made" crises, provide clear political and strategic direction, and ensure the Centre is vested with sufficient authority, resources, and expertise to be able to respond to such crises. Moreover, consider the role of the AHA Centre, which focuses on humanitarian assistance, as part of a holistic approach that also addresses peace building and development;

- Revise the Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights (AICHR) to ensure it has a full protection and promotion mandate and is able to accept and investigate individual and group complaints and allegations of human rights violations. Ensure the independence of all AICHR Representatives, and in particular that they are appointed through an open, fair, and transparent process with emphasis on their demonstrated knowledge and expertise of human rights issues;
- In line with the principle “*One ASEAN. One response*”, ensure greater coordination between ASEAN bodies working on Rakhine State, and establish a dedicated forum through which all ASEAN entities engaging on the situation can share information, including about plans and activities;
- Organize urgent and coordinated search and rescue operations for boats in distress, and allow all boats carrying refugees and migrants to land safely, disembark passengers, end ensure the provision of humanitarian assistance, including adequate food, water, shelter, and healthcare;
- Respect the principle of non-refoulement, by ensuring people are not transferred to any place, including their country of origin, where their lives, liberty, or human rights would be at risk. Ensure that people claiming asylum are able to access fair refugee status determination procedures; and
- For those member states that have not yet done so, ratify the 1951 Refugee Convention and its 1967 Protocol.

#### **TO THE GOVERNMENT OF MYANMAR:**

- Immediately and consistently call on the Myanmar armed forces to end all violations of international humanitarian and human rights law in Rakhine State and across the country, and ensure the protection of all civilians;
- Establish a follow-up mechanism to ensure full implementation of the recommendations made by the Advisory Commission on Rakhine State, in consultation with all communities in Rakhine State, in particular women, children, older people, and people with disabilities. The mechanism should have clear targets, timeframes, and indicators of success and provide regular public reporting on progress;
- Review and repeal or reform the 1982 Citizenship Law to bring it in line with international human rights law and standards, including by ensuring that citizenship is not determined on discriminatory grounds, and that citizenship laws are not applied in a discriminatory and/or arbitrary manner;
- Immediately suspend the citizenship verification process and restore Rohingya’s citizenship rights through a prompt and transparent process developed in consultation with the Rohingya community;
- Revoke all laws and policies that place arbitrary and discriminatory restrictions on Rohingya, in particular on their freedom of movement. Take effective steps to ensure Rohingya can access healthcare, education, and livelihood opportunities without discrimination;
- Guarantee the safe, voluntary and dignified return of displaced communities, including Rohingya, Rakhine, and other ethnic and religious minorities, to their homes or places of origin, or to permanent resettlement in adequate alternative housing in accordance with their wishes;

- Restore full internet access to Rakhine and Chin States, and take immediate action to amend the 2013 Telecommunications Law in line with international human rights law and standards, including by removing provisions that grant authorities overly broad powers to order the suspension of telecommunications services;
- Ensure ASEAN entities, national and international humanitarian organizations, independent journalists and monitors have free, unimpeded, and sustained access to Rakhine State;
- Fully cooperate with international justice efforts, including by granting access to the Independent Investigative Mechanism on Myanmar (IIMM) and the International Criminal Court;
- Ratify key international human rights treaties, including the International Covenant on Civil and Political Rights, the UN Convention on the Elimination of all Forms of Racial Discrimination, and the Rome Statute of the International Criminal Court and implement their provisions;
- Ensure meaningful consultation with and participation of Rohingya in Myanmar and the refugee camps in Bangladesh in all decisions concerning their future. Take effective measures to ensure the inclusion of diverse voices, including in particular women, children, older people, and people with disabilities; and
- Allow for full and frank discussions on Rakhine State in regional fora.

#### **TO PARLIAMENTARIANS IN SOUTHEAST ASIA:**

- Use your position in Parliament, including through Parliamentary questions, freedom of information requests, and using privilege speech, to ask your government about actions it is taking, individually and as part of ASEAN, to push the government of Myanmar to resolve the crisis in Rakhine State, including by restoring Rohingyas' rights and ensuring accountability for serious crimes;
- Engage with Members of Parliament from Myanmar to discuss concerns about the situation in Rakhine State, in particular for the Rohingya community, and encourage them to use their positions in Parliament to push for change;
- Encourage your Ministry of Foreign Affairs to increase pressure on the Government of Myanmar to implement the recommendations above; and
- Advocate for the Rohingya's rights to be respected and raise awareness about the crisis in Rakhine State by encouraging dialogue among your constituents and policy-makers, and raising the issue in the media and on social media (for example, by writing articles, sharing relevant news, etc).

**TO NATIONAL, REGIONAL, AND INTERNATIONAL NON-GOVERNMENTAL, HUMANITARIAN, DEVELOPMENT, AND CIVIL SOCIETY ORGANIZATIONS:**

- Where possible, dedicate specific resources to build and strengthen engagement with ASEAN entities and its Member States, with a view to addressing the crisis in Rakhine State and other human rights situations in the region; and
- Consider offering assistance, sharing experience, and knowledge or capacity building programs to ASEAN entities, in particular on the principle of “do no harm”, rules for humanitarian engagement, and international human rights law and standards.

**TO ASEAN PARTNERS, IN PARTICULAR JAPAN, SOUTH KOREA, AUSTRALIA, NEW ZEALAND, INDIA, CANADA, THE US AND THE EU:**

- Use all available means to persuade ASEAN and ASEAN Member States to play a more effective and positive role in Rakhine State, including through the implementation of the recommendations set out above.

# ANNEX

## Responses from the Myanmar Ministry of Social Welfare, Relief and Resettlement to APHR's questions

### **1. Could you please describe what steps the Myanmar government has undertaken towards ending the conflict in Rakhine State and addressing its root causes including the systematic discrimination against the Rohingya?**

Since the government came to power, emphasis was made on bringing peace, stability and socio-economic development in Rakhine State. However, the terrorist attacks from the ARSA in 2016 and 2017; and its consequences, and the armed clashes between Tatmadaw and the Arakan Army (AA) have hindered many of the government's efforts.

Barely one month after taking responsibility as the government, on 30th May 2016, the government established "Central Committee for the Implementation of Peace and Development in Rakhine State" to enhance peace and stability in Rakhine state and to facilitate development. The State Counsellor chaired that committee and it was composed with Union Ministers/ high level officials of the relevant ministries. There are four working committees, which are

1. Security, Peace and Stability and the Rule of Law Working Committee,
2. Immigration and Citizenship Scrutinizing Working Committee,
3. Settlement and Socio-economic Development Working Committee
4. Working Committee on Cooperation with UN Agencies and International Organizations.

For the better understanding of the local context and to find out underlying causes of conflicts in Rakhine State, "Advisory Commission on Rakhine State" was formed on 5th September 2016, led by former UN General Secretary, the late Mr. Kofi Annan with 9 national and international experts. The Commission submitted their final reports with 88 recommendations. "Maundaw Region Investigation Commission" was also formed on 1st December 2016 with 13 members, chaired by the Vice-President 1, U MyintSwe to carry out investigations.

To implement the recommendations of these two commissions, the committee for the implementation of the Recommendations on Rakhine State (CIRR Committee) was formed in September 2017. Union Minister for Social Welfare, Relief and Resettlement was assigned as a chair and the Chief Minister of Rakhine State as Co-Chair.

The Government of Myanmar strongly believes that development and peace are interrelated; and social cohesion plays indispensable role in peace process. The implementation of 88 recommendations of Kofi Annan Commission is one of the government efforts to solve the long-standing root causes.

In addition, the formation of 'Union Enterprise for Humanitarian Assistance, Resettlement and Development (UEHRD)' with the leadership of Her Excellency State Counsellor, Daw Aung San Suu Kyi has served as the implementation mechanism of Myanmar to be able to address the root-causes.

Aiming to effectively carry out humanitarian assistance, resettlement and development in Rakhine State, the UEHRD has envisioned:

- a) To carry out the effective provision of humanitarian aids,
- b) To coordinate the resettlement and rehabilitation efforts and
- c) To carry out regional development and work towards durable peace.

For the long term development, the ten task forces of UEHRD (i.e Construction and Infrastructure, Agriculture and Livestock, Development of Industrial Zones, Communication, Information and Media, Job Creation and Vocational Training, Healthcare, Financial Inclusion, Crowd-funding, Tourism Promotion and International Relations) was set up in collaboration with the officials from Union of Myanmar Federation of Chambers of Commerce and Industries (UMFCCI).

At present, UEHRD is coordinating with both private and public organizations and individuals in order to effectively implement recommendations of Kofi Annan Commission through short-term, medium term and long-term activities.

As the State Counsellor repeatedly says, conflicts happened in Rakhine State has deeply rooted in the low level of socio-economic development in this area. Therefore, the Government is carrying out every possible measure to bring social and economic development in Rakhine State.

Among others, with regards to the development of Rakhine State, the Memorandum of Understanding (MoU) has signed between the Government of Myanmar and UNDP, UNHCR for conducting the socio-economic development, and creating conducive condition for the voluntary, safe, dignity of displaced persons in Rakhine State, and this MoU was already extended for one more year.

Through the collaborative efforts, on-ground assessments were undertaken and quick impact projects for the development in the pilot areas in Rakhine State were implemented. Those quick impact projects are intended to contribute to voluntary repatriation programme, reintegration, recovery and development in Rakhine State.

## **2. Could you please describe the steps taken by the Myanmar government towards ensuring that the Rohingya can go back to Myanmar in safety and dignity?**

The Government of the Republic of the Union of Myanmar is committed to a voluntary, safe and dignified return of the displaced people from Rakhine State and it has made extensive efforts to achieve this in collaboration with both international and local authorities.

As for the bilateral cooperation with Bangladesh, Myanmar Government is also working very closely with the Government of Bangladesh to ensure safe, dignified and voluntary return of displaced persons to Rakhine State.

To complement the national efforts, in November 2017, a bilateral approach with the Government of Bangladesh was initiated by signing an Arrangement on Return of Displaced Persons from Rakhine State (the Arrangement) on 23rd November 2017 between the Government of Myanmar and the Government of Bangladesh.

Subsequently, Terms of Reference (TOR) for the Joint Working Group (JWG) on the Repatriation of Displaced Myanmar Residents from Bangladesh was signed on 19th December 2017 to ensure the prompt and safe process of repatriation. As per the Bilateral Agreement, the repatriation process would have commenced within 2 months.

The JWG of Myanmar and Bangladesh led by the respective Ministries of Foreign Affairs (MOFAs) convened its first meeting on 15 January 2018 to discuss the details of the verification process and the movement and physical arrangement for repatriation of displaced Myanmar residents from Bangladesh. According to the Physical Arrangement signed on 16 January 2018, the following procedures are agreed by both governments:

- a. Myanmar will receive the verified returnees who will travel by land route at Taung Pyo Letwe Reception Centre, and for those who will travel by river route at Nga Khu Ra Reception Centre;
- b. Myanmar will use Hla Pho Kaung as a Transit Centre for returnees;
- c. Bangladesh will establish five transit camps;
- d. Myanmar will receive returnees five days per week;
- e. Bangladesh will provide, in advance, the list of prospective returnees and duly filled verification forms to Myanmar for a smooth verification process;
- f. Myanmar will provide Bangladesh the detailed lists of 508 persons of Hindu faith, and 750 persons of Muslim faith who have been verified as Myanmar residents and will suggest to Bangladesh to include them in the first batch of repatriation; and
- g. The repatriation process will commence on 23 January 2018.

In compliance with agreed Physical Arrangement between Bangladesh and Myanmar, Myanmar is ready to repatriate through Two Reception Centers (Taung-phyo-latwel for land route access and Nga-khyu-ra for water way access) and One Transit Centre (Hla-phoe-khaung).

Upon reception, the returnees will receive the food and non-food items assistance from the government. (Preparation of 3 meals per day and other non-food items assistance such as family size mosquito nets, clothing, blankets and soap)

After having verification at reception centers, the returnees will move to the Transit Centre. Individual will have food ration for one month (rice, pulse, cooking oil, salt), non-food items assistance (kitchen set, stoves and fuel) and cash assistance to buy meat or vegetables.

When the returnees arrive at the Transit Centre, persons who have intact houses or already constructed house at the specific sites can move their destination shortly.

On the other hand, persons from the burnt villages have to be settled according to a new village plan. For those who want to participate in the cash-for-work program for rebuilding of their own houses. They otherwise may wait at transit centers until their own houses are fully constructed. And it will take less than a month. The Government will take all possible measures to ensure that the returnees will not stay in temporary places for a long period of time.

Myanmar has made preparations to receive the displaced persons from Rakhine as part of the bilateral agreement with Bangladesh. After the Foreign Ministry of Bangladesh accepted Myanmar's proposal for the repatriation of displaced people from Bangladesh, the repatriation process was expected on 22nd August. The officials from the Government of Myanmar had been in a state of readiness at the Taungpyo Letwe Reception Centre along with the officials from ASEAN Secretariat and the ASEAN Coordination Centre for Humanitarian Assistance on disaster management (AHA) Centre, and the Emergency Rapid Assessment Team (ERAT) Team members. But no displaced persons returned on 22 August. This is the second time that the planned repatriation was not successful. On 15 November, 2018, officials were waiting to receive the returnees for the first time, but it did not happen either.



Following the recommendations of International communities and Preliminary Needs Assessment conducted by ASEAN ERAT, information dissemination about the repatriation process to the displaced people in Bangladesh side has been executed through two high-level visits to Cox's Bazar led by the Government representatives of Myanmar and joined by the delegates from ASEAN Member States, ASEAN Secretariat and AHA Centre on 27-29 July 2019 and on 18-19 December 2019.

### **3. Could you please explain how the National Verification Card process will ensure full citizenship rights for the Rohingya?**

As other sovereignty countries in the world, Myanmar has Union Citizenship Act, Union Citizenship Act (Election) and the Citizenship law for national verification. A person, who lives in Myanmar without any identity, has to be verified according to these existing laws and acts.

The verification process usually starts with applying National Verification Card. Those who have NVC or National registration identity card are eligible to apply for the citizenship. The process of citizenship application may usually take less than six months to seek the decision of the Central Body. Then, the applicants will know his/her citizenship status as Citizen/ Associate citizen/ Naturalized citizen according to existing law, acts and standard operating procedures.

As a certified citizen of any types, he or she will be entitled to enjoy the rights prescribed by the laws of the State. At the same time, he or she must respect and abide by the laws of the State and have to discharge the duties prescribed by the laws of the State.

On the other hands, existing laws and acts only allow to give "Certificate of Identity" for those who apply for identity and have proper evidence of former residence in Myanmar. Such person, upon entering into Myanmar and without having any type of previous citizenship identity, shall undergo the same process through NVC application.

All the returnees, except who have National registration identity card, will receive NVC upon entry at the reception center. As soon as holding the NVC, they can enjoy the benefits of NV as follows:

- NVC holder can show it as an evidence of residing in Myanmar because of registered as resident of Myanmar.
- NVC holder is eligible to apply national verification process in accordance with Myanmar Citizenship Law.
- The decision of citizen or naturalized citizen is made in line with Myanmar Citizenship Law. The citizen or naturalized citizen shall be entitled to enjoy the rights prescribed by the laws of the State.
- Offspring born by parents of NVC holder are also eligible to apply national verification process in accordance with Myanmar Citizenship Law.
- If NVC holders want to go somewhere in Myanmar, they will travel in accordance with local orders and instructions issued by related local authority or State or Regional Government.
- NVC holders in Rakhine State can enter and depart border legally with Border Pass through border checkpoints to Bangladesh.
- NVC holders in Rakhine State can go freely within township. Travelling in Rakhine State is allowed in accordance with local orders and instructions issued by Rakhine State Government.
- NVC holders can go international water territory in line with the law like Myanmar identity card holders (including fishing). For fishery in international water territory, fishery license can be applied with identity card recognized by the State such as NVC.

#### **4. Could you please describe what access humanitarian organisations have to Rakhine State and to all communities affected by the conflict?**

Humanitarian assistance is continuously provided by the Union Government, Rakhine State Government, the public, UEHRD Youth Volunteer Program, Red Cross Movement 1, ASEAN countries, partner countries and various UN, international and local organizations.

Particularly, the Ministry of Social Welfare, Relief and Resettlement in cooperation with World Food Programme has been supporting food rations to the displaced persons in IDP camps and temporary displaced sites.

Even in light of COVID-19 outbreak, the local staffs of UN and International Organizations are allowed to continue their activities in Rakhine State and travel authorization has been granted by the Coordination Committee of Rakhine State Government.

#### **5. Could you please describe how you are engaging with ASEAN towards the above?**

Regarding the ASEAN and Myanmar collaboration, in the 33rd ASEAN Summit held on 13th November 2018 in Singapore, Myanmar Government called for the support and cooperation of ASEAN in the repatriation process of displaced persons from Bangladesh to Myanmar.

With the concurrence of ASEAN Leaders for their readiness to support Myanmar in the ongoing efforts on the repatriation process, Government of Myanmar, the ASEAN Secretariat and the ASEAN Coordinating Centre for Humanitarian Assistance on Disaster Management (AHA Centre) have initiated to deploy a need assessment team and to identify possible areas of cooperation in Rakhine State to facilitate the repatriation process.

As per the 1st High Level Coordination meeting between ASEAN and Myanmar, ToR for the Needs Assessment Team and assessment procedures and methodology were adopted.

1 Red Cross Movement comprises of the International Committee of the Red Cross (ICRC), the Myanmar Red Cross Society (MRCS) and the International Federation of the Red Cross and Red Crescent Societies (IFRC).

Accordingly, an ASEAN Emergency Response and Assessment Team (ASEAN-ERAT) composed of (10) members from Indonesia, Malaysia, Myanmar, Singapore, Thailand, the AHA Centre and the ASEAN Secretariat were deployed to conduct the need assessment process in Rakhine State on 4-13 March, 2019.

Upon the endorsement of the report by the Government, ASEAN Secretariat had disseminated the Preliminary Needs Assessment Report to the ASEAN Foreign Ministers and Myanmar side has also disseminated the report to AHA Centre's Governing Board Members, Embassies in Myanmar, and other in-country UN agencies. In addition, Ministry of Foreign Affairs, Myanmar also distributed the report to the permanent missions in the foreign countries.

Based on the findings of this report, Myanmar Government has formed a Technical Working Group (TWG) with the membership of counterpart Ministries, UEHRD, ASEAN Secretariat and AHA Centre.

With the guidance of High-level Strategic Coordination Group, TWG has worked on the development of tools and procedures for executing Comprehensive Needs Assessment and implementation of the PNA's recommendations.

**6. Could you please describe the activities of ASEAN in Rakhine State and how they have improved the conditions for all communities in Rakhine?**

In order to realize the recommended points spelt out in PNA Report, two times of TWG meeting were convened already and the prioritized projects were prepared.

Through a series of consultations, the (7) priority projects across three PNA's recommendations are identified to implement as the first step.

1) To enhance the capacity of transit and reception centres, two priority projects; (i) Provision of equipment (e.g. Biometric scanners) at the reception centres and (ii) Establishment of child friendly and women friendly spaces at transit centre will be implemented.

2) For strengthening the Information dissemination, another two projects, (i) Social media training for government officials and (ii) Distribution of FM Radios to Rakhine State communities including returnees will be carried out.

3) To achieve the improvement of the Provision of basic services, three more projects including (i) Infrastructure project focusing on roads access to essential services from transit and reception centres to livelihood facilities (e.g. Hospitals, market), (ii) Provisions of agricultural equipment to facilitate agriculture work (iii) Establishment of fish ponds to facilitate fisheries work are already proposed to the ASEAN Secretariat.

The Government of the Republic of Korea has contributed to implement the Distribution of FM Radios to the communities including returnees in Rakhine State.

Furthermore, with the support of the Government of Indonesia, an Ad Hoc Support Team of the ASEAN Secretariat has been set up and it has been working closely with MSWRR and line Ministries for finalizing the priority projects.

Another ASEAN Project on Enhancing the Readiness of Myanmar Government Local Capacity in Providing Humanitarian Assistance to Support the Repatriation Process with the support of the Government of Japan has been under implementation through ASEAN ERAT tools and methodology.

**7. Could you please describe the access that ASEAN has to Rakhine State and what the conditions are?**

In terms of ASEAN engagement in Rakhine State, Myanmar together with ASEAN deployed the ASEAN Emergency Response and Assessment Team (ASEAN ERAT) to the reception and transit centers to develop the Preliminary Needs Assessment (PNA) Report.

As the follow-up of the report, we invited ASEAN ERAT members to get involved in the repatriation process for three times, to join the High-level visits to Bangladesh in July and in December 2019 to disseminate the information about repatriation arrangements to the displaced people in Bangladesh side and to observe the repatriation process officially proposed by Bangladesh on 22 August 2019 in Taung Pyo Let We Reception Centre.

In addition, through the implementation of the Local Capacity Building Project, stakeholders in Rakhine State will be capacitated through the familiarization of ASEAN's practice and protocols and visits to ASEAN related institutions.

## **8. What assistance do you need from ASEAN leaders to improve the situation for all communities living in Rakhine State?**

Since ASEAN is a trusted partner of Myanmar, the Government of Myanmar remains committed to cooperate with ASEAN Member States, ASEAN Secretariat and AHA Centre in the course of implementing PNA's recommendations and building socio-economic development in Rakhine State.

During the 36th ASEAN Summit, the leaders also reaffirmed ASEAN's continued support for Myanmar's efforts to bring peace, stability, the rule of law, and to promote harmony and reconciliation among the various communities as well as to ensure sustainable and equitable development in the Rakhine State.

Since, the issues happened in Rakhine State cannot be solved overnight, forward-looking visions and long-term investment for social and economic development will be needed for Rakhine State.

## **9. Could you please describe the steps taken by the government of Myanmar towards ensuring accountability for the human rights crimes and abuses committed in Rakhine State?**

Myanmar has an independent body to investigate the complaints of possible human rights violation i.e. Myanmar National Human Rights Commission. In addition, Anti-corruption Committee of Myanmar is organized to receive information regarding corruption or unlawful acts. Myanmar plans to use these 2 mechanisms for collecting possible complaints and other information through their hot-line phone numbers.

Furthermore, Myanmar established the Independent Commission of Enquiry (ICOE) to investigate human rights violations and related issues following the terrorist attacks by the ARSA with a view to seeking accountability and formulating recommendations on steps to be taken to ensure peace and stability in Rakhine State. ICOE submitted its final report to the Government on 20 January, 2020. The Criminal Investigation and Prosecution Body was formed based on the report submitted by the Independent Commission of Inquiry (ICOE) in January 2020. Moreover, the Tatmataw is conducting its court of inquiry.

## **10. Could you please also describe how the Myanmar government is complying with international accountability mechanisms such as the International Court of Justices?**

The case against Myanmar was brought before the International Court of Justice (ICJ) by Gambia, on behalf of the Organization of Islamic Corporation (OIC), although the conflicts in Myanmar do not directly affect Gambia. Gambia claims that Myanmar is directly or indirectly responsible for violations of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention 1948).

The ICJ's primary functions are to settle international legal disputes submitted by states and give advisory opinions on legal issues.

As a State party to the Genocide Convention, Myanmar appears at the ICJ with regards to the Application by Gambia, to prove that the country has no genocidal intent and it is strongly complying with the Genocide Convention 1948.

# Government efforts in addressing the issue of Rakhine State

2016	May 31	Setting up of the Central Committee on Implementation of Peace, Stability and Development of Rakhine State
	August 23	Formation of the Advisory Commission on Rakhine State
	October 9	The violent attacks by ARSA against three police outposts occurred.
2017	January	Development of five-year Socio-economic Development Plan for Rakhine State
	August 24	Final report of the Advisory Commission on Rakhine State was submitted
	August 25	The outbreaks of violent attacks by ARSA against thirty Border Guard and Police outposts
	September 12	Formation of the Committee for Implementation of the Recommendations on Rakhine State
	October 17	Formation of the Union Enterprise for Humanitarian Assistance, Resettlement and Development in Rakhine (UEHRD)
	November 23	The Government of Myanmar and Bangladesh signed “The Arrangement on the Return of Displaced Persons from Rakhine State “the Arrangement”.
	December 14	The Establishment of the Advisory Board for the “Committee for Implementation of the Recommendations on Rakhine State”
	December 19	Terms of Reference for the Joint Working Group (JWG) on the Repatriation of Displaced Persons from Bangladesh was signed in Dhaka, Bangladesh.
		First JWG meeting was convened in Yangon.
2018	January 16	The Physical Arrangement containing detailed procedures for repatriation was signed in Nay Pyi Taw.
	January 23	Myanmar’s side was ready to start the repatriation process according to the bilateral agreement. The Government opened two reception centres at Taung Pyo Latwe (land route) and Nga Khyu Ya (river route) and transit centre at Hla Phoe Khaung since 23 January, 2018.
	May	Second JWG meeting was conducted in Dhaka on 17 May, 2018.
	June 6	With a view to assisting the government in the implementation of the Arrangement for repatriation and resettlement, the Government of Myanmar signed a tripartite MoU with UNDP and UNHCR.
	July 30	Independent Commission on Enquiry (ICOE) was formed
	October 30	At the Third JWG meeting, both side agreed to commence the first batch of 2261 verified displaced persons on 15 Nov, 2018.
	November 13	At the 33rd ASEAN Summit in Singapore, ASEAN leaders showed their readiness to support in the repatriation process.
	November 15	First attempt to start the repatriation process to receive the returnees from Bangladesh, but it did not happen.

- December 7 Joint Communique was signed between the Government of Myanmar and the United Nations (Office of the Special Representative to the Secretary General on Conflict Related Sexual Violence) to prevent and respond to conflict related sexual and gender based violence
- December 18 First coordination meeting held between the Government Representatives and the AHA Centre, and the Terms of Reference for conducting needs assessment was approved.
- 2019 January Armed clashes with the Arakan Army started happening.
- January 7 National Committee formed to prevent grave violations against children in armed conflict.
- March Preliminary Needs Assessment (PNA) conducted by ASEAN ERAT
- May Report of PNA was disseminated
- 2019 May 23 MoSWRR signed MOU with UNHCR to facilitate the resettlement.
- May 27 High level coordination meeting to implement the recommendations in the PNA.
- Establishment of Technical Working Group (TWG) for the implementation of PNA's recommendation was agreed.
- July 24 Child Rights Law has been enacted.
- July 27 to 29 High level Myanmar delegation and representatives from ASEAN Secretariat and AHA went to Cox's Bazar. Factsheets distributed. Dialogues were made.
- August 22 Second attempt to start the repatriation which did not realize.
- August 30 First meeting of TWG held for implementation of PNA.
- September Myanmar ratified the Optional Protocol to the CRC on Children in Armed Conflict.
- The results from the Rakhine Joint Assessment (RJA) jointly conducted with the UNDP and MoSWRR finally came out. The RJA was planned to conduct since 2017, but the outbreaks of August 25 attacks and the security conditions delayed the assessment. The RJA found out that the underdevelopment in Rakhine was the key issue for major conflicts.
- October 29 Second meeting of TWG. Seven priority projects were identified out of 38 proposed projects across the three recommendations of PNA.
- ASEAN Secretariat Office agreed to set up Ad-Hoc Support Group for implementation of PNA's recommendations.
- November 11 Gambia filed lawsuit against Myanmar at the ICJ for violations of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide.
- Together with the Application, a request for Provisional Measures was also filed by Gambia.
- November 19 National Strategy on the Resettlement of IDPs and Closure of the IDP Camps was launched.
- December 11 Public sitting of the ICJ was held, and Her Excellency State Counsellor led the Myanmar delegation and delivered the Statement.

December 18-19	High level delegation and ASEAN ERAT went to Cox's Bazar. Continued dialogues were made.
2020 January 7	Displaced Persons Accepting and Resettlement Committee held the coordination meeting.
January 17	Information session on the implementation of the Tripartite MoU was held at the MOFA.
January 20	ICOE submitted its final report to the President. The Criminal Investigation and Prosecution Body was formed based on the report submitted by the Independent Commission of Inquiry (ICOE) in January 2020. Moreover, the Tatmataw is conducting its court of inquiry.
January 23	Decision by the ICJ on provisional measures in the case brought by the Gambia against Myanmar.
February 3	Professor Dr. Walter Kaelin, who has been assisting in the National Camp Closure Strategy, visited Kyaut Ta Lone Camp in Kyauk Phyu, together with Rakhine State Chief Minister, Rakhine State MPs, and Director General of Department of Disaster Management and officials from UEHRD, to observe situations on the ground for closure of the camp, and provide inputs for the localized action plan.
February	National Committee for the implementation of the National Strategy on the Resettlement of IDPs and closure of IDP Camps was formed
March 17-18	Community consultation at Kyauk Ta Lone camp continued
March 23	First meeting of the National Committee for Camp Closure convened
March 28	Action Plan for the Control of COVID-19 Outbreak in the IDP camps and temporary shelters adopted by the government. The government then financed 2.1 billion MMK (Est: USD 1.5 million) for the implementation of this action plan. COVID-19 prevention and response are being carried out in IDP camps and temporary shelters including in Rakhine State.
May 11	The Ministry of Labour, Immigration and Population, on behalf of the Government of Myanmar, signed the exchange of letters with the UNDP and UNHCR to extend the MOU through June 2021. The MOU aims to assist the government's efforts to implement the bilateral agreements with Bangladesh to facilitate the voluntary, safe, dignified and sustainable repatriation of verified displaced persons from camps in Bangladesh.
May 20	Dr. Tin Myo Win, Chairman of the Committee on Coordination and Cooperation with Ethnic Armed Organizations in relation to COVID-19 Prevention, Control and Treatment, held a virtual meeting with the Arakan Liberation Party (ALP) to conduct COVID-19 measures in conflict affected areas.

As of July, 2020, the COVID-19 control and response measures along with humanitarian assistance provisions continue in Rakhine State in collaboration with international agencies. Meanwhile, community consultations continue for the closure of some camps, which will again provide inputs for development of localized action plan in accordance with the National Strategy.

# ASEAN'S RAKHINE CRISIS

## Assessing the regional response to atrocities in Myanmar's Rakhine State

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It has been three years since the outbreak of violence in August 2017 in Myanmar's Rakhine State, which forced more than 740,000 Rohingya to flee to Bangladesh. Three years later, the situation for the Rohingya in Myanmar and Bangladesh remains dire, with a new conflict in Rakhine threatening the safety of all communities.

APHR's new report, *ASEAN's Rakhine Crisis: Assessing the regional response to atrocities in Myanmar's Rakhine State*, examines ASEAN's response to the protracted crisis. Although the regional bloc has clearly pushed the boundaries of its founding principle of non-interference, the report analyzes the reasons behind ASEAN's mostly ineffective actions, which include a lack of cohesive and strategic leadership, reluctance to acknowledge and address the human rights dimension of the crisis, a lack of transparency and engagement, in particular with Rohingya communities, and institutional weaknesses. The report further identifies recommendations for ASEAN to play a more positive and holistic role in promoting lasting and meaningful solutions for all people of Rakhine.