

## **U.S. Commission on International Religious Freedom**

### ***Ending Genocide – U.S. Government Genocide Determinations and Next Steps***

**May 12, 2021**

#### **Written Testimony of Daniel Fullerton**

Chair Bhargava, Vice Chair Perkins, Commissioners—thank you for the opportunity to testify on this vital topic.

First, I must note that my testimony today is primarily based on my previous work with the Public International Law & Policy Group (PILPG), where, among other things, I managed the State Department-commissioned 2018 investigation into atrocities against the Rohingya and co-authored PILPG’s factual findings & legal analysis report on the outcomes that investigation. As such, I am testifying in my personal capacity; the views I express are thus my own and should not be construed as representing the views of the USAID or the U.S. Government.

I will focus my testimony on the two issues I was asked to address: how the State Department sought to use a large-scale investigation to help determine if atrocities against the Rohingya should be construed as a genocide; and, whether there is a reasonable basis to conclude, legally, that genocide or crimes against humanity were committed against the Rohingya.

As to how the State Department approached a potential genocide determination about crimes against the Rohingya, it is important to note that the State Department did not set out with genocide specifically in mind when commissioning its 2018 Rohingya investigation. Rather, the purpose of the State Department-commissioned investigation was to accurately document patterns of any abuses and atrocities committed against any residents in Myanmar’s northern Rakhine State to help inform the policy decisions related to accountability in Myanmar.

In support of that objective, and within just a few months after the major attacks against the Rohingya of August 2017, the State Department began working with PILPG to design a rigorous investigation methodology that would provide the most accurate and representative accounting of the violence in northern Rakhine State as possible. Drawing from previous investigation missions in South Sudan and Darfur, the State Department and PILPG developed a questionnaire and

accompanying methodology to systematically collect credible first-hand accounts from a random and representative sample of refugee respondents in Bangladesh.

While the intricacies of an applied methodology of an investigative mission may not be what catches public attention regarding atrocity crimes, it is key to understanding the basis and process for making, or not making, a genocide determination.

Across four weeks in March–April 2018, the 18 highly experienced and trained international investigators on the PILPG investigation team collected 1,024 interviews from a representative sample of Rohingya refugees across all the refugee camps and settlement areas of Eastern Bangladesh. The investigators and a team of dozens of attorneys then spent months carefully reviewing the more than 15,000 pages of documentation from those interviews and ultimately identified more than 13,000 instances of documented grave human rights violations. As one of the few people who has read all 15,000 pages responses, I can assure you that the findings were staggering.

The collected data revealed years-long patterns of gradually worsening violence and widespread human rights violations targeted against the Rohingya, which began to dramatically increase in severity and frequency in the year leading up to the major attacks of 2017. The investigation further uncovered the horrific details of the widespread and systematic attacks against Rohingya civilians across northern Rakhine State in August–September 2017. These attacks included brutal large-scale ground assaults, indiscriminate shootings, mass killings, executions, crucifixions, rapes and gang rapes, beatings, mutilations, the burning and drowning of children, the widespread destruction of Rohingya homes and villages, among many other brutal acts.

Of particular note for this hearing the years of oppressive religious and ethnic persecution and the public, brutal, and terrorizing attacks against Rohingya religious leaders and symbols, such as how religious leaders often being first to be attacked and were often publicly mutilated and murdered. There were credible reports of Rohingya community leaders being gathered into buildings and burned alive, of imams being beaten and having their beards burned off, and of Rohingya religious or community leaders being shot or stabbed in front of the members of their village. Symbolic burnings of mosques, madrassas, and Korans were widely documented.

In July 2018, PILPG delivered to the State Department all of collected data detailing that terrible violence, including the completed surveys, coded quantitative data of each documented violation, and a qualitative report and military expert report that complemented and provided further context from the investigators' observations and PILPG's factual analysis.

That collection and analysis of that vast body of information, less than one year after the major attacks of 2017, was a tremendous achievement by the State Department; it had designed and commissioned the then-largest investigation into the crimes against the Rohingya, and because of the State Department's rigorous methodology and a highly capable investigative team, the State Department had access to a trove of reliable and representative data detailing the horrific violence and abuse against the Rohingya.

On August 13, 2018, Politico reported on a leaked draft statement from Secretary of State Mike Pompeo that reportedly contained a bracketed phrase to "hold for determination" about how to refer to the violence against the Rohingya. Despite widespread expectations and reporting that the State Department would announce its findings before the August 25 one-year anniversary of the major attacks, the State Department did not release its report until September 24, 2018 (though the report is dated "August 2018").

The State Department's report provided a thorough accounting of the violence against the Rohingya—with detailed statistics, geospatial assessments, and analyses of the collected data—but it offered no legal conclusions. The State Department report detailed the "extreme, large-scale, widespread" violence, it outlined the "well-planned and coordinated" manner of the attacks "that resulted in mass casualties," and it noted how religious leaders had been singled out for attacks. The report did not, however, make any determination of genocide, crimes against humanity, or other atrocity crimes.

The issue of determinations raises the issue of whether, from a legal perspective, there are reasonable grounds to believe that genocide and/or crimes against humanity were committed against the Rohingya.

The short answer is a resounding, "Yes."

Following the conclusion of the investigation mission, my PILPG co-authors and I, with substantial support from an array of international attorneys and criminal law experts, undertook a comprehensive legal analysis of the collected documentation

and published those findings. That legal analysis, which the State Department did not request and was independently prepared by PILPG, found reasonable grounds to believe that crimes against humanity, genocide, and war crimes were committed against the Rohingya.

The ‘reasonable grounds to believe’ standard in question is important because it is the same objective standard used by the ICC, UN fact finding missions, commissions of inquiry, and other international investigations when determining whether to open investigations or to move forward with further investigative or prosecutorial efforts. This standard is lower than the standard for proving criminal guilt, and it does not require identifying individual perpetrators. Satisfying this standard involves determining whether there are strong preliminary indications that crimes have been committed and that further investigation is warranted.

Looking to the specific crime of genocide, as it has emerged from the Genocide Convention, customary international law, and the development of international legal jurisprudence, there are three basic criteria for determining whether genocide has occurred: (1) whether a protected group was targeted, (2) whether individuals of that group were the victims of certain underlying prohibited acts, and (3) whether those acts were committed with an intent to destroy the protected group, in whole or in part.

Taking each of those elements in turn, first, the Rohingya easily fit within the established understanding of what constitutes a “protected group” within the international legal community. The Rohingya self-identify as a distinct ethnic group with their own language, culture, and long-standing connection to Rakhine State. Moreover, the Rohingya were specifically and exclusively targeted because of their ethnic and/or religious identities and status as a group, as exemplified by the perpetrators’ use of ethnic and racial slurs during the attacks. The particularly public, brutal, and symbolic targeting of Rohingya religious leaders, teachers, buildings, and symbols further reinforced the targeting of the Rohingya as a distinct group.

As for the second element, a range of underlying prohibited acts were committed against the Rohingya, including killings, the causing of serious bodily or mental harm, and the deliberate infliction of conditions of life calculated to bring about the partial or complete physical destruction of the Rohingya. These acts included widely documented mass killings by every conceivable violent means; the brutal attacking and killing of women and young children; massive attacks on fleeing victims; violent rapes and gang rapes; the burning of villages, mosques, madrassas,

and persons; and, the overall erasure of any signs of vestiges of the Rohingya's existence in Rakhine State, including leveling Rohingya villages with bulldozers.

Finally, genocidal intent is always the most challenging element to satisfy because there is typically so little direct evidence, but a totality of facts and circumstances can provide sufficient circumstantial evidence to find reasonable grounds to believe there was genocidal intent. In this instance: the attacks were systematically and exclusively directed against the Rohingya; there were clear patterns of abuse and systematic violations of fundamental human rights; the perpetrators regularly used racial and ethnic slurs; the extent of the destruction and systematicity of the attacks shows a clear pattern of mass atrocities of a great scale; there were particularly brutal attacks against Rohingya religious leaders and Islamic symbols; and, some of the deadliest attacks occurred as the Rohingya were fleeing or crossing the border into Bangladesh. The facts and circumstances thus provide reasonable grounds to believe there was an intent to destroy the Rohingya.

Given this hearing's focus on genocide, I will not go into the details of the specific elements of crimes against humanity, other than to highlight that PILPG's legal analysis found that all the elements of crimes against humanity under international law were so extensively documented that the events against the Rohingya rise well beyond the reasonable grounds standard. The evidence was overwhelming.

In addition to the PILPG report, multiple other international investigations and legal analyses, including the UN Independent International Fact Finding Mission on Myanmar, have similarly determined that there are reasonable grounds to believe that serious international crimes were committed against the Rohingya. The chronology, speed, and widespread scope of the attacks, as well as the systematic and exclusive targeting of all Rohingya people suggest that the Myanmar armed forces were carrying out an intentional, planned, coordinated, and systematic attack aimed with a goal not just to expel, but also to exterminate the Rohingya.

While technological, legal, and political developments make it harder for perpetrators to hide atrocities, access to reliable information about such crimes often remains a challenge for international actors, and/or provides an excuse for inaction, and these developments have not deterred perpetrators—as we are now seeing in the streets of Yangon and across Myanmar.

Ultimately, State Department determinations of genocide and other crimes are complex processes with multiple technical, investigative, analytical, legal, and policy components.

It is thus important and impressive that, within a few months after the major attacks of 2017, the State Department had put itself in the best possible position to make a determination about crimes against the Rohingya: the investigation and its methodology were skillfully designed, the investigation was expertly implemented, the data was systematically collected and thoroughly analyzed, and the patterns of abuse, violations, and crimes were plainly revealed.

Then, when the time had seemingly come for a policy decision, an official State Department report was published, the facts were recounted, and maps and charts were drawn, but a determination of crimes was not made.

Though criminal accountability will require more investigations, access to Rakhine State remains non-existent, and the stories of countless Rohingya victims will unfortunately likely never be heard, we can safely say that, on the whole, we do know what happened to the Rohingya.

We thus face the question of: if the U.S. can't or we won't make a determination when it actually has so much reliable information about what happened, when can it?

Thank you.