

## A Survivor-centered Approach to Justice and Care for the Rohingya

### PHR Legal Brief

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In August 2017, the armed forces of Myanmar (Tatmadaw) unleashed a violent campaign of widespread and systematic attacks on the country's Rohingya communities, escalating previous episodes of human rights abuses committed against the Rohingya population. The United Nations (UN) and multiple human rights groups documented that Myanmar security forces committed rape, gang rape, sexual slavery, forced nudity, genital mutilation and other forms of violence targeting sexual organs, sexual assault, and threats and attempts at rape and sexual assault followed by the killing of victims. In numerous instances, survivors recounted being forced to witness the rape or sexual assault of family or community members. Following what the Myanmar government called "clearance operations," more than 720,000 Rohingya fled to neighboring Bangladesh. Analyses of these experiences suggest that sexual violence is a deliberate strategy used by the Tatmadaw to intimidate, terrorize, punish, and forcibly displace the Rohingya civilian population from their land.

In its recent report, "Sexual Violence, Trauma, and Neglect: Observations of Health Care Providers Treating Rohingya Survivors in Refugee Camps in Bangladesh," Physicians for Human Rights (PHR) captures the experiences of Rohingya survivors through the intimate lens of the people who cared for them in Bangladesh – doctors, nurses, mental health experts, and other health professionals. PHR's findings – specifically regarding the scale, brutality, and patterns of sexual violence experienced by the Rohingya in Myanmar, the ongoing experiences of intimate partner violence experienced in Bangladesh, and the severe barriers to care – all demand concerted action at national, regional, and international levels.

PHR recommends meaningful efforts be made by the government of Myanmar to investigate allegations of widespread sexual violence by the Tatmadaw, prosecute those responsible, and work to provide human rights protections to the Rohingya currently living in Myanmar and any who choose to return in the future. PHR also calls upon the government of Bangladesh and relevant humanitarian response actors to take all possible measures to address any barriers to care and ensure trauma-informed, survivor-centered approaches to respond to survivors' needs. PHR further recommends that the government of Myanmar and the regional and international community use all means at their disposal to support a range of justice and accountability efforts and ensure that the government of Myanmar complies with its obligations to prevent and punish the perpetration of grave human rights violations and related crimes, including sexual violence.

**With international justice processes currently ongoing, this brief details how PHR's documentation can be used to support a survivor-centered approach to justice and accountability.<sup>1</sup>**

It first sets forth the protections guaranteed the Rohingya under international human rights, international humanitarian, and customary international law. It then explains how PHR's documentation can be used in accountability processes to corroborate other evidence of atrocities – specifically sexual violence – committed against the Rohingya in Myanmar, while honoring survivors' immediate needs for reparations and effective, long-term care. Finally, the brief describes the other measures necessary to ensure the Rohingya population's safe return home, advancing a holistic, survivor-centered approach to justice and non-recurrence of the violations in question.

# The Rohingya are entitled to protection under the law.

## Myanmar and Bangladesh must honor their obligations to the Rohingya under international human rights law

As PHR has documented over the past 15 years, the Rohingya have been deprived of citizenship and subjected to decades of persecution as ethnic, religious, and linguistic minorities in Myanmar, resulting in the erosion of several basic rights and protracted displacement.<sup>2</sup> Medical and humanitarian relief efforts have largely been hindered by waves of mass violence and the government of Myanmar's restrictions on access to Rakhine state, where the majority of the Rohingya lived, and other parts of the country.<sup>3</sup> PHR's latest study captures how Rohingya forcibly displaced to neighboring Bangladesh, especially sexual violence survivors, lack access to justice and appropriate health care services in the refugee camps. The Rohingya's situation in Bangladesh is further complicated by their legal status as "stateless," "refugees," or undocumented "asylum-seekers" and the government of Bangladesh's short-term focus on repatriation.<sup>45</sup> Yet, discriminatory treatment of the Rohingya – including denial of their right to participate in decisions about their lives – must end to remedy the systemic inequities that have long affected Rohingya communities.<sup>6</sup>

Since all states have an obligation to respect the human rights of all persons in their territory and under their jurisdiction without discrimination, the Rohingya are entitled to protection irrespective of their legal status.<sup>7</sup> In addition to the United Nations Charter (1945) and the Universal Declaration of Human Rights (1948), these obligations are delineated in the core international human rights treaties to which Myanmar and Bangladesh are state parties:

| Human Rights Instrument  | Myanmar Ratification, Acceptance or Approval | Bangladesh Ratification, Acceptance or Approval |
|--|--|---|
| International Convention on the Elimination of all Forms of Racial Discrimination (1965)                             |  | 06/11/1979                                      |
| International Covenant on Economic, Social and Cultural Rights (1966)  | 10/06/2017                                   | 10/05/1998                                      |
| International Covenant on Civil and Political Rights (1966)  |  | 09/06/2000                                      |
| Convention on the Elimination of All Forms of Discrimination against Women (1979)                                    | 07/22/1997                                   | 11/06/1984                                      |
| Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)                      |  | 10/05/1998                                      |
| Convention on the Rights of the Child (1989)   | 07/15/1991                                   | 08/03/1990                                      |
| International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) |  | 08/24/2011                                      |
| Convention on the Rights of Persons with Disabilities (2006)   | 12/07/2011                                   | 11/30/2007                                      |

A state's human rights obligations remain consistent, even in times of armed conflict.<sup>8</sup> Additionally, where a state is compelled to distinguish between the rights of citizens and non-citizens, the distinction must serve a legitimate aim and the measures adopted must be necessary and proportional to the achievement of its objective.<sup>9</sup>

## Myanmar is bound by the laws of state responsibility.

Accordingly, Myanmar is obligated to uphold the basic rights of all Rohingya currently in Myanmar, as well as those who return in the future.<sup>10, 11</sup> Sexual violence violates several fundamental rights, including the rights to life, privacy, torture, and to be free from gender-based discrimination.<sup>12</sup> The state of Myanmar is responsible for providing survivors of sexual violence access to medical and psychosocial support services, including sexual and reproductive health services.<sup>13</sup> Restrictions on the right to freedom of movement must only be exercised in exceptional circumstances and serve a legitimate and necessary purpose.<sup>14</sup> Additionally, the measures adopted must be applied in a non-discriminatory manner and cannot prevent survivors from accessing appropriate care.<sup>15</sup>

Myanmar also has a duty to investigate and prosecute violations of international human rights, including sexual violence, committed against the Rohingya.<sup>16</sup> Where existing national mechanisms lack the capacity to undertake independent impartial investigations and prosecutions, the formation of special tribunals to adjudicate serious crimes perpetrated by the Tatmadaw and others may be appropriate.<sup>17</sup> Additionally, Myanmar has a duty to provide survivors of sexual violence access to effective remedies.<sup>18</sup> This may include a range of preventive, rehabilitative, punitive, compensatory, and protective measures.<sup>19</sup> Myanmar is also responsible for ensuring that children born of rape receive adequate care and birth registration.<sup>20</sup> Survivors' meaningful participation in these responses to sexual violence are necessary at all stages to ensure a rights-based, victim-centered approach.

Bangladesh is obligated to address any barriers to care and other essential needs while the Rohingya are within its territories.<sup>21</sup> This includes investigating and prosecuting intimate partner violence and other forms of sexual violence committed against the Rohingya while in Bangladesh. The government of Bangladesh is also responsible for removing any obstacles survivors face in accessing reporting and accountability mechanisms, particularly where they may be subject to arrest due to their legal status.<sup>22</sup> Bangladesh is further obligated to provide adequate care and birth registration for all children born in Bangladesh, including children who would otherwise be considered stateless.<sup>23</sup> Again, survivors should be consulted throughout these processes to ensure a rights-based approach to justice and care.

### **The Rohingya are also entitled to protection under international humanitarian law and customary international law**

International humanitarian law complements the protections guaranteed the Rohingya under international human rights law by seeking to reduce the impact of armed conflict on people and property.<sup>24</sup> Myanmar has ratified the four Geneva Conventions (1949), which establish minimum standards for the conduct of war and protections for people who are not active in hostilities, including civilians, medical personnel, and other humanitarians. Article 3, which is common to the four Geneva Conventions, may be applicable to the Myanmar context, as it governs situations of non-international armed conflict.<sup>25</sup>

Accordingly, the government of Myanmar is obligated to care for Rohingya who are sick or wounded during hostilities in a non-discriminatory manner.<sup>26</sup> Parties to the conflict are also responsible for ensuring the continued operation of medical facilities and the safe passage of humanitarians to deliver relief.<sup>27</sup> In some circumstances, it may be considered "cruel, inhuman, and degrading treatment" where the Rohingya, particularly survivors of sexual violence, are unable to access adequate medical or psychosocial care.<sup>28</sup>

In instances where states are not parties to a treaty, they may still be bound to those principles that have achieved the status of customary international law, for example *non-refoulement*.<sup>29, 30, 31</sup> Customary international law also includes non-derogable peremptory norms of general international law, *jus cogens*,<sup>32</sup> which prohibit, *inter alia* (among other things), acts such as

genocide, crimes against humanity, war crimes, and torture.<sup>33</sup> Since judicial authorities have long recognized that sexual violence may serve as a basis for these crimes,<sup>34</sup> the state of Myanmar again has an obligation to cease violations by the Tatmadaw and other security forces aimed at Rohingya civilians and to prosecute those responsible.<sup>35</sup> Myanmar is also prohibited from upholding the Tatmadaw's violent attacks on the Rohingya as lawful, or supporting the commission of these serious breaches of international law in any way.<sup>36</sup> Whereas the violent attacks on the Rohingya have continued, all states also have obligations to invoke Myanmar's responsibility to end these atrocities against the Rohingya, consistent with its *erga omnes*<sup>37</sup> obligations to the international community as a whole.<sup>38</sup>

Myanmar is a state party to the Convention on the Prevention and Punishment of the Crimes of Genocide (1948), which gives rise to its duty to prevent, stop, and punish the crime of genocide in times of peace and war.<sup>39</sup> In the light of emerging reports of Rohingya civilians being subjected to ongoing violations of human rights and humanitarian law in Rakhine state, the International Court of Justice has already determined its jurisdiction to review the case and issue provisional measures.<sup>40</sup> Myanmar is not a state party to the Rome Statute of the International Criminal Court (1998). Nonetheless, the International Criminal Court has authorized its prosecutor to open an investigation of the forced deportation of the Rohingya from Myanmar across the border into Bangladesh, which is a state party to the Rome Statute.<sup>41</sup> Evidence of rape and other sexual violence may be relevant if it can be shown that these acts were committed with the intent to force the Rohingya to flee into Bangladesh.<sup>42</sup> A case has also been filed in Argentina's federal courts under universal jurisdiction which seeks to establish the responsibility of military and civilian leaders, as well as political, religious, and corporate figures, for the crimes of genocide and crimes against humanity.<sup>43</sup>

### **PHR's documentation can be used to substantiate sexual violence and other mass atrocities**

The Tatmadaw's violent "clearance operations" in 2017 and prevailing insecurity in Rakhine state form part of a broader campaign of violence aimed at the Rohingya that has been carried out over several decades. With international justice and accountability processes currently underway, prosecutors and legal teams must not only prove that the violations occurred, but that the contextual elements indicative of mass atrocities are also present.<sup>44</sup> Statistical data have previously been used to substantiate mass atrocities in international justice processes and can be introduced in the Myanmar context to overcome the pervasive impunity generally characteristic of sexual violence.<sup>45</sup>

In its most recent report, PHR has added to the body of documentation demonstrating that the Tatmadaw perpetrated mass atrocities against the Rohingya, while revealing more about the circumstances in which sexual violence occurred in Myanmar.<sup>46</sup> Rohingya survivors disclosed to health care workers who first treated them in Bangladesh that they experienced gang rape, sexual humiliation and other attacks on personal dignity, and sexual violence accompanied by other violent acts. Further analysis of the patterns tied to these violations would consider the Tatmadaw's *modus operandi*, the geographic and temporal scope of the violations, that they are "systematic or widespread" in nature, and that they coerce displacement to Bangladesh and other locations where survivors are unable to receive appropriate medical care or psychosocial and mental health support services.<sup>47</sup> Consideration should also be given to pregnancy or abortion rates and the long-term damage to Rohingya survivors and their communities.<sup>48</sup> The element of intent necessary to establish the crime of genocide may be assigned where there is varied treatment between population groups, and where certain categories of people experience violations at higher rates than others.<sup>49</sup> Victims' national, ethnic, racial, or religious identities, in addition to their age, gender, social position, level of education, and professional background may all bear relevance.<sup>50</sup> To be most effective, parties introducing this type of statistical analysis should limit the focus of the inquiry the data seeks to address.<sup>51</sup>

## Trauma-informed documentation of Rohingya survivors' experiences and the right to reparations

PHR's documentation also emphasizes the need for greater consideration of Rohingya survivors' social, cultural, and religious experiences in the investigation of sexual violence and the shame and stigma that may surface in describing or acknowledging related harm. PHR's study can be introduced to bolster other evidence gathered, mitigating the effects of trauma, underreporting, or overdocumentation that may call witness credibility into question in legal proceedings. Additionally, through describing the serious injuries to victims' bodies and the immense suffering caused by sexual humiliation and forced witnessing of sexual crimes, PHR's documentation may also encourage a more expansive view of the types of crimes that lead to convictions in cases involving female and non-female victims.<sup>52, 53</sup>

Given the pervasive psychological *sequelae* identified among Rohingya survivors, PHR's documentation can also be instrumental in avoiding the potential re-traumatization of witnesses during legal proceedings.<sup>54</sup> In addition to inputs from Rohingya survivors and medical professionals, PHR's data may inform the design of protective measures and other forms of assistance to survivors.<sup>55</sup> Such arrangements may include, but are not limited to: witness preparation before trial of what to expect from the process, or "familiarization"; the use of pseudonyms; non-disclosure of witness or victim identity; closed sessions; electronic image and voice distortion; having legal representatives, medical or psychosocial professionals, or family members present during victim testimony; video or other forms of electronic testimony; witness relocation; or the potential relocation of judicial hearings.<sup>56</sup>

Rohingya victims and survivors who were directly and indirectly harmed by the Tatmadaw's violent attacks are also entitled to reparations from individual perpetrators and the state of Myanmar for the harm suffered.<sup>57</sup> The international community may also receive equitable remedies or reparations for Myanmar's breaches of its *erga omnes* obligations.<sup>58</sup> Reparations are particularly significant for victims and survivors as they constitute direct and profound acknowledgement of their experiences and the harm suffered.<sup>59</sup> Effective reparations schemes generally introduce a range of material and symbolic measures that are compensatory, rehabilitative, restorative, and retributive in nature and include guarantees of non-repetition of the violations experienced.

Reparations are also important to address deeply entrenched gender discrimination and inequalities that perpetuate sexual violence. They provide survivors the satisfaction of identifying the truth about what occurred to ensure such violations can be avoided in the future. While justice remains elusive in Myanmar, Rohingya survivors may urgently require protection outside of the country, as well as specialized medical care for their injuries and long-term health complications.<sup>60</sup> It is important that survivors and health professionals be involved in reparations program design to ensure its relevancy and effectiveness.<sup>61</sup>

## International accountability processes must be complemented by other forms of justice for sustainable peace

The Global Responsibility to Protect reiterates Myanmar's obligations to protect the Rohingya and prevent genocide, war crimes, ethnic cleansing, and crimes against humanity, as well as the international community's residual duty to act in the face of these atrocities.<sup>62</sup> Consistent with UN Security Council Resolution 1325 on Women, Peace and Security and the 2020 Report of the UN Secretary-General, "*Prioritizing Prevention and Strengthening Response: Women and the Responsibility to Protect*," women and girls in Myanmar are entitled to special protection and consideration in atrocity-prevention and peace-building efforts.<sup>63</sup> Yet, even with several accountability processes underway at the international level, it may still be several years before Rohingya survivors receive any form of justice or acknowledgement for the serious violations experienced in Myanmar. PHR's compelling documentation further accentuates the need for



## Survivor-centered approaches to justice require forums that determine the truth, trauma-informed opportunities for survivors to receive information, be heard, and be recognized, and adequate means of redress.

international accountability efforts to be complemented by other more immediate forms of relief that promote dignity and respect for Rohingya survivors, while reinforcing their capacity to exercise agency over their lives. Other justice processes may include, but are not limited to, truth and reconciliation initiatives, other reparations and compensation programs, the reform of discriminatory laws and institutions, and the preservation of historical memory to honor the Rohingya's experiences – all designed to prevent recurrence of the violations experienced.<sup>64</sup>

Beyond international accountability efforts, national and local-level accountability processes are necessary to identify and hold other perpetrators accountable and to re-establish the rule of law in Myanmar. Truth and reconciliation initiatives are particularly important, as they offer survivors acknowledgment of their experiences and establish a factual record of events, while shedding more light on the types of violations that occurred and appropriate forms of redress. Community-based reparations and compensation schemes complement formal reparation programs by providing other compensation for recuperation and rehabilitation and fostering empathy and solidarity among victims, survivors, and their communities. Memorialization perpetuates the memory and honors the experiences of Rohingya survivors. Legal and institutional reforms address the root causes of violence, while re-establishing public trust in the state.

| <b>The range of survivor-centered approaches to justice includes:</b> |   |
|---|---|
| <b>Accountability</b>   | International Criminal Court, international tribunals, hybrid tribunals, domestic prosecutions, universal jurisdiction, customary courts (or other community-based justice processes harmonized with international legal standards)   |
| <b>Truth, reconciliation, and healing</b>                             | State-sanctioned truth commissions, fact-finding bodies, reform of national curricula in education systems, community-based dialogues and townhalls, documentation of oral histories, community archives, awareness-raising campaigns around the types of violations that have occurred |
| <b>Reparations</b>  | Official apologies by the state, monuments, national commemoration, monetary compensation, medical assistance, infrastructure for local communities, land restitution   |
| <b>Non-recurrence</b>   | Control of military and security structures, reform of laws and institutions, vetting, lustration, security sector reform, disarmament, demobilization and reintegration programs, human rights due diligence policies  |
| <b>Memorialization</b>  | Official days of commemoration, renaming public spaces, preserving sites of atrocity, spontaneous memorials, community oral archive projects, murals and quilting projects that recognize victims, photo exhibits and documentaries, community memorial gardens                         |

It is critical that Rohingya communities are informed about the range of justice processes possible in order to determine their own needs and priorities.<sup>65</sup> The social and political situation in Myanmar will influence the kinds of mechanisms introduced, as well as their timing. While it is important to include a range of formal and local or community-based mechanisms, it is equally important not to attempt to integrate several initiatives at once in a situation with ongoing violations. Flexibility in the types of mechanisms introduced will allow for innovative programming that is responsive to the context. Rohingya survivors and other members of marginalized groups must actively participate in the design and implementation of these initiatives to ensure their sustainability and that conditions are met for safe, voluntary, and dignified returns.

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## Endnotes

<sup>1</sup> Notwithstanding Myanmar's regional commitments and national laws, this brief will focus on Myanmar's obligations under international law. It is worth noting that Myanmar is an Association of South East Asian Nations (ASEAN) Member State and signatory to the ASEAN Human Rights Declaration (2012). Though the ASEAN Human Rights Declaration is non-binding, it reiterates the principles enshrined in the UN Charter, the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action (1993) and the international human rights instruments to which ASEAN member states are parties. The ASEAN Intergovernmental Commission on Human Rights is charged with upholding these commitments. Myanmar has also joined the Declaration on the Elimination of Violence Against Women in the ASEAN Region (2012). ASEAN. "ASEAN Human Rights Declaration." <https://aichr.org/wp-content/uploads/2018/10/ASEAN-Human-Rights-Declaration.pdf>. November 18, 2012., ASEAN Intergovernmental Commission on Human Rights. "Terms of Reference." <https://aichr.org/wp-content/uploads/2020/02/TOR-of-AICHR.pdf>. October 2009., ASEAN. "Declaration on the Elimination of Violence Against Women in the ASEAN Region." [https://asean.org/?static\\_post=declaration-on-the-elimination-of-violence-against-women-in-the-asean-region-4](https://asean.org/?static_post=declaration-on-the-elimination-of-violence-against-women-in-the-asean-region-4). June 30, 2004.

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<sup>3</sup> Amnesty International. "Myanmar: Lift restrictions immediately on humanitarian aid."

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<sup>4</sup> Physicians for Human Rights. "Stateless and Starving: Persecuted Rohingya Flee Burma and Starve in Bangladesh." <https://phr.org/wp-content/uploads/2010/03/stateless-and-starving-1.pdf>. March 2010., Abul Hasnat Milton, Mijanur Rahman, Sumaira Hussain, et al. "Trapped in Statelessness: Rohingya Refugees in Bangladesh." *International Journal of Environmental Research and Public Health*. 14, 942. (August 2017). [ncbi.nlm.nih.gov/pmc/articles/PMC5580644/pdf/ijerph-14-00942.pdf](https://pubmed.ncbi.nlm.nih.gov/pmc/articles/PMC5580644/pdf/ijerph-14-00942.pdf), Amal de Chickera. "Statelessness and Identity in the Rohingya Refugee Crisis."

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<sup>5</sup> Bangladesh has allowed the Rohingya to shelter within its borders even though it has not ratified the 1951 Refugee Convention (or its 1967 Protocol), the 1954 Convention relating to the Status of Stateless Persons or the 1961 Convention on the Reduction of Statelessness. Since Bangladesh has not introduced domestic legislation with respect to asylum procedures or refugee status determination, the Rohingya's legal status in Bangladesh is primarily governed by its national Constitution and laws on entry and residence outlined in the 1946 Foreigners Act. Immigration, Bangladesh Police: Bangladesh Immigration Rules.

<sup>6</sup> United States Holocaust Memorial Museum, Simon-Skjoldt Center for the Prevention of Genocide.

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<sup>8</sup> International Commission of Jurists. “COVID-19 and Human Rights: Upholding the Right to Health in Myanmar’s Conflict Areas.” <https://www.icj.org/wp-content/uploads/2020/04/Myanmar-COVID19-Briefing-Paper-2020-ENG.pdf>. April 2020.

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<sup>10</sup> United Nations High Commissioner for Refugees. “The Rights of Non-Citizens.” <https://www.ohchr.org/documents/publications/noncitizensen.pdf> . 2006.

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<sup>12</sup> United States Holocaust Memorial Museum, Simon-Skjodt Center for the Prevention of Genocide. “Practical Prevention. How the Genocide Convention’s Obligation to Prevent Applies to Myanmar. Report #1: Identifying and Mitigating Risk Factors.”

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<sup>13</sup> United Nations General Assembly. “International Covenant on Economic, Social and Cultural Rights.” 1976., United Nations Committee on Economic, Social and Cultural Rights. “CESCR General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/22.” 2016., Office of the High Commissioner for Human Rights. “CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12).” 2000., UN Committee on the Elimination of Discrimination Against Women (CEDAW). “CEDAW General Recommendation No. 24.” 1999., UN Committee on the Elimination of Discrimination Against Women (CEDAW). “General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations.” 2013., United Nations General Assembly. “Convention on the Rights of the Child.” 1990., United Nations General Assembly. “International Covenant on Civil and Political Rights.” 1976., UN Human Rights Committee. “General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life.” 2018., United Nations High Commissioner for Refugees. “Convention Relating to the Status of Refugees.” 1954., Institute on Statelessness and Inclusion. “Statelessness and Human Rights: The Convention on the Rights of the Child.”

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<sup>17</sup> Committee on the Elimination of Discrimination against Women. “Concluding observations on the report of Myanmar submitted under the exceptional reporting procedure.”

<https://undocs.org/en/CEDAW/C/MMR/CO/EP/1>. March 2019.

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<sup>38</sup> International Law Commission, “Report of the International Law Commission on the Work of Its Fifty-Third Session (23 April–1 June and 2 July–10 August 2001).” 2001., Craig Eggett, Sarah Thin. “Clarification and Conflation: Obligations Erga Omnes in the Chagos Opinion.” <https://www.ejiltalk.org/clarification-and-conflation-obligations-erga-omnes-in-the-chagos-opinion/>. May 2019.

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