INTERNATIONAL COURT OF JUSTICE

APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

THE GAMBIA
v.
MYANMAR

MEMORIAL OF THE GAMBIA

VOLUME I

23 OCTOBER 2020

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CHAPTER 1
INTRODUCTION

1.1 The Republic of The Gambia ("The Gambia") instituted these proceedings against the Republic of the Union of Myanmar ("Myanmar") on 11 November 2019 when it filed its Application in accordance with Article 36, paragraph 1 and Article 40 of the Statute of the Court. As set out in the Application, this case concerns violations by Myanmar of its obligations under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention" or "Convention"), in relation to its treatment of the Rohingya group and its members.

1.2 The Gambia seeks to hold Myanmar responsible for acts it has taken and condoned against the Rohingya group, a distinct ethnical, racial and religious group that resides largely in Myanmar's Rakhine State. These include widespread and systematic acts of killing, rape and gang rape, torture, infliction of other serious bodily and mental injuries, burning of homes and villages and confiscation of property. These acts were committed by Myanmar's military (known as the "Tatmadaw") during so-called "clearance operations" between 2016 and 2018. They were taken with the specific intent to destroy, in whole or in part, the Rohingya group as such. Figures 1.1 and 1.2 (following page 2 and in Volume XII) are maps showing the location of Rakhine State in Myanmar and showing the three townships in the northern part of the State populated by Rohingya, where the genocidal acts were carried out.

1.3 With its Application The Gambia requested that the Court indicate provisional measures, in view of the real and imminent risk of continued acts of genocide against the Rohingya group. Following oral hearings held between 10 and 12 December 2019, the Court delivered its Order indicating

provisional measures (the "Provisional Measures Order") on 23 January 2020.[1] The Court ordered Myanmar to, *inter alia*, take all measures in its power to prevent acts of genocide against the Rohingya, take effective measures to prevent the destruction and ensure the preservation of evidence, and submit regular reports on the measures it takes to give effect to the Provisional Measures Order.[2]

1.4 By further Order also dated 23 January 2020, the Court fixed the time limit for the filing of the Memorial of The Gambia as 23 July 2020 and the time limit for the filing of the Counter-Memorial of Myanmar as 25 January 2021.[3]

1.5 In view of the difficulties caused by the COVID-19 pandemic, by letter dated 24 April 2020, The Gambia requested an extension of the time limit for the filing of its Memorial. After soliciting the views of Myanmar, the Court granted The Gambia's request by Order dated 18 May 2020, and it extended the time limit for the filing of the Memorial to 23 October 2020 and the filing of the Counter-Memorial until 23 July 2021.[4] This Memorial is submitted pursuant to that Order.

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[1] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020* [**hereinafter** Provisional Measures Order].

[2] *Ibid.*, para. 86(1).

[3] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Order of 23 January 2020 on fixing of time-limits for the Memorial and Counter-Memorial.*

[4] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Order of 18 May 2020 on extension of time-limits for the Memorial and Counter-Memorial.*


Rakhine State
MYANMAR
Mercator Projection, WGS-84 Datum
Scale accurate at 20°N
0
150
300
Kilometers
Prepared by: International Mapping
CHINA
BHUTAN
INDIA
BANGLADESH
Dhaka
KACHIN STATE
SAGAING REGION
MYANMAR
CHIN STATE
SHAN STATE
MANDALAY REGION
MAGWAY REGION
Sittwe
RAKHINE STATE
NAY PYI TAW
Nay Pyi Taw
KAYAH STATE
BAGO REGION
KAYIN STATE
MON STATE
YANGON REGION
AYEYARWADY REGION
LAOS
Vientiane
THAILAND
Bangkok
TANINTHARYI REGION
Bay of Bengal
Andaman Sea
Gulf of Thailand
Preparis Island (MYANMAR)
Coco Islands (MYANMAR)
Andaman and Nicobar Islands (INDIA)
20°N
15°N
10°N
95°E
100°E

Figure 1.1


Buthidaung, Maungdaw, and Rathedaung Townships
Northern Rakhine State
MYANMAR
Mercator Projection, WGS-84 Datum
Scale accurate at 20°N
0 10 20
Kilometers
Prepared by: International Mapping
92°15'E
92°30'E
92°45'E
21°15'N
21°00'N
20°45'N
20°30'N
20°15'N
BANGLADESH
MYANMAR
Chin
Kyauktaw
Ponnagyun
Sittwe
Bay of Bengal
Buthidaung
Maungdaw
Rathedaung
Kha Maung Seik
Ta Man Thar
Khun Thi Pyin
Pa Da Kar Ywar Thit
Min Gyi (Tula Toli)
Aung Sit Pyin
Kyein Chaung
Laung Don
Kyin Tauk
Doe Tan
Ngar Sar Kyu
Nga Khu Ya
Kyet Yoe Pyin
Ngan Chaung
U Shey Kya
Pwint Hpyu Chaung
Hpar Wut Chaung
Myaw Taung
Yae Khat Chaung Gwa Son
Maung Hnit Ma Gyi
Dar Gyi Zar
Naung Dar Khar Li
Hla Poe Kaung
Wa Peik
Yin Ma Kyaung Taung
Taung Bazar
Nga Yant Chaung
Hpaung Taw Pyin
Maung Nu
Chin Tha Mar
Dar Paing Sa Yar
Maung Gyi Taung
Lak Wei Dak
Pyin Shey (La Ba Daung)
Kwan Dine (Kun Taing)
U Hla Hpay
Myaung Nar
Kan Kya
Nyaung Chaung
Chee Yar Tan
Gaw Du Thar Ra
Gu Dar Pyin
War Char
Chein Khar Li
Ah Lel Than Kyaw
Du Oh The Ma
Myin Hlut
Zoe Parang/Phet Leik
Zo Pa Ran (Tha Bay Daw)
Chut Pyin
Zay Di Pyin
Htet Nan Yar
Pyaing Taung
Kyauk Pan Du
Thinn Baw Kway
Pae Youne
Inn Din
Tha Win Chaung
Koe Tan Kauk
Chein Khar Li
MYANMAR
Area of map
Nay Pyi Taw
RAKHINE STATE
Villages mentioned in the Memorial
Township capital
Township boundary
State/Region boundary
International boundary

Figure 1.2

I. The Events Giving Rise to These Proceedings

1.6 The Gambia comes to the Court to ensure respect for rights and obligations under the Genocide Convention. It does so with a deep sense of responsibility and cognizant of the gravity of the charges it levels against Myanmar. It also does so with the firm conviction that the facts fully support those charges. As The Gambia shows in this Memorial, the only reasonable inference that can possibly be drawn from the evidence cited herein, most of which is a matter of public record, is that the Government of Myanmar specifically intended to destroy the Rohingya group as such, in whole or in part.

1.7 The Gambia is not alone in reaching this conclusion. Especially significant in this respect are the findings of the United Nations Human Rights Council's Independent International Fact-Finding Mission on Myanmar ("UN Fact-Finding Mission" or "Mission").

1.8 The Mission was established on 24 March 2017 in the wake of disturbing and credible reports of widespread atrocities committed against the Rohingya in Rakhine State. Its mandate was "to establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State".[5] It was composed of three distinguished, independent jurists: Marzuki Darusman (Chairman, from Indonesia), Radhika Coomaraswamy (Sri Lanka) and Christopher Sidoti (Australia). The members of the Mission

[5] UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/39/CRP.2 (17 September 2018), para. 4. MG, Vol. II, Annex 40 [**hereinafter** UN Fact-Finding Mission, *Report of the Detailed Findings* (2018)].

followed best practices established by the Office of the United Nations High Commissioner for Human Rights ("UN OHCHR") in its publication, *International Commissions of Inquiry and Fact-Finding Missions on International Human Rights Law and International Humanitarian Law—Guidance and Practice*.[6]

1.9 Based on a meticulous collection and review of extensive evidence, the UN Fact-Finding Mission concluded in its September 2018 Report to the UN Human Rights Council that "the factors allowing the inference of genocidal intent are present".[7] It urged that "named Senior-Generals of the Myanmar military", including the Tatmadaw's Commander-in-Chief, be "investigated and prosecuted in an international criminal tribunal for genocide".[8]

1.10 The factual findings upon which the Mission's conclusions were based included the following:

- "The Rohingya are in a situation of severe, systemic and institutionalised oppression from birth to death. Their extreme vulnerability is a consequence of State policies and practices implemented over decades, steadily marginalising the Rohingya and eroding their enjoyment of human rights. The process of 'othering' the Rohingya and their discriminatory treatment started long before the period covered by the Mission."[9]

- "The Rohingya have gradually been denied birth registration, citizenship and membership of the political community. This lack of legal status and identity is the cornerstone of the oppressive system targeting the Rohingya. It is the consequence

[6] *Ibid.*, para. 9.

[7] *Ibid.*, para. 1441.

[8] *Ibid.*, p. 1 (Summary).

[9] *Ibid.*, para. 458.

of the discriminatory and arbitrary use of laws to target an ethnic group and deprive its members of the legal status they once possessed. It is State-sanctioned and in violation of Myanmar's obligations under international law because it discriminates on the basis of race, ethnicity and religion."[10]

- These "discriminatory policies and practices, [have] tightly control[led] almost every aspect of their private lives", including "restrictions related to marriage" and the "number and 'spacing' of children", as well as those concerning "population control".[11]

- Myanmar's adoption and enforcement of these policies and practices has been accompanied by a "carefully crafted hate campaign" that "portrays the Rohingya and other Muslims as an existential threat to Myanmar and to Buddhism", and includes "dehumanising language and the branding of the entire community as 'illegal Bengali immigrants'" who have no right to exist in the country.[12]

- During the "clearance operations" the "Myanmar military and other security forces committed human rights violations on a colossal scale, in violation of all basic tenets of international law". This "had a devastating impact on the Rohingya civilian population, which was targeted, brutalised and terrorized".[13]

- "Rohingya-populated areas across the three townships of northern Rakhine State were deliberately destroyed, in a targeted manner."[14] During these operations, "thousands of Rohingya villagers were killed and injured. Women and girls were subjected to rape and other forms of sexual violence, and

[10] *Ibid.*, para. 491.

[11] *Ibid.*, paras. 580-581.

[12] *Ibid.*, para. 696.

[13] *Ibid.*, para. 883.

[14] *Ibid.*

frequently then killed. Children were attacked deliberately and callously subjected to grave violations".[15]

- "[T]argeted killings occurred as Tatmadaw soldiers and other security forces systematically moved from house to house, pulling people out of their homes and executing them, or shooting them inside their houses, or as they left their houses, often in front of family members."[16]

- "Another feature of the 'clearance operations' was the widespread destruction of Rohingya homes and villages, causing further death and injury through burning. Houses were burned both manually using flammable liquid and matches, and by the use of 'launchers', weapons firing a munition that explodes upon impact."[17]

- "The Mission further verified a pattern of Tatmadaw soldiers intentionally forcing people into houses that were either burning or about to be set alight, and even locking them inside."[18] These included "babies and children" who were "pushed or thrown into burning houses by soldiers".[19]

- "Rape and other sexual and gender-based violence were perpetrated on a massive scale during the 'clearance operations'", including "mass gang rapes, sexually humiliating acts, sexual slavery and sexual mutilations".[20] In particular, "young women and girls were particularly targeted for sexual violence and were disproportionately affected".[21]

- There was a "notable pattern" of "mass gang rape, involving multiple perpetrators and multiple victims in the same incident",

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[15] *Ibid.*

[16] *Ibid.*, para. 893.

[17] *Ibid.*, para. 905.

[18] *Ibid.*, para. 908.

[19] *Ibid.*, para. 910.

[20] *Ibid.*, para. 920.

[21] *Ibid.*, para. 921.

including incidents where "up to 40 women and girls were raped or gang raped together".[22]

- "Many of the women and girls had infants and children with them, who were killed or severely injured while their mothers were raped", and the "houses were then often locked and set on fire and most victims who were still alive were burned to death".[23]

1.11 The UN Fact-Finding Mission issued a further report in September 2019, based on additional investigations, with a particular attention to events that had transpired after September 2018. The Mission's September 2019 report confirmed its earlier conclusion that Myanmar is responsible for the "commission of genocide".[24] It concluded: "the evidence that infers genocidal intent on the part of the State against the Rohingya, identified in its last report, has strengthened".[25]

1.12 Among the reasons given by the Mission for its conclusion that evidence of Myanmar's genocidal intent had "strengthened" were: "the Government's application of laws and policies that keep Rohingya uprooted and living in inhumane conditions through their inability to return home and the deprivation of items essential to their survival";[26] and the "lack of any accountability and of public condemnation to prevent

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[22] *Ibid.*

[23] *Ibid.*, para. 924.

[24] UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/CRP.5 (16 September 2019), para. 9. MG, Vol. III, Annex 49 [**hereinafter** UN Fact-Finding Mission, *Report of the Detailed Findings* (2019)].

[25] *Ibid.*

[26] *Ibid.*, para. 238.

'clearance operations' from recurring and to end the continuing persecution of Rohingya"[27].

1.13 The UN Fact-Finding Mission determined:

> "All of these measures embody the discriminatory rationale for the underlying acts of genocide and all of them remain present in Myanmar at the time of writing. The Government is able but unwilling to bring them to an end. This strengthens the inference of genocidal intent in the past and provides the basis for an inference that the State continues to harbour genocidal intent."[28]

1.14 Based on its 2019 findings, the Mission issued a warning that "there is a serious risk that genocidal actions may occur or recur, and that Myanmar is failing in its obligation to prevent genocide, to investigate genocide and to enact effective legislation criminalizing and punishing genocide".[29] It emphasized that the risk of genocide was particularly acute for the approximately 600,000 Rohingya remaining in Myanmar, most of whom were confined to internment camps, urban ghettoes or isolated villages, where they are entirely at the mercy of Myanmar's military forces.[30]

1.15 The Gambia's Application followed the publication of the Fact-Finding Mission's Reports. The events that prompted The Gambia to institute these proceedings are the same as those that compelled the Human

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[27] *Ibid.*

[28] *Ibid.*

[29] *Ibid.*, para. 58.

[30] *Ibid.*, paras. 57, 107, 158, 212.

Rights Council to establish the Fact-Finding Mission, and that the Mission described in great detail in both of its Reports to the Council.

1.16 The Gambia will show in subsequent chapters of this Memorial that the intent to destroy the Rohingya as a group, in whole or in part, was part of a process that unfolded over time. This followed the well-established path that has led to genocide against other groups in other parts of the world. As the UN Fact-Finding Mission found, the genocidal violence of the Tatmadaw's "clearance operations" was presaged by decades of discriminatory laws and policies against the Rohingya. These date back to at least 1982, when Myanmar adopted its current Citizenship Law. The 1982 law made citizenship, and the rights associated therewith, dependent upon belonging to one of the country's so-called "national races";[31] notably, the category of "national races" did *not* include the Rohingya, and it still does not today, despite the fact that they number over a million human beings. Indeed, along with its refusal to recognize the Rohingya as a "national race", the Government of Myanmar refuses to even acknowledge the existence of the Rohingya group as such. Official government policy, implemented through a variety of national and Rakhine State-level measures, regards them as foreign "Bengalis" who have illegally come to Myanmar from neighbouring Bangladesh, and imposes restrictions on their movement, employment, access to food and health care and ability to marry and bear children.[32]

1.17 These long-standing and overtly discriminatory laws and policies have been accompanied by government-sponsored campaigns, reinforced

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[31] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 477-479. MG, Vol. II, Annex 40.

[32] *See infra* Chapter 6.

by allied religious leaders. Such campaigns seek to identify, label and disparage the Rohingya, to dehumanize and demonize them as inferior "Muslim dogs", to separate them from the rest of society, and to depict them as an existential threat to favoured racial and religious groups in Rakhine State and the nation as a whole. Such campaigns also serve to incite violent actions against them.[33]

1.18 By the time the Tatmadaw launched the first wave of its "clearance operations", from October 2016 to February 2017, the Rohingya were already identified, targeted, isolated and defenceless. A second wave followed, beginning in August 2017 and extending into 2018. The Tatmadaw's Commander-in-Chef, Senior-General Min Aung Hlaing, declared publicly that the "Bengali problem" had plagued Myanmar for decades, but that this time it would be finally "solve[d]".[34]

1.19 The "clearance operations" were the Tatmadaw's final solution. They followed a well-organized plan, conceived and developed at the top of the chain-of-command. Tatmadaw units and equipment were deployed in advance to strategic locations in northern Rakhine State to target specific villages with large populations of Rohingya.[35] At the designated moment, they surrounded the targeted village, typically in the early hours when residents were still asleep or in their homes,[36] and then converged on it from

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[33] Steve Stecklow, "Hatebook: Why Facebook is losing the war on hate speech in Myanmar", *Reuters* (15 August 2018). MG, Vol. IX, Annex 287; Kjell Anderson, "The Enemy Next Door: Hate Speech in Burma", *The Sentinel* (17 October 2014). MG, Vol. IX, Annex 251.

[34] Senior-General Min Aung Hlaing, "Entire government institutions and people must defend the country with strong patriotism" (2 September 2017). MG, Vol. VI, Annex 150.

[35] *See* UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 752. MG, Vol. II, Annex 40.

[36] *See ibid.*, paras. 752, 761, 801, 820, 846, 858, 866, 1077, 1085.

various directions in vehicles or on foot.[37] Typically, everyone from the Rohingya community was ordered outside and separated by gender. The men and boys were then killed, often in mass executions.[38] The women and girls were raped, gang raped, sexually mutilated and often killed, as well.[39] No one was spared and no quarter was given.[40] Villagers who fled were also targeted, sometimes from helicopter gunships, and shot as they were trying to escape.[41] The wounded were killed, often by hand with long knives of the sort used to butcher animals.[42] Atrocities were committed against even the most vulnerable among the population, including small children

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[37] The Public International Law & Policy Group, *Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar's Rakhine State: Factual Findings & Legal Analysis Report* (December 2018), p. 29. MG, Vol. IV, Annex 121 [**hereinafter** PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018)].

[38] *Ibid.*, pp. 33, 42, 43, 73; UN OHCHR, *Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016: FLASH REPORT* (3 February 2017), pp. 14-15. MG, Vol. II, Annex 30 [**hereinafter** UN OHCHR, *Flash Report* (2017)].

[39] UN Human Rights Council, *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts*, UN Doc. A/HRC/42/CRP.4 (22 August 2019), paras. 73-75. MG, Vol. III, Annex 48; PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 37. MG, Vol. IV, Annex 121.

[40] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1433. MG, Vol. II, Annex 40.

[41] *Ibid.*, para. 1084. MG, Vol. II, Annex 40; UN OHCHR, *Flash Report* (2017), pp. 14-15. MG, Vol. II, Annex 30.

[42] UN OHCHR, *Flash Report* (2017), p. 18. MG, Vol. II, Annex 30; UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 894. MG, Vol. II, Annex 40.

and infants, the elderly and the infirm.[43] Homes and entire villages were then burned to the ground.[44]

1.20 The UN Fact-Finding Mission documented "detailed accounts" of "corroborated mass killings" in which "hundreds of men, women and children were killed" in "targeted attacks".[45] Soldiers "shot individual persons, including at point blank range, and executed people, including those injured, by slitting their throats using long knives".[46]

1.21 The Mission further found that "educated, wealthy and influential men, that is, the Rohingya leaders in towns and villages, were also specifically targeted", and that "in addition to the subsequent impact on the Rohingya community's ability to rebuild itself, the specific targeting of these groups is also demonstrative of a deliberate plan or level of organization evidencing a plan of destruction".[47]

1.22 Survivors, interviewed by the UN Fact-Finding Mission, have vividly described the destruction inflicted on their communities. One woman, from Maung Nu, in Buthidaung Township, told the Mission:

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[43] US Department of State, *Documentation of Atrocities in Northern Rakhine State* (August 2018), pp. 12, 13. MG, Vol. VII, Annex 194 [**hereinafter** US Department of State, *Atrocities in Northern Rakhine* (2018)]; UN Security Council, *Report of the Secretary-General on children and armed conflict in Myanmar*, UN Doc. S/2018/956 (29 October 2018), para. 13. MG, Vol. III, Annex 42.

[44] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 959-960. MG, Vol. II, Annex 40; PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 45. MG, Vol. IV, Annex 121.

[45] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 892. MG, Vol. II, Annex 40.

[46] *Ibid.*, para. 893.

[47] *Ibid.*, para. 1431.

> "The soldiers killed the male members of my family. They shot at them first and then slit their throats. The courtyard was full of blood. They killed my husband, my father-in-law and my two nephews of 15 and eight years old. They even killed the child in the same way."[48]

1.23 Another woman, from Gu Dar Pyin, in southern Buthidaung Township, recounted the "clearance operation" in her village:

> "The soldiers were shooting at the people, who were running from burning houses to save their lives. People were running everywhere, in the paddy fields, jumping into the river, and hiding in trees. I saw people burning, and people being cut."[49]

1.24 After the Tatmadaw's "clearance operation" in Chein Khar Li, in Rathedaung Township, a survivor told the Mission simply: "They burned everything. Not one tree was left."[50]

1.25 No attempts were made by the Tatmadaw to identify suspected "insurgents" or "terrorists", or to separate them from the civilian population. To the contrary, the entire Rohingya population was targeted. The UN Fact-Finding Mission determined that, although the "clearance operations" were "[o]stensibly to eliminate the 'terrorist threat' posed by ARSA [an insurgent group]", in fact: "The operations targeted and terrorised the entire Rohingya population …".[51]

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[48] *Ibid.*, para. 809.

[49] *Ibid.*, para. 823.

[50] *Ibid.*, para. 838.

[51] *Ibid.*, para. 751.

1.26 This has been confirmed by two Tatmadaw soldiers who participated in the "clearance operations" and later sought the protection of the Government of Bangladesh. They have provided clear testimony, which states that they were ordered by their superior officers to kill everyone—men, women and children, all members of the Rohingya group—without distinction. In the words of one of these two soldiers, they "ordered us to shoot every target in villages, to go for one village after another, to shoot at every sight of a person".[52] The Tatmadaw, of which these two soldiers were members, were not hunting "terrorists"; they were targeting members of the Rohingya community and acting on instructions from their superiors to kill as many as they possibly could.

1.27 In addition to these acts of killing, the UN Fact-Finding Mission painstakingly documented the Tatmadaw's commission of "mass gang rape, involving multiple perpetrators and multiple victims in the same incident".[53] These acts were "commonly perpetrated in open public spaces, in front of family and neighbours, within forested areas near the village; in large houses within the village; and during detention in military and police compounds".[54] Many victims were killed after being raped, often in gruesome fashion. Many had their throats slit or were burned to death.[55] Others died from the trauma inflicted upon them. According to the UN Fact-Finding Mission:

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[52] Interview of Myo Win Tun (15 August 2020), p. 5. MG, Vol. V, Annex 142. *See also* Interview of Zaw Naing Tun (15 August 2020). MG, Vol. V, Annex 141.

[53] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 921. MG, Vol. II, Annex 40.

[54] *Ibid.*

[55] *Ibid.*, para. 927.

> "Death may have been caused by genital trauma, especially when a woman had been gang raped, or women and girls may have been raped with instruments, such as knives or sticks, which caused internal organ damage, leading to death."[56]

1.28 The sexual violence against Rohingya women and girls carried out by Tatmadaw officers and soldiers during the "clearance operations" was systematic, pervasive and brutal. It reflected a callous disregard for the humanity of the victims. The testimony of one survivor, from Kyein Chaung, in Maungdaw Township, reported by the UN Fact-Finding Mission, reflects the pattern of behaviour:

> "I was eight months pregnant. They stamped and kicked my stomach with their boots, and then stripped me naked. I recognised some of the Tatmadaw from the local camp. I was blindfolded and hung by my wrists from a tree. I was raped nine times, both anally and vaginally. I counted all of them. Whilst they were raping me they bit me on my breasts and neck. They left me tied to the tree. My mother found me in the evening. My unborn baby died."[57]

1.29 Hundreds of Rohingya villages across all three townships in northern Rakhine States suffered these targeted actions. After the killings and rapes, most of the villages were set afire and destroyed. By analysing satellite imagery and witness accounts, the UN Fact-Finding Mission documented the "widespread, systematic, deliberate, organized and targeted destruction, mainly by fire, of Rohingya-populated areas" in the

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[56] *Ibid.*

[57] *Ibid.*, para. 921.

townships of Maungdaw, Buthidaung and Rathedaung.[58] It identified approximately 37,700 individual structures as having been destroyed, the "vast majority" of which were "Rohingya homes". Other buildings, including "markets, religious schools (madrassas) and mosques", were destroyed as well.[59] Myanmar forces did this both "manually using flammable liquid and matches" and by using "launchers", *i.e.*, "weapons firing a munition that explodes upon impact".[60]

1.30 As shown in Figure 1.3 (following page 16 and in Volume XII) analysis of satellite imagery by the Operational Satellite Applications Programme of the UN Institute for Training and Research ("UNITAR") demonstrates that at least 178 Rohingya villages were totally destroyed and another 214 were partially destroyed by fire.[61] Satellite imagery also shows that whenever Myanmar conducted "clearance operations" in villages of mixed ethnicity, only Rohingya structures were burned. Ethnic Rakhine individuals and their homes were left untouched.[62]

1.31 In the context of Myanmar's actions against the Rohingya, The Gambia felt compelled to take what steps it could, in respect of a group that was entitled to full protection under the Convention. On 1-2 March 2019, The Gambia and other members of the Organisation of Islamic Cooperation ("OIC"), called upon Myanmar "[t]o honor its obligations under

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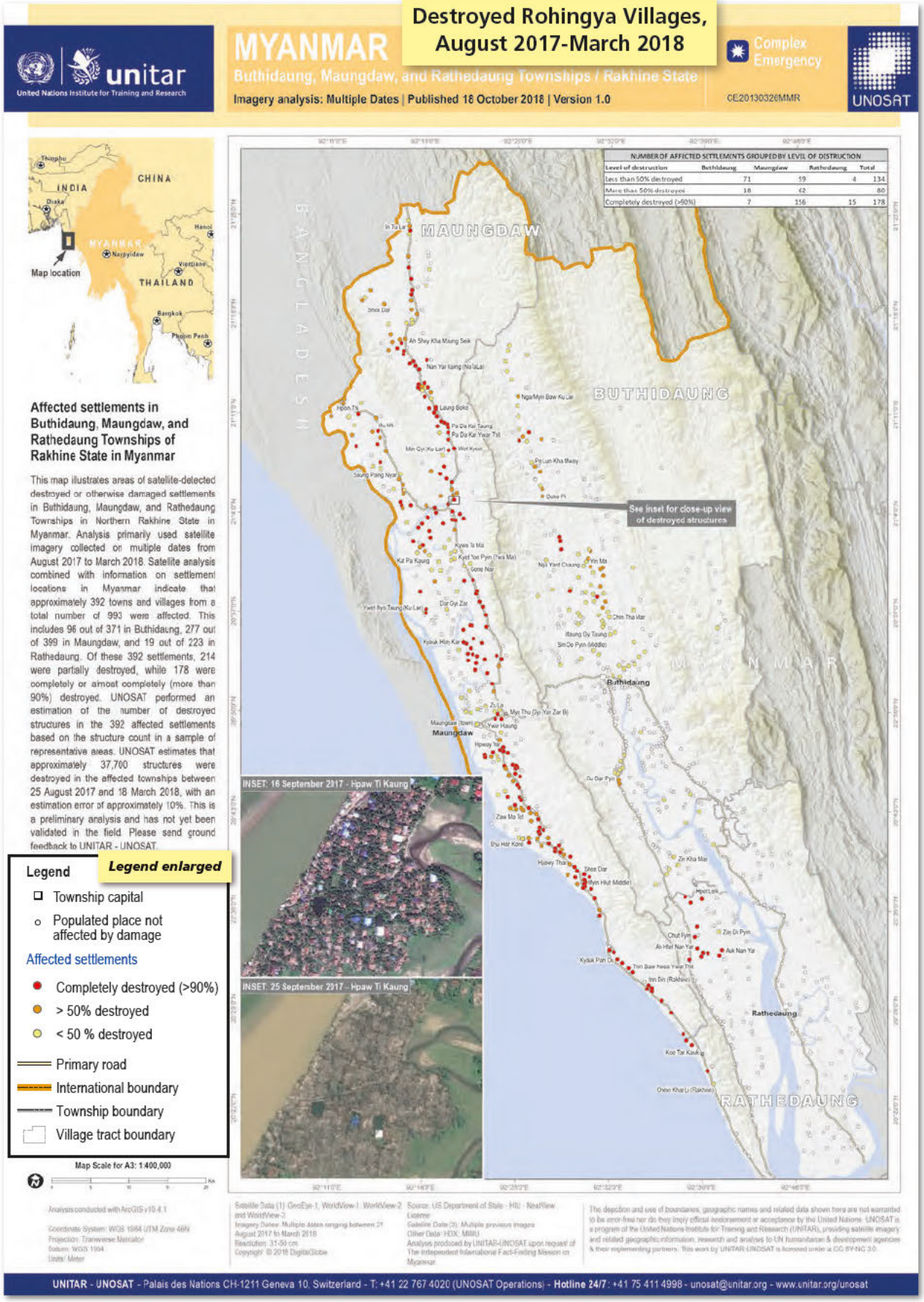
[58] *Ibid.*, para. 959.

[59] *Ibid.*, para. 960.

[60] *Ibid.*, para. 905.

[61] United Nations Institute for Training and Research, *Affected settlements in Buthidaung, Maungdaw and Rathedaung Townships of Rakhine State in Myanmar* (18 October 2018). MG, Vol. III, Annex 70.

[62] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 971-972. MG, Vol. II, Annex 40.



Source: **UNITAR-UNOSAT,** ***"Affected settlements in Buthidaung, Maungdaw, and Rathedaung Townships of Rakhine State in Myanmar"*****,18 Oct 2018, https://unitar.org/maps/map/2854.**

Figure 1.3

International Law and Human Rights covenants, and to take all measures to immediately halt all vestiges and manifestations of the practice of … genocide … against Rohingya Muslims".[63]

1.32 At the 14th OIC Summit Conference three months later, The Gambia affirmed its support for the *Ad hoc* Ministerial Committee on Human Rights Violations against the Rohingyas in Myanmar and declared the urgency of "using all international legal instruments to hold accountable the perpetrators of crimes against the Rohingya".[64]

1.33 On 16 September 2019, the UN Fact-Finding Mission submitted its second detailed report to the UN Human Rights Council. This emphasized the need to hold Myanmar accountable for the crime of genocide.[65] As indicated above, the report concluded that Myanmar "continues to harbour genocidal intent" and that "the Rohingya remain under serious risk of genocide".[66] The Mission also took note of and welcomed the efforts of "The Gambia … and the Organisation of Islamic Cooperation to encourage and pursue a case against Myanmar before the International Court of Justice … under the Genocide Convention".[67]

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[63] Organisation of Islamic Cooperation, *Resolution No. 4/46-MM on the Situation of the Muslim Community in Myanmar*, OIC Doc. OIC/CFM-46/2019/MM/RES/FINAL (1-2 March 2019), p. 18. MG, Vol. VII, Annex 204.

[64] Organisation of Islamic Cooperation, *Final Communiqué of the 14th Islamic Summit Conference*, OIC Doc. OIC/SUM-14/2019/FC/FINAL (31 May 2019), p. 11. MG, Vol. VII, Annex 205.

[65] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), paras. 41, 220. MG, Vol. III, Annex 49.

[66] *Ibid.*, paras. 140, 213.

[67] *Ibid.*, para. 40.

1.34 In light of the UN Fact-Finding Mission's Report, Her Excellency Mrs. Isatou Touray, Vice-President of The Gambia, declared during the general debate of the 74th Session of the UN General Assembly on 26 September 2019 that "The Gambia is ready to lead the concerted efforts for taking the Rohingya issue to the International Court of Justice".[68]

1.35 Three days later, the Union Minister for the Office of the State Counsellor of Myanmar, Mr. Kyaw Tint Swe, rejected the Fact-Finding Mission's conclusions and told the general debate: "[The Mission's] Reports, without exception, are biased and flawed, based not on facts but on narratives."[69]

1.36 Shortly thereafter, on 11 October 2019, the Permanent Mission of The Gambia to the United Nations in New York sent Myanmar's Permanent Mission a *Note Verbale* in which The Gambia expressed its deep concerns about the findings of the UN Fact-Finding Mission and Myanmar's rejection of those findings. The Gambia also called Myanmar's attention to OIC Resolution No. 4/46-MM of 2 March 2019. Finally, The Gambia urged Myanmar to take action to bring itself into compliance with the Genocide Convention, to make reparations to the victims and to issue assurances and guarantees of non-repetition.[70]

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[68] UN General Assembly, 74th Session, 8th Plenary Meeting, *Address by Mrs. Isatou Touray, Vice President of the Republic of The Gambia*, UN Doc. A/74/PV.8 (26 September 2019), p. 31. MG, Vol. III, Annex 51.

[69] UN General Assembly, 74th Session, 12th Plenary Meeting, *Address by Mr. Kyaw Tint Swe, Union Minister for the Office of the State Counsellor of Myanmar*, UN Doc. A/74/PV.12 (28 September 2019), p. 24. MG, Vol. III, Annex 52.

[70] *Note Verbale from* Permanent Mission of the Republic of The Gambia to the United Nations *to* Permanent Mission of the Republic of the Union of Myanmar to the United Nations, No. GPM/NV241/Vol.1(LY) (11 October 2019). Observations of the Republic of the Gambia [**hereinafter** "OG"] (2 December 2019), Annex 1.

1.37 Myanmar did not respond to The Gambia's *Note Verbale*. Despite all the evidence and the many calls by The Gambia and others to desist from further acts of genocide, Myanmar continued to deny any wrongdoing. In such circumstances, The Gambia concluded that it had no choice but to institute these proceedings under the Convention, to protect the rights of the Rohingya group—and its rights—under the Convention, and to bring these proceedings against Myanmar to hold it to account for committing this gravest of crimes.

II. Structure of the Memorial

1.38 The Gambia's Memorial consists of 12 volumes. Volume I contains the main text of the Memorial, together with selected maps and figures. Volumes II through XI contain supporting materials. Volume V contains video annexes, which are available on DVD discs affixed at the end of that volume. Volume XII contains large-format versions of selected maps and figures.

1.39 The main text of the Memorial, Volume I, is made up of 13 Chapters, followed by The Gambia's Submissions. It is divided into three parts: **Part I** (Chapters 2-4) addresses the law; **Part II** (Chapters 5-11) presents the facts; and **Part III** (Chapters 12-13) applies the law to the facts, including by setting out The Gambia's position on appropriate remedies.

1.40 Following this Introduction, **Chapter 2** confirms the Court's jurisdiction over the dispute. Both The Gambia and Myanmar are parties to the Genocide Convention, and both are bound by Article IX of the Convention, which provides that any State Party may initiate proceedings in the Court against any other State Party in respect of a dispute relating to

the interpretation, application or fulfilment of the Convention. The facts show that there was plainly a dispute between the Parties when The Gambia submitted its Application, and The Gambia also unmistakably has standing to bring that dispute to the Court. There is no bar to jurisdiction or its exercise.

1.41 **Chapter 3** demonstrates that the Rohingya are a group entitled to the protections of the Genocide Convention. Under Article II, the proscribed acts must be "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".[71] The evidence presented in Chapter 3 shows that the Rohingya are protected as a distinct ethnical group, religious group and racial group.

1.42 **Chapter 4** sets out the core legal principles that arise under the Genocide Convention. It addresses the background to and text of the Convention, examples of subsequent practice and the jurisprudence of the Court and other international tribunals, to provide a detailed analysis of the legal framework within which The Gambia's Application falls to be considered. In particular, the Chapter provides a comprehensive overview of the various elements of the crime of genocide and the approach to be taken by the Court in assessing the allegations that form the substance of the Application.

1.43 **Chapter 5** introduces The Gambia's presentation of the facts, which are set out in detail in the six chapters that follow, each of which addresses one of the specific indicators of genocidal intent identified by the UN Fact-

[71] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951), 78 UNTS 277, art. II. MG, Vol. II, Annex 1 [**hereinafter** Genocide Convention (1951)].

Finding Mission and in the jurisprudence of the Court and other international tribunals. As explained in Chapter 5, the facts are organized chronologically, illustrating how Myanmar's persecution of the Rohingya escalated over the decades, before culminating in the acts of genocide committed during the "clearance operations". It is well-established that genocide is a process, one that occurs over time and place.

1.44 Chapter 5 also describes the diverse sources of evidence upon which The Gambia relies. These include fact-finding reports from a range of authoritative third parties, including United Nations entities. Of particular significance are the reports of the UN Fact-Finding Mission, but also reports by the UN OHCHR, the Special Advisor of the UN Secretary-General on the Prevention of Genocide, the UN Secretary-General's Special Representative on Sexual Violence in Conflict, and the UN Special Rapporteur on the situation of human rights in Myanmar. The sources of evidence relied upon by The Gambia also include, *inter alia*, public statements by senior Myanmar military and civilian officials; testimony by former Tatmadaw soldiers; reports by credible non-governmental organizations, including the Public International Law and Policy Group, Human Rights Watch, Physicians for Human Rights and Fortify Rights; and witness statements by Rohingya survivors and independent journalists.

1.45 **Chapter 6** describes Myanmar's long-standing laws and policies that target, discriminate against, dehumanize and persecute the Rohingya group. These began with the 1982 Citizenship Law, which stripped the Rohingya of their Myanmar nationality, and continued with successive "citizenship verification" processes that branded them as "foreign Bengalis" who are not entitled to the rights of citizens. In order to have even minimal rights in Myanmar, Rohingya are forced to accept National

Verification Cards that deny their identity as "Rohingya". At both the national and regional levels, Myanmar has also adopted a series of laws and orders restricting marriages and births among the Rohingya, including by refusing to register or even acknowledge births. The Chapter also explains that, especially since 2012, Myanmar has adopted a policy of separating the Rohingya from the rest of the population, and confining them in internment camps, ghettos and isolated villages.

1.46 **Chapter 7** examines Myanmar's coordinated programme of hate speech directed at the Rohingya group, which has featured malicious, disparaging and dehumanizing verbal attacks propagated by senior Tatmadaw commanders, high government officials and influential religious leaders. This relentless campaign of official and officially sanctioned hate speech has been carried out over many years and depicts the Rohingya as a specific target that offers an existential threat to Buddhism and Myanmar's "national races". It is specifically intended to deny the Rohingya group's existence as a distinct racial, ethnical or religious group; to exclude them from the Myanmar nation; to incite hatred and violence against them; and to prepare for their ultimate destruction as a group. By dehumanizing and stigmatizing the Rohingya in this way, Tatmadaw commanders and senior civilian authorities encouraged the security forces dispatched to carry out the "clearance operations" in 2016-2018 to destroy the Rohingya group.

1.47 **Chapter 8** describes the brutality of the Tatmadaw's violence against the Rohingya during the "clearance operations". It shows that, across northern Rakhine State, the Tatmadaw systematically killed members of the Rohingya group with exceptional cruelty, involving acts of torture, mutilation and killing in a manner calculated to maximize fear and suffering. It further demonstrates that the Tatmadaw systematically targeted

and killed even the most vulnerable among the Rohingya, including pregnant women, the elderly and infirm and young children and infants. The Chapter then presents in detail evidence of the Tatmadaw's brutality in three specific villages located in each of the townships subjected to the "clearance operations".

1.48 **Chapter 9** shows that the Tatmadaw conducted a systematic and widespread campaign of rape, including gang rape and other forms of sexual violence against Rohingya women and girls during the "clearance operations". The Tatmadaw and other security forces committed these sex crimes with unspeakable cruelty, including the mutilation, torture and killing of the victims in front of family members or the public. Victims included young girls and pregnant women. Like Chapter 8, this Chapter concludes by presenting the evidence of the Tatmadaw's sexual violence perpetrated in selected villages in northern Rakhine State.

1.49 **Chapter 10** demonstrates that the extreme brutality and pervasive sexual violence that characterized the Tatmadaw's "clearance operations" were neither spontaneous nor aberrational. They were deliberate elements of a pre-conceived plan prepared by senior military officers for the express purpose of "solving the Rohingya problem", and carried out by troops under the direct supervision of field-level officers who faithfully executed orders from above. The "clearance operations" followed a consistent tactical formula that is not only indicative of a significant level of pre-planning, but also a level of coordination in executing those plans. Immediately after the "clearance operations", the Tatmadaw carried out a highly organized campaign to erase the remaining Rohingya homes and buildings, confiscate Rohingya lands and build new facilities on them for the benefit of other ethnic and religious groups and for the construction of military facilities.

1.50 **Chapter 11** addresses the Tatmadaw's impunity and destruction of evidence during and after the "clearance operations" of 2016-2018. It is presented in five sections. Section I describes how the Tatmadaw and other security forces enjoy total impunity under Myanmar's system of government. Section II demonstrates that Myanmar's "military justice system" further ensures the impunity of its security forces for crimes committed against the Rohingya. Section III recounts the international community's repeated entreaties that Myanmar investigate and prosecute the perpetrators of crimes against the Rohingya. Section IV shows how Myanmar, in fact, did the opposite and systematically destroyed evidence to cover up the Tatmadaw's crimes. Finally, Section V addresses Myanmar's efforts to deflect international concerns through the creation of a series of sham State-controlled "investigative commissions", none of which has found any wrongdoing by the Tatmadaw or its soldiers.

1.51 **Chapter 12** applies the law to the facts. It shows that Myanmar is internationally responsible for the commission of genocide because its *de jure* State organs committed the *actus reus* of genocide—killing, causing serious physical and mental harm, inflicting conditions of life calculated to bring about the physical destruction of the Rohingya as a group, and imposing measures intended to prevent births within the Rohingya group—with the specific intention of destroying the Rohingya as a group, in whole or in part, as such.

1.52 The evidence admits of no other reasonable explanation, thus meeting the standard for a finding of genocide set out by the Court's

Judgment in *Croatia v. Serbia*.[72] The UN Fact-Finding Mission applied this standard as well in determining that the only reasonable conclusion to be drawn from the evidence is that Myanmar acted against the Rohingya with genocidal intent. It found, specifically: "there is no reasonable conclusion to draw, other than the inference of genocidal intent, from the State's pattern of conduct".[73] As described in Chapter 12, the Mission reached this conclusion based on the following "indicators" of genocidal intent, each of which was drawn from the Court's jurisprudence and that of other international tribunals: (1) "the existence of discriminatory plans and policies"; (2) the "exclusionary utterances of Myanmar officials and others" and their tolerance of a "public rhetoric of hatred and contempt"; (3) "the Tatmadaw's extreme brutality during its attacks on the Rohingya"; (4) "the enormity and nature of the sexual violence"; (5) "the organized nature of the Tatmadaw's destruction" and (6) Myanmar's "failure to investigate and prosecute gross violations of international human rights law and serious violations of international humanitarian law".[74]

1.53 Chapter 12 refutes the alternative "hypothesis" that Myanmar has advanced, during the oral hearings on provisional measures and publicly, that the "clearance operations" were a counterinsurgency effort to combat

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[72] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 121, para. 413 [**hereinafter** *Croatia v. Serbia*, Judgment (2015)].

[73] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 225. MG, Vol. III, Annex 49. *See also* UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1434-1438. MG, Vol. II, Annex 40.

[74] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 224. MG, Vol. III, Annex 49.

suspected anti-government insurgents.[75] This "hypothesis" does not withstand scrutiny and was rejected by the UN Fact-Finding Mission because, in carrying out the "clearance operations" in northern Rakhine State, the Tatmadaw made no effort to identify suspected insurgents, to separate them from the civilian population or to not target them. To the contrary, the Tatmadaw targeted the entire Rohingya population, including children and infants, and pervasively raped and gang raped Rohingya women and girls. Such acts, committed by different Tatmadaw units in hundreds of Rohingya villages across three townships, are inconsistent with any counterinsurgency strategy or objective. Rather, they reflect only an intention to destroy the Rohingya as a group, in whole or in part.

1.54 Chapter 12 further shows that Myanmar, in addition to its international responsibility for genocide, is also responsible for other crimes under the Genocide Convention, including: the direct and public incitement of genocide, conspiracy to commit genocide, the attempt to commit genocide, and complicity in genocide, as well as for failing to prevent and failing to punish genocide, and for failing to enact legislation giving effect to the provisions of the Convention.

1.55 **Chapter 13** addresses the legal consequences of Myanmar's wrongful conduct under the rules of State responsibility and the remedies that are appropriate. The Chapter recalls that, as a State party to the Genocide Convention, The Gambia is entitled to seek from the Court a declaration that Myanmar has violated its obligations under the Convention, and an order that it immediately desist from any ongoing violations and take

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[75] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures*, Verbatim Record CR2019/19 of Public Sitting held on 11 December 2019, paras 11-15 (Aung San Suu Kyi).

steps to ensure full compliance with its obligations going forward. Given the heinous nature of Myanmar's crimes, and the extreme and continuing vulnerability of the Rohingya group, Myanmar should also be ordered to provide assurances and guarantees of non-repetition. Myanmar must also make reparation, principally in the form of restitution, to the Rohingya victims for its genocidal acts. Where the injury cannot be redressed by restitution, Myanmar must provide reparation through compensation and additional means.

1.56 Chapter 13 also addresses Myanmar's violations of the Court's Provisional Measures Order and the remedies Myanmar must make for those violations.

1.57 This Memorial concludes with The Gambia's Submissions.

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CHAPTER 2
THE COURT HAS JURISDICTION TO ADJUDICATE THE GAMBIA'S CLAIMS

2.1 Article 36(1) of the Statute of the Court provides that the Court's jurisdiction "comprises … all matters specially provided for … in treaties and conventions in force". This includes the Genocide Convention. Both The Gambia and Myanmar are Parties to the Convention, which provides in Article IX that any State Party may initiate proceedings in the Court against any other State Party in respect of a dispute relating to the interpretation, application or fulfilment of the Convention.[76] The Gambia initiated these proceedings on 11 November 2019 based on Article 36(1) of the Statute of the Court and Article IX of the Genocide Convention.[77]

2.2 As discussed in **Section I**, both Parties are bound by Article IX of the Convention, including the requirements for the exercise of the Court's jurisdiction. **Section II** shows that the only requirement for the exercise of the Court's jurisdiction is the existence of a dispute between the Parties relating to the interpretation, application or fulfillment of the Convention, and that this requirement is plainly met in the present case. Finally, **Section III** demonstrates that The Gambia has standing to submit its dispute with Myanmar to the Court.

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[76] The Gambia acceded to the Convention on 29 December 1978. Myanmar deposited its instrument of ratification on 14 March 1956. The Convention became applicable between the Parties 90 days after 29 December 1978, pursuant to Article XIII of the Convention.

[77] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Application Instituting Proceedings and Request for Provisional Measures* (11 November 2019).

I. Both The Gambia and Myanmar Are Bound by Article IX of the Genocide Convention

2.3 Article IX of the Genocide Convention provides for recourse to the International Court of Justice. Neither Party has made a reservation in relation to Article IX.

2.4 Although Myanmar made a reservation to Article VIII of the Genocide Convention, it has no effect on the Court's jurisdiction over a dispute brought under Article IX of the Convention. Myanmar's reservation reads as follows: "With reference to Article VIII, the Union of Burma makes the reservation that the said Article shall not apply to the Union."[78] Article VIII of the Genocide Convention provides:

> "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."[79]

The plain terms of Article VIII make it clear that this provision:

> "only addresses in general terms the possibility for any Contracting Party to 'call upon' the competent organs of the United Nations to take 'action' which is

[78] United Nations, *Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide: Ratification with Reservations by Burma*, Reference C.N.25.1956.Treaties (29 March 1956). MG, Vol. II, Annex 5.

[79] Genocide Convention (1951), art. VIII. MG, Vol. II, Annex 1.

> 'appropriate' for the prevention and suppression of acts of genocide".[80]

2.5 Article VIII therefore applies to a procedure that is separate and distinct from adjudication. Indeed, Article VIII makes no reference to the submission of disputes between Contracting Parties to the Court for adjudication. This matter is specifically addressed in and governed by Article IX of the Convention. As the Court has previously held, it is "only Article IX of the Convention which is relevant to the seisin of the Court in the present case".[81]

2.6 It follows that Myanmar's reservation to Article VIII of the Genocide Convention cannot preclude The Gambia from seizing the Court of a dispute with Myanmar under Article IX of the Convention.

II. There Is a Dispute between The Gambia and Myanmar Relating to the Interpretation, Application or Fulfilment of the Convention

2.7 Article IX of the Genocide Convention provides:

> "*Disputes* between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of

[80] Provisional Measures Order, para. 35.

[81] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 23, para. 47; Provisional Measures Order, para. 35.

> Justice at the request of any of the parties to the dispute."[82]

2.8 It follows from the text of Article IX that the only jurisdictional requirement that must be satisfied in the present case is the existence of a dispute relating to the interpretation, application or fulfilment of the Genocide Convention.

2.9 In its Provisional Measures Order, the Court unanimously made *prima facie* determinations that, as of the date of The Gambia's Application, an unresolved dispute existed between the Parties concerning the interpretation, application and fulfillment of the Convention,[83] and that "at least some of the acts alleged by The Gambia are capable of falling within the provisions of the Convention".[84] There is no basis to revise these determinations.

2.10 According to the Court's well-established jurisprudence, a dispute between States exists where they "'hold clearly opposite views concerning the question of the performance or non-performance of certain' international obligations".[85] Whether a dispute exists is "a matter for objective determination" that "must turn on an examination of the facts",[86]

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[82] Genocide Convention (1951), art. IX (emphasis added). MG, Vol. II, Annex 1.

[83] Provisional Measures Order, paras. 27-28.

[84] *Ibid.*, para. 30.

[85] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 26, para. 50 (*citing Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74).

[86] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 26, para. 50.

which include, *inter alia*, "exchanges made in multilateral settings",[87] as well as "statements or documents exchanged between the parties".[88] The conduct of the parties "may also be relevant" to show a dispute if one of them fails "to respond to a claim in circumstances where a response is called for", especially where the claim concerns grave violations of international law.[89] If a dispute is brought under an international treaty, it also must be shown that "the violations [alleged] … fall within the provisions" of the treaty, such that "the dispute is one which the Court has jurisdiction *ratione materiae* to entertain".[90]

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[87] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 94, paras. 51, 53.

[88] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, pp. 443-445, paras. 50-55.

[89] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 84, para. 30 (*citing Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89).

[90] *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 292, para. 46 ("The Court recalls that, in order for it to determine whether a dispute is one concerning the interpretation or application of a given treaty, it 'cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations [alleged] . . . do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain'".); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Judgment* (8 November 2019), para. 57; *see also* paras. 94-95 (holding the Court "does not need to satisfy itself that the measures of which Ukraine complains actually constitute 'racial discrimination' within the meaning of art. 1, paragraph 1, of CERD. … At the current stage of the proceedings, *the Court only needs to ascertain whether the measures of which Ukraine complains fall within the provisions of the Convention*".) (emphasis added); *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 810, para. 16 (holding the Court "must ascertain whether the violations [alleged] . . . do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain".).

2.11 There can be no doubt that an unresolved dispute falling within the Genocide Convention arose between the Parties, following the presentation by the UN Fact-Finding Mission of its first report on 12 September 2018. This report documented atrocities and other acts that Myanmar committed against the Rohingya group. The report affirmed that "[t]he crimes in Rakhine State, and the manner in which they were perpetrated, are similar in nature, gravity and scope to those that have allowed genocidal intent to be established in other contexts".[91] Because the prohibition of genocide has the character of a peremptory norm and the obligations under the Convention are owed *erga omnes* and *erga omnes partes*,[92] The Gambia has consistently made clear to Myanmar that Myanmar had violated its obligations under the Convention owed to The Gambia and other States parties. In response, Myanmar rejected and opposed any contention that it violated the Genocide Convention. This is evident from statements made in multilateral settings, documents exchanged between the Parties and the conduct of Myanmar, as described below.

2.12 During 5-6 May 2018, the Member States of the OIC, including The Gambia, held a ministerial level meeting in Dhaka, Bangladesh, to discuss, *inter alia*, the crimes that Myanmar's military and security forces had committed against the Rohingya. The meeting resulted in the Dhaka Declaration, which expressed serious concerns over the "systematic brutal acts perpetrated by [Myanmar] security forces against the Rohingya" and

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[91] UN Human Rights Council, *Report of the independent international fact-finding Mission on Myanmar*, UN Doc. A/HRC/39/64 (12 September 2018), para. 85. MG, Vol. II, Annex 39.

[92] *Croatia v. Serbia*, Judgment (2015), pp. 45-47, paras. 85-88 (*citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 104, para. 147).

categorized those acts as "constitut[ing] a serious and blatant violation of international law".[93] The Declaration also stressed the importance of ensuring "accountability … for the violations … against the Rohingyas" and provided for "an *ad hoc* ministerial committee, to be chaired by Gambia".[94] In response, Myanmar expressed a clearly opposite view concerning the characterization of its acts and performance of its international obligations. Specifically, the Myanmar Ministry of Foreign Affairs issued a press statement that "categorically reject[ed]" the description of "events in Rakhine State" as "'State backed violence'" and disclaimed any responsibility for violating applicable international obligations, by contending that "no violation of human rights will be condoned".[95]

2.13 On 2 March 2019, The Gambia, as an OIC Member State, called upon Myanmar to "honor its obligations under International Law and Human Rights covenants, and to take all measures to immediately halt all vestiges and manifestations of the practice of … genocide … against Rohingya Muslims".[96] Myanmar thus knew that it was identified as a

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[93] Organisation of Islamic Cooperation, 45th Session of the Council of Foreign Ministers of the Organisation of Islamic Cooperation, *Dhaka Declaration* (6 May 2018), para. 14. MG, Vol. VII, Annex 203.

[94] *Ibid.*, para. 17. *See also* UN General Assembly, 73rd Session, 7th Plenary Meeting, *Address by Mr. Adama Barrow, President of the Republic of the Gambia*, UN Doc. A/73/PV.7 (25 September 2018), p. 6 ("As the upcoming Chair of the next OIC summit, The Gambia has undertaken, through a Resolution, to champion an accountability mechanism that would ensure that perpetrators of the terrible crimes against the Rohingya Muslims are brought to book".). MG, Vol. III, Annex 41.

[95] Republic of the Union of Myanmar, Ministry of Foreign Affairs, "#Myanmar rebuts Dhaka Declaration's reference on situation in Rakhine State and calls for Bangladesh's sincere cooperation to start early repatriation", *Twitter* (9 May 2018). MG, Vol. VI, Annex 158.

[96] Organisation of Islamic Cooperation, *Resolution No. 4/46-MM on the Situation of the Muslim Community in Myanmar*, OIC Doc. OIC/CFM-46/2019/MM/RES/FINAL (1-2 March 2019), para. 11(a). MG, Vol. VII, Annex 204. The Resolution also noted "the

perpetrator of genocide by The Gambia and other OIC Member States.[97] However, Myanmar offered no response to those claims, although their gravity called for one.

2.14 On 31 May 2019, at the 14th OIC Summit Conference, The Gambia declared, along with other OIC members, the urgency of "using all international legal instruments to hold accountable the perpetrators of crimes against the Rohingya".[98] This statement put Myanmar on notice about the possibility of future legal action aimed at invoking its responsibility under international law.

2.15 On 8 August 2019, the UN Fact-Finding Mission submitted to the General Assembly a new report. It affirmed the conclusion from its 2018 report "that Myanmar incurs State responsibility under the prohibition against genocide",[99] and found that the evidence of Myanmar's intention to commit genocide had grown even stronger since the earlier report.[100] In these circumstances, the Mission "welcome[d] the efforts of … The Gambia … to … pursue a case against Myanmar before the [Court] under

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opening Statement of the Chairperson of the United Nations Independent International Fact-Finding Mission on Myanmar, at the UN Security Council on 24 October 2018, in which he stated that the 'Mission… found sufficient information to warrant the investigation and prosecution of senior officials in the Tatmadaw on charges of genocide. This means that we consider that genocidal intent, meaning the intent to destroy the Rohingya in whole or in part, can be reasonably inferred'". *Ibid.*, p. 15.

[97] "World Islamic Group Votes to Take Myanmar Rohingya Abuses to International Court of Justice", *Radio Free Asia* (5 March 2019). MG, Vol. IX, Annex 304.

[98] Organisation of Islamic Cooperation, *Final Communiqué of the 14th Islamic Summit Conference*, OIC Doc. OIC/SUM-14/2019/FC/FINAL (31 May 2019), para. 47. MG, Vol. VII, Annex 205.

[99] UN Human Rights Council, *Report of the independent international fact-finding mission on Myanmar*, UN Doc. A/HRC/42/50 (8 August 2019), paras. 18, 107. MG, Vol. III, Annex 47.

[100] *Ibid.*, para. 23.

the Convention on the Prevention and Punishment of the Crime of Genocide".[101]

2.16 On 26 September 2019, during the general debate of the seventy-fourth session of the General Assembly, The Gambia stated that, in light of the UN Fact-Finding Mission's latest report, it was "ready to lead concerted efforts to take the Rohingya issue to the International Court of Justice".[102] Myanmar addressed the General Assembly two days later and characterized the Fact-Finding Mission report as "biased and flawed, based not on facts but on narratives".[103] Those exchanges have two important consequences. First, they confirmed that the Parties continued to hold opposing views concerning the events that occurred in Rakhine State in relation to the Rohingya: The Gambia continued to characterize Myanmar's conduct as genocide based, *inter alia*, on the evidence and conclusions in the UN Fact-Finding Mission reports, while Myanmar persisted in rejecting the reports as flawed and unfounded. Second, The Gambia's statement removed any possible doubt about Myanmar's awareness of an impending case against it before the Court to hold it accountable under international law for its genocidal acts against the Rohingya group.

2.17 The opposing views expressed in multilateral settings were consistent with the positions that the Parties took bilaterally. On 11 October 2019, The Gambia sent to Myanmar a *Note Verbale* concerning Myanmar's

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[101] *Ibid.*, para. 107.

[102] UN General Assembly, 74th Session, 8th Plenary Meeting, *Address by Mrs. Isatou Touray, Vice President of the Republic of The Gambia*, UN Doc. A/74/PV.8 (26 September 2019), p. 31. MG, Vol. III, Annex 51.

[103] UN General Assembly, 74th Session, 12th Plenary Meeting, *Address by Mr. Kyaw Tint Swe, Union Minister for the Office of the State Counsellor of Myanmar*, UN Doc. A/74/PV.12 (28 September 2019), p. 24. MG, Vol. III, Annex 52.

ongoing non-compliance with the Genocide Convention. Specifically referring to the reports of the Fact-Finding Mission and Myanmar's denial of responsibility under the Convention, The Gambia stated that it considered "Myanmar to be in ongoing breach of those obligations under the Convention and under customary international law".[104] On that basis, The Gambia "insist[ed] that Myanmar take all necessary actions to comply with [its] obligations".[105] Myanmar did not respond to The Gambia's *Note Verbale*, even though The Gambia's insistence on desisting from acts of genocide clearly called for a response. In light of the gravity of the matters raised in The Gambia's *Note Verbale*, Myanmar's lack of response further demonstrates the existence of a dispute between the Parties.

2.18 It follows that, prior to the seizing of the Court on 11 November 2019, an unresolved dispute relating to the interpretation, application and fulfilment of the Genocide Convention had arisen and continued to exist between the Parties. Moreover, Myanmar was fully aware that this dispute would be brought to the Court under the Genocide Convention. In fact, five days after the Application was filed, the spokesperson of Myanmar's Government admitted in a public statement that "the government had expected over a month before that Myanmar could face a suit at ICJ".[106]

2.19 It is clear that the dispute between The Gambia and Myanmar relates to "the interpretation, application or fulfilment of the present Convention",

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[104] *Note Verbale from* Permanent Mission of the Republic of The Gambia to the United Nations *to* Permanent Mission of the Republic of the Union of Myanmar to the United Nations, No. GPM/NV241/Vol. 1(LY) (11 October 2019). OG (2 December 2019), Annex 1.

[105] *Ibid*.

[106] Min Naing Soe, "Myanmar to respond to Gambia lawsuit at ICJ in line with international laws", *Eleven News* (16 November 2019). MG, Vol. IX, Annex 316.

including those provisions "relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III", and that the Court has jurisdiction *ratione materiae* over this dispute. The claims made by The Gambia in Section IV of its Application assert that Myanmar's military and security forces, and persons or entities acting on their instructions or under their direction and control, perpetrated against the Rohingya mass killings, rape, gang rape, sexual mutilation, torture and beatings; destroyed their homes and villages; confiscated their lands and equipment; and denied them access to shelter, food and other essentials of life, with the intent to destroy them as a group in whole or in part.[107] Such acts indisputably fall within Article III of the Convention, which prohibits the commission of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and attempts to commit genocide. These acts, undertaken by State organs or with their knowledge and approval, also fall within Article I of the Convention, which obligates Myanmar to prevent genocide.

2.20 Further, Section IV of the Application raises claims that Myanmar failed to take actions to punish persons committing genocide or any of the acts prohibited by the Convention. Nor did Myanmar enact the necessary legislation to give effect to the provisions of the Convention or provide effective penalties for persons guilty of genocide or any of the acts prohibited by the Convention. These omissions fall within Articles I, IV, V and VI of the Convention.

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[107] *See* Chapters 5-11.

2.21 It is clear, therefore, that the conditions for the exercise of the Court's jurisdiction under Article IX of the Convention are met.

III. The Gambia Has Standing to Submit Its Dispute with Myanmar under the Convention to the Court

2.22 In its Provisional Measures Order, the Court unanimously determined that The Gambia "has *prima facie* standing to submit to it the dispute with Myanmar on the basis of alleged violations of obligations under the Genocide Convention".[108] This determination recognized the legal interest of The Gambia and there is no basis for revisiting it.

2.23 It is a well-settled principle of international law that any State party to an international treaty that imposes obligations *erga omnes partes* is entitled to invoke the responsibility of another State party in any given case and seek reparation for the breach of those obligations without having to prove a special interest.[109]

2.24 This rule was applied by the Court in *Belgium v. Senegal*, in which Belgium was found to have standing to bring claims concerning Senegal's breaches of *erga omnes partes* obligations under the Convention against Torture.[110] As the Court held:

> "The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their

[108] Provisional Measures Order, para. 42.

[109] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 450, para. 69.

[110] *Ibid.*, p. 450, para. 70.

> authors do not enjoy impunity. ... That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties 'have a legal interest' in the protection of the rights involved ... These obligations may be defined as 'obligations *erga omnes partes*' in the sense that each State party has an interest in compliance with them in any given case. …
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> The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes* … and to bring that failure to an end".[111]

2.25 The same conclusion follows inexorably in this case. As the Court has held in relation to the Genocide Convention, the "obligations enshrined by the Convention are … obligations *erga omnes*",[112] such that "each State party has an interest in compliance with them in any given case"[113] because

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[111] *Ibid.*, pp. 449-450, paras. 68-69.

[112] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 616, para. 31; *see also Croatia v. Serbia*, Judgment (2015), p. 47, para. 87.

[113] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 449, para. 68.

of "the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge'".[114] The Court recognized, in particular, that "the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention".[115]

2.26 All States parties to the Genocide Convention thus "have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity".[116] This common interest implies that the obligations under the Convention "are owed by any State party to all the other States parties".[117] Therefore, "any State party to the Genocide Convention, and not only a specially affected State", is entitled to bring claims against another State party to hold it accountable for its failure to comply with its obligations *erga omnes partes*, "and to bring that failure to an end".[118]

2.27 This is precisely what The Gambia has done in the present case: it commenced these proceedings to hold Myanmar accountable for violating the obligations owed to it under Articles I, III, IV, V and VI of the Convention, to bring those violations to an end and to ensure the protection

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[114] *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

[115] *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Merits, Judgment, I.C.J. Reports 2012*, p. 450, para. 69.

[116] Provisional Measures Order, para. 41.

[117] *Ibid.*

[118] *Ibid.*

of the Rohingya group. Accordingly, it has standing to bring these claims before the Court.

2.28 For these reasons, the Court has jurisdiction to adjudicate The Gambia's claims under Article IX of the Genocide Convention and there are no impediments to the Court's exercise of that jurisdiction.

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CHAPTER 3
THE ROHINGYA ARE A "GROUP" UNDER THE CONVENTION

3.1 Under Article II of the Genocide Convention, the proscribed acts must be "committed with intent to destroy, in whole or in part, *a national, ethnical, racial or religious group*".[119]

3.2 The Rohingya are such a "group", within the meaning of Article II. As the UN Fact-Finding Mission found, "the Rohingya, who predominantly live in Myanmar's Rakhine State, constitute a protected group" under the Convention, because they can be regarded as an ethnical, racial or religious group, or a combination thereof, and because "[t]he Rohingya also consider themselves as a distinct group, as do the Myanmar authorities and security forces".[120] The Court, in its Provisional Measures Order of 23 January 2020, observed that: "the Rohingya in Myanmar appear to constitute a protected group within the meaning of Article II of the Genocide Convention".[121]

3.3 The Court recognized, in *Bosnia v. Serbia*, that, in determining whether a given population constitutes a "group" under Article II, "international jurisprudence accepts a combined subjective-objective approach".[122] Under this jurisprudence, objective evidence of whether a

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[119] Genocide Convention (1951), art. II (emphasis added). MG, Vol. II, Annex 1; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 124, para. 191 [**hereinafter** *Bosnia v. Serbia*, Judgment (2007)].

[120] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1391. MG, Vol. II, Annex 40.

[121] Provisional Measures Order, para. 52.

[122] *Bosnia v. Serbia*, Judgment (2007), p. 124, para. 191. This is consistent with the jurisprudence of the ICTY and the ICTR. In *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, the ICTR held that membership in a protected group is essentially "a subjective

protected group exists consists of the group's distinguishing or immutable characteristics,[123] including factors such as citizenship, language, hereditary physical traits identified with a geographical region, or religion.[124] Subjective evidence of a group's existence, in contrast, includes the socio-historic context which the group inhabits,[125] self-identification by group members,[126] identification by others, including perpetrators, and the group's perceived characteristics.[127]

3.4 As shown below, both the objective and the subjective evidence fully establish that the Rohingya are to be treated under the Convention as a distinct ethnical group (**Section I**) within the meaning of Article II, and that they are also a distinct religious group (**Section II**) and a distinct racial

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rather than an objective concept", but the subjective perspective must necessarily interact with the objective approach, where relevant evidence and the specific social and cultural context are scrutinized in a case-by-case analysis. *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, ICTR-96-3-T, Trial Judgment (6 December 1999), paras. 56-58. Since *Rutaganda*, the combined approach, also defined as a "hybrid formulation", has been consistently followed by the ICTR and ICTY. *See Prosecutor v. Ignace Bagilishema*, ICTR-95-1A-T, Trial Judgment (7 June 2001), para. 65; *Prosecutor v. Juvénal Kajelijeli*, ICTR-98-44A-T, Trial Judgment and Sentence (1 December 2003), para. 811; *Prosecutor v. Sylvestre Gacumbitsi*, ICTR-2001-64-T, Trial Judgment (17 June 2004), para. 254; *Prosecutor v. Radislav Krstić*, IT-98-33-T, Trial Judgment (2 August 2001), paras. 556-557.

[123] *Bosnia v. Serbia*, Judgment (2007), p. 125, para. 194.

[124] *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998), paras. 512-515.

[125] *Prosecutor v. Radislav Krstić*, IT-98-33-T, Trial Judgment (2 August 2001), para. 557; *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, ICTR-96-3-T, Trial Judgment (6 December 1999), para. 56.

[126] *Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, Trial Judgment (21 May 1999), para. 98; *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, ICTR-96-3-T, Trial Judgment (6 December 1999), para. 56.

[127] *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998), paras. 122-124; *Prosecutor v. Radislav Krstić*, IT-98-33-T, Trial Judgment (2 August 2001), para. 557; *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, ICTR-96-3-T, Trial Judgment (6 December 1999), para. 56; *Prosecutor v. Ignace Bagilishema*, ICTR-95-1A-T, Trial Judgment (7 June 2001), para. 65.

group (**Section III**). Any one of these qualifications would be sufficient to bring them within the protection of Article II (**Section IV**).[128]

I. The Rohingya Are an Ethnical Group

3.5 In *Prosecutor v. Akayesu*, the International Criminal Tribunal for Rwanda ("ICTR") defined an ethnical group "as a group whose members share a common language or culture".[129] In *Prosecutor v. Kayishema and Ruzindana*, it added that this can also be a group "which distinguishes itself, as such".[130] In respect of the Rohingya, the UN High Commissioner for Human Rights reported in 2016 that "Rohingya Muslims 'self-identify as a distinct ethnic group with their own language and culture, and claim a long-standing connection to Rakhine State'".[131] The Court cited this finding in its Provisional Measures Order and explained that its "references in this Order to the 'Rohingya' should be understood as references to the group that self-identifies as the Rohingya group and that claims a longstanding connection to Rakhine State, which forms part of the Union of Myanmar".[132]

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[128] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1390-1391. MG, Vol. II, Annex 40. *See also* William A. Schabas, *Genocide in International Law* (Cambridge University Press 2009), p. 130. MG, Vol. VIII, Annex 221.

[129] *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998), para. 513.

[130] *Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, Trial Judgment (21 May 1999), para. 98.

[131] Provisional Measures Order, para. 14, (*citing* UN OHCHR, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar, Report of the UN High Commissioner for Human Rights*, UN Doc. A/HCR/32/18 (29 June 2016), para. 3. MG, Vol. II, Annex 28).

[132] Provisional Measures Order, para. 15.

3.6 In regard to language, the Rohingya share a common language that is distinct from other languages spoken in Myanmar. The Rohingya language, known as Rohingya or Ruáingga, is an Indo-Aryan language[133] that is primarily an oral language and can be written using various scripts, including Arabic, Urdu, Rohingyalish (a simplified Rohingya script using Latin letters), Hanifi and Burmese.[134] Although the Rohingya language is "closely related to the Chittagonian (Chittagong) dialect of Bengali (Bangla)",[135] which is spoken in Bangladesh, anthropologist Elliott Prasse-Freeman has shown that the Rohingya "speak a different dialect".[136] According to a recent study conducted by Translators Without Borders in Cox's Bazaar, 36 percent of Rohingya refugees struggle to understand even basic sentences in Chittagonian.[137]

3.7 There is evidence that the Rohingya language has been spoken in what is now Myanmar for at least the last two centuries. For example, the *Classical Journal* of 1811 identified three languages spoken in the "Burmah Empire", including "Rooinga",[138] and an 1815 German collection of

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[133] Azeem Ibrahim, *The Rohingyas, Inside Myanmar's Genocide* (Hurst & Company 2018), p. 21. MG, Vol. VIII, Annex 232.

[134] UN High Commissioner for Refugees, *Culture, Context and Mental Health of Rohingya Refugees: A review for staff in mental health and psychosocial support programmes for Rohingya refugees* (2018), p. 20. MG, Vol. II, Annex 31.

[135] *Ibid.*

[136] Elliott Prasse-Freeman & Kirt Mausert, 'Two Sides of the Same Arakanese Coin: "Rakhine", "Rohingya", and Ethnogenesis as Schismogenesis' in Prasse-Freeman, Chachavalpongpun & Strefford (eds), *Unraveling Myanmar: Critical Hurdles to Myanmar's Opening Up Process* (Kyoto University Press 2020), p. 12. MG, Vol. VIII, Annex 236.

[137] Translators Without Borders, *The Language Lesson: What We've Learned About Communicating With Rohingya Refugees* (November 2018), p. 5. MG, Vol. IV, Annex 120.

[138] 'Numbers in 200 Tongues' (London 1811) 535 Classical Journal, p. 107. MG, Vol. VIII, Annex 206.

languages noted the existence of the "Ruinga" as an ethnic group with a distinct language.[139]

3.8 The Rohingya also have a distinct culture.[140] There is evidence that their forebears have been present in what is now Myanmar for centuries.[141] The first English-language reference in writing to the name "Rohingya" appeared in a 1799 British colonial ethnography listing "the Mohammedans, who have long settled in Arakan [modern Rakhine State], and who call themselves Rooinga, or natives of Arakan" and speak their own dialect.[142] Some official Myanmar accounts claim that the Rohingya first arrived in Rakhine State during the British colonial period, after 1824.[143] But even if this biased version of history, which seeks to portray the Rohingya as non-native to Rakhine State, were accurate, *quod non*, it

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[139] J.S. Vateri, *Linguarum Totius Orbis* (1815). MG, Vol. VIII, Annex 207.

[140] UN High Commissioner for Refugees, *Culture, Context and Mental Health of Rohingya Refugees: A review for staff in mental health and psychosocial support programmes for Rohingya refugees* (2018). MG, Vol. II, Annex 31.

[141] Moshe Yegar, *The Muslims of Burma: A Study of a Minority Group* (Otto Harrassowitz 1972), pp. 18-19. MG, Vol. VIII, Annex 211; Mohammed Yunus, *A History of Arakan: Past and Present* (University of Chittagong 1994), pp. 14-15. MG, Vol. VIII, Annex 212; Michael W. Charney, 'Theories and Historiography of the Religious Basis of Ethnonyms in Rakhaing (Arakan), Myanmar (Burma)' (2005) Workshop The Forgotten Kingdom of Arakan: A Public Seminar on the People of Present Day Arakan State of Myanmar (2005), p. 31 (the "claim of the Buddhist school in Rakhaing historiography, that Rohingya was an invention of the colonial period, is contradicted by the evidence"). MG, Vol. VIII, Annex 218; Syed Zain Al-Mahmood, "Timeline: A Short History of Myanmar's Rohingya Minority", *Wall Street Journal* (23 December 2016). MG, Vol. IX, Annex 262.

[142] Francis Buchanan, 'A Comparative Vocabulary of Some of the Languages Spoken in the Burma Empire' (2003) 1(1) SOAS Bulletin of Burma Research, p. 55 (emphasis omitted). MG, Vol. VIII, Annex 214.

[143] *See, e.g.*, UN General Assembly, *Letter dated 16 October 2019 from the Permanent Representative of Myanmar to the United Nations addressed to the Secretary-General*, UN. Doc A/74/505/Rev.1 (28 October 2019), p. 11. MG, Vol. III, Annex 53.

would not contradict the fact that the Rohingya are a distinct cultural group who can trace their presence in the country back to the 19th century, at least.

3.9 Rohingya culture is also distinguished by its unique music and art, including Rohingya poems and songs known as "*tarana*" and "*hawla*" that play a significant role in preserving the Rohingya collective memory and identity.[144] Rohingya culture traditionally places emphasis on family and community over individual identity.[145] Many Rohingya identify with a particular "*shomaz*" ("community"), which is generally organized around a mosque or group of mosques.[146] Shomaz committees, composed of prominent members of the community, perform key social and religious functions, including arbitrating and resolving civil disputes, assisting the poor and enforcing moral codes.[147]

3.10 In addition to these objective indicators that the Rohingya are a distinct ethnical group, their status as such is reinforced by subjective factors, including their own self-identification as a unique ethnical group. As both the UN High Commissioner for Human Rights and the Fact-Finding Mission have reported, the Rohingya self-identify as a separate ethnical group. This has also been confirmed by Myanmar. In its 2013

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[144] Kazi Fahmida Farzana, 'Music and Artistic Artefacts: Symbols of Rohingya Identity and Everyday Resistance in Borderlands' (2011) 4(2) ASEAS - Austrian Journal of South-East Asian Studies 215, pp. 218, 220, 232. MG, Vol. VIII, Annex 224; Kazi Fahmida Farzana, 'Boundaries in Shaping the Rohingya Identity and the Shifting Context of Borderland Politics' (2015) 15(2) Studies in Ethnicity and Nationalism 292, p. 299. MG, Vol. VIII, Annex 227.

[145] Daniel Coyle, Abdul-Kadar (AK) Rahim & Mohammed Abdullah Jainul, 'Clan, Community, Nation: Belonging Among Rohingya Living in Makeshift Camps' (2020) Bangladesh International Organization for Migration, p. 10. MG, Vol. X, Annex 333.

[146] *Ibid.*, pp. 14-15.

[147] *Ibid.*, pp. 17-18.

report, Myanmar's Inquiry Commission on Sectarian Violence in Rakhine State recognized that 85 percent of the 800 "Bengali" it interviewed identified themselves as Rohingya.[148]

3.11 Myanmar's refusal to officially recognize the Rohingya as one of the country's "national races" cannot negate the fact that they constitute an ethnical group entitled to protection under the Genocide Convention. To the contrary, Myanmar's refusal to recognize them is part of the State's policy of discriminating against them by denying them the legal status, including citizenship, that they would enjoy as a recognized ethnical minority. Indeed, by targeting the Rohingya for such discriminatory treatment, and worse (as more fully described in succeeding chapters) based on their ethnicity (as well as their religion and race), Myanmar, in fact, confirms its regard of them as a separate ethnical (and religious and racial) group, which has been singled out for prejudicial treatment on those bases.

3.12 This was the conclusion of the UN Fact-Finding Mission. As it explained, "the fact[s] that the Myanmar authorities do not officially recognize them as a 'national race' or refer to them as 'Bengali'" do "not call into question that the Rohingya are a distinct group ... If anything, the differential treatment of the Rohingya, through the adoption of specific laws, policies and practices, supports the conclusion that they are a protected group as defined by the Genocide Convention".[149]

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[148] Republic of the Union of Myanmar, *Final Report of Inquiry Commission on Sectarian Violence in Rakhine State* (8 July 2013), p. 55. MG, Vol. VI, Annex 161.

[149] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1391. MG, Vol. II, Annex 40.

3.13 In its report of 22 May 2020 on implementation of the Court's Provisional Measures Order, Myanmar implicitly acknowledged that the Rohingya are a distinct ethnical group. It recognized that "the community referred to in the Court's Order as the 'Rohingya,' the members of which live predominantly in northern Rakhine State, and speak an Indo-European tongue which is a variant of, or is closely related to, the Chittagonian dialect spoken in Bangladesh" is one of the two "sizable Muslim communities" in Rakhine State.[150]

II. The Rohingya Are a Religious Group

3.14 The Rohingya are also a religious group. The ICTR has defined a "religious group" as "one whose members share the same religion, denomination or mode of worship".[151] The Rohingya are predominantly Muslim, and Myanmar itself identifies them as such, as indicated in the passage just cited from its report on implementation of the Court's Provisional Measures Order. To the same effect, at the oral proceedings on provisional measures, Myanmar's Agent consistently referred to the Rohingya as "Muslims" living in Rakhine State.[152] While nearly two billion

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[150] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020, para. 35 [**hereinafter** Myanmar's Report pursuant to Provisional Measures Order]. The other "sizeable Muslim community", according to Myanmar, is "the Kaman Muslim community, whose members live predominantly in the southern part of the State and speak the Rakhine language". *Ibid.*

[151] *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998), para. 515.

[152] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures*, Verbatim Record CR2019/19 of Public Sitting held on 11 December 2019, paras. 9-10, 20, 27, 32, 34 (Aung San Suu Kyi). *See also ibid.*, paras. 9(c), 10, 18, 22 (Okowa).

human beings share the Muslim faith around the world, the Rohingya constitute a protected religious group under the Convention because "[t]he area of the perpetrator's activity and control are to be considered" for the purpose of defining the group by application of the Convention's criteria.[153]

3.15 For decades, the international community has called on Myanmar to cease its persecution of the Rohingya as a religious group. In October 1992, the UN Special Rapporteur on Freedom of Religion or Belief reported that "since late 1989, the Rohingya citizens of Myanmar who belong to the Muslim faith and live predominantly in the northern part of Rakhine State (Arakan) located in the northwestern part of the country have been subjected to persecution based on their religious beliefs".[154]

3.16 A number of Myanmar's laws specifically target the Rohingya as a group based on their adherence to Islam. For example, Regional Order 1/2005 of the Maungdaw Township Peace and Development Council includes a section that is only applicable to those who marry "as per the Islamic religion", and requires that couples obtain a special marriage permission from government authorities before being allowed to marry.[155] Those who receive such permission "must limit the number of children".[156] This is but one example of how Myanmar law singles out the Rohingya for

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[153] *Bosnia v. Serbia*, Judgment (2007), p. 126, para. 199.

[154] UN Commission on Human Rights, *Report submitted by Mr. Angelo Vidal d'Almeida Ribeiro, Special Rapporteur appointed in accordance with Commission on Human Rights resolution 1986/20 of 10 March 1986*, UN Doc. E/CN.4/1993/62 (6 January 1993), p. 64, para. 45. MG, Vol. II, Annex 6.

[155] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 590. MG, Vol. II, Annex 40.

[156] *Ibid.*

discriminatory treatment based on their religious beliefs. Many other examples are provided in succeeding chapters, especially Chapter 6.

III. The Rohingya Are a Racial Group

3.17 The Rohingya are also a racial group. The ICTR has defined a "racial group" as one that is "based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors".[157] The subjective test for determining whether a "racial group" exists takes into consideration the perpetrators' perceptions of the group as belonging to a separate race of people.[158] Myanmar has repeatedly referred to the Rohingya as belonging to a separate race, one which has no place in its territory.

3.18 As documented by the UN Fact-Finding Mission, Myanmar's authorities have declared that "the Rohingya do not belong in Myanmar" because they "are not considered a 'national race'".[159] They are distinguished, inter *alia*, by the color of their skin, which is generally darker than that of ethnical Burmese, and more like that of the South Asian people of neighboring Bangladesh.[160] To accentuate their racial difference,

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[157] *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998), para. 514.

[158] *Prosecutor v. Clément Kayishema & Obed Ruzindana*, ICTR-95-1-T, Trial Judgment (21 May 1999), para. 98.

[159] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 460. MG, Vol. II, Annex 40.

[160] Azeem Ibrahim, *The Rohingyas, Inside Myanmar's Genocide* (Hurst & Company 2018), p. 4. MG, Vol. VIII, Annex 232.

Myanmar authorities consistently refer to the Rohingya as "Bengali" or "people of Bengali stock".[161]

3.19 In 1992, Myanmar's Permanent Mission to the United Nations in Geneva declared to the UN Special Rapporteur on Freedom of Religion and Belief that "[s]ince the first Anglo-Myanmar war in 1824, Muslims *of Bengali stock* had entered Rakhine (Arakan) State illegally from across the border" and the "so-called 'Rohingyas' never belonged to the national races or national racial groups of Myanmar".[162] Reflecting this view, a number of Myanmar's laws and policies refer to the Rohingya as "Bengali",[163] and Myanmar authorities have forced the Rohingya to identify as "Bengali" to register for censuses and to apply for identity cards.[164]

3.20 Other terms for the Rohingya used by Myanmar authorities further underscore the view that the Rohingya are a separate racial group. For

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[161] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 460 and note 1066. MG, Vol. II, Annex 40.

[162] UN Commission on Human Rights, *Report submitted by Mr. Angelo Vidal d'Almeida Ribeiro, Special Rapporteur appointed in accordance with Commission on Human Rights resolution 1986/20 of 10 March 1986*, UN Doc. E/CN.4/1993/62 (6 January 1993), p. 76, para. 46 (emphasis added). MG, Vol. II, Annex 6.

[163] *See infra* Chapter 6; Addendum on "Requirements for Bengalis who apply for Permission to Marry", (1 May 2005), *in* Republic of the Union of Myanmar, Border Regional Immigration Control Headquarters, *Regional Order and Processes for Controlling Bengali Population, (circulating Regional Order of 1993, Regional Order 1/2005 and Various Addenda)* (11 February 2008) (original and translation), PDF p. 9. MG, Vol. VI, Annex 177 [**hereinafter** *Regional Order and Processes for Controlling Bengali Population* (11 February 2008)]. Republic of the Union of Myanmar, Immigration and National Registration Department of Rakhine State, *Instruction relating to travelling of foreigners, persons who are doubted as foreigners and Bangali races residing within Rakhine State* (June 1997) (original and translation) (specifying requirements for temporary travel permits to travel outside of their township and providing that the obligation to obtain a Form 4 permit was only applicable to "Bangali races" and "foreigners"). MG, Vol. VI, Annex 175.

[164] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 66, note 91. MG, Vol. III, Annex 49.

example, they are frequently referred to as "Kalar",[165] which is defined in contemporary Burmese language dictionaries as "person from South Asia".[166] The UN Fact-Finding Mission explains, however, that "[w]hile some argue that it can be used in a benign manner, it is often used as a racist slur to insult and highlight someone's dark skin or foreign ancestry, signifying inferiority compared to 'ethnic' Myanmar people".[167] Reflecting this attitude, Ye Myint Aung, the Burmese envoy in Hong Kong, described the Rohingya as "ugly as ogres", because of their "dark brown" complexion, unlike the "fair and soft" skin of other Burmese ethnic groups.[168]

3.21 To this day, Myanmar's authorities continue to refer to members of the Rohingya group as "Bengali", and use this as a pretext for arguing that they do not belong in Myanmar, but are, allegedly, "illegal immigrants"

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[165] *See, e.g.*, UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 559, 582, 610, 626. MG, Vol. II, Annex 40.

[166] Scholarly commentary notes that "the term's etymology is contested, with two primary interpretations. First, that kalar is derived from Pali ku-la, where ku indicates 'crossing maritime space' and la indicates 'to come'. Thus foreigners arriving via the ocean were identified as ku-la, which would include both foreigners from South Asia as well as Arab trader. … In contrast, foreigners arriving from China or Thailand—both land routes rather than sea—are never referred to as 'kalar'… The second interpretation is that kalar is derived from the Sanskrit word for 'black,' used in both Hindi and Urdu, and was thus adopted to refer to persons with dark skin". Matt Schissler, Matthew J. Walton & Phyu Phyu Thi, 'Reconciling Contradictions: Buddhist-Muslim Violence, Narrative Making and Memory in Myanmar' (2017) 47(3) Journal of Contemporary Asia 376, pp. 39-40, note 11. MG, Vol. VIII, Annex 230.

[167] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1312. MG, Vol. II, Annex 40.

[168] Ishaan Tharoor, "Why Does This Buddhist-Majority Nation Hate These Muslims So Much?", *The Washington Post* (13 February 2015). MG, Vol. IX, Annex 253; AFP, "Myanmar envoy terms Rohingyas 'ugly as ogres'", *Dawn* (12 February 2009). MG, Vol. IX, Annex 238; Kyaw Zwa Moe, "Skin Color and Prejudice Endangers Rohingya", *The Irrawaddy* (13 February 2009). MG, Vol. IX, Annex 239.

from Bangladesh,[169] despite being born in Myanmar and having centuries-long ancestral roots in the country. They are not citizens of Myanmar only because Myanmar refuses to grant them citizenship, precisely because they are Rohingya.[170]

3.22 The derogatory terms used by Myanmar's officials to refer to the Rohingya confirm that they are viewed by that State as a separate and distinct—and inferior—racial, ethnical and religious group. These include "Ro-lein-nyar" ("Ro-liars"/"Rohingya are liars"),[171] "Ro-gein-nya" ("Rohingya are lying dogs"), "Mout Kalar" ("Muslim Kalar"), "Kway Kalar" ("Muslim dog"), "Khoe Win Bengali" ("Bengali that sneaked in") and "Kalasoe" ("Bad Kalar").[172]

IV. Conclusion

3.23 As demonstrated above, the Rohingya qualify for protection under the Genocide Convention on at least three grounds: as a distinct ethnical group, a distinct religious group and/or a distinct racial group within Myanmar. The group and its members self-identify as such. Myanmar's protestations that there are no such people as "Rohingya",[173] or its refusal

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[169] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 460. MG, Vol. II, Annex 40.

[170] *Ibid.*

[171] The UN Fact-Finding Mission reports that "in Myanmar language, the pronunciation of the word 'Rohingya' sounds similar to that of 'Ro-lein-nyar', meaning 'Ro-liar'. This play on words implies that all Rohingya are liars, and is part of a widespread narrative claiming that there are no Rohingya, only 'Ro-lein-nya'". UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1312. MG, Vol. II, Annex 40.

[172] *Ibid.*

[173] *See, e.g.*, UN Commission on Human Rights, *Report submitted by Mr. Angelo Vidal d'Almeida Ribeiro, Special Rapporteur appointed in accordance with Commission on Human Rights resolution 1986/20 of 10 March 1986*, UN Doc. E/CN.4/1993/62 (6 January

throughout the hearings on provisional measures to use the word, cannot change reality. To the contrary, Myanmar's discriminatory measures, and ultimately its genocidal acts, targeting them—based on their ethnicity, religion and race—demonstrate its own understanding that they are a separate and distinct group, even if the State, to further its efforts to destroy them, refuses to grant them official recognition.

3.24 Indeed, before the 1980s, when Myanmar began implementing the discriminatory policies that culminated in its genocidal acts of 2016-2018, it acknowledged the existence of the Rohingya as a distinct ethnical, religious and racial group. In 1961, the Deputy Chief of Defence, Brigadier General Aung Gyi, stated publicly that Myanmar recognized the Rohingya as an ethnic group, and was committed to ensuring that they would obtain citizenship as promptly as possible.[174] More recently, in 2014, Myanmar declared that the Rohingya would be free to identify themselves as such in the census, conducted in March-April 2014. But the winds quickly changed. A day before the census began, Myanmar announced that the use of the term would not be allowed,[175] and a presidential spokesperson explained

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1993), para. 46. MG, Vol. II, Annex 6; UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 19, notes 2, 85, 87, 106. MG, Vol. II, Annex 40; Richard C. Paddock, "Aung San Suu Kyi Asks U.S. Not to Refer to 'Rohingya'", *The New York Times* (6 May 2016). MG, Vol. IX, Annex 259; Editorial Board, "Myanmar is now erasing the Rohingya's very name", *The Washington Post* (16 June 2018). MG, Vol. IX, Annex 310; Anealla Safdar & Usaid Siddiqui, "ICJ speech: Suu Kyi fails to use 'Rohingya' to describe minority", *Al Jazeera* (13 December 2019). MG, Vol. IX, Annex 319.

[174] Nick Cheesman, 'How in Myanmar "National Races" Came to Surpass Citizenship and Exclude Rohingya' (2017) 47(3) Journal of Contemporary Asia 461, p. 475. MG, Vol. VIII, Annex 231; General Aung Gyi, "Address Delivered in Mujahid Insurgents' Surrender Ceremony" (Maungdaw Township, 4 July 1961). MG, Vol. VI, Annex 143.

[175] Timothy Mclaughlin, "Myanmar Releases Census Data, but Excludes Rohingya Minority", *Reuters* (29 May 2015). MG, Vol. IX, Annex 255; International Crisis Group, 'Counting the Costs: Myanmar's Problematic Census' (2014) Asia Group Briefing No. 144. MG, Vol. IV, Annex 92.

that those wishing to record their ethnicity as Rohingya would not be registered.[176]

3.25 Myanmar has chosen, in violation of its obligations under international law, not to register or grant citizenship to members of the Rohingya group, and has denied them official recognition, but it cannot credibly deny that the group exists, or that it is a separate ethnical, religious and racial group within the country, or that it is entitled to protection under the Genocide Convention.

[176] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), note 906. MG, Vol. II, Annex 40.

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CHAPTER 4
APPLICABLE LAW

I. Introduction to the Genocide Convention

A. Background and Negotiating History

4.1 The concept of genocide was invented by the Polish jurist Rafael Lemkin in the autumn of 1944.[177] A few months later it was introduced into the Indictment issued by prosecutors at the International Military Tribunal at Nuremberg, as a species of crimes against humanity under Article 6(c) of the Tribunal's Charter. It was argued in those proceedings but did not feature in the judgment handed down in October 1946. In December 1946, the United Nations General Assembly adopted resolution 96(I), which recognized genocide to be "a crime under international law" denying the "right of existence of entire human groups", and called for international co-operation to facilitate its prevention and punishment.[178]

4.2 Thereafter, following two years of negotiations, on 9 December 1948 the Convention on the Prevention and Punishment of the Crime of Genocide was adopted as an annex to UN General Assembly Resolution 260A(III). It entered into force on 12 January 1951, with an original 38

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[177] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944), p. xi. MG, Vol. VIII, Annex 208 [**hereinafter** Lemkin, *Axis Rule in Occupied Europe* (1944)].

[178] UN General Assembly, 55th Plenary Meeting, *96 (I). The Crime of Genocide*, UN Doc. A/Res/96(I) (11 December 1946). MG, Vol. II, Annex 4.

States parties. Today, there are 152 States parties to the Genocide Convention, including The Gambia and Myanmar.[179]

4.3 The Genocide Convention has been the subject of proceedings before the Court on five prior occasions.[180] In its 1951 Advisory Opinion, the Court offered a view on the possibility of making reservations to the Convention. In so doing, it addressed the *travaux préparatoires* as an aid to interpretation of the Convention's object and purpose. The Court observed:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as a crime under international law involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations. The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the

[179] United Nations, *Convention on the Prevention and Punishment of the Crime of Genocide: List of Participants.* MG, Vol. II, Annex 2.

[180] Those five occasions have resulted in decisions on the substance of the Convention in three proceedings: the *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, and decisions on provisional measures and the merits in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia).* The Genocide Convention also formed part of the proceedings, though without the Court issuing any judgment on the merits, in *Legality of the Use of Force (Yugoslavia v. various NATO members)* and in *Trial of Pakistani Prisoners of War (Pakistan v. India).*

> co-operation required "in order to liberate mankind from such an odious scourge"….
>
> The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."[181]

The Court thus made clear, some seven decades ago, that the Convention's express purpose is to "liberate mankind from such an odious scourge",[182] and its provisions have been and must be interpreted by the Court in accordance with that humanitarian and civilizing purpose.

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[181] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

[182] Genocide Convention (1951), Preamble. MG, Vol. II, Annex 1.

B. SUBSEQUENT PRACTICE UNDER THE CONVENTION

4.4 The proper interpretation of the Genocide Convention is reflected in the practice of international courts and tribunals, in decisions of national courts, and in the practice of other authoritative actors at the international, supra-national and national levels. The starting point, and most authoritative precedent for the interpretation of the Convention, is the Court's own jurisprudence, specifically its decisions in its *1951 Advisory Opinion*, and the *Bosnia* and *Croatia* cases.

4.5 In addition to the Court, other international courts and tribunals have also had occasion to interpret and apply the elements of the crime of genocide as it is expressed in the Convention. Those tribunals include the International Criminal Tribunal for the former Yugoslavia ("ICTY"),[183] the ICTR,[184] the Extraordinary Chambers in the Courts of Cambodia ("ECCC"),[185] and the International Criminal Court ("ICC").[186] The decisions of these tribunals provide significant elucidation of the principles arising under the Convention. Indeed, the jurisprudence produced by the international criminal tribunals in this field has become extensive since the

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[183] *See, e.g.*, *Prosecutor v. Radislov Krstić*, IT-98-33-A, Appeals Chamber Judgment (19 April 2004); *Prosecutor v. Ratko Mladić*, IT-09-92-T, Trial Chamber Judgment (22 November 2017); *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-T, Trial Chamber Judgment (12 December 2012); *Prosecutor v. Goran Jelisić*, IT-95-10-A, Appeals Chamber Judgment (5 July 2001).

[184] *See, e.g.*, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, Trial Judgment (21 May 1999); *Prosecutor v. Jean-Paul Akayesu*, ICTR96-4-A, Appeals Chamber Judgment (1 June 2001), *Sylvestre Gacumbitsi v. Prosecutor*, ICTR-2001-64-A, Appeals Chamber Judgment (7 July 2006).

[185] *See, e.g.*, *Prosecutor v. Nuon Chea and Khieu Samphan*, ECCC Case 002/02, Trial Judgment (16 November 2018).

[186] *See, e.g.*, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Pre-Trial Chamber I (30 September 2008); *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09 OA2, Appeals Chamber Judgment (6 May 2019).

middle of the 1990s, after a period of quiescence that lasted nearly five decades. The interaction between the decisions of the Court and the jurisprudence of other international courts and tribunals is apparent.[187]

4.6 Alongside this jurisprudence, international commissions that have investigated the crime of genocide provide additional assistance on the interpretation of the Convention. In this regard, The Gambia notes in particular the reports of the UN Guatemala Historical Clarification Commission, the UN Fact-Finding Mission on Darfur, the Independent International Commission of Inquiry on the Syrian Arab Republic (in respect of the Yazidi in Iraq), and, of course, the UN Fact-Finding Mission for Myanmar. While the investigative bodies are not themselves judicial, and their findings do not, therefore, constitute judicial precedent, they offer significant guidance on the approach to be taken in applying the provisions of the Convention to particular evidential circumstances.

4.7 National courts too have, on occasion, had an opportunity to interpret and apply the concept of genocide as defined by the Convention. By way of example, Israel's prosecution of Adolf Eichmann in 1961 was pursuant to the 1950 Nazi Collaborators (Punishment) Law, itself based on the Genocide Convention. Other national courts have also tried cases of

[187] *See, e.g.*, *Croatia v. Serbia*, Judgment (2015), pp. 66-67, paras. 146-148.

genocide, related to the Convention, including in Canada,[188] Sweden,[189] Switzerland,[190] Belgium,[191] and Bangladesh.[192]

4.8 This is the context in which the Genocide Convention falls to be interpreted and applied in this case. In submitting its Application, The Gambia has based itself fully on the approach taken by the Court in its earlier cases. It has also had regard to the jurisprudence of other international courts and tribunals, where appropriate, and the views on the application of the Convention expressed by authoritative and independent United Nations entities that have investigated the situation in Rakhine state.

C. THE DEFINITION OF GENOCIDE

4.9 Article II of the Convention sets out the definition of genocide, from which all other provisions of the Convention flow. This provides that:

> "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;

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[188] *Prosecutor v. Désiré Munyaneza*, 2009 QCCS 2201, Trial Judgment (22 May 2009).

[189] *Prosecutor v. Stanislas Mbanenande*, Stockholm District Court (20 June 2013).

[190] *Fulgence Niyonteze case*, Military Court of Cassation (27 April 2001).

[191] *Prosecutor v. Fabien Neretse*, Brussels Assize Court (19 & 20 December 2019), confirmed by Court of Cassation, N° P.20.0146.F (27 May 2020).

[192] *See, e.g.*, International Crimes Tribunal-1, *Prosecutor v. Talukder et al.*, ICT-BD [ICT-1] Case No. 08 of 2016, Judgment (17 July 2018).

> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group."[193]

4.10 Thus, genocide "contains two constituent elements"[194]—the acts set out in paragraphs (a)-(e) of Article II, each of which on its own is sufficient to give rise to the act of genocide; and the intent described in the *chapeau*, to destroy the protected group in whole or in part.

4.11 While the key "intent" for genocide is the special intent, or "*dolus specialis*"[195] contained in the *chapeau* to Article II, the Court has made clear that each of the acts identified in paragraphs (a) to (e) of Article II, themselves include mental elements:

> "'Killing' must be intentional, as must 'causing serious bodily or mental harm'. Mental elements are made explicit in paragraphs (c) and (d) of Article II by the words 'deliberately' and 'intended', quite apart from the implications of the words 'inflicting' and 'imposing'; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts."[196]

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[193] Genocide Convention (1951), Art. II. MG, Vol. II, Annex 1.

[194] *Croatia v. Serbia*, Judgment (2015), p. 62, para. 130.

[195] *Bosnia v. Serbia*, Judgment (2007), p. 121, para. 187.

[196] *Ibid.*, p. 121, para. 186.

4.12 Accordingly, the Court has confirmed that pursuant to Article II, genocide occurs when there is the commission of any one of the acts specified in paragraphs (a)-(e), provided that it is perpetrated both with the subsidiary intent specific to that act, and with the special genocidal intent described in the *chapeau*. While the *actus reus* and *mens rea* are "analytically distinct, the two elements are linked. The determination of *actus reus* can require an inquiry into intent. In addition, the characterization of the acts and their mutual relationship can contribute to an inference of intent".[197]

II. The *Actus Reus* of Genocide

4.13 As mentioned above, Article II of the Convention identifies five categories of conduct capable of constituting the *actus reus* of genocide.

A. KILLING MEMBERS OF THE GROUP—ARTICLE II(A)

4.14 The acts falling within Article II(a) are self-explanatory: as the Court has confirmed, this paragraph of Article II refers to "the act of intentionally killing members of the group".[198] In the equally authoritative French and English versions of the Convention, the words "meurtre" and "killing" are used, and those words have the same meaning in the context of the Convention, namely that the Convention "always presupposes the existence of an intentional element (which is altogether distinct from the

[197] *Croatia v. Serbia*, Judgment (2015), p. 62, para. 130.

[198] *Ibid.*, p. 69, para. 156.

'specific intent' necessary to establish genocide), namely the intent to cause death".[199]

B. CAUSING SERIOUS BODILY OR MENTAL HARM TO MEMBERS OF THE GROUP—ARTICLE II(B)

4.15 Paragraph (b) of Article II "must be regarded as encompassing only acts carried out with the intent of achieving the physical or biological destruction of the group, in whole or in part",[200] and so the serious harm perpetrated "must be such as to contribute to the physical or biological destruction of the group, in whole or in part".[201] Such acts include, but are not limited to, "acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution".[202] The harm caused by those acts to group members need not be permanent or irremediable.[203]

4.16 It is now well-established that acts of rape and other acts of sexual violence perpetrated against members of the protected group may fall within the scope of Article II(b)[204]:

> "Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by

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[199] *Ibid.*, p. 138. para. 474.

[200] *Ibid.*, p. 63, para. 136.

[201] *Ibid.*, p. 69, para. 157.

[202] *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber Judgment (2 September 1998), para. 504.

[203] *Ibid.*, para. 502.

[204] *Croatia v. Serbia*, Judgment (2015), p. 70, para. 158.

> or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[205]

4.17 Further, and subsequent to the Court's judgment on the merits in *Croatia*, the ICTY Appeals Chamber confirmed that, although the forcible transfer of a civilian population out of an area is not a genocidal act as such, "it is … a relevant consideration as part of the overall factual assessment and could be an additional means by which to ensure the physical destruction of the protected group … by causing serious mental harm".[206] Thus, forcible transfer of members of a group may, in certain circumstances, contribute or amount to conduct falling within Article II(b). The Appeals Chamber observed that such would be the case where forcible transfer "caused grave and long-term disadvantage to the ability of the members of the protected group to lead a normal and constructive life so as to threaten the physical destruction of the group in whole or in part".[207] In determining whether forcible transfer falls within Article II(b), it will be appropriate to take account of "post-transfer suffering", in particular to evaluate "whether serious mental harm was inflicted".[208]

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[205] *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber Judgment (2 September 1998), para. 597.

[206] *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-A, Appeals Chamber Judgment (8 April 2015), para. 209.

[207] *Ibid.*, para. 212.

[208] *Ibid.*, para. 211.

C. Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about Its Physical Destruction in Whole or in Part—Article II(c)

4.18 Paragraph (c) of Article II "covers methods of physical destruction, other than killing, whereby the perpetrator ultimately seeks the death of the members of the group …. Such methods of destruction include notably deprivation of food, medical care, shelter or clothing, as well as lack of hygiene, systematic expulsion from homes, or exhaustion as a result of excessive work or physical exertion".[209] The destruction of homes and entire villages, and of medical facilities, plainly falls within the scope of this finding. Widespread rape and other acts of sexual violence, while they fall primarily within paragraph (b) of Article II, are also capable of amounting to the imposition of conditions designed to bring about the physical destruction of the group in whole or in part, where they take place on a sufficient scale.[210]

4.19 While, as above, forced displacement or removal of a protected group from an area does not of itself amount to a genocidal act, it may fall within the Article II genocidal acts, including Article II(c), if it leads "to conditions of life calculated to bring about the group's physical destruction".[211] As the Court itself has observed, the absence of forcible transfer as a discrete genocidal act under Article II "is not to say that acts described as 'ethnic cleansing' may never constitute genocide, if they are such as to be characterized as, for example, 'deliberately inflicting on the

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[209] *Croatia v. Serbia*, Judgment (2015), p. 70, para. 161.

[210] *Ibid.*, p. 110, para. 364.

[211] *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-A, Appeals Chamber Judgment (8 April 2015), para. 209.

group conditions of life calculated to bring about its physical destruction in whole or in part', contrary to Article II paragraph (c) of the Convention".[212] In that regard, "the circumstances in which forced displacements were carried out are critical"[213] for the purposes of establishing whether they amount to genocidal acts. Other acts that might be attendant to forced displacement, such as the razing of entire villages, the burning of harvests or confiscation of food and the destruction of medical facilities, can also amount to the infliction of conditions of life falling within paragraph (c).[214]

D. IMPOSING MEASURES INTENDED TO PREVENT BIRTHS WITHIN THE GROUP—ARTICLE II(D)

4.20 Policies that limit births within a protected group in order to bring about the destruction of the group in whole or in part are paradigmatically genocidal acts within the meaning of Article II(d). Such policies may be direct, such as forced sterilization, or indirect, such as the separation of men and women.[215]

4.21 Alongside such measures, Article II(d) has also been interpreted to cover acts of rape and sexual violence against members of the protected group:

> "provided that they are of a kind which prevent births within the group. In order for that to be the case, it is necessary that the circumstances of the commission of those

[212] *Bosnia v. Serbia*, Judgment (2007), p. 123, para. 190.

[213] *Croatia v. Serbia*, Judgment (2015), p. 72, para. 163.

[214] The Commission for Historical Clarification, *Guatemala Memory of Silence, Report of the Commission for Historical Clarification: Conclusions and Recommendations* (February 1999), paras. 116-118. MG, Vol. X, Annex 329.

[215] *Bosnia v. Serbia*, Judgment (2007), para. 355.

> acts, and their consequences, are such that the capacity of members of the group to procreate is affected. Likewise, the systematic nature of such acts has to be considered in determining whether they are capable of constituting the *actus reus* of genocide within the meaning of Article II (d) of the Convention."[216]

4.22 While it is now widely recognized that rape may fall within the scope of Article II(b), as a measure calculated to inflict serious bodily or mental harm to members of the group, rape may also fall within Article II(d), as a measure intended to prevent births.

E. Forcibly Transferring Children of the Group to Another Group—Article II(e)

4.23 The conduct that constitutes the *actus reus* pursuant to paragraph (e) of Article II is not relevant to the facts of this case and is not, therefore, addressed in this Memorial.

III. The *Mens Rea* of Genocide

4.24 "[T]he essential characteristic of genocide, which distinguishes it from other serious crimes", is the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.[217] This is the *mens rea* of genocide. It may be established by direct proof of genocidal intent, for example documents that reference the intention to destroy a group in whole or in part. This, however, is rare, as actors engaged in conduct that

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[216] *Croatia v. Serbia*, Judgment (2015), p. 73, para. 166.

[217] *Ibid.*, p. 62, para. 132.

constitute the *actus reus* of genocide tend not to produce overt incriminating evidence of this kind.[218]

4.25 The more usual way, therefore, of proving genocidal intent is by circumstantial inference (see further at Section III.E., below), such as offering evidence of a discernible pattern of conduct that shows "acts on a scale that establishes an intent not only to target certain individuals because of their membership to a particular group, but also to destroy the group itself in whole or in part".[219]

4.26 As the Court has made clear, "care must be taken in finding in the facts a sufficiently clear manifestation of that intent",[220] though the inference of genocidal intent may even be established on the basis of an "isolated" act,[221] and may co-exist with other motivations such as, for example, personal revenge or advancement, retaliation or collective punishment.[222]

A. INTENT TO DESTROY

4.27 The special intent to destroy a relevant group, in whole or in part, is what distinguishes genocide from other crimes,[223] such as extermination or

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[218] *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-T, Trial Chamber Judgment (12 December 2012), para. 745.

[219] *Croatia v. Serbia*, Judgment (2015), p. 64, para. 139.

[220] *Bosnia v. Serbia*, Judgment (2007), p. 122, para. 189.

[221] *Prosecutor v. Goran Jelišic*, IT-95-10-T, Trial Judgment (14 December 1999), para. 100.

[222] *Prosecutor v. Goran Jelišic*, IT-95-10-A, Appeals Chamber Judgment (5 July 2001), para. 49.

[223] *Croatia v. Serbia*, Judgment (2015), p. 62, para. 132.

murder.[224] The commission of any of the acts in Article II of the Convention with the special intent to destroy is sufficient to constitute genocide[225].

4.28 Genocide does not require that the group is *actually* destroyed.[226] While the perpetrator's aim must be to destroy the group in whole or in part, the acts need not have succeeded in causing the destruction of the group, either in whole or in part, in order for genocide to have occurred.[227] The acts in Article II are not limited to killing and, as paragraphs (b)-(e) of Article II make clear, an intent to destroy the group cannot be equated with the killing of its members.

4.29 Indeed, there is no numeric threshold of killings or other victims that must be met before genocide can be said to have occurred. The Court's sole finding of genocide to date, at Srebrenica, was on the basis of around 7,000 deaths, and other tribunals have made findings of genocide on even fewer deaths. For example, the ECCC has found that the killing of 60 people constituted genocide,[228] while the ICTY has found two killings to constitute

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[224] *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgment (21 May 1999), para. 91.

[225] *Prosecutor v. Goran Jelišic*, IT-95-10-A, Appeals Chamber Judgment (5 July 2001), para. 45.

[226] *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber Judgment (2 September 1998), para. 497.

[227] International Law Commission, Draft Code of Crimes Against Peace and Security of Mankind, with Commentaries (1996), reproduced in *Yearbook of the International Law Commission 1996*, Vol. II (Part Two), para. 18. MG, Vol. II, Annex 8; *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Motion for Judgment of Acquittal (TC) (16 June 2004), para. 125.

[228] By way of example, the ECCC made a finding of genocide on the basis of the murder (with genocidal intent) of 60 Vietnamese. *See* Extraordinary Chambers in the Courts of Cambodia, Case 002/02 Judgment (16 November 2018), paras. 3499 (in which the number of deaths is given), 3516-3519 (in which they are deemed to constitute genocide). MG, Vol. X, Annex 328.

genocide,[229] and, indeed, killing a *single* victim may actually be sufficient to constitute genocide,[230] as long as it is done with the intent to destroy the group.

4.30 Rather than a factual consequence of genocide, the destruction of the group must be the underpinning and defining *purpose* of the acts—it must be what the perpetrator "seeks to achieve"[231]—whether or not it has actually been achieved. In this way, the special intent bears on and alters the character of the acts, such that they constitute genocide: it is the commission of the acts under Article II together with the *dolus specialis* that distinguishes the crime of genocide[232] from, for example, murder[233] or ethnic cleansing.

4.31 The significance of "intent to destroy" as the distinguishing feature of genocide is exemplified by comparison with crimes against humanity, which may often be comprised of the same underlying acts as genocide.[234] Indeed, while murder, extermination, rape and grave sexual violence (all of

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[229] *Prosecutor v. Ildéphonse Nizeyimana*, ICTR-2000-55C-T, Trial Judgment and Sentence (19 June 2012), para. 1521.

[230] *Prosecutor v. Sylvestre Gacumbitsi*, ICTR-2001-64-T, Trial Judgment (17 June 2004), paras. 252-255. William A. Schabas, *Genocide in International Law* (Cambridge University Press 2009), p. 179. MG, Vol. VIII, Annex 221; Christian J. Tams, Lars Berster & Björn Schiffbauer, *Convention on the Prevention and Punishment of Genocide: A Commentary* (2014), para. 61. MG, Vol. VIII, Annex 226.

[231] *Prosecutor v. Goran Jelišic*, IT-95-10-A, Appeals Chamber Judgment (5 July 2001), para. 46.

[232] *Croatia v. Serbia*, Judgment (2015), p. 62, para. 132.

[233] *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgment (21 May 1999), para. 91.

[234] Convictions for both genocide and crimes against humanity were imposed on the basis of the same underlying acts in *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Appeals Chamber Judgment (28 November 2007), para. 1029; Extraordinary Chambers in the Courts of Cambodia, Case 002/02 Judgment (16 November 2018). MG, Vol. X, Annex 328.

which are capable of constituting the *actus reus* of genocide) may amount to crimes against humanity, they will only do so where those acts are committed on a widespread or systematic basis. Thus, the scale of the acts is inherent in the definition of a crime against humanity. The same is not true of genocide. For those underlying acts to be genocidal, it is the *mens rea*, and not the manner of commission of the *actus reus*, that is the distinguishing feature. Scale and a systematic pattern of conduct are relevant to genocide because they provide a basis for inferring the existence of the distinguishing *mens rea*—an intent to destroy the group in whole or in part—but they do not form an element of the crime itself.

4.32 Thus, it is *intent* in respect of the group and not *acts* in respect of individuals, nor any assessment of *scale*, that distinguishes genocide from other crimes. Accordingly, while genocide is popularly denoted the "crime of crimes", and "bears a special stigma", there is no requirement for the physical destruction of individuals on a scale greater than any other crime; there is no hierarchy of crimes, and "some categories of crimes against humanity may be similarly heinous".[235]

B. A PROTECTED GROUP

4.33 As Article II makes clear, the protections of the Convention are directed towards groups, not individuals. Genocide as a crime aims for the physical destruction of human groups and encompasses acts committed with the "intent to destroy a collection of people who have a particular group identity".[236] It is that conduct which the Convention prohibits. The

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[235] United Nations International Commission of Inquiry on Darfur, *Report to the United Nations Secretary General* (25 January 2005), p. 506. MG, Vol. II, Annex 18.

[236] *Bosnia v. Serbia*, Judgment (2007), pp. 124-125, para. 193.

existence of an identifiable protected group, which is the victim of the impugned acts, is thus a condition precedent for a finding of genocide in international law.

4.34 Pursuant to Article II, genocide can only be committed against *a national, ethnical, racial or religious group*—a categorization that requires a positive, not negative definition.[237] Group identity "is a matter of who those people are, not who they are not",[238] and the drafters of the Convention had in mind "groups with specific distinguishing well-established, some said immutable, characteristics".[239] Indeed, as the ICTR has observed, "[i]t appears, from a reading of the *travaux préparatoires* of the Genocide Convention, that certain groups, such as political and economic groups, have been excluded from the protected groups because they are considered to be 'mobile groups' which one joins through individual, political commitment. That would seem to suggest … that the Convention was presumably intended to cover relatively stable and permanent groups".[240] As is made clear by the careful thought given by the drafters of the Convention to the types of groups that should be included in its remit, the list in Article II is exhaustive: it is only if a group falls within one of those four categories that it obtains the protection of the Genocide Convention.

4.35 Whether a particular group satisfies the criteria to fall within one of the categories identified by the Genocide Convention "must be assessed in

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[237] *Ibid.*, p. 125, para. 194.

[238] *Ibid.*, pp. 124-125, para. 193.

[239] *Ibid.*, p. 125, para. 194.

[240] *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, ICTR-96-3-T, Trial Judgment and Sentence (6 December 1999), para. 57.

the light of [the] particular political, social and cultural context …",[241] and does not require reference to "scientifically irreproachable criteria", the attempted application of which "would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such a categorization".[242] Rather, "it is the stigmatization of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators".[243]

4.36 The ICTR Trial Chamber in *Kayishema* held that the protected groups encompass those "whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)".[244]

4.37 As shown previously, in Chapter 3, the group that self-identifies as the Rohingya group shares a common language and culture, religion and racial characteristics, and is unquestionably a distinct ethnical, racial and religious group that is, as such, protected by the Genocide Convention.

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[241] *Ibid.*, para. 56.

[242] *Prosecutor v. Goran Jelišic*, IT-95-10-T, Trial Judgment (14 December 1999), para. 70.

[243] *Ibid.*, para. 70.

[244] *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgment (21 May 1999), para. 98.

C. IN WHOLE OR IN PART

4.38 The intent to destroy a protected group "in whole" requires no explication. What constitutes a relevant "part" of a protected group has been the subject of attention by the Court in its prior judgments, which have given a clear explanation of the conditions that are necessary to ground a finding of genocidal intent in the targeted destruction of part of a group.

4.39 The critical criterion is that the targeted part of the group must be substantial—which is not simply a numeric requirement.[245] In assessing substantiality—whether the allegedly targeted part of a protected group is substantial in relation to the overall group—the Court has, in its case-law, taken account of three factors[246]: (i) the quantitative element (though, as above, there is no numeric threshold for genocide), (ii) the geographic location and (iii) the significance of the targeted part to the viability of the group.[247]

4.40 Where acts are in a limited geographical area, the Court has noted that:

> "'it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area' … and that, accordingly, '[t]he area of the perpetrator's activity and control are to be considered'".[248]

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[245] *Bosnia v. Serbia*, Judgment (2007), pp. 126-127, paras. 198, 201.

[246] *Ibid.*, p. 126, para. 198.

[247] *Ibid.*, pp. 125-126, paras. 193, 198-200; *Croatia v. Serbia*, Judgment (2015), p. 65, para. 142.

[248] *Croatia v. Serbia*, Judgment (2015), p. 65, para. 142, *citing Bosnia v. Serbia*, Judgment (2007), pp. 126-127, paras. 198-199.

4.41 The area of activity and control is relevant because the opportunity available to the perpetrators is significant in ascertaining whether geographically limited acts might nevertheless display the necessary genocidal intent.[249] It is thus "not necessary to intend to achieve the complete annihilation of a group from every corner of the globe";[250] instead, destruction in a particular region or more limited area is sufficient for the commission of genocide.

4.42 As to significance, that requires consideration of whether the targeted part of the group is emblematic of the group, or essential to its survival as a whole.[251] The targeting of community leaders, including religious or political leaders, or those who are otherwise prominent members of the protected group, may be particularly relevant in this regard.[252]

D. "AS SUCH"

4.43 The inclusion of the words "as such" in the *chapeau* to Article II underscores that genocide requires an intent to destroy a collection of people who have a particular group identity,[253] and that the ultimate victim of genocide is the group itself.[254] It is "not enough that members of the

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[249] *Bosnia v. Serbia*, Judgment (2007), p. 127, para. 199, *citing Prosecutor v. Krstić*, IT-98-33-A, Judgment (19 April 2004), para. 13; *Prosecutor v. Stakić*, IT-97-24-T, Trial Judgment (31 July 2003), para. 523.

[250] *Bosnia v. Serbia*, Judgment (2007), p. 126, para. 199 (quoting with approval the International Law Commission).

[251] *Croatia v. Serbia*, Judgment (2015), p. 65, para. 142.

[252] *Prosecutor v. Ildéphonse Nizeyimana*, ICTR-2000-55C-T, Trial Judgment and Sentence (19 June 2012), para. 1521.

[253] *Bosnia v. Serbia*, Judgment (2007), pp. 124-125, para. 193.

[254] *Prosecutor v. Popović et al.*, IT-05-88-T, Judgment (10 June 2010), para. 1312.

group are targeted because they belong to that group, that is, because the perpetrator has a discriminatory intent. Something more is required. … The words "as such" emphasize the intent to destroy the protected group."[255]

4.44 The ICTR Appeals Chamber has provided a useful summary of international practice:

> "The words 'as such' … constitute an important element of genocide … It was deliberately included by the authors of the Genocide Convention in order to reconcile the two diverging approaches in favour of and against including a motivational component as an additional element of the crime. The term 'as such' has the *effet utile* of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion. In other words, the term 'as such' clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context … ['as such' means] that the proscribed acts were committed against the victims *because* of their membership in the protected group, but not *solely* because of such membership".[256]

4.45 In the same vein, "as such" indicates that a person has been targeted "not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group. The victim of

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[255] *Bosnia v. Serbia*, Judgment (2007), p. 121, para. 187.

[256] *Eliézer Niyitigeka v. Prosecutor*, ICTR-96-14-A, Appeals Chamber Judgment (9 Juy 2004), para. 53.

the act is, therefore, a member of a given group selected as such, which, ultimately, means the victim of the crime of genocide is the group itself and not the individual alone."[257]

E. INFERRING INTENT FROM A PATTERN OF CONDUCT: THE "ONLY REASONABLE INFERENCE" TEST

4.46 As the Court has recognized, the evidence relied on must convincingly demonstrate the existence of a genocidal intent.[258] At the same time, a State policy to destroy a protected group in whole or in part "will seldom be expressly stated".[259] Thus, as noted above, because express evidence of genocidal intent is rarely available, the relevant intent "may be established by indirect evidence, *i.e.*, deduced or inferred from certain types of conduct".[260]

4.47 For a pattern of conduct to provide evidence of genocidal intent, that intent must be the only reasonable inference to be drawn from the acts in question.[261] The Court addressed this point in paragraph 148 of its judgment in *Croatia*, when it accepted that "genocidal intent" can be "established indirectly by inference". As the Court put it:

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[257] *Afred Musema v. Prosecutor*, ICTR-96-13-A, Appeals Chamber Judgment (16 November 2001), para. 165.

[258] *Bosnia v. Serbia*, Judgment (2007), pp. 196-197, para. 373.

[259] *Croatia v. Serbia*, Judgment (2015), p. 65, para. 143. *See also Bosnia v. Serbia*, Judgment (2007), *Declaration of Judge Bennouna*, p. 362 ("Indeed, it is rare for a State bluntly to proclaim its intent to destroy, in whole or in part, an ethnical, cultural or religious group or to disclose knowledge that such a crime was going to occur or to admit to having committed it.").

[260] *Croatia v. Serbia*, Judgment (2015), p. 65, para. 143.

[261] *Ibid.*, p. 67, para. 148.

> "in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question".[262]

In preparing its Application, and this Memorial, The Gambia has been guided by, and has applied, this standard. The Gambia understands that this is the same standard that was applied by the UN Fact-Finding Mission, which was aware of, and guided by, the jurisprudence of the Court and of international criminal tribunals like the ICTY and ICTR.[263]

4.48 In seeking to establish whether the existence of a *dolus specialis* indicative of genocidal intent is the only inference that could reasonably be drawn, courts and tribunals have identified a range of factors that may be taken into account. They include:

> "(a) the general context; (b) the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others; (c) the scale of atrocities committed; (d) their general nature; (e) their execution in a region or a country; (f) the fact that the victims were deliberately and systematically chosen on account of their membership in a particular group; (g) the exclusion, in this regard, of members of other groups; (h) the political doctrine which gave rise to the acts referred to; (i) the repetition of destructive and discriminatory acts; and (j) the perpetration of acts which violate the very

[262] *Ibid.*

[263] *See* UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1419-1433. MG, Vol. II, Annex 40; UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 223. MG, Vol. III, Annex 49.

> foundation of the group or are considered as such by their perpetrators".[264]

4.49 The Court has indicated that, for it, the most important indicia of genocidal intent are the "scale and allegedly systematic nature of the attacks, the fact that those attacks are said to have caused casualties and damage far in excess of what was justified by military necessity, the specific targeting of [members of the protected group] and the nature, extent and degree of the injuries caused to the [protected] population".[265] The Court has also made clear that conduct which is not itself genocidal may also point to a genocidal intent, for example the demarcation of members of a group by the forced wearing of ethnic insignia,[266] or attacks on cultural and religious property.[267] In the same vein, the Court has held that "acts of 'ethnic cleansing' may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts".[268]

4.50 Drawing on this approach, the UN Fact-Finding Mission has pointed to seven indicators in particular from which it concluded that genocidal intent to destroy the Rohingya people as such could reasonably be inferred:

> "[F]irst, the Tatmadaw's extreme brutality during its attacks on the Rohingya; second, the organized nature of the Tatmadaw's

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[264] *Prosecutor v. Tharcisse Muvunyi*, ICTR-00-55A-T, Trial Judgment (11 February 2010), para. 29.

[265] *Croatia v. Serbia*, Judgment (2015), p. 121, para. 413.

[266] *Croatia v. Serbia*, Judgment (2015), p. 115, para. 382.

[267] *Ibid.*, p. 116, para. 390.

[268] *Ibid.*, p. 123, para. 190.

> destruction; third, the enormity and nature of the sexual violence perpetrated against women and girls during the 'clearance operations'; fourth, the insulting, derogatory, racist and exclusionary utterances of Myanmar officials and others prior, during and after the 'clearance operations'; fifth, the existence of discriminatory plans and policies, such as the Citizenship Law and the [National Verification Card] process, as well as the Government's efforts to clear, raze, confiscate and build on land in a manner that sought to change the demographic and ethnic composition of Rakhine State, the goal being to reduce the proportion of Rohingya; sixth, the Government's tolerance for public rhetoric of hatred and contempt for the Rohingya; and seventh, the State's failure to investigate and prosecute gross violations of international human rights law and serious violations of international humanitarian law, both as they were occurring and after they occurred".[269]

4.51 As described in Chapter 12, these indicators are consistent with the approach taken by the Court and international tribunals in previous cases: showing organization, a pattern of purposeful action and systematic conduct against the protected group, all of which may ground an inference of genocidal intent.[270]

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[269] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 224. MG, Vol. III, Annex 49.

[270] *Croatia v. Serbia*, Judgment (2015), p. 121, para. 413; *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgment (21 May 1999), para. 93.

IV. Punishable Acts

4.52 Alongside the commission of genocide itself, Article III of the Convention also prohibits a range of ancillary acts. These are: (i) conspiracy to commit genocide (Article III(b)); (ii) direct and public incitement to commit genocide (Article III(c)); (iii) attempt to commit genocide (Article III(d)); and (iv) complicity in genocide (Article III(e)).

4.53 Since each of these (with the exception of complicity) are inchoate acts, they may be committed—and a State may be liable for them—even if no genocide actually occurs. Indeed, as the Court has made clear, they become relevant only in a situation where genocide is found *not* to have occurred:

> "To the extent that consideration of the first issue were to lead to the conclusion that some acts of genocide are attributable to the Respondent, it would be unnecessary to determine whether it may also have incurred responsibility under Article III, paragraphs (b)-(e), of the Convention for the same acts. Even though it is theoretically possible for the same acts to result in the attribution to a State of acts of genocide, conspiracy to commit genocide, and direct and public incitement to commit genocide, there would be little point, where the requirements for attribution are fulfilled under (a), in making a judicial finding that they are also satisfied under (b) and (c), since responsibility under (a) absorbs that under the other two. The idea of holding the same State responsible by attributing to it acts of genocide, attempt to commit genocide, and complicity in genocide, in relation to the same actions,

> must be rejected as untenable both logically and legally."[271]

4.54 The Gambia's position is that Myanmar has committed genocide, so that, based on the Court's observations quoted above, it is not required in this case to consider the secondary modes of liability that are provided for in Article III paras (b)-(e). Nevertheless, for purposes of completeness, in the absence of evidence sufficient to attribute genocidal acts to a Respondent State, the following forms of liability would become relevant. For each of the subsidiary modes of liability in Article III, the Court has confirmed that the *dolus specialis* is a necessary component.[272]

A. CONSPIRACY

4.55 While the Court itself has given limited consideration to the crime of conspiracy, the ICTR has defined conspiracy as an agreement between two or more persons to commit the crime of genocide[273]—thus electing the common law, rather than civil law, definition of conspiracy, which does not require the crime itself to have been committed. Indeed, in its view, in respect of conspiracy to commit genocide, it is "the process of conspiracy which is punishable and not its result".[274] A conspiracy to commit genocide, and liability under Article III(b), may therefore arise even if genocide has not in fact been committed.

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[271] *Bosnia v. Serbia*, Judgment (2007), para. 380.

[272] *Croatia v. Serbia*, Judgment (2015), p. 128, para. 443 and p. 152, para. 517.

[273] *Prosecutor v. Musema*, ICTR-96-13-A, Trial Judgment and Sentence (27 January 2000), para. 191.

[274] *Ibid.*, para. 193.

B. DIRECT AND PUBLIC INCITEMENT

4.56 Like conspiracy, and as the *travaux préparatoires* to the Convention make clear, direct and public incitement to genocide does not require that genocide has in fact occurred. As to the conduct that will fall within that category, the ICTR has held that it requires words spoken aloud, published or displayed in a public place, which specifically provoke genocide, and which are more than an indirect (but may be implicit) suggestion of it.[275] Whether conduct satisfies those criteria will depend on the context, including the country and audience in question, and in particular whether the intended audience would immediately grasp the genocidal implication.[276]

4.57 As to *mens rea*, the perpetrator must intend to directly prompt or provoke another to commit genocide.[277]

C. ATTEMPT

4.58 The ILC *Draft Code of Crimes against Peace and Security of Mankind* are instructive on the question of attempt to commit genocide. They provide that:

> "An individual shall be responsible for a crime set out in article 17[278], 18, 19 or 20 if that individual … attempts to commit such a

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[275] *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber Judgment (2 September 1998), paras. 555-556, 559.

[276] *Ibid.*, paras. 556-558.

[277] *Ibid.*, para. 560.

[278] International Law Commission, Draft Code of Crimes Against Peace and Security of Mankind, with Commentaries (1996), reproduced in *Yearbook of the International Law Commission 1996*, Vol. II (Part Two), art. 17. MG, Vol. II, Annex 8.

> crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions".[279]

4.59 The Rome Statute of the ICC provides that, for conduct to amount to a criminal attempt, a "substantial step" must have been taken.[280] The ICC has held that, while the objective element (*actus reus*) of genocide is incomplete in an attempt to commit genocide, the subjective element (*mens rea*) is complete.[281] That accords with the Court's finding that the punishable acts in Article III all require the existence of the *dolus specialis*.[282]

D. COMPLICITY

4.60 Unlike the punishable acts in paragraphs (b)-(d), complicity pursuant to paragraph (e) of Article III requires that genocide has actually taken place.[283]

4.61 Complicity in genocide cannot be based solely on a State's failure to act; it "always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide".[284] A State will be complicit in genocide if it has provided means to enable or facilitate the

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[279] *Ibid.*, pp. 18-19. MG, Vol. II, Annex 8.

[280] International Criminal Court, *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (17 July 1998), art. 25(3)(f). MG, Vol. II, Annex 9.

[281] *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Pre-Trial Chamber I, Decision on the Confirmation of Charges (30 September 2008), para. 460.

[282] *Croatia v. Serbia*, Judgment (2015), p. 128, para. 443 and p. 152, para. 517.

[283] *Ibid.*, p. 152, para. 517.

[284] *Bosnia v. Serbia*, Judgment (2007), p. 222, para. 432.

commission of genocide[285] (though if it has directed or instructed genocide, primary responsibility for genocide, rather than complicity, will arise).[286] To ascertain whether a State is responsible for complicity in genocide, the Court "must examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished 'aid or assistance' in the commission of the genocide … in a sense not significantly different from that of those concepts in the general law of international responsibility"[287]. Extrapolating from the general principles of international responsibility, for a State to be complicit in genocide, it would therefore need to know the circumstances of the wrongful act, and to provide aid and assistance to it.

V. The Scope of Obligations Under the Genocide Convention

4.62 The Convention imposes responsibility for the commission of the crime of genocide—as well as for its prevention and punishment—on the State Party itself. While individual criminal responsibility accrues to the individual perpetrators of genocide, the Court has made clear that "State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one".[288]

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[285] *Ibid.*, p. 217, para. 419.

[286] *Ibid.*

[287] *Ibid.*, p. 217, para. 420.

[288] *Bosnia v. Serbia*, Judgment (2007), p. 120, para. 182, adopted in *Croatia v. Serbia*, Judgment (2015), p. 61, para. 182.

A. THE OBLIGATIONS UNDER ARTICLE I

4.63 Article I of the Genocide Convention provides that:

> "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."[289]

4.64 As the Court has observed, the text of Article I contains two propositions. The first is:

> "the affirmation that genocide is a crime under international law. That affirmation is to be read in conjunction with the declaration that genocide is a crime under international law, unanimously adopted by the General Assembly two years earlier in its resolution 96(I), and referred to in the Preamble to the Convention".[290]

4.65 The second proposition in Article I is distinct, namely, that there is an "undertaking of the Contracting Parties to prevent and punish the crime of genocide".[291] In this regard, the Court has noted that "[t]he ordinary meaning of the word 'undertake' is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation".[292] Such an obligation, the Court has made clear, is "not merely hortatory or purposive": in its undertaking to prevent genocide, Article I

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[289] Genocide Convention (1951), Art. I. MG, Vol. II, Annex 1.

[290] *Bosnia v. Serbia*, Judgment (2007), p. 110, para. 161.

[291] *Ibid.*, p. 111, para. 162.

[292] *Ibid.*

"creates obligations distinct from those which appear in the subsequent Articles".[293]

4.66 The terms of the Convention do not expressly contain an obligation on State Parties not to commit genocide themselves (unlike the express obligations in Article I to prevent and punish). However, the Court has confirmed that the language of Article I is properly to be interpreted and applied in that manner: "the effect of Article I is to prohibit States from themselves committing genocide".[294] As the Court explained:

> "Such a prohibition follows, first, from the fact that the Article categorizes genocide as 'a crime under international law': by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal … to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily

[293] *Ibid.*; *see also ibid.*, p. 113, para. 165.

[294] *Ibid.*, p. 113, para. 166.

> implies the prohibition of the commission of genocide."[295]

B. THE DUTY TO PREVENT

4.67 The duty to prevent genocide is an obligation of conduct, not of result.[296] The obligation on a State party is to "employ all means reasonably available to them, so as to prevent genocide as far as possible".[297] The key parameter by which the Court will assess whether a State has complied with the duty to prevent is the State's capacity to influence effectively the action of persons likely to commit, or already committing, genocide.[298] The duty is breached where a State manifestly fails to take all measures within its power to prevent genocide. Where the acts concerned are carried out by the State's own military forces, a State may be responsible both for committing genocide—in accordance with the established principles of attribution under the law of State Responsibility—and for a failure to prevent genocide from being committed.[299]

4.68 A condition precedent for a breach of the obligation is that genocide must in fact have occurred. A State is not liable for violation of the duty to prevent if there has been no genocide. The duty to prevent is engaged at the instant that State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.[300] It is breached as soon

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[295] *Ibid.*, p. 113, para. 166.

[296] *Ibid.*, p. 221, para. 430.

[297] *Ibid*.

[298] *Ibid.*

[299] *See infra* Chapter 12, Section I.A.

[300] *Bosnia v. Serbia*, Judgment (2007), pp. 221-222, para. 431.

as genocide occurs, whether or not it knew to any degree of certainty that genocide would be committed.[301]

4.69 Unlike the punishable acts in Article III of the Convention (on which, see Section IV above), breach of the obligation to prevent genocide does not require positive action on the part of the State: it may be occasioned by omission, for example by a failure to adopt and implement suitable measures to prevent genocide.[302]

C. THE DUTY TO PUNISH

4.70 While the duty to punish is primarily located within Article I, the content of this obligation is supplemented by the provisions of Articles IV, V and VI of the Convention, which provide for specific duties to punish perpetrators of genocide (and associated inchoate acts under Article III) irrespective of their constitutional status; to enact legislation necessary for giving effect to the provisions of the Convention; to provide effective penalties for perpetrators of genocide; and to try persons charged with genocide in a competent tribunal of the State. Each of these specific duties informs the scope of the general duty to punish.[303] Unlike the duty to prevent, the duty to punish is a result-focused duty: to comply with it, States parties must *actually* have the necessary legislation in place, and they must *actually* try perpetrators regardless of constitutional status and impose effective penalties for their crimes. The obligation to punish arises only after genocide has been committed, but it is engaged as soon as there is

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[301] *Ibid.*, pp. 222-223, para. 432.

[302] *Ibid.*

[303] *Ibid.*, p. 109, para. 159 and p. 219, para. 426.

sufficient basis for knowledge that genocide has occurred[304]—a State Party cannot evade the obligation to punish by turning a blind eye to sufficient evidence of genocidal acts.

VI. The Legal and Evidential Approach to the Convention

A. THE BURDEN, STANDARD AND METHODS OF PROOF

4.71 The Court has confirmed that, as to burden of proof:

> "It is for the party alleging a fact to demonstrate its existence. This principle is not an absolute one, however, since the determination of the burden of proof is in reality dependent on the subject matter and the nature of the dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case."[305]

4.72 Indeed, the Court has clarified that an Applicant such as The Gambia "cannot be required to prove a 'negative fact'".[306] It has made clear that regardless of where the burden lies on any particular fact, there is a duty of co-operation which falls on the other party to provide such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it.[307] In this case, that general duty of co-operation

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[304] *Prosecutor v. Hadzihasanovic & Kubura*, IT-01-47-A, Appeals Chamber Judgment, paras. 260, 273-274.

[305] *Croatia v. Serbia*, Judgment (2015), p. 73 para. 172, *citing Guinea v. Democratic Republic of the Congo*, p. 660, para. 54.

[306] *Ibid.*, p. 73, para. 172, *citing Guinea v. Democratic Republic of the Congo*, p. 660, para. 55.

[307] *Ibid.*, p. 73, paras. 172-173.

dovetails with the binding legal obligation on Myanmar, pursuant to the Provisional Measures Order, to prevent the destruction and ensure the preservation of all relevant evidence, and provide reports to the Court on the steps it has taken to give effect to its obligations.

4.73 As to the standard of proof, a finding of genocide requires evidence that is "fully conclusive" that genocide has occurred; as the Court has put it, it must be "fully convinced" that genocide has been committed.[308]

4.74 In each of the cases the Court has considered previously, it has received a variety of evidence in support of the claims made by the parties. Accordingly, there is no single method by which facts must be proved: the parties can adduce whatever credible and reliable evidence is available to them to satisfy the standard of proof. Neither the Court's Statute nor its Rules lay down any specific requirements concerning the admissibility of statements nor the nature of evidence which may be taken into account. The evidence, in whatever form, must be such as to allow the Court itself to make its own determination of the facts that are relevant to the law which the Application says has been breached.[309]

4.75 Where there have been previous judicial decisions directly on the issues in question, those decisions are, of course, highly persuasive.[310] Reports from official or independent bodies may, on a case-by-case basis, be another compelling method of proof. As the Court has put it, their probative value:

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[308] *Ibid.*, p. 74, para. 177.

[309] *Bosnia v. Serbia*, Judgment (2007), p. 130, para. 212.

[310] *Croatia v. Serbia*, Judgment (2015), p. 74, para. 182.

> "depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process) and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts".[311]

4.76 Considered by reference to these criteria, the UN Fact-Finding Mission reports on the situation in Myanmar provide compelling evidence on which the Court is entitled to place significant weight. The Fact-Finding Mission, with its three independent members who are prominent jurists, was established by the UN Human Rights Council by resolution 34/22, and it produced two detailed reports—one in 2018, and a second in 2019.[312]

4.77 The reports of the Fact-Finding Mission are analogous to the Secretary-General's report on Srebrenica, in relation to which the Court held that: "The care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it."[313]

4.78 As on that occasion, the Court can derive "substantial assistance" from the Fact-Finding Mission reports in this case.

4.79 Alongside UN materials, the statements of individual eyewitnesses and NGOs provide assistance to the Court's analysis of events by providing

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[311] *Bosnia v. Serbia*, Judgment (2007), p. 135, para. 227.

[312] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018). MG, Vol. II, Annex 40; UN Fact-Finding Mission, *Report of the Detailed Findings* (2019). MG, Vol. III, Annex 49.

[313] *Bosnia v. Serbia*, Judgment (2007), p. 137, para. 230.

corroboration from credible, neutral sources.[314] In reaching its conclusions in this case, the Court is bound to take account of evidence from a range of such sources.

B. ATTRIBUTION

4.80 In determining State liability for genocide, the Court is required to consider the following, as explained in its *Bosnia* judgment:

> "First, it needs to be determined whether the acts of genocide could be attributed to the Respondent under the rules of customary international law of State responsibility; this means ascertaining whether the acts were committed by persons or organs whose conduct is attributable […] to the Respondent. Second, the Court will need to ascertain whether acts of the kind referred to in Article III of the Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the Respondent under those same rules of State responsibility: that is to say, the acts referred to in Article III, paragraphs (b) to (e)...".[315]

4.81 The relevant rules of customary international law include Articles 4 and 8 of the ILC Articles on State Responsibility,[316] pursuant to which conduct is attributable to a State if: (a) it is the conduct of any State organ (Article 4), or (b) it is the conduct of a person or group of persons acting on

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[314] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, pp. 239-240, paras. 205-209.

[315] *Bosnia v. Serbia*, Judgment (2007), p. 199, para. 379.

[316] *Ibid.*, p. 202, para. 385 and p. 207, para. 398.

the instructions of, or under the direction or control of, the State in question (Article 8).

4.82 Whether the "State organ" test is satisfied depends in part on the internal law of the Respondent State and whether the perpetrators are part of a *de jure* organ of the State. It also depends on the *de facto* question of whether the perpetrators "in fact act under such strict control by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State's responsibility for an internationally wrongfully act".[317] The relevant test for a *de facto* organ of the State is whether the relevant persons, groups or entities act in complete dependence on the State.[318] As it is, the Tatmadaw is a *de jure* organ of the Myanmar State and so its acts are attributable to Myanmar under the first basis for attribution under Article IV. The acts of armed irregular groups operating under the Tatmadaw's direction or control would be attributable to Myanmar under the second basis set out in Article IV.

4.83 The "direction or control" basis for attribution requires an assessment of "whether, in the specific circumstances surrounding the events [in question], the perpetrators of genocide were acting on the Respondent's instructions, or under its direction or control".[319] That would mean that State responsibility "would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international

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[317] *Ibid.*, pp. 202-205, paras. 387-392.

[318] *Ibid.*, p. 205, para. 392.

[319] *Ibid.*, p. 207, para. 397.

obligations".[320] To the extent that the Tatmadaw gave instructions or exercised control over other perpetrators of genocidal acts against the Rohingya, Myanmar is responsible under this limb of the rules of attribution because it had "effective control" over the perpetrators.[321]

4.84 The rules of attribution do not apply to the free-standing obligation on States under the Genocide Convention to prevent and punish genocide. Those obligations, whose breaches consist of wrongful omissions, bear on States whether or not the underlying genocidal conduct is attributable to the State.

VII. Conclusion

4.85 The Gambia has based its Application and this Memorial fully on the approach taken by the Court in its earlier cases interpreting the Genocide Convention, with due regard to the jurisprudence of other international courts and tribunals, and the views on the application of the Convention expressed by authoritative and independent United Nations entities. The following six chapters, numbered 5 through 11, discuss in detail the evidence of Myanmar's *actus reus* and *mens rea* in relation to its actions against the Rohingya group. Following that presentation of the evidence, Chapter 12 sets out the legal conclusions to be drawn from an application of the law, as described in the present Chapter, to the facts of this case.

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[320] *Ibid.*, p. 207, para. 397.

[321] *Ibid.*, p. 208, para. 399 (*citing Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 64, para. 115).

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CHAPTER 5
THE EVIDENCE OF GENOCIDE: AN OVERVIEW

5.1 This Chapter introduces The Gambia's presentation of the evidence in support of its claims. In the six chapters that follow, that evidence is set out. It shows that Myanmar has committed genocide against the Rohingya group. It demonstrates beyond any doubt that Myanmar's armed forces, the "Tatmadaw", acting on behalf of the State, planned, organized and executed a campaign to inflict conditions on the Rohingya—including killings on a massive scale, beatings, torture, burning of homes and villages, systematic rape, gang rape and genital mutilation of Rohingya women and girls to destroy their reproductive capacity, and enforcement of strict measures to prevent marriage, childbirth, and renewal of the group—that were calculated to bring about their physical destruction, in whole or in part.

5.2 The evidence that Myanmar's heinous acts against the Rohingya were committed with genocidal intent is overwhelming. It includes, in particular:

(i) in the early stages, the adoption and implementation of racially discriminatory laws and policies that were intended to dehumanize the Rohingya, strip them of citizenship, confine them to isolated camps and villages, deprive them of individual and group rights—including freedom of movement and access to food, shelter, medical assistance and livelihood—and render them outcasts in their own country (**Chapter 6**);

(ii) the propagation of virulent hate speech by the Government, including the Commander-in-Chief of the Tatmadaw and

other senior military and civilian leaders, that was intended to vilify the Rohingya as foreign "Bengalis" who had no legitimate place in Myanmar and whose very existence in the country threatened its racial and religious purity and constituted an existential threat, in particular, to the Buddhist ethnic majority in Rakhine State; and propagation of equally violent hate speech by influential Buddhist leaders, not only with the tolerance but the support and encouragement of the Government, that emphasized the "threat" presented by the Rohingya, likened them to African carp, an invasive alien species that needed to be exterminated, and aroused racial hatred and incited violence against them (**Chapter 7**);

(iii) after targeting the Rohingya and rendering them isolated and extremely vulnerable, the launching of violent "clearance operations" against them by the Tatmadaw, who carried out their mission with extreme brutality by systematically killing members of the group, including young children and infants, with extraordinary cruelty, including burning homes with families forcibly locked inside, and by completely razing entire villages, with no quarter given (**Chapter 8**);

(iv) the Tatmadaw's perpetration, during the "clearance operations", of widespread rape and gang rape, as well as other acts of sexual violence, including brutal genital mutilation, against Rohingya women and girls in a deliberate effort to terrorize them and destroy or reduce their reproductive capacity (**Chapter 9**);

(v) the organized nature in which the Tatmadaw planned, ordered, carried out and covered up the "clearance operations", with the central purpose of destroying the Rohingya as a group (**Chapter 10**); and

(vi) the impunity that Myanmar has bestowed, and continues to bestow, upon the perpetrators of these acts of genocide through its refusal to seriously investigate or prosecute the responsible parties (**Chapter 11**).

5.3 The subjects of the next six chapters correspond to the indicators of genocidal intent that, the UN Fact-Finding Mission determined, collectively admit of no explanation other than Myanmar's intention to destroy the Rohingya as a group, in whole or in part. A separate chapter addresses each of these indicators, except that Chapter 7 addresses two closely related indicators: hate speech against the Rohingya propagated by the Government of Myanmar, and hate speech propagated by closely allied Buddhist religious leaders and others with the encouragement and support of the State.

5.4 These six chapters are ordered chronologically, beginning with Myanmar's adoption of racist laws and policies that dehumanized the Rohingya, deprived them of the right of citizenship and other basic civil and political rights, stigmatized and isolated them, and characterized them as enemies of the Buddhist peoples of Rakhine State (**Chapter 6**). The narrative continues, in the following chapter, with the vicious hate speech disseminated by senior military and civilian leaders as well as by Buddhist religious leaders, all turning the Rohingya into objects to be feared and hated by other ethnical and religious groups and inciting those groups to violence against them (**Chapter 7**). These concerted actions aimed at the

Rohingya set the stage for the "clearance operations", which comprise the central *actus reus* in the present case, and were meticulously planned, organized and carried out by the Tatmadaw between 2016 and 2018, with the support of the local, non-Rohingya groups they had studiously incited. **Chapter 8** addresses the extreme brutality against the Rohingya that characterized the "clearance operations". **Chapter 9** describes the pervasive and purposeful sexual violence that was perpetrated against Rohingya women and girls, including children under ten years of age. The planning, organization and objective of these operations are the subject of **Chapter 10.** The final chapter in the series recounts the evidence of Myanmar's refusal to acknowledge the acts its armed forces carried out against the Rohingya, its efforts to destroy and hide evidence of that conduct and its unwillingness to properly investigate, let alone prosecute, the perpetrators, resulting in their complete and total impunity (**Chapter 11**).

5.5 Set out in this fashion, the evidence shows how Myanmar followed the well-recognized progression that begins with the dehumanization of a targeted minority group, before passing through the various stages that culminate in massive violence to bring about the group's destruction in whole or in part. As Lemkin observed, genocide does not necessarily begin at the end, with mass killings of the targeted group.[322] Rather, it can begin when the State adopts laws and policies that define the group as inherently inferior and unwanted, and on this basis justifies the removal of their citizenship and related rights. It then progresses to confiscation of their property, prohibitions on their freedom of movement, or confinement to

[322] Lemkin, *Axis Rule in Occupied Europe* (1944), p. 79. MG, Vol. VIII, Annex 208.

designated locations and escalates from there to restrictions on access to food, employment, medical care and other necessities of life, until it reaches its final denouement in systematic killings.[323]

5.6 The genocide of the Rohingya followed this pattern. As the UN Fact-Finding Mission observed, "[n]one of the prohibited physical acts" of genocidal violence inflicted upon the Rohingya "occurred in a vacuum".[324] Rather, they took place in the "broader context" of a "widely prevalent rhetoric of hatred and contempt toward Rohingya", which had been "cultivated through an environment of long-standing, extreme and systemic discrimination based on the ethnic, racial and/or religious identity of the Rohingya".[325] This hostile environment, the Mission found, was "rooted in Myanmar's laws, policies and practices" and "accompanied and compounded by stigmatization of the group, a process in which Government officials, military and other security forces, and religious figures have had a role".[326] All of this preceded, and led to, the killings, rapes and other genocidal acts that were committed during the "clearance operations".

5.7 The evidence that The Gambia presents in the following Chapters is drawn from a wide and diverse range of highly reliable sources. Particular use is made of the extensive fact-finding undertaken by UN bodies and

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[323] *See also* Gregory Stanton, 'The Seven Stages of Genocide' (1998) 12 Yale Center for International and Area Studies Working Paper Series, p. 2 ("The seven stages of genocide are classification, symbolization, dehumanization, organization, polarization, identification, and extermination."). MG, Vol. VIII, Annex 213.

[324] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1419. MG, Vol. II, Annex 40.

[325] *Ibid.*

[326] *Ibid.*

entities, including the UN OHCHR, the Special Advisor of the UN Secretary-General on the Prevention of Genocide, Mr. Adama Dieng, the UN Secretary-General's Special Representative on Sexual Violence in Conflict, Ms Pramila Patten and the UN Special Rapporteur on the situation of human rights in Myanmar, Ms Yanghee Lee and her successor Mr. Thomas Andrews, each of which has, among other fact-finding activities, interviewed survivors of the "clearance operations" who have found refuge in Bangladesh.

5.8 The detailed and comprehensive findings of the UN Fact-Finding Mission, which are presented in the Memorial, are especially significant. The Mission was established by the UN Human Rights Council with the mandate "to establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State".[327] It was composed of three distinguished jurists: Marzuki Darusman (Chairman, from Indonesia), Radhika Coomaraswamy (Sri Lanka) and Christopher Sidoti (Australia). In carrying out its mandate, the Mission rigorously followed best practices established by the UN OHCHR in its publication, *International Commissions of Inquiry and Fact-Finding Missions on International Human Rights Law and International Humanitarian Law—Guidance and Practice.*[328]

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[327] UN Human Rights Council, *Report of the independent international fact-finding Mission on Myanmar*, UN Doc. A/HRC/39/64 (12 September 2018), para. 4. MG, Vol. II, Annex 39; UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 4. MG, Vol. II, Annex 40.

[328] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 9. MG, Vol. II, Annex 40.

5.9 The Mission conducted over 600 interviews with victims and eyewitnesses as well as over 250 consultations with stakeholders, including intergovernmental and non-governmental organizations, researchers and diplomats.[329] It "took care to diversify its sources of information"[330] and, in selecting interviewees, "strove to only speak with persons who had not previously spoken with any other organization or media outlet, and confirmed this ahead of the interview".[331] The Mission also "obtained a large body of satellite imagery and analysis with the support of the United Nations Operational Satellite Applications Programme ("UNOSAT"), and received a vast amount of documents, photographs and videos—some clandestinely recorded or obtained by the source".[332] It "only used those materials that it was able to authenticate", and "[a]ll information was checked against secondary information assessed as credible and reliable, including organizations' raw data or notes, expert interviews, submissions and open source material".[333]

5.10 Based on its collection and review of the evidence, the UN Fact-Finding Mission concluded in its September 2018 *Report of the Detailed Findings* to the UN Human Rights Council that "the factors allowing the inference of genocidal intent are present".[334] It thus urged that "named Senior-Generals of the Myanmar military" be "investigated and prosecuted

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[329] *Ibid.*, paras. 19, 23, 754.

[330] *Ibid.*, para. 19.

[331] *Ibid.*, para. 20.

[332] *Ibid.*, para. 22.

[333] *Ibid.*

[334] *Ibid.*, para. 1441.

in an international criminal tribunal for genocide".[335] Six Senior-Generals were so named. They are identified in Chapters 10 and 11.

5.11 The UN Fact-Finding Mission issued a second report on its detailed findings in September 2019, based on further investigation, with a particular attention to events that transpired since September 2018.[336] The Mission's September 2019 report confirmed its earlier conclusion that Myanmar is responsible for the "commission of genocide".[337] Indeed, it found: "the evidence that infers genocidal intent on the part of the State against the Rohingya, identified in its last report, has strengthened".[338] That determination was based on additional interviews with victims and witnesses, both targeted and randomly selected, taking "special care to avoid re-interviewing victims and witnesses".[339] The Mission also "obtained and analysed satellite imagery, photographs and videos and a range of documents", and "cross-checked the information against secondary information assessed as credible and reliable".[340]

5.12 In addition to each of these United Nations-affiliated sources, The Gambia also makes use of the findings of a large-scale survey of Rohingya refugees in Bangladesh that the Public International Law and Policy Group ("PILPG") conducted on behalf of the United States Department of State's (the "US State Department") Bureau of Intelligence and Research, and

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[335] *Ibid.*, p. 1.

[336] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 1. MG, Vol. III, Annex 49.

[337] *Ibid.*, para. 9.

[338] *Ibid.*, para. 58.

[339] *Ibid.*, paras. 32-33. In total, the Mission conducted 419 interviews, some of which concerned situations elsewhere in Myanmar. *Ibid.*, para. 32.

[340] *Ibid.*, para. 32.

which were published in separate reports by the PILPG and the US State Department. The study's methodology employed a "combination of classical survey and criminal investigation methods" that involved "conducting interviews to a criminal investigation standard".[341] In particular, 18 highly experienced and trained international investigators from 11 countries, including "former investigators from Darfur and South Sudan investigation missions, former prosecutors and investigators from a range of countries and international criminal tribunals, military and security experts and interactional criminal accountability experts", administered the survey questionnaire to 1,024 randomly selected Rohingya residing in refugee camps and settlement areas. The survey methodology required, among other things, interviewing only persons above the age of 18; interviewing only respondents who had fled Myanmar since October 2016, that is, since the commencement of the "clearance operations"; collecting only first-hand accounts of human rights violations suffered or witnessed by the respondent, thus excluding hearsay from the study; and using a standardized interview format and approach to information collection.[342]

5.13 The Gambia also places reliance on public statements made by senior Myanmar officials, both military and civilian, including via their social media accounts. These statements, which are recorded in **Chapter 7**, constitute, in the context of a case of genocide, significant admissions against interest, especially in regard to the anti-Rohingya hate speech that they conveyed, the incitement to violence against them and the real object and purpose of the "clearance operations". The Gambia also relies on

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[341] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 9. MG, Vol. IV, Annex 121.

[342] *Ibid*.

statements made by Myanmar's representatives at the oral hearings on provisional measures, in December 2019, especially in regard to the impunity enjoyed by Tatmadaw leaders responsible for the "clearance operations" and the inability of civilian authorities to hold them to account.

5.14 Beyond these sources, The Gambia presents the results of the extensive fact-finding efforts that have been undertaken by highly credible international human rights and humanitarian organizations, including Amnesty International, Human Rights Watch, Physicians for Human Rights, Fortify Rights and Médecins Sans Frontières. The Gambia also presents contemporaneous press reports by credible and independent media outlets. The Gambia has obtained witness statements from journalists affiliated with the BBC, Sky News and The Sunday Times, who have testified about their first-hand knowledge of the "clearance operations" based on their on-the-ground coverage at the time they were being conducted. The Gambia presents as well witness statements from Tatmadaw soldiers who participated in the "clearance operations" and have provided their eyewitness accounts, including the orders they received from their superior officers to kill all Rohingya they encountered. Finally, The Gambia presents witness statements from Rohingya survivors of Myanmar's "clearance operations", which were taken by independent third-party organizations. One such organization, Legal Action Worldwide, provides legal representation to Rohingya survivors, and it took statements from victims, including many in collaboration with investigators from the Royal Canadian Mounted Police.[343]

[343] Statement of Antonia Mulvey (9 October 2020), paras. 7-11. MG, Vol. XI, Annex 373.

5.15 All of these sources of evidence yield an entirely consistent and coherent description of events. No matter the source, the evidence is all to the same effect. Indeed, aside from Myanmar, no one in the international community seriously disputes the essential facts of what happened and when. Put simply, the totality of the evidence points conclusively and irrefutably to the abundant presence of *all* of the indicators of genocidal intent that were identified and relied on by the UN Fact-Finding Mission.

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CHAPTER 6
DISCRIMINATORY LAWS AND POLICIES AGAINST THE ROHINGYA

6.1 The genocidal acts that Myanmar launched against the Rohingya did not arise in a vacuum, or occur spontaneously, at the time the Tatmadaw commenced the first wave of "clearance operations" in October 2016. As is often the case with genocide, they were preceded by Myanmar's adoption of laws and policies that discriminated against the Rohingya as a group—measures that Myanmar employed to identify the Rohingya as foreign "Bengalis", exclude them from among Myanmar's lawful "national races", and then, on this basis, isolate, deprive them of fundamental rights, dehumanize them and persecute them. Senior government and military officials have been explicit in declaring that these anti-Rohingya laws and policies were specifically intended to change the ethnic composition of Rakhine State by restricting the ability of the Rohingya to sustain themselves as a group, so that they could not procreate, proliferate and "swallow up" favored, non-Muslim "races".[344]

6.2 The UN Fact-Finding Mission concluded that Myanmar's discriminatory laws and policies were an early and significant factor in confirming the existence of Myanmar's genocidal intent. Specifically, the Mission identified, as indicative of Myanmar's intent to destroy the Rohingya as a group: "the existence of discriminatory plans and policies that seek to change the demographic and ethnic composition of Rakhine

[344] *See infra* Chapter 7, Section I.

State, the goal being to reduce the proportion of Rohingya".[345] These "plans and policies" included "the arbitrary deprivation of nationality of the Rohingya"; and "the laws and orders restricting marriages and births among the Rohingya population".[346]

6.3 Internationally recognized experts on genocide have concurred with these findings. A Resolution of the International Association of Genocide Scholars ("IAGS") concluded that "the plans and policies to change the demographic composition of the Rakhine State" reflect "the level of intent required to constitute the crime of genocide".[347] The IAGS found, specifically, that:

> "Myanmar has a long history of discrimination against the Rohingya People based on their identity and religious beliefs, which has resulted in the government denying them citizenship in the 1982 Citizenship Act, as well as birth certificates and full political participation, and thus restricting their rights to freedom of movement; of access to food, health care, livelihood, and education."[348]

6.4 The IAGS considered it especially indicative of Myanmar's intention to destroy the Rohingya as a group, in whole or in part, that the

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[345] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1425. MG, Vol. II, Annex 40; UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 224. MG, Vol. III, Annex 49.

[346] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1425. MG, Vol. II, Annex 40.

[347] International Association of Genocide Scholars, *Resolution to Declare the Rohingya Persecution a Crime of Genocide and Crimes Against Humanity* (21 April 2020), p. 2. MG, Vol. V, Annex 130.

[348] *Ibid*., p. 1.

Government's "discriminatory policies against this specific group have also included population control such as household registration, marriage permissions, and birth restrictions".[349]

6.5 This Chapter is divided into two parts. **Section I** begins with a review of Myanmar's laws and policies that have identified, labelled and targeted the Rohingya, *inter alia*, by denying their citizenship, legal status and ethnic identity. The UN High Commissioner for Human Rights has concluded that, by adoption and enforcement of these laws and policies, Myanmar's authorities "have engaged in a protracted campaign to ensure [the Rohingya's] 'administrative destruction'".[350] This campaign began with the 1982 Citizenship Law, which deprived the Rohingya of their citizenship. It continued over three decades through, among other measures, successive "citizenship verification" processes that sought to diminish the number and proportion of Rohingya in Rakhine State, and ultimately erase their identity as an ethnic group in Myanmar.

6.6 **Section II** addresses Myanmar's efforts to prevent the Rohingya from renewing themselves by restricting marriages, limiting the number of offspring and refusing to register or acknowledge births. It also describes how Myanmar has jeopardized the long-term survival of the Rohingya through forced segregation and confinement in internment camps, ghettos, villages and townships, especially since 2012 and continuing to the present day. It addresses, as well, Myanmar's confiscation of Rohingya homes, lands and farm animals and equipment, in a conscious effort to deny them

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[349] *Ibid.*

[350] UN Human Rights Council, *Oral Update of the High Commissioner for Human Rights on Situation of Human Rights of Rohingya People*, UN Doc. A/HRC/38/CRP.2 (3 July 2018), para. 33. MG, Vol. II, Annex 35.

shelter, food and livelihood. Separated from the rest of the nation and denied access to sufficient nutrition, humanitarian aid, healthcare and employment, the Rohingya have been deliberately deprived of the means of sustaining themselves and condemned to a slow but inevitable demise.

I. Myanmar's Denationalization of the Rohingya and Refusal to Recognize or Accept Them as a Group

6.7 Historical evidence dating back to the 18th Century establishes the longstanding and continuous presence of the "Rooingya" in what is now Rakhine State, as described in Chapter 3.[351] Nevertheless, Myanmar has implemented a series of policies that have been premised on the fiction that their presence in the country is recent, and harmful to other ethnical and religious groups, beginning with laws that stripped them of their citizenship and legal status. In its 2018 detailed report, the UN Fact-Finding Mission described Myanmar's state-sanctioned system of discrimination against the Rohingya as follows:

> "The Rohingya are in a situation of severe, systemic and institutionalised oppression from birth to death. Their extreme vulnerability is a consequence of State policies and practices implemented over decades, steadily marginalising the Rohingya and eroding their enjoyment of human rights. The process of 'othering' the Rohingya and

[351] Fortify Rights, *They Gave Them Long Swords: Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar* (July 2018), p. 36. MG, Vol. IV, Annex 114 [**hereinafter** Fortify Rights, *They Gave Them Long Swords* (2018)]; *see supra* Chapter 3.

> their discriminatory treatment started long before the period covered by the Mission."[352]

6.8 In its 2019 Report, the following year, the assessment of the Mission was that "[t]he Government of Myanmar has made no progress towards addressing the underlying structural discrimination against the Rohingya by amending the discriminatory laws, including the 1982 Citizenship Law."[353]

6.9 Fortify Rights similarly explained that, "[f]or decades, the Government of Myanmar under both military and civilian rule has upheld the rhetoric that the Rohingya do not exist by creating, upholding and enforcing discriminatory policies against the Rohingya".[354]

6.10 As described in detail in Chapter 7, this official rhetoric includes statements by senior civilian and military authorities denying that there is such a group as the Rohingya, and claiming that those who self-identify as such are mere "Bengalis", who have no legal right to live in Myanmar, and whose presence constitutes an existential threat to other, officially-recognized racial, ethnical and religious groups that live in Rakhine State. The statements of Senior-General Min Aung Hlaing, Commander-in-Chief of the Tatmadaw, for example, reflect Myanmar's official attitude toward the Rohingya, as embedded in its racially-discriminatory laws and policies:

- "[T]hey came from Bengal, so they were called Bengalis. [T]hose Bengalis are not Myanmar ethnics. ... Bengalis

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[352] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 458. MG, Vol. II, Annex 40.

[353] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), paras. 9, 210. MG, Vol. III, Annex 49.

[354] Fortify Rights, *They Gave Them Long Swords* (2018), p. 36. MG, Vol. IV, Annex 114.

themselves needed to accept the fact that they were Bengalis, not Rohingya…".[355]

- "The Bengalis do not have any characteristics or culture in common with the ethnicities of Myanmar. The tensions were fuelled because the Bengalis demanded citizenship."[356]

- "[T]he Bengali population exploded and the aliens tried to seize the land of local ethnics. … Race cannot be swallowed by the ground but only by another race. All must be loyal to the State in serving their duties, so that such cases will never happen again".[357]

6.11 These views have long reflected Myanmar's official position on the Rohingya. They led, in 1982, to the adoption of the Citizenship Law, which deprived the Rohingya of their citizenship and all rights associated therewith, even if born in Myanmar and their families had lived there for generations. The Citizenship Law formally denationalized the Rohingya, rendering them stateless by severing their link of nationality to the State.[358]

6.12 The UN Fact-Finding Mission found that the "arbitrary deprivation of nationality of the Rohingya, their consequent and consistent labeling as 'Bengali' or 'illegal immigrants', and the protracted and unresolved nature of the 'citizenship' issue … indicate a desire to rid Myanmar of the

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[355] Senior-General Min Aung Hlaing, "Crisis in Rakhine State Can Be Solved Only Through Comprehensive Knowledge of the Historical Facts" (16 October 2017). MG, Vol. VI, Annex 153.

[356] "Min Aung Hlaing Warns Against Anti-military Sentiment", *DVB* (21 March 2018). MG, Vol. IX, Annex 280; *see also* UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1328. MG, Vol. II, Annex 40.

[357] Senior-General Min Aung Hlaing, "Gallant Efforts to Defend the HQ Against Terrorist Attacks and Brilliant Efforts to Restore Regional Peace, Security are Honoured" (20 September 2017). MG, Vol. VI, Annex 152.

[358] *See infra* paras. 6.13 *et seq*.

Rohingya".[359] In its 2019 Report, the Mission reiterated that Myanmar's genocidal intent could be inferred from its adoption and implementation of citizenship policies that sought to change the demographic and ethnic composition of Rakhine State by drastically reducing the Rohingya population.[360]

A. MYANMAR'S 1982 CITIZENSHIP LAW STRIPPING THE ROHINGYA OF CITIZENSHIP

6.13 The right of the Rohingya to citizenship in Myanmar (then Burma) was recognized at the time of independence, and for more than three decades thereafter. Pursuant to the 1948 Union Citizenship Act (adopted under the 1947 Constitution), in addition to citizenship based on ethnicity, automatic citizenship was bestowed on any permanent resident whose grandparents had permanently resided in Myanmar, was born in Myanmar and whose parents had also been born in the State.[361] In addition, a person could apply for citizenship if he or she was at least 18 years of age, resided in the country for at least five continuous years, was of good character and spoke "any of the indigenous languages", and intended to reside permanently in the country.[362] Within this legal framework, the Rohingya

[359] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1425. MG, Vol. II, Annex 40.

[360] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 224. MG, Vol. III, Annex 49.

[361] Republic of the Union of Myanmar, *The Union Citizenship Act* (1948), Section 4(2). MG, Vol. VI, Annex 172. Republic of the Union of Myanmar, *The Constitution of the Union of Burma* (1947), Section 11. MG, Vol. VI, Annex 171.

[362] Republic of the Union of Myanmar, *The Union Citizenship Act* (1948), Section 7. MG, Vol. VI, Annex 172.

enjoyed citizenship status for over 30 years,[363] until 15 October 1982, when Myanmar adopted the Citizenship Law that stripped them of this status.

6.14 The new law redefined citizenship in Myanmar so that it extended only to so-called "pure blooded" national "races" whose ancestors were considered to have settled within Myanmar before the British conquest in 1824. Although the Rohingya have resided in Myanmar continuously since at least the 18th century, their ancestry prior to 1824 was ignored by the State and they were excluded from citizenship under the 1982 Law.

6.15 As explained by then Head of State, General Ne Win, the Rohingya were deliberately targeted for loss of citizenship because, in the State's view, they are a race of people "[w]e cannot trust … fully".[364] Henceforth, citizenship in Myanmar would be based on "race", and only certain "races"—not including the Rohingya—would qualify. In General Win's words: "Racially, only pure-blooded nationals will be called citizens."[365]

6.16 The 1982 Law defined these "pure-blooded" peoples as belonging to one of eight "national races".[366] The eight "national races" were later sub-divided into 135 "national races" through an administrative

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[363] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 473-475. MG, Vol. II, Annex 40.

[364] General Ne Win, "Speech at Meeting Held in the Central Meeting Hall" (President House, Ahlone Road, 8 October 1982), p. 4. MG, Vol. VI, Annex 144.

[365] *Ibid*., pp. 3-4.

[366] Section 3 of the Citizenship Law lists the eight recognized groups, and provides that "[n]ationals such as the Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine or Shan and ethnic groups that have settled in any of the territories included within the State as their permanent home from a period anterior to 1185 B.E., 1823 A.D, are Burma citizens". Republic of the Union of Myanmar, *Citizenship Law* (15 October 1982) (original and translation), Section 3. MG, Vol. VI, Annex 174.

instruction.[367] As the UN Special Rapporteur on the situation of human rights in Myanmar observed, the 1982 Law "excludes the Rohingya minority from citizenship, leaving them *de facto* stateless".[368] The UN High Commissioner for Refugees has reported that "the way in which the 1982 Citizenship Law was applied to members of the Rohingya led to the deprivation of Myanmar citizenship for an estimated one million people".[369] In 2018, after a UN Security Council mission to Bangladesh and Myanmar, the Representative of France noted that: "The Rohingya, whose nationality the Burmese Government has withdrawn based on a law adopted in 1982, *make up the largest group of stateless persons in the world.*"[370]

6.17 Upon being stripped of their citizenship, the Rohingya were automatically deprived of fundamental rights which may be exercised only by Myanmar's citizens. The 1982 Citizenship Law thus severely curtailed their access to food, healthcare, employment and humanitarian aid, and it severely restricted their freedom of movement. Although the Law created two inferior statuses of "associate" and "naturalized" citizenship for which the Rohingya technically could qualify, and enjoy certain lesser rights connected to these statuses, in practice the requirements that were imposed

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[367] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 85. MG, Vol. II, Annex 40, *citing* Republic of the Union of Myanmar, Myanmar Defence Services, *Myanmar Politics and the Tatmadaw, Part (I)* (July 2018), p. 115. MG, Vol. VI, Annex 159.

[368] UN General Assembly, *Interim Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Myanmar*, UN Doc. A/60/221 (12 August 2005), para. 80 (emphasis added). MG, Vol. II, Annex 20.

[369] UN High Commissioner for Refugees, *Study on Community Perceptions of Citizenship, Documentation and Rights in Rakhine State* (August 2016), p. 6 (emphasis omitted). MG, Vol. II, Annex 29.

[370] UN Security Council, *Briefing by Security Council Mission to Bangladesh and Myanmar (28 April to 2 May 2018)*, UN Doc. S/PV.8255 (14 May 2018) (emphasis added). MG, Vol. II, Annex 34.

put even this lower category out of their reach. In particular, each Rohingya individual who aspired to "associate" or "naturalized" citizenship had to provide documentary proof of his or her particular ancestral links to persons living in Myanmar prior to 1824, or prove a link that predated the establishment of Myanmar as an independent State in 1948.[371] Even Myanmar's own Advisory Commission on Rakhine State recognized, in 2017, that the 1982 Citizenship Law had enabled no more than approximately 4,000 Rohingya to enjoy some inferior form of citizenship status "out of a population of around one million stateless Muslims in the state".[372] In other words, more than 99% of the Rohingya were denied even the lesser rights available to "associate" or "naturalized" citizens.

6.18 Referring to the denaturalization of the Rohingya during the UN Security Council dialogue following its mission to Bangladesh and Myanmar, the Representative of France declared: "There can be no just or sustainable solution for their plight, or assurance of the rule of law in Burma, if they are not recognized as Burmese citizens and allowed to fully

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[371] *See* Republic of the Union of Myanmar, *Citizenship Law* (15 October 1982) (original and translation), Chapter 2, para. 3 (on full citizenship), Chapter 3, para. 23 (on associate citizenship) and Chapter 4, para. 42 (on naturalized citizenship). MG, Vol. VI, Annex 174; UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 477-479. MG, Vol. II, Annex 40; *see also* International Commission of Jurists, *Citizenship and Human Rights in Myanmar: Why Law Reform is Urgent and Possible* (June 2019), pp. 8-9 (explaining that the only difference between "associate" and "naturalized" citizen is that the latter category applies to people who had applied for citizenship prior to the enactment of the 1982 Citizenship Law). MG, Vol. V, Annex 122.

[372] The Commission also recognized that "[t]he manner in which the law has been applied over the past decades has not done justice to the credible claims of communities who have been living in the country for generations." Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on the Rakhine State* (August 2017), pp. 26, 29. MG, Vol. IV, Annex 103.

enjoy their rights and fundamental freedoms. That will be achieved only when their citizenship is restored."[373]

6.19 In March 2019, the UN Human Rights Council adopted a resolution which: "Urges the Government of Myanmar to expedite efforts to eliminate statelessness and the systematic and institutionalized discrimination against members of ethnic and religious minorities, in particular against the Rohingya, by, *inter alia*, reviewing the 1982 Citizenship Law, which has led to violations of human rights".[374] This was not the first time that a United Nations body had urged Myanmar to reinstate citizenship for the Rohingya. As far back as 1993, the UN Special Rapporteur on the situation of human rights in Myanmar, Mr. Yozo Yokota, warned that:

> "The 1982 Citizenship Law should be revised or amended to abolish its over-burdensome requirements for citizenship. The law should not apply its categories of second-class citizens in a manner which has discriminatory effects on racial or ethnic minorities particularly the Rakhine Muslims."[375]

6.20 In 2014, another UN Special Rapporteur on the situation of human rights in Myanmar recalled that: "for more than 20 years, holders of the

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[373] UN Security Council, *Briefing by Security Council Mission to Bangladesh and Myanmar (28 April to 2 May 2018)*, UN Doc. S/PV.8255 (14 May 2018), p. 11. MG, Vol. II, Annex 34.

[374] UN Human Rights Council, *Resolution adopted by the Human Rights Council on 22 March 2019*, UN Doc. A/HRC/RES/40/29 (11 April 2019), para. 16 (emphasis omitted and added). MG, Vol. III, Annex 45.

[375] UN Commission on Human Rights, *Report on the situation of human rights in Myanmar, prepared by Mr. Yozo Yokota, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1992/58*, UN Doc. E/CN.4/1993/37 (17 February 1993), para. 242(g). MG, Vol. II, Annex 7.

special procedures mandate on the situation of human rights in Myanmar have been advocating reform of the 1982 Citizenship Act". [376]

6.21 In spite of the widespread international criticism of the 1982 Citizenship Law and its impact on the Rohingya group, and repeated calls for its repeal or reform, Myanmar has refused to change it, or to grant citizenship to the Rohingya.

B. OPERATION "CLEAN AND BEAUTIFUL NATION"

6.22 In 1991, the Tatmadaw launched a targeted military campaign, known as *Operation Pyi Thaya* ("Clean and Beautiful Nation") in Rakhine State.[377] The stated purpose of the campaign was to verify the citizenship of the inhabitants of that State,[378] but, in fact, it was intended to create a "clean and beautiful nation" through the violent removal of "non-citizens", specifically, members of the Rohingya group. According to the UN Special

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[376] *See* UN Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, UN Doc. A/HRC/25/64 (2 April 2014), para. 44. MG, Vol. II, Annex 25.

[377] Amnesty International, *Rohingyas–The Search for Safety* (September 1997), p. 1. MG, Vol. IV, Annex 87; Human Rights Watch, *Burmese Refugees in Bangladesh: Still No Durable Solution* (May 2000), Chapter II **(**"The most recent mass outflow from Arakan to Bangladesh took place in 1991 and 1992, when more than 250,000 Rohingya refugees fled forced labor, rape and religious persecution at the hands of the Burmese army."). MG, Vol. IV, Annex 88.

[378] Fortify Rights, *"Tools of Genocide": National Verification Cards and the Denial of Citizenship of Rohingya Muslims in Myanmar* (September 2019), p. 39. MG, Vol. V, Annex 126 [**hereinafter** Fortify Rights, *Tools of Genocide* (2019)]; Amnesty International, *Rohingyas–The Search for Safety* (September 1997), p. 1 ("Rohingya refugees who arrived in Bangladesh in 1991 and 1992 fled massive human rights violations in the Rakhine State, including extrajudicial executions, torture, forced labour and portering. The range and extent of these abuses constituted widespread repression of the Rohingyas by the Burmese security forces, resulting in huge numbers of refugees fleeing the country. This pattern of repression occurred in the context of the Burmese authorities' denial of citizenship rights to the Rohingyas."). MG, Vol. IV, Annex 87.

Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Mr. Angelo Vidal d'Almeida Ribeiro, as a result of this operation, the Rohingya:

> "who belong to the Muslim faith and live predominantly in the northern part of Rakhine State (Arakan) located in the northwestern part of the country have been subjected to persecution based on their religious beliefs involving extrajudicial executions, torture, arbitrary detention, forced disappearances, intimidation, gang-rape, forced labour, robbery, setting of fire to homes, eviction, land confiscation and population resettlement as well as the systematic destruction of towns and mosques".[379]

6.23 Operation "Clean and Beautiful Nation" was thus a forerunner to the "clearance operations" of 2016-2018. The Special Rapporteur recounted that "the persecution of Rohingyas is said to have intensified in late 1991" with "[s]everal thousand … said to have been killed by border guards while thousands more are reportedly kept in custody."[380] The Special Rapporteur observed that denial of citizenship for the Rohingya was at the root of the violation, with many of them who had been born in Myanmar being detained "on charges of illegal immigration".[381] The State Law and Order Restoration Council—the highest executive authority of the State—attempted to justify these actions by declaring that "Rohingyas are

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[379] UN Commission on Human Rights, *Report submitted by Mr. Angelo Vidal d'Almeida Ribeiro, Special Rapporteur appointed in accordance with Commission on Human Rights resolution 1986/20 of 10 March 1986*, UN Doc. E/CN.4/1993/62 (6 January 1993), para. 45. MG, Vol. II, Annex 6.

[380] *Ibid*.

[381] *Ibid*.

not citizens of Myanmar and therefore cannot return."[382] By this declaration, approximately 300,000 Rohingya were forced to flee to Bangladesh to avoid slaughter by Myanmar's security forces.[383]

6.24 Myanmar's Permanent Mission to the United Nations responded to the Special Rapporteur's criticisms of "Operation Clean and Beautiful Nation" by denying the existence of the Rohingya:

> "The so-called 'Rohingyas' never belonged to the national races or national racial groups of Myanmar. *The Rohingyas do not exist in Myanmar either historically, politically or legally*. Nor do they in any way represent any segment of the population in Myanmar including those professing the Islamic faith."[384]

C. IMPOSITION OF NATIONAL VERIFICATION CARDS

6.25 Prior to 1982, the Rohingya, like other citizens of Myanmar, carried official registration documentation known as the National Registration Card. Following the 1982 Citizenship Law, National Registration Cards were replaced by so-called "Citizenship Scrutiny Cards" which were

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[382] *Ibid.* (also noting that "there appears to be a government policy of moving non-Muslim Burmese into northern Rakhine State in an effort to displace the people the government calls 'foreigners'").

[383] US Committee for Refugees, *USCR Report on the Rohingya Repatriation, The Return of the Rohingya Refugees to Burma: Voluntary Repatriation or Refoulement?* (March 1995), PDF pp. 3, 6. MG, Vol. IV, Annex 86; Amnesty International, *Rohingyas–The Search for Safety* (September 1997), p. 1 (noting that the massive human rights violations against the Rohingya "occurred in the context of the Burmese authorities' denial of citizenship rights to the Rohingyas"). MG, Vol. IV, Annex 87.

[384] UN Commission on Human Rights, *Report submitted by Mr. Angelo Vidal d'Almeida Ribeiro, Special Rapporteur appointed in accordance with Commission on Human Rights resolution 1986/20 of 10 March 1986*, UN Doc. E/CN.4/1993/62 (6 January 1993), para. 46. MG, Vol. II, Annex 6.

withheld from the Rohingya.[385] From 1995 onwards, approximately 700,000 Rohingya were issued "Temporary Registration Cards".[386] These were the only registration cards issued by Myanmar to the Rohingya for the next 20 years.[387]

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[385] *See, e.g.*, [redacted]. MG, Vol. X, Annex 335.

[386] For a description of the process of erosion of the Rohingya's right to citizenship and ethnic identity, *see* United States Holocaust Memorial Museum, Video "Gradual Erasure: Burma's Path to Genocide" (May 2020) *available at* https://exhibitions.ushmm.org/burmas-path-to-genocide/chapter-2/gradual-erasure (video and transcript). Showing images of identity cards and registration lists held by the Rohingya, the video explains how identity documents recognizing the Rohingya as such and as citizens of Myanmar were replaced with those that identify them as foreign and Bengali. It notes in particular: "1970s-1980s: the government confiscates Rohingya ID Cards. They are now stripped of their main proof of citizenship; 1982: The government passes a new citizenship law. Citizenship is now based on ethnicity. The Rohingya are no longer recognized; 1989: The government requires everyone to apply for new ID cards. Rohingya never receive the new cards; 1995: Rohingya receive different ID Cards. [Screen shows ID card adding Race/Religion category: '*Bengali/Islam*']. These cards are temporary and not proof of Burmese citizenship. [video displays translation of ID which states '*Holding this card doesn't testify that he/she is actually a citizen of Myanmar*.']. While taking away citizenship, the government begins to reject the name Rohingya; 1978: Registration lists change their status from Rohingya … ; 1984: … to Islam … ;1996: … to Bengali; 2015: The government invalidates all temporary ID Cards and imposes National Verification Cards (NVC). To get these cards, the Rohingya must first declare themselves foreigners." MG, Vol. V, Annex 140.

[387] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 479. MG, Vol. II, Annex 40. By Presidential Notification of February 2015, all "white cards" were invalidated. These had been issued since 1995 to Rohingya who had previously lost their right to a National Registration Card during the first Citizenship Verification Process of the early 1990s. Upon rendering their temporary "white cards", Rohingya received only a "slip" in exchange, which further limited the Rohingya's rights. *See* Republic of the Union of Myanmar, Presidential Notification 19/2015, *Announcement on Expiration of Temporary Identity Cards and Schedule/Plan to Hand over the Expired Cards* (11 February 2015) (original and translation). MG, Vol. VII, Annex 181; UN High Commissioner for Refugees, *Study on Community Perceptions of Citizenship, Documentation and Rights in Rakhine State* (August 2016), pp. 6, 10. MG, Vol. II, Annex 29.

6.26 In October 2014, Myanmar launched a so-called "citizenship verification process" that, it claimed, was designed to "assess, verify and confirm or grant citizenship to the Rohingya".[388] But that is not what happened. Instead, the "citizenship verification process" cemented the status of the Rohingya as non-citizens, by requiring them to carry with them a National Verification Card ("NVC"), which explicitly identified them as non-citizens.[389] The NVC stated expressly that: "This identity card holder is a person who need [*sic*] to apply for citizenship in accordance with Myanmar Citizenship Law", and that: "Holding this identity card does not testify that 'the card holder is Myanmar Citizen'".[390]

6.27 Moreover, Myanmar authorities processing applications for NVCs, which all Rohingya are required to carry on their persons, have insisted that the Rohingya register as "Bengali".[391] They are, in fact, prohibited from registering as "Rohingya", because Myanmar officially refuses to recognize the existence of such a "race". The experience of a Rohingya man exemplifies Myanmar's effort to force the Rohingya to renounce their identity, as a condition of obtaining an NVC. Willfully disregarding the

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[388] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), paras. 65-66. MG, Vol. III, Annex 49; Fortify Rights, *Tools of Genocide* (2019), p. 43. MG, Vol. V, Annex 126; *see also* Natalie Brinham, "'Genocide Cards': Rohingya refugees on why they risked their lives to refuse ID cards", *Open Democracy* (21 October 2018). MG, Vol. IX, Annex 300; Burma Human Rights Network, *National Verification Cards: a Barrier to Rohingya Repatriation* (July 2019). MG, Vol. V, Annex 124.

[389] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 65. MG, Vol. III, Annex 49; *see* [redacted]. MG, Vol. XI, Annex 372.

[390] Fortify Rights, *Tools of Genocide* (2019), Annex 1, p. 92. MG, Vol. V, Annex 126.

[391] *Ibid.* p. 44 ("'Rohingya' is not an accepted option for 'race' on the form, and the Myanmar authorities instead require Rohingya to register as 'Bengali,' or another foreign identity.").

man's birth certificate from Maungdaw Hospital, the officer in charge recorded him as having been born in Bangladesh:

> "During the application process for the NVC, the authorities called me a 'kalar'. They filled in the application form for me. I was not allowed to provide answers to the questions on the NVC application form, except for the names of my family members. The officer wrote in all the other answers in the form without asking me, even though I was physically present. For example, he wrote on my form that I came from Bangladesh by waterway, even though I was born in Maungdaw Hospital and I had given him my birth certificate to prove it. Then they kept my application form."[392]

6.28 Those Rohingya who refuse to relinquish their identity by registering as "Bengali" are not issued NVC cards, and thus face severe restrictions in accessing food, healthcare and employment. In 2017, for example, the Government distributed pamphlets to the Rohingya setting out the following requirements: "If you want to do fishing, apply [for the] NV card first", and "[f]or social and economic activities, hold the NV card."[393]

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[392] [redacted] Vol. XI, Annex 372. The UNHCR confirms that one of the "concerns" the Rohingya have about the card is the "need to identify as Bengali and answer questions that insinuate that they are not originally from Myanmar - E.g. *When did you arrive to the country? By which route did you arrive?*" UN High Commissioner for Refugees, *Study on Community Perceptions of Citizenship, Documentation and Rights in Rakhine State* (August 2016), p. 16. MG, Vol. II, Annex 29.

[393] Fortify Rights, *Tools of Genocide* (2019), p. 59. MG, Vol. V, Annex 126, *citing* Republic of the Union of Myanmar, Ministry of Labour, Immigration and Population Department, "National Verification Card Relevant Facts" (undated). MG, Vol. VI, Annex 170; *see also* Republic of the Union of Myanmar, Ministry of Livestock, Fisheries, and Rural Development, Ministry of Transport, and the Immigration Department, *Announcement about Fishing, Fishing Vessels, and Boats* (undated) (original and translation) (announcing that "fishing licenses can be renewed only if you hold an NVC").

Rohingya in Sittwe and Pauktaw Township have testified that they were coerced to apply for NVCs in order to obtain fishing licenses or conduct other economic activities.[394] According to a Rohingya fisher from central Rakhine State: "Taking the NVC was the only way I could feed my children".[395]

6.29 A Rohingya from Buthidaung Township explained that an NVC was required to travel to the general hospitals in Sittwe or Yangon for healthcare:

> "We cannot go to Sittwe and Yangon, even if we are seriously sick. To go to Sittwe and Yangon, we have to take the NVC first, apply for other cards, and then we will be able to travel. Even in dying condition, we have to die, but we are not allowed to go to Sittwe."[396]

6.30 Myanmar has also used other forms of coercion to force Rohingya to "take the NVC", including violence. The testimonies of numerous Rohingya witnesses demonstrate that police authorities have deployed psychological pressure, life-threats, beatings and killings to compel them to renounce their identity as Rohingya and apply for and accept an NVC. A Rohingya woman from Chut Pyin, in Rathedaung Township, reported in 2017 that "the military, police and the Rakhine surrounded the village" and

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MG, Vol. VI, Annex 169; Fortify Rights, *Tools of Genocide* (2019), note 205. MG, Vol. V, Annex 126.

[394] Independent Rakhine Initiative, *Freedom of Movement in Rakhine State* (March 2020), p. 60, interview at note 48. MG, Vol. V, Annex 129.

[395] Fortify Rights, *Tools of Genocide* (2019), p. 59. MG, Vol. V, Annex 126.

[396] Independent Rakhine Initiative, *Freedom of Movement in Rakhine State* (March 2020), p. 127. MG, Vol. V, Annex 129.

instructed village leaders "to convince the villagers to accept the [NVC]".[397] The Rohingya villagers had "refused the card because it branded them Bangladeshi yet they are Rohingya. They refused because they belong to Burma not to Bangladesh. When the villagers refused to accept this card, the military began shooting and raping people at random. Those who did not die in the attack left for Bangladesh."[398]

6.31 Fortify Rights has documented extensively how "Myanmar authorities beat and threatened Rohingya residents to accept the NVC, and beat, threatened and deprived Rohingya prisoners of food in order to force them to accept NVCs."[399] A Rohingya man from Maungdaw Township, who had been taken into custody on the false charge of entering Myanmar illegally from Bangladesh, recounted: "Prison guards beat me in the face and on my chest. I was bleeding … I kept refusing [the NVC]. They did not feed me. They stopped feeding me for not taking the NVC."[400] He was ultimately released after he took the NVC.

6.32 Another Rohingya from Maungdaw Township explained how authorities threatened to kill him if he refused to take the NVC card:

> "I was imprisoned because I was accused of being a terrorist. I am only a farmer, not a terrorist. I was in prison for 42 months…I was beaten so badly that I lost [some of] my teeth . . . I was beaten everywhere—my head, back, chest, and all over my body. All my clothes were red with blood. I threw up blood

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397 [redacted]. MG, Vol. X, Annex 336.

398 *Ibid.*

399 Fortify Rights, *Tools of Genocide* (2019), p. 49. MG, Vol. V, Annex 126.

400 *Ibid.*

> when they beat me . . . I was threatened to take the NVC. One [officer] told me, "If you don't accept the NVC, we will kill you"… I feel very sad that I had to accept the NVC. I didn't want to. It is not for Rohingya people … We are indigenous to the Myanmar land. If I did not take the NVC, I would have either been kept in prison, killed, or imprisoned again upon my release."[401]

6.33 The evidence thus shows that, by means of the 1982 Citizenship Law and subsequent "citizenship verification" processes, Myanmar has effectively stripped more than one million Rohingya of citizenship status, deprived them of fundamental rights and legal protections, denied them recognition as a group and punished them, often violently, for self-identifying as Rohingya. Through the NVC system, imposed to further this purpose in 2014, access to the basic necessities of life—food, healthcare, livelihood—was conditioned on renunciation of Rohingya identity and formal acceptance of "foreigner" status. Even so, many Rohingya resisted, and Myanmar resorted to increasingly violent tactics to force them to give up their identity, leading up to and setting the stage for the massive "clearance operations" of 2016-2018.

6.34 The threat posed by these policies to the survival of the Rohingya as a group was described by the United States Holocaust Memorial Museum ("USHMM"), in its 2019 Report entitled *Practical Prevention: How the Genocide Convention's Obligation to Prevent Applies to Myanmar*:

> "Myanmar's 1982 Citizenship Law grants full citizenship on the basis of 'national

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[401] *Ibid*.

> races' identified by the Myanmar Government, which do not include the Rohingya. By passing this law, Myanmar stripped the Rohingya community of their citizenship. To this day, it continues to systematically deny this right through the use of National Verification Cards (NVC) and annual household list systems. This has effectively denied the Rohingya access to education and health care, the ability to work, to participate in public affairs, to freedom of movement, and their right to property."[402]

6.35 Based on these findings, the USHMM's Report concluded:

> "For the Government of Myanmar to uphold its Genocide Convention obligations, it must cease systematically denying the right of the Rohingya to citizenship and a nationality, repeal or amend legislation and policies that arbitrarily deny these rights to the Rohingya on the basis of their ethnicity, and cease systematically forcing the Rohingya to identify as foreigners."[403]

II. Myanmar's Efforts to Prevent the Rohingya from Reproducing and Sustaining Themselves as a Group

6.36 Myanmar has long raised alarms about the allegedly high growth rate of the Rohingya population.[404] The warning issued by then Minister of Defence Lieutenant-General Hla Min to the Parliament on 1 September

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[402] United States Holocaust Memorial Museum, *Practical Prevention: How the Genocide Convention's Obligation to Prevent Applies to Myanmar* (24 June 2020), p. 6. MG, Vol. VII, Annex 195.

[403] *Ibid.* (emphasis omitted).

[404] *See infra* Chapter 7, Section I.

2011 is typical. According to the Defence Minister, the Rohingya population of northern Rakhine State was becoming "denser" and "the birth rate outnumbers [the] international standard at a breakneck speed".[405] Likewise, Rakhine State spokesperson Win Myaing complained in 2013: "The population growth of Rohingya Muslims is 10 times higher than that of the Rakhine [Buddhists]. Overpopulation [of Muslims] is one of the causes of tension."[406] In October 2013, the Speaker of the House, Thura Shwe Mann, sent to then President Thein Sein a declaration by Director-General Kyaw Soe of the Office of the Union Parliament, describing the Rohingya as "Bengalis whose population are increasing due to the marriage and having the children [in] unsystematic ways which are not suitable with the cultural norms of human beings".[407]

6.37 Beyond "not suitable", Myanmar has characterized the "high" growth rate of the Rohingya as an existential threat to the survival of more favored "national races". The very motto of Myanmar's Ministry of Labour, Immigration and Population reflects this ominous message: "*The earth will not swallow a race to extinction but another race will.*"[408] The Ministry

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[405] Fortify Rights, *Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar* (February 2014), p. 20. MG, Vol. IV, Annex 91 [**hereinafter** Fortify Rights, *Policies of Persecution* (2014)], *citing* The New Light of Myanmar, "Second regular session of First Amyotha Hluttaw continues for ninth day Queries raised and answered, proposals submitted and approved" (2 September 2011). MG, Vol. IX, Annex 240.

[406] Fortify Rights, *Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar* (February 2014), p. 20. MG, Vol. IV, Annex 91, *citing* "Burmese Muslims Given Two-Child Limit", *The Guardian* (25 May 2013). MG, Vol. IX, Annex 244.

[407] Director General Kyaw Soe, *Submission on the Development of Rakhine State* (15 October 2013), p. 4. MG, Vol. VI, Annex 145.

[408] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 698 (emphasis added). MG, Vol. II, Annex 40.

chose this motto in 1995 and has displayed it on billboards and in offices until recently.[409] It continues to be featured on the Ministry's website.[410]

6.38 This Section describes Myanmar's policies and practices specifically intended to confront and reverse the growth of the Rohingya population, by reducing the capacity of the Rohingya to procreate, and thus to sustain themselves as a group over the long term. Official measures adopted for these purposes include marriage restrictions, obligatory birth control, the withholding of birth certificates and the refusal to register births. The Section also describes other efforts by Myanmar to impair the ability of the Rohingya to sustain themselves, especially by forcibly segregating them and confining them in inhospitable locations—internment camps, ghettoes and isolated hamlets—where their access to food, healthcare, employment and other basic necessities of life is severely restricted.

A. RESTRICTIONS ON PROCREATION

1. Restrictions on Marriage

6.39 Myanmar's efforts to restrict Rohingya reproduction include what the UN Fact-Finding Mission describes as "restrictions related to marriage" and the "number and 'spacing'" of children.[411] These have resulted in what

[409] *Ibid*., para. 699.

[410] *See infra* Chapter 7, Figure 7.1.

[411] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 580. MG, Vol. II, Annex 40.

Fortify Rights characterizes as a "consistent state policy of restrictions on marriage imposed against the Rohingya in Rakhine State".[412]

6.40 To this end, in May 2005, Maungdaw authorities issued Regional Order 1/2005 requiring the Rohingya to seek permission to marry and prohibiting certain Rohingya marriages altogether.[413] They justified the order by invoking fears of "population explosion" and "children who are not controlled and systematically taken care of by the parents [who] can become a class of stray, bad youth in the future, creating problems for the human environment".[414]

6.41 Regional Order 1/2005 applied exclusively to individuals seeking to have Islamic marriages. No other religions were implicated and the Rohingya were the only Muslim group in Maungdaw Township. Pursuant to the order, anyone wishing to have an Islamic marriage was required to seek permission from the Ward Peace and Development Council and the Border Police Force (Na Sa Ka).[415] Permission could only be granted upon fulfilment of onerous documentary requirements that applied only to the

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[412] Fortify Rights, *Policies of Persecution* (2014), p. 10. MG, Vol. IV, Annex 91. These date back as early as 1993, when a Maungdaw Township regional order placed special requirements for marriage permissions on Islamic marriages. *See* Letter No. Na-Sa-Ka 56/U 4 to Chairman of Illegal Entry Prevention People's Group, *Issuing Temporary Regional Order* (31 January 1993), *in Regional Order and Processes for Controlling Bengali Population* (11 February 2008), PDF pp. 2-3 (the 1993 order indicated that it was intended "for the good of the region and the race" in response to the determination that the population increase in the predominantly Rohingya township was "extremely high, considering the current population, space, production of regional goods, and the yield of rice"). MG, Vol. VI, Annex 177.

[413] *Regional Order 1/2005* (1 May 2005), *in Regional Order and Processes for Controlling Bengali Population* (11 February 2008), PDF pp. 4-5, para. 1. MG, Vol. VI, Annex 177.

[414] *Ibid*., p 4, para. 1.

[415] *Ibid*., pp. 4-5, para. 1.

Rohingya, as set out in an addendum circulated along with the order entitled "Requirements for *Bengalis* who Apply for Permission to Marry".[416]

6.42 The addendum listed eleven prerequisites for marriage permission. Among them, Rohingya wishing to marry were required to present documentation showing legal status.[417] As explained above, linking permission to marry to NVCs or other legal documents, which the Rohingya are loathe to obtain because they require them to formally accept non-citizenship and designation as "Bengali", creates a significant obstacle to marriage. The order and the addendum also required Rohingya seeking permission to marry to present: proof that they are legal residents of Maungdaw Township;[418] certificates issued by the Ward Peace and Development Council indicating that they are single;[419] additional certificates if either individual is widowed or divorced; approval by the parents of both individuals; and an agreement between the bride and groom to marry.[420] Again, only the Rohingya were subject to these requirements.

6.43 As a further disincentive to apply for marriage permission, Rohingya couples were also required to present photographs in which, contrary to religious customs, men had to appear "without a beard".[421]

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[416] Addendum on "Requirements for Bengalis who apply for Permission to Marry", *in Regional Order and Processes for Controlling Bengali Population* (11 February 2008), PDF p. 9, paras. a-k (emphasis added). MG, Vol. VI, Annex 177.

[417] *Ibid*., p. 9, paras. c & d.

[418] *Regional Order 1/2005* (1 May 2005), *in Regional Order and Processes for Controlling Bengali Population* (11 February 2008), PDF p. 9, para. 1.d. MG, Vol. VI, Annex 177.

[419] Addendum on "Requirements for Bengalis who apply for Permission to Marry", *in Regional Order and Processes for Controlling Bengali Population* (11 February 2008), PDF p. 9, para. g. MG, Vol. VI, Annex 177.

[420] *Ibid*., p. 9, paras. i, f & e, respectively.

[421] *Ibid*., p. 9, N.B.

Rohingya women were routinely required to be photographed without a hijab.[422]

6.44 In addition to these formal obstacles to marriage, the process of obtaining permission is set up to be costly and protracted. As the Special Rapporteur on the situation of human rights in Myanmar has pointed out, "Unlike other people of Myanmar, this Muslim community must apply for papers from Nasaka, the border and immigration forces in Northern Rakhine State ... This process is reported to cost 40,000 kyat (about $40), which many Muslims cannot pay, and can take up to several years to complete."[423]

6.45 In addition to putting marriage out of reach for many Rohingya, Regional Order 1/2005 prevented certain Rohingya marriages altogether. It outlaws marriage for anyone under 18 years of age.[424] It also prohibited any Rohingya who is divorced or widowed from applying to remarry until three years after the legal divorce or the death of their partner.[425]

6.46 To further obstruct reproduction, the Rohingya were even prohibited from "having a relationship with another person without marrying".[426] Another addendum circulated with Regional Order 1/2005,

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[422] Fortify Rights, *Policies of Persecution* (2014), p. 30. MG, Vol. IV, Annex 91.

[423] UN Human Rights Council, *Progress Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, UN Doc. A/HRC/13/48 (10 March 2010), para. 89. MG, Vol. II, Annex 23.

[424] *Regional Order 1/2005* (1 May 2005), *in Regional Order and Processes for Controlling Bengali Population* (11 February 2008), PDF pp. 4-5, paras. 1.d & i. MG, Vol. VI, Annex 177.

[425] *Ibid*., PDF pp. 4-5, paras. 1.g & h.

[426] Addendum on "Population Control Activities", *in Regional Order and Processes for Controlling Bengali Population* (11 February 2008), PDF p. 7, para. 7. MG, Vol. VI, Annex 177.

entitled "Population Control Activities", criminalizes violations of this rule.[427] The Rohingya also face up to ten years of imprisonment for "seducing a girl under age 18 to have sex with her and marry her",[428] and up to one year of imprisonment for extra-marital relationships.[429] Still another addendum circulated with the order, entitled "Spot Checking", provides that "[a]ction must be taken against those who are married unofficially and live together".[430]

6.47 [redacted][431] As reported in 2010 by the Special Rapporteur on the Situation of Human Rights in Myanmar, "the majority of the prison population of Buthidaung were Muslim, most of them [imprisoned] for charges related to immigration or

[427] *Ibid*.

[428] *Ibid*., PDF p. 7, para. 5.

[429] *Ibid*., PDF p. 7, para. 7.

[430] Addendum on "Spot Checking", *in Regional Order and Processes for Controlling Bengali Population* (11 February 2008), PDF p. 8, para. h. MG, Vol. VI, Annex 177. Aiding and abetting people to violate these rules, and "fail[ing] to give information on those who disobey restrictions" is also punishable by a sanction to be freely decided by the competent governmental authorities. *See* Addendum on "Population Control Activities", *in Regional Order and Processes for Controlling Bengali Population* (11 February 2008), PDF p. 7, para. 8. MG, Vol. VI, Annex 177.

[431] [redacted] MG, Vol. X, Annex 340.

marriage offenses".[432] He urged Myanmar to "release all those prisoners currently serving sentences for illegal marriage".[433]

2. Obligatory Birth Control

6.48 In addition to restricting marriages and criminalizing relationships out of wedlock, Myanmar has forced the Rohingya to limit the number of children they produce. Regional Order 1/2005, mentioned above, establishes that "those who have permission to marry must limit the number of children in order to control birth rate", on the pretext that this is needed to ensure "enough food and shelter".[434] In practice, the instruction mandates "a strict two-child policy".[435] To ensure compliance with it, "newly-married couples—once they satisfy the odious and abusive process to get permission to marry" are forced "to sign a statement saying they will not have more than two children".[436] As a village leader from Buthidaung Township testifies:

> "It was very difficult to get married. I married in 2010. The Nasaka would impose different conditions on Rohingya for marriage. We had conditions such as we were only allowed to have two babies and things like that. If you breach the laws and

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[432] UN Human Rights Council, *Progress Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, UN Doc. A/HRC/13/48 (10 March 2010), para. 89. MG, Vol. II, Annex 23.

[433] *Ibid*.

[434] *Regional Order 1/2005* (1 May 2005), *in Regional Order and Processes for Controlling Bengali Population* (11 February 2008), PDF p. 5, para. 1.f. MG, Vol. VI, Annex 177.

[435] Fortify Rights, *Policies of Persecution* (2014), p. 24. MG, Vol. IV, Annex 91.

[436] *Ibid*.

> have more babies you will face the consequences."[437]

6.49 *Médecins sans Frontières* ("MSF") confirms the existence of a requirement that the Rohingya make such undertakings, based on their reproductive health survey of 406 women located in nine different village tracts between July and October 2011.[438] Copies of a marriage certificate containing the stipulation that the couple "will only have (two) children" and that they "will follow birth control procedures in order to decrease increasing population rate and secure (ample) rations" are included as Annexes 168 and 178.[439]

6.50 This obligation is enforced through various burdensome and degrading mechanisms outlined in the addenda that were circulated with Regional Order 1/2005. Officials are instructed to "chec[k] members of households in villages against family pictures to see if the number of people is correct".[440] The "checks" are to be made "in the presence of the Ya-Ya-Ka [Ward Peace and Development Council] and villagers",[441] so that the

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[437] [redacted] Annex 343.

[438] Médecins Sans Frontières, *Fatal Policy: How the Rohingya Suffer the Consequences of Statelessness* (July-October 2011), p. 2 (also reporting that "[i]n most cases a pregnancy test is also performed, either during the presentation [of the marriage permission application] or beforehand and attached to the file"). MG, Vol. IV, Annex 89.

[439] *See* Republic of the Union of Myanmar, *Copy of Marriage Registration Certification* (original and translation) (identity of the certificate's holders redacted in the original). MG, Vol. VI, Annex 168; Republic of the Union of Myanmar, *Copy of Marriage Registration Certification of (names redacted)* (original and translation). MG, Vol. VI, Annex 178.

[440] Addendum on "Drawing Maps, Making a Record of Buildings, and Reviewing Household Registrations", *in Regional Order and Processes for Controlling Bengali Population* (11 February 2008), PDF pp. 12-13, subsection (d) on "Taking Family Pictures", para. 4. MG, Vol. VI, Annex 177; *see also* Fortify Rights, *Policies of Persecution* (2014), p. 73. MG, Vol. IV, Annex 91.

[441] Fortify Rights, *Policies of Persecution* (2014), p. 68. MG, Vol. IV, Annex 91.

officers "will know right away if someone is being substituted".[442] An addendum entitled "Drawing Maps, Making a Record of Buildings, and Reviewing Household Registrations", with a sub-section on "Taking Family Pictures", instructs officers to force Rohingya women to breastfeed in their presence to ensure compliance with the two-child policy: "If there is suspicion of someone being substituted, children in the household will be compared in age and in appearance. If the child is an infant, the mother will be made to breast feed the child. Young children will be questioned separately."[443]

6.51 Pursuant to the addendum entitled "Population Control Activities", a violation of the child limitation policy can be sanctioned with imprisonment, fines, or both, in accordance with Criminal Law Section 188.[444] The addendum entitled "Spot Checking" declares that "action must be taken against illegal children".[445]

6.52 Fear of punishment from authorities for giving birth to a third child or a child out of wedlock has driven many pregnant Rohingya women to

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[442] *Ibid*.

[443] Addendum on "Drawing Maps, Making a Record of Buildings, and Reviewing Household Registrations", *in Regional Order and Processes for Controlling Bengali Population* (11 February 2008), PDF p. 13, subsection (d) on "Taking Family Pictures", para. 5. MG, Vol. VI, Annex 177.

[444] Addendum on "Population Control Activities", *in Regional Order and Processes for Controlling Bengali Population* (11 February 2008), PDF p. 7, para. 4. MG, Vol. VI, Annex 177.

[445] Addendum on "Drawing Maps, Making a Record of Buildings, and Reviewing Household Registrations", *in Regional Order and Processes for Controlling Bengali Population* (11 February 2008), PDF p. 8, subsection (d) on "Taking Family Pictures", para. i. MG, Vol. VI, Annex 177.

risk their lives by fleeing to squalid camps abroad or undergoing illegal and dangerous abortions.[446] Health workers in Rakhine State have reported that:

> "Abortions in Rakhine State are illegal, unsafe, and are typically conducted using the 'stick method,' whereby a stick is inserted into the uterus to terminate the pregnancy. When subsequent health complications arise, women report being afraid to seek necessary medical attention, fearful they will be exposed as having had an abortion or for living with their partner without marriage permission."[447]

6.53 In May 2013, following the restatement of the two-child policy for the Rohingya, the spokesperson of the Rakhine State Government, Win Myang, euphemistically described the limitation on Rohingya child-bearing as "family planning", while candidly acknowledging that it was discriminatory, and for the purpose of suppressing the Rohingya population: "Regarding family planning, they can only [have] two children … For Buddhist people, we don't need that rule, because Buddhist people

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[446] *See* Fortify Rights, *Policies of Persecution* (2014), p. 28 ("[a] 2011 assessment shared with Fortify Rights by a reliable and credible source revealed 14.3 percent of Rohingya women in northern Rakhine State had undergone at least one abortion and 26% percent of those had multiple abortions, due to the restriction on child-birth […] [T]he statistics do not account for underreporting, which is likely high considering risks involved for unauthorized pregnancies, or for women who did not survive the procedure and its consequences.") MG, Vol. IV, Annex 91; *see also* The Arakan Project, *Key Issues Concerning the Situation of Stateless Rohingya Women and Girls in Rakhine State, Submission to the CEDAW Commission* (10 June 2016). MG, Vol. IV, Annex 94.

[447] Fortify Rights, *Policies of Persecution* (2014), p. 28. MG, Vol. IV, Annex 91; *see also* Médecins Sans Frontières, *Fatal Policy: How the Rohingya Suffer the Consequences of Statelessness* (July-October 2011), p. 3 (confirming on the basis of the reproductive health survey mentioned above in note 438 that "[t]he biggest health impact of marriage restrictions is its direct link to induced abortions. Of the 14.3% of women who report having an induced abortion, 88% of them state their reason was related to not being formally married, not having marriage permission or not having yet applied for a marriage license."). MG, Vol. IV, Annex 89.

only have one wife. … It's being implemented to control the population growth, because it's becoming too crowded there."[448]

6.54 In May 2015, restrictions on Rohingya childbearing were incorporated into national law, in the form of the Population Control and Healthcare Law. Although the law is, in theory, of general applicability, the International Crisis Group has observed that it:

> "gives the government the power to implement (non-coercive) population control measures in areas designated by the president with high population density, growth, maternal and child mortality, poverty or food insecurity. No such areas have been designated, but the provisions would appear to apply particularly to Muslim-majority northern Rakhine state where coercive local orders that limited Muslim couples to two children have been in place in the past."[449]

6.55 Under the Population Control and Health Care Law, Rohingya women are required to practice "birth spacing", by waiting at least three years after the birth of one child before having another.[450] The Law also

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[448] Paul Vrieze & Zarni Mann, "Gov't Sets Two-Child Limit for Rohingyas in Northern Arakan", *The Irrawaddy* (20 May 2013). MG, Vol. IX, Annex 243; *see also* National League for Democracy, *Statement by Townships in Rakhine State* (31 May 2013) (original and translation). MG, Vol. VII, Annex 180. The restatement of the two-child policy was contemporaneously condemned by the Special Rapporteur on the situation of human rights in Myanmar, Mr. Tomás Ojea Quintana, who urged the Government of Myanmar to respond unequivocally to the revival of a local order limiting the number of children Rohingya Muslims and stressed that this is a clear violation of their human rights. "Two-child policy violates human rights of Myanmar's Rohingya Muslims – UN expert", *UN News* (31 May 2013). MG, Vol. IX, Annex 245; Fortify Rights, *Policies of Persecution* (2014), pp. 26-27. MG, Vol. IV, Annex 91.

[449] International Crisis Group, 'Buddhism and State Power in Myanmar' (2017) Asia Report No. 290, p. 15. MG, Vol. IV, Annex 105.

[450] Republic of the Union of Myanmar, *Population Control and Healthcare Law* (19 May 2015) (original and translation). MG, Vol. VII, Annex 182.

provides a legal basis for the establishment of even stricter birth control measures at the local and regional levels.[451]

6.56 The Population Control and Healthcare Law was part of a legislative package of four "Race and Religion Protection Laws" adopted by Myanmar's Parliament to restrain the Rohingya from perpetuating themselves as a group.[452] As explained by the influential Buddhist monk, Ashin Wirathu, this law was intended to "stop the Bengalis that call themselves Rohingya, who are trying to seize Rakhine State".[453] The other three were the Buddhist Special Marriage Law, restricting the ability of Buddhist women to marry non-Buddhist men;[454] the Religious Conversion Law, requiring permission from local authorities before converting to a different religion;[455] and the Monogamy Law, reiterating the prohibition against polygamy and extra-marital relationships.[456]

6.57 The four "Race and Religion Protection Laws" were sponsored by Myanmar's Association for the Protection of Race and Religion ("Ma Ba

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[451] Republic of the Union of Myanmar, *Population Control and Healthcare Law* (19 May 2015) (original and translation), art. 10 (ordering the creation of "Region or State population healthcare control groups"). MG, Vol. VII, Annex 182.

[452] International Crisis Group, 'Buddhism and State Power in Myanmar' (2017) Asia Report No. 290, p. 15. MG, Vol. IV, Annex 105; Ronan Lee, 'The Dark Side of Liberalization: How Myanmar's Political and Media Freedoms Are Being Used to Limit Muslim Rights' (2016) (27)(2) Islam and Christian-Muslim Relations 195. MG, Vol. VIII, Annex 229.

[453] Nobel Zaw, "Population Control Bill Could 'Stop the Bengalis': Wirathu", *The Irrawaddy* (18 May 2015). MG, Vol. IX, Annex 254.

[454] Republic of the Union of Myanmar, *The Myanmar Buddhist Women's Special Marriage Law* (26 August 2015) (original and translation). MG, Vol. VII, Annex 183.

[455] Republic of the Union of Myanmar, *Religious Conversion Law* (26 August 2015) (original and translation). MG, Vol. VII, Annex 184.

[456] Republic of the Union of Myanmar, *Monogamy Law* (31 August 2015) (original and translation). MG, Vol. VII, Annex 185.

Tha"), which is led by ultra-nationalist Buddhist monks,[457] including Ashin Wirathu, and supported financially by the Tatmadaw.[458] Ma Ba Tha was founded in 2012 by Ashin Wirathu "to operate when *kalars* harm Buddhists".[459] As shown in the film "The Venerable W", he has used the Ma Ba Tha to propagate fear among Buddhists that there were "more and more *kalars*" in Myanmar and that they "reproduce like rabbits".[460]

6.58 By adopting the "Race and Religion Protection Laws", Myanmar endorsed and adopted the anti-Rohingya attitudes of the Ma Ba Tha. In the film, Ashin Wirathu states that the Ma Ba Tha proposed these "indispensable" laws, which must be "upheld",[461] because the country's "main threat" is that "Muslim men marry several women and have many children, with the unique purpose of becoming the majority population in

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[457] *See* International Commission of Jurists, *Challenges to Freedom of Religion or Belief in Myanmar: A Briefing Paper* (October 2019), p. 23 (explaining that these laws "began to be discussed publicly for the first time in June 2013, when, at a religious conference in Yangon, U Wirathu, a prominent monk associated with the 969 and Ma Ba Tha movements, presented two drafts laws that, when enacted, would restrict inter-religious marriage and conversions."). MG, Vol. V, Annex 127, *citing* Joshua Carroll, "The Man Who Wrote Ma Ba Tha's 'Race and Religion Laws'", *Frontier* (10 October 2015). MG, Vol. IX, Annex 258.

[458] *See infra* Chapter 7, Section II. *See, e.g.*, Htet Naing Zaw, "MaBaTha is a Necessity: Military", *The Irrawaddy* (19 June 2019) (explaining that: "Yangon Region military commander personally donated 30 million kyats (US$19,600) to the Buddha Dhamma Prahita Foundation—formerly known by its Burmese acronym Ma Ba Tha—as nearly 1,000 Buddhist monks and their followers from across the country gathered at the group's headquarters, in Yangon's Insein Township, for their annual meeting."). MG, Vol. IX, Annex 311.

[459] Barbet Schroeder, Video "The Venerable W." (2017), at 1:09:02. MG, Vol. V, Annex 135; Hannah Beech, "The Face of Buddhist Terror", *Time* (1 July 2013). MG, Vol. IX, Annex 248.

[460] Barbet Schroeder, Video "The Venerable W." (2017), at 42:20. MG, Vol. V, Annex 135.

[461] Barbet Schroeder, Video "The Venerable W." (2017), at 21:44. MG, Vol. V, Annex 135.

Myanmar".[462] The film depicts Ashin Wirathu praising himself and the Ma Ba Tha for securing adoption of the legislative package by the Parliament, and participating in festivities to celebrate their "success".[463]

6.59 Upon Myanmar's adoption of these laws, the UN OHCHR reported that: "A group of United Nations human rights experts today expressed alarm at the enactment of the Population Control Healthcare Bill in Myanmar … 'At a time when thousands of Rohingya are already fleeing the country by boat, this sends precisely the wrong signal to these communities.'"[464]

6.60 In its 2018 Report, the UN Fact-Finding Mission found that these laws were intended to reduce the number of Rohingya and curtail their capacity to perpetuate themselves as a group: "The measures imposed on Rohingya women and girls, when considered both individually and cumulatively, appear targeted at the capacity of the group to 'live and reproduce normally'."[465]

6.61 The UN Fact-Finding Mission explained that the purported justification for the laws was contradicted by Myanmar's own official data on the Rohingya' population growth:

> "The Myanmar authorities, including the Tatmadaw, have actively propagated the

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[462] Barbet Schroeder, Video "The Venerable W." (2017), at 23:22. MG, Vol. V, Annex 135.

[463] Barbet Schroeder, Video "The Venerable W." (2017), at 1:27:58. MG, Vol. V, Annex 135.

[464] UN OHCHR, *Myanmar: UN Rights Experts Express Alarm at Adoption of First of Four 'Protection of Race and Religion' Bills* (27 May 2015). MG, Vol. II, Annex 26.

[465] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1409. MG, Vol. II, Annex 40.

> narrative of 'uncontrollable' Rohingya birthrates that constitute a threat to the nation. This is despite the results of the 2014 Population and Housing Census, released in 2016, indicating that the percentage of Muslims in the country had not meaningfully increased in recent decades."[466]

3. Denial of Birth Registration

6.62 The UN Fact-Finding Mission observed that, "[a]ccording to credible reports the authorities stopped issuing birth certificates to Rohingya children in northern Rakhine in the 1990s, with no official reason given for this change of policy."[467]

6.63 Since then, the recognition of newborn Rohingya that Myanmar typically provides is their inclusion on so-called "house-hold lists".[468] As the UN Fact-Finding Mission has explained, "inclusion" in the household list is a "pre-requisite for obtaining identity documents, travel authorizations, marriage permissions and enrolment in most government schools".[469] But Myanmar has made the placement of a child on a household list so difficult that its own Rakhine Inquiry Commission

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[466] *Ibid*.

[467] *Ibid*., para. 463.

[468] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 463. MG, Vol. II, Annex 40; UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), paras. 95-96 ("Household lists are issued and updated by the Ministry of Immigration and Population and the Ministry of Home Affairs. They are the only form of identification for many Rohingya since the revocation of the Temporary Registration Cards on 31 March 2015, which established their place of origin and rights to their property."). MG, Vol. III, Annex 49.

[469] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 463. MG, Vol. II, Annex 40.

estimated that, by 2013, 60,000 Rohingya children were not registered.[470] This has enabled Myanmar to deny them any form of legal status or identity, or basic rights.[471]

6.64 Myanmar not only makes it difficult for Rohingya newborns to be included in household lists. Myanmar makes it equally difficult for those who somehow manage to be inscribed on a list to remain on it. The UN Fact-Finding Mission found that Myanmar authorities regularly remove from the lists any Rohingya who are not in their homes when the authorities undertake unannounced household list checks. The Mission reported that these "authorities were aggressive during the annual listing and randomly removed individuals from the list, including those who were absent at the time when the officials went house to house to update the lists".[472] The Mission highlighted that, in the aftermath of the "clearance operations", Myanmar took advantage of the absence of Rohingya from their homes—thousands of which were burned to the ground by the Tatmadaw—to erase them from the household lists.[473]

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[470] Republic of the Union of Myanmar, *Final Report of Inquiry Commission on Sectarian Violence in Rakhine State* (8 July 2013), para. 12.28. MG, Vol. VI, Annex 161.

[471] The UNHCR explains the connection between the practice of refusing birth registration and curtailing the Rohingya's capacity to perpetuate themselves as a group: "Families also highlight that if children are not on household lists they will have no proof that they were born in Myanmar and they may be denied any form of citizenship and be seen as illegal in the country. Both displaced and non-displaced communities express their concern that the new generation is not formally documented anywhere, fearing that this will significantly affect their future." UN High Commissioner for Refugees, *Study on Community Perceptions of Citizenship, Documentation and Rights in Rakhine State* (August 2016), p. 10. MG, Vol. II, Annex 29.

[472] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 98. MG, Vol. III, Annex 49.

[473] *Ibid*. ("After the 'clearance operations', the BGP and the Committee for the Prevention of the Illegal Immigration of Foreigners, or Makapa, commenced a 'household list' updating exercise in late 2018. Conducting population checks after the 'clearance

B. SEGREGATION, CONFINEMENT AND DENIAL OF ACCESS TO SUSTENANCE

6.65 Since 2012, Myanmar has forced many Rohingya to live in separate areas, removed from the general population. These include: squalid internment camps enclosed by barbed wire, cramped ghettos and isolated villages. After confining them to these areas, Myanmar has denied them freedom of movement, and severely restricted their access to food, healthcare and other basic necessities of life, all in furtherance of its effort to prevent them from renewing and sustaining themselves as a group over the long term.

1. Confinement of the Rohingya in Internment Camps

6.66 According to a December 2018 United Nations Humanitarian Response Plan Report, and two 2020 reports from, respectively, Human Rights Watch and Fortify Rights, approximately 126,000 Rohingya men, women and children have been forcibly confined in internment camps in central Rakhine State since 2012.[474] These facilities were ostensibly created to house tens of thousands of Rohingya who had fled their homes to escape ethnic violence launched by Rakhine Buddhists at the instigation of the

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operations' had a particularly detrimental impact on the hundreds of thousands of Rohingya who were unable to return to their homes to be present for the checks. The mission received accounts of inspection authorities deleting the names of Rohingya who had fled to Bangladesh following the August 2017 events.").

[474] Fortify Rights, *Myanmar: New Evidence of Denial of Rohingya Citizenship* (16 January 2020) ("The government of Myanmar continues to confine more than 125,000 Rohingya to more than 20 internment camps in five townships of Rakhine State. During violent attacks in 2012, extremists and state security forces forcibly displaced most of the Rohingya now confined to the camps."). MG, Vol. V, Annex 128; Human Rights Watch, *Joint Letter Re: Restrictions on Communication, Fencing, and COVID-19 in Cox's Bazar District Rohingya Refugee Camps* (2 April 2020), p. 4 (indicating that "Myanmar authorities [p]resently confine more than 125,000 Rohingya to more than 20 internment camps in five townships of Rakhine State"). MG, Vol. VII, Annex 189.

State. The Rakhine Buddhists were allowed to return to their villages or were resettled by the Government. But the Rohingya were required to remain in the camps.[475] As a result, more than eight years later, over 20 percent of the current Rohingya population of Myanmar is cordoned off from the outside world and confined in crowded and unsanitary conditions where food and healthcare are scarce.[476] A map prepared by the UN Office for the Coordination of Humanitarian Affairs, which depicts the locations of the 23 displacement camps and other sites in central Rakhine State where Rohingya are confined, is reproduced at Figure 6.1 (following page 154 and in Volume XII).[477]

6.67 In its 2018 Report, the UN Fact-Finding Mission condemned these internment camps as "effectively places of deprivation of liberty" which "adversely impact every aspect of [Rohingya] life, including their access to food, livelihood, health and education—and in extreme cases leading to preventable deaths".[478]

6.68 In another 2018 report, the Special Rapporteur on the situation of human rights in Myanmar similarly concluded that: "Their situation remains precarious; they live without privacy in undignified, overcrowded longhouses and are subject to extreme movement restrictions. They are the

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[475] United Nations and Partners, *Humanitarian Response Plan, January–December 2019* (December 2018), p. 10. MG, Vol. III, Annex 43.

[476] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 517. MG, Vol. II, Annex 40.

[477] United Nations Office for the Coordination of Humanitarian Affairs, *Myanmar: IDP Sites in Rakhine State as of 31 July 2018* (20 August 2018). MG, Vol. II, Annex 36 (reproduced in UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 691. MG, Vol. II, Annex 40).

[478] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 378, 517, 525. MG, Vol. II, Annex 40.

subject of policies that prevent them from engaging in livelihoods, attending school or accessing health services and they regularly face exploitation by the authorities."[479]

6.69 The UN Humanitarian Response Plan likewise underscored the deplorable conditions endured by the Rohingya confined in these camps:

> "They have been segregated since 2012 and continue to face severe restrictions on their freedom of movement, limiting their access to livelihoods and essential services, including formal education and healthcare. This has exposed them to a wide range of protection risks and it has left them heavily dependent on humanitarian assistance. Lack of sufficient land in IDP camps, including sites located below sea-level, is a major challenge, hampering efforts to improve the living condition of IDPs. This results in overcrowding, poor environmental health conditions and has a disproportionate impact on women and children."[480]

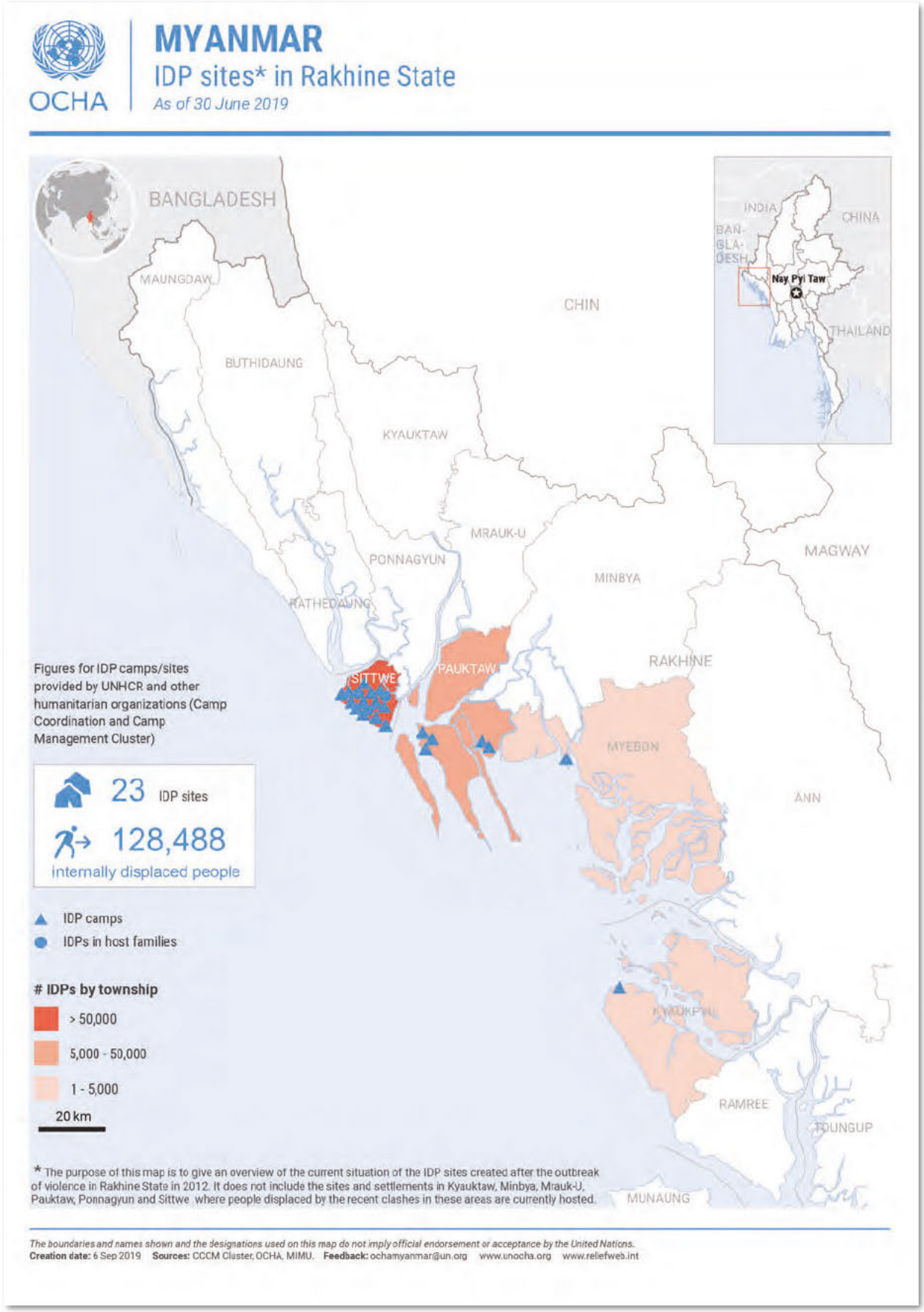
6.70 Myanmar's own Rakhine Inquiry Commission has reported that these restrictions obstruct the ability of the Rohingya to access two of the main forms of livelihood in Rakhine State: agriculture and fisheries.[481] The Commission specifically found that: "*Bengalis* in Myebon and Kyaukpyu,

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[479] UN General Assembly, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, UN Doc. A/73/332 (20 August 2018), para. 52. MG, Vol. II, Annex 37.

[480] United Nations and Partners, *Humanitarian Response Plan, January–December 2019* (December 2018), p. 11. MG, Vol. III, Annex 43.

[481] Republic of the Union of Myanmar, *Final Report of Inquiry Commission on Sectarian Violence in Rakhine State* (8 July 2013), para. 7.3.2. MG, Vol. VI, Annex 161.



Source: **OCHA, "Myanmar: IDP Sites in Rakhine State - as of 31 July 2018" (20 August 2018).**

Figure 6.1

now in IDP camps, are not allowed to go outside of these camps, far less to go to sea for their livelihoods."[482]

6.71 As a consequence, in order to survive, Amnesty International has found, the Rohingya who are interned in the camps are forced to "rely on humanitarian organizations for food, shelter, healthcare and other essential services".[483] MSF, based on its observations, concurs that the Rohingya are "entirely dependent on humanitarian assistance for their survival, due to severe movement restrictions".[484] But the humanitarian assistance they receive is not enough to sustain them. Even Myanmar has been forced to recognize this. According to the Rakhine Inquiry Commission: "[a]lthough the government and international organizations have been providing humanitarian assistance to these groups, their basic needs are still not fully met."[485]

6.72 Even that admission significantly underestimates the precariousness of the Rohingya's circumstances. In its January 2019 Report, the USHMM concluded that, in confining the Rohingya in internment camps, and denying them freedom of movement and access to the basic necessities of

[482] *Ibid*., para. 7.2.3 (emphasis added).

[483] Amnesty International, *"Caged without a Roof": Apartheid in Myanmar's Rakhine State* (November 2017), p. 53. MG, Vol. IV, Annex 104.

[484] Médecins Sans Frontières, *International humanitarian access to Rakhine State must urgently be permitted* (18 September 2017). MG, Vol. IV, Annex 106.

[485] Republic of the Union of Myanmar, *Final Report of Inquiry Commission on Sectarian Violence in Rakhine State* (8 July 2013), para. 6.6. MG, Vol. VI, Annex 161.

life, Myanmar has condemned them to "poverty, food insecurity, and negative health and education outcomes".[486] It found:

> "Since the mass forced displacement of Rohingya in 2012, an estimated 126,000 Rohingya that remained in the country have been forced to live in internally displaced person (IDP) camps, where their ability to move is severely and arbitrarily limited. More generally, the Rohingya population continues to face serious and discriminatory restrictions on their right to freedom of movement within Rakhine state and even across villages. This deprivation directly restricts their ability to access basic services and pursue gainful employment, and renders them particularly vulnerable to poverty, food insecurity, and negative health and education outcomes."[487]

2. The Aung Mingalar Ghetto

6.73 Another group of over 4,000 Rohingya has been confined for the past eight years to a small quarter of Sittwe Town in Central Rakhine, known as Aung Mingalar.[488] The UN Fact-Finding Mission described Aung Mingalar as "[e]ffectively a closed ghetto, where Muslims are trapped and have lived separately from the rest of the population since 2012."[489] The Mission observed that "[i]t is guarded by armed police, checkpoints and

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[486] United States Holocaust Memorial Museum, *Practical Prevention: How the Genocide Convention's Obligation to Prevent Applies to Myanmar* (24 June 2020), pp. 6-7. MG, Vol. VII, Annex 195.

[487] *Ibid*.

[488] Independent Rakhine Initiative, *Freedom of Movement in Rakhine State* (March 2020), p. 32. MG, Vol. V, Annex 129.

[489] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 520. MG, Vol. II, Annex 40.

barbed wire. …People can only leave the quarter with special permission and in organized convoys with police escorts."[490]

6.74 Like the Rohingya confined in internment camps, those who are confined in the Aung Mingalar ghetto have inadequate access to food, healthcare, education and employment. As of 2014, when the Special Rapporteur on the situation of human rights in Myanmar was permitted by Myanmar authorities to make two visits to the ghetto: "Residents are still prevented from leaving the quarter by armed guards and wire fencing, and are reliant on food being delivered from a nearby market. Only one medical assistant is provided, by an international NGO, for all 4,375 residents of the ward. In view of the limited access to hospitals, more outreach of medical assistance is required."[491] In 2015, the International State Crime Initiative further reported that "[Myanmar] authorities have denied humanitarian aid to the residents [of Aung Mingalar]", and that "[h]unger and illness were visible throughout the ghetto and discussions with a wide range of residents revealed an increasingly desperate situation in relation to inadequate food and medical supplies."[492]

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[490] *Ibid*.; *see also* Amnesty International, *"Caged without a Roof": Apartheid in Myanmar's Rakhine State* (November 2017), p. 55 ("Prior to 2012, around 73,000 Muslims reportedly lived in the town, about half the total population, mixing freely with the neighbouring communities and conducting business. Today, just over 4,000 remain, guarded by armed police, eight checkpoints and barbed wire blockades which separate them from the surrounding population."). MG, Vol. IV, Annex 104.

[491] UN Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, UN Doc. A/HRC/25/64 (2 April 2014), para. 44. MG, Vol. II, Annex 25.

[492] International State Crime Initiative, *Countdown to Annihilation: Genocide in Myanmar* (2015), p. 85. MG, Vol. IV, Annex 93.

6.75 Following his own visit to the ghetto, Holocaust survivor George Soros, founder of the Open Society Institute, reported:

> "In January [2015], when I visited Burma for the fourth time in as many years, I made a short visit to Sittwe, the capital of Rakhine State, in order to see for myself the situation on the ground. I met with state and local leaders and both Rakhine and Rohingya populations, and also talked to internally displaced persons and those mostly Rohingya living in a section of Sittwe called Aung Mingalar, a part of the city that can only be called a ghetto.
>
> In Aung Mingalar, I heard the echoes of my childhood. You see, in 1944, as a Jew in Budapest, I too was a Rohingya. Much like the Jewish ghettos set up by Nazis around Eastern Europe during World War II, Aung Mingalar has become the involuntary home to thousands of families who once had access to health care, education and employment.
>
> Now, they are forced to remain segregated in a state of abject deprivation.
>
> The parallels to the Nazi genocide are alarming."[493]

3. Confinement in Isolated Villages

6.76 Rohingya who are not confined in an internment camp or ghetto are restricted to isolated villages in central and northern Rakhine State, which

[493] George Soros, "As a Jew in Budapest, I too Was a Rohingya", *Newsweek* (31 May 2015). MG, Vol. IX, Annex 256.

they can only leave with great difficulty, if at all. As reported by the UN Fact-Finding Mission:

> "In northern Rakhine State, movement between villages is also restricted and curfews are imposed. Restrictions are enforced through multiple security checkpoints, which had reportedly risen to over 160 before 25 August 2017. In central Rakhine State, severe restrictions imposed since the 2012 violence have resulted in a policy of segregation of communities. Rohingya can generally not move to ethnic Rakhine areas, including the main towns and markets."[494]

6.77 Amnesty International corroborates the fact that the Rohingya are severely restricted in their movements beyond the limits of the villages that they inhabit. According to Amnesty International, its on-the-ground research:

> "paints an extremely bleak picture of Rohingya trapped in villages which they have essentially been unable to leave since 2012. All of the Rohingya Amnesty International interviewed in 11 different villages in central Rakhine State said that they are not allowed to travel to Rakhine villages, and have not been able to travel to the main town of their township ... The only travel permitted is to other Muslim villages in the township, however they are not

[494] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 525. MG, Vol. II, Annex 40.

> allowed to use roads and can only use waterways to reach these villages."[495]

6.78 Amnesty International reports that the documentary requirements imposed by Myanmar for such limited travel as the Rohingya are allowed are so onerous that they make even this travel all but impossible.[496] Any Rohingya seeking to travel outside his or her village first must obtain a Village Departure Certificate, travel to the Township Immigration Department at the intended destination and submit a travel application in person.[497] As a teacher from Buthidaung Township testifies:

> "We could not go to the Township unless you got permission. The government would have to issue you a document they called TOHCENSHAH to allow you in the travel to the Township. Only the Rohingya needed permission to travel, the Buddhist could go anywhere without permission."[498]

Even when Rohingya are able to satisfy the requirements for authorization to travel outside their villages, the physical and psychological abuses they are forced to endure at Myanmar's ubiquitous security checkpoints

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[495] Amnesty International, *"Caged without a Roof": Apartheid in Myanmar's Rakhine State* (November 2017), p. 48. MG, Vol. IV, Annex 104.

[496] *Ibid*., p. 49.

[497] Republic of the Union of Myanmar, Immigration and National Registration Department of Rakhine State, *Instruction relating to travelling of foreigners, persons who are doubted as foreigners and Bangali races residing within Rakhine State* (June 1997) (original and translation), p. 3. MG, Vol. VI, Annex 175. *See also* Fortify Rights, *Policies of Persecution* (2014), p. 30, note 39 (explaining that the Rohingya are required to inform authorities within seven days of all movements from one place to another). MG, Vol. IV, Annex 91. Once at the destination, the applicant must also present, along with the Village Departure Certificate, "several identification documents, a police clearance form, and a payment to Immigration Department for their assistance." Independent Rakhine Initiative, *Freedom of Movement in Rakhine State* (March 2020), p. 38. MG, Vol. V, Annex 129.

[498] [redacted] MG, Vol. X, Annex 339.

constitute further barriers. At these checkpoints, they may encounter intimidation, arbitrary arrest, sexual assault, torture or arbitrary killing by the Myanmar Police Force, the BGP, the Tatmadaw or Myanmar's Immigration Department.[499]

6.79 Because the Rohingya are unable or not allowed to travel to towns populated by ethnic Rakhine, they are prevented from accessing government institutions, located in those towns, for the various authorizations, permissions and registrations they need to work, to obtain healthcare, or to receive humanitarian assistance, and this, according to Amnesty International, "has a significant impact on their lives and rights".[500]

6.80 In regard to access to healthcare, the UN Fact-Finding Mission found that the restrictions Myanmar has placed on the Rohingya's freedom of movement, as well as other bureaucratic obstacles, have:

> "led to numerous undue delays in reaching medical facilities. Restrictions have been enforced strictly, even in the case of women in obstructed labour, infants needing emergency oxygen, people suffering from heart attacks and people with severe

[499] Independent Rakhine Initiative, *Freedom of Movement in Rakhine State* (March 2020), pp. 31-34 (checkpoints are "the most ubiquitous formal restriction on freedom of movement", as they are present in both northern and central Rakhine State, in rural and urban areas. In northern Rakhine, they are staffed by representatives of the Myanmar Police Force, the Tatmadaw, the BGP and Myanmar's Immigration Department (amongst others). In both northern and central Rakhine, checkpoints are regularly manned by the Tatmadaw and BGP in rural areas and by Myanmar Police Force in urban areas.) MG, Vol. V, Annex 129. *See also* United Nations and Partners, *Humanitarian Response Plan, January–December 2019* (December 2018), p. 12. MG, Vol. III, Annex 43.

[500] Amnesty International, *"Caged without a Roof": Apartheid in Myanmar's Rakhine State* (November 2017), p. 49. MG, Vol. IV, Annex 104.

> disabilities. In some cases, the delays caused by these restrictions have been fatal."[501]

6.81 A Rohingya woman in central Rakhine State described the consequences of these restrictions: "If we cannot access the hospital, patients die. Many people died this way. Ninety per cent of serious patients die."[502]

6.82 The Rohingya's access to healthcare has been limited even further by Myanmar's imposition of curfews in Rohingya villages and townships since 2012, which ban any kind of travel to a healthcare center or hospital after dark. As recounted by a Rohingya man from Maungdaw Township: "[w]e can only go to the hospital during the day, if we need to go to the hospital at night, it's really difficult. I have two relatives that have died in the night because they were not able to travel to the hospital at night."[503]

6.83 In these circumstances, the Rohingya have become heavily dependent on international humanitarian organizations for whatever medical treatment they are able to obtain.[504] It has thus been particularly harmful to them that Myanmar, prior to the "clearance operations" launched against the Rohingya from 2016-2018, began restricting the activities of those organizations. MSF, for example, used to operate four primary health care clinics in northern Rakhine State, where it was providing 11,000

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[501] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 550, 570. MG, Vol. II, Annex 40.

[502] Independent Rakhine Initiative, *Freedom of Movement in Rakhine State* (March 2020), p. 128. MG, Vol. V, Annex 129.

[503] *Ibid*., p. 126.

[504] *Ibid*., p. 129. The Independent Rakhine Initiative reports that "Rohingya in need of urgent care *simply did not receive permission* to travel from Immigration Department officials."

primary and reproductive consultations per month, as well as emergency transport and assistance for patients requiring hospitalization.[505] That was until Myanmar required MSF to terminate all of those services, on 11 August 2017, two weeks prior to the second wave of "clearance operations".[506] A year later, in August 2018, MSF still was not authorized by Myanmar to resume operations.[507]

6.84 The USHMM has called special attention to Myanmar's denial of access to healthcare for the Rohingya:

> "For the Rohingya, the lack of adequate health facilities in Rakhine State is exacerbated by the discriminatory and onerous restrictions on movement, access to food, and land use enforced by the Myanmar government against the Rohingya. This results in a situation of extreme vulnerability and inhumane and unsafe living conditions."[508]

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[505] Médecins Sans Frontières, *Myanmar Continues to Block Humanitarian Access in Rakhine State* (10 August 2018). MG, Vol. IV, Annex 116; Médecins Sans Frontières, *International humanitarian access to Rakhine State must urgently be permitted* (18 September 2017). MG, Vol. IV, Annex 106.

[506] Médecins Sans Frontières, *Myanmar Continues to Block Humanitarian Access in Rakhine State* (10 August 2018). MG, Vol. IV, Annex 116; Médecins Sans Frontières, *International humanitarian access to Rakhine State must urgently be permitted* (18 September 2017). MG, Vol. IV, Annex 106.

[507] Médecins Sans Frontières, *Press Release: Independent humanitarian agencies and access to healthcare still blocked in northern Rakhine* (15 August 2018). MG, Vol. IV, Annex 117.

[508] United States Holocaust Memorial Museum, *Practical Prevention: How the Genocide Convention's Obligation to Prevent Applies to Myanmar* (24 June 2020), p. 7. MG, Vol. VII, Annex 195.

4. Deprivation of Food

6.85 The restrictions imposed by Myanmar on the Rohingya have not only prevented them from obtaining needed healthcare; they have also prevented them from obtaining food. In its 2019 Report, the UN Fact-Finding Mission placed the blame squarely on these restrictions for what it called the "food insecurity" experienced by the Rohingya: "Food insecurity is being caused by Government laws and policies, including stringent restrictions on movement and the Tatmadaw's use of Rohingya land that prevents them from farming and related activities."[509] That was consistent with the Amnesty International report in 2018, that the Rohingya population "has long faced acute food insecurity, as the authorities' restrictions on their movement have critically undermined livelihoods, including the ability to fish, farm, collect wood, and sell goods at market".[510]

6.86 Amnesty International characterized Myanmar's restrictions on the movement and activities of the Rohingya as a policy of "forced starvation":

> "By denying access to rice fields; burning several markets and denying access to others; severely restricting access to humanitarian organizations who provide food and other essential aid; and turning a blind eye to the looting of Rohingya livestock by non-Rohingya villagers, the Myanmar authorities, in particular the military, have in

[509] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 156. MG, Vol. III, Annex 49.

[510] Amnesty International, *"We Will Destroy Everything": Military Responsibility for Crimes Against Humanity in Rakhine State, Myanmar* (June 2018), p. 107. MG, Vol. IV, Annex 112 [**hereinafter** Amnesty International, *"We Will Destroy Everything"* (2018)].

> effect instituted a policy of forced starvation."[511]

6.87 Amnesty International was not alone in sounding an alarm over the "forced starvation" of the Rohingya. In 2019, the Committee on the Elimination of Discrimination against Women reported that the approximately 600,000 Rohingya remaining in Rakhine State after the 2016-2018 "clearance operations" were "experiencing conditions of *forced starvation*, with security forces denying access to the remaining rice fields and markets".[512]

6.88 As a consequence, the Rohingya have been forced "to depend heavily on food aid for survival", according to Amnesty International.[513] However, instead of facilitating the Rohingya's access to humanitarian aid, as even Myanmar's own investigatory commissions have recommended,[514] since 2012 the Government has steadily increased restrictions on it, substantially reducing the amount of food and other necessities that are available to the Rohingya.[515] In a June 2018 Report, Amnesty International emphasized the calculated nature of Myanmar's obstruction of humanitarian assistance, both during and after the "clearance operations"

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[511] Amnesty International, *Briefing: Myanmar Forces Starve, Abduct and Rob Rohingya, as Ethnic Cleansing Continues* (February 2018), pp. 1-2. MG, Vol. IV, Annex 111.

[512] *See* UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 158. MG, Vol. III, Annex 49; UN OHCHR, *Statement by Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 37th session of the Human Rights Council* (12 March 2018), p. 2. MG, Vol. II, Annex 32.

[513] Amnesty International, *"We Will Destroy Everything"* (2018), pp. 107-108. MG, Vol. IV, Annex 112.

[514] Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on the Rakhine State* (August 2017), p. 28. MG, Vol. IV, Annex 103.

[515] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 167. MG, Vol. III, Annex 49.

carried out by the Tatmadaw: "Deliberate restrictions on humanitarian access—still present at time of publication, though less severe than in the crisis's first months—have prevented aid from reaching many who needed it, with the foreseeable result of starving out Rohingya who stayed through the acute violence."[516]

6.89 The UN Fact-Finding Mission concluded that "the Government's movement restrictions, deprivation of food, restrictions on land use and denials of humanitarian relief" constitute "retrogressive measures" that "deny Rohingya access to food and put their health and lives at risk".[517] In the view of the Mission "it is unconceivable that the Government is unaware of these consequences".[518]

[516] Amnesty International, *"We Will Destroy Everything"* (2018), p. 108. MG, Vol. IV, Annex 112.

[517] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), paras. 171-172. MG, Vol. III, Annex 49.

[518] *Ibid*., para. 172.

CHAPTER 7
OFFICIAL AND OFFICIALLY-SANCTIONED HATE SPEECH AGAINST THE ROHINGYA

7.1 Myanmar's imposition of laws and policies that discriminated against, denaturalized and isolated the Rohingya, and restricted their rights, was accompanied by a concerted and constant campaign of hate speech directed at them by the Government and its allied forces in the Buddhist religious community. The anti-Rohingya hate speech was propagated through the publication of provocative, malicious, disparaging and dehumanizing verbal attacks, emanating from senior Tatmadaw commanders, high government officials and influential religious leaders.

7.2 The campaign of official and officially-sanctioned hate speech, carried out over many years, depicts the Rohingya as ugly, inferior, dishonest and animal-like "Bengalis", who were alien to Myanmar and had no rightful place in it. Government leaders, especially in the Tatmadaw, regularly called them an existential threat to Myanmar's "national races", including especially ethnic Rakhine Buddhists, and incited those groups to rise up against them. The Government's hate speech also incited the security forces dispatched for "clearance operations" in 2016-2018, and led them to engage in acts of extreme savagery against the Rohingya, including mass killings of men, women, children and infants in brutal fashion; burning to the ground thousands of homes and hundreds of villages; and horrendous sexual violence, including pervasive rape, gang rape and sexual mutilation of Rohingya women and girls. In carrying out these well-documented atrocities, Tatmadaw officers and enlisted personnel routinely shouted out the same racial and religious slurs that they had heard repeatedly from their senior commanders over many years.

7.3 Myanmar's verbal attacks on the Rohingya were led by the most powerful figure in the country: the Commander-in-Chief of the Tatmadaw, Senior-General Min Aung Hlaing. From the time of his appointment to that position in 2011, Senior-General Hlaing orchestrated a propaganda war against the Rohingya that repeatedly characterized them as inferior "Muslim dogs" and "Bengalis", native to Bangladesh rather than Myanmar, whose high birth rate and large families threatened to "swallow" the ethnic Rakhine population, and displace it as the dominant ethnic and religious group in the region, if not extinguish it altogether, unless the "Bengali problem" were finally "solved", as he pledged the Tatmadaw would do in the "clearance operations".

7.4 The UN Fact-Finding Mission concluded that the hate speech propagated by the Commander-in-Chief, and by other Myanmar officials and State-controlled outlets, in which the Rohingya were "systematically referred to in derogatory and dehumanizing terms", was specifically intended to deny their existence as a distinct racial, ethnic, or religious group; "exclude them from the Myanmar nation to which they once belonged, in pursuit of an exclusionary vision based on 'national races'"; incite hatred and violence against them; and prepare for their ultimate destruction as a group by means of the "clearance operations".[519] The Mission concluded that the "specific utterances of government officials, politicians, religious authorities and military commanders, as well as of direct perpetrators prior, during and after the violence" indicated that Myanmar acted with genocidal intent.[520]

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[519] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1420-1422. MG, Vol. II, Annex 40.

[520] *Ibid*., para. 1422.

7.5 Similar anti-Rohingya hate speech was regularly disseminated to vast audiences in Myanmar, especially in Rakhine State, by influential Buddhist leaders who had long espoused, and pressured the government to turn Myanmar into, an ethnically and religiously "pure" State by, *inter alia*, extirpating the Rohingya Muslims.[521] The UN Fact-Finding Mission concluded that, like the Tatmadaw and its Commander-in-Chief, and senior civilian members of the government, these religious leaders engaged in a coordinated campaign to "debase and humiliate" the Rohingya group, so as to "strip it of its humanity in the eyes of the eventual direct perpetrators",[522] that is, the security forces that carried out the "clearance operations".

7.6 The UN Fact-Finding Mission found that the hateful and dehumanizing language used by these forces, as well as the brutal violence and other inhumane treatment they inflicted on the Rohingya, were directly related to their exposure to, and absorption of, decades of "derogatory, discriminatory and exclusionary" hate speech against the Rohingya emanating from their highest military, governmental and religious authorities.[523] According to the UN Fact-Finding Mission:

> "The use of such derogatory, discriminatory and exclusionary language on the ground in the course of military operations is hardly surprising: it mirrors the statements made by the Tatmadaw Commander-in-Chief, Senior-General Min Aung Hlaing. The public statements of the Senior-General and his Office reveal a deeply exclusionary vision, mirroring the hateful anti-Rohingya rhetoric promoted by influential, ultranationalist

[521] *See ibid*., paras. 736-738.

[522] *Ibid*., para. 1421.

[523] *Ibid*., para. 1379.

> Buddhist groups. He has denied that a group called 'Rohingya' exists, consistently called this group 'Bengali', and associated them with illegal immigration, terrorism and extremism. He has denied their suffering and—in the midst of a most brutal military campaign—denied any wrongdoing by the military and praised its discipline. At the same time, he has asked the Myanmar 'ethnics', in his terms the non-Rohingya population of Myanmar, to be patriots in facing the threats to the nation. In doing so, he has effectively made the entire Rohingya group the enemy. These statements are part of a broader propaganda campaign, spreading demonstrably false information and inciting hatred, discrimination and violence."[524]

7.7 In short, the anti-Rohingya hate speech that long issued from the highest military, civilian and religious authorities in Myanmar—dehumanizing the Rohingya and depicting them as mortal enemies of the local population and the State—produced its logical effects, by "inciting hatred, discrimination and violence" against them.

7.8 This Chapter is divided into three Sections. **Section I** describes the anti-Rohingya hate speech disseminated by the Tatmadaw, especially its Commander-in-Chief, Senior-General Hlaing, by other military sources and by senior civilian officials of the national and Rakhine State

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[524] *Ibid*., para. 1379; *see also* UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. A/HRC/40/68 (5 March 2019), paras. 52, 54 (reporting that "hate speech and misinformation" coming from "public institutions linked to the military, its supporters, extremist religious groups, and members of the Government continue to proliferate", and that the "pervasive nature of hate speech is alarming, particularly that it is used by senior Government officials"). MG, Vol. III, Annex 44; US Department of State, *Atrocities in Northern Rakhine* (2018), p. 9. MG, Vol. VII, Annex 194.

governments. **Section II** discusses how prominent Buddhist religious leaders continuously propagated hatred of the Rohingya and pushed the government and military to undertake violence against them for the purpose of destroying them as a group in Myanmar. Finally, **Section III** recounts how these hate-filled messages influenced and motivated the security forces, and the local Rakhine Buddhist population, to engage in acts of extreme and unprecedented brutality during the "clearance operations" of 2016-2018.

I. Anti-Rohingya Hate Speech Propagated by the Tatmadaw and Other Governmental Authorities

7.9 Under Senior-General Hlaing's leadership, the Tatmadaw carried out a propaganda campaign to stigmatize the Rohingya, to arouse the local Rakhine population against them, and to motivate the soldiers ultimately tasked with attacking them to act with extreme brutality, and show no compassion or mercy. To this end, Senior-General Hlaing repeatedly invoked longstanding national myths regarding the Rohingya's arrival and presence in Myanmar, and the threat they allegedly posed to the ethnic Rakhine people. He made a particularly provocative statement in September 2017, while the Tatmadaw's second wave of "clearance operations" was underway, in which he referred to them, as was his custom, as "Bengalis":

> "Rakhine ethnics lost their land in the Alethankyaw crisis that broke out in Rakhine State in 1942 in which Bengalis attacked, murdered and coerced them into leaving their homes. We will never let such a terrible occurrence happen again. … During the Alethankyaw crisis in 1942, over 20,000 ethnic Rakhine people were slaughtered.

> Bengalis after murdering ethnic Rakhine people seized their land and villages and lived there. … *The Bengali problem was a long-standing one which has become an unfinished job despite the efforts of the previous governments to solve it. The government in office is taking great care in solving the problem.*"[525]

7.10 The UN Fact-Finding Mission found that Senior-General Hlaing's linkage of the Rohingya's purported historical wrongs with the "unfinished job" of solving the "Bengali problem", and the pledge by the "government in office" to finally "solve it", revealed that Myanmar's objective was not just, as it claimed, to combat "terrorism", but more fundamentally to attack and destroy "all Bengali":

> "[T]he Commander-in-Chief's explicit link between the 2017 'clearance operations' in Rakhine State and an 'unfinished' 'Bengali problem' dating back to 1942 reveals that the 2017 military operation was not (only) to respond to the ARSA attacks and to quell the threat posed by this group, as has been claimed. It rather speaks to a broader objective on the part of the Tatmadaw with historical roots and reinforces the narrative that *all* 'Bengali' are a problem and that a distinction between 'terrorists' and civilians/victims is not relevant."[526]

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[525] Senior-General Min Aung Hlaing, "Entire government institutions and people must defend the country with strong patriotism" (2 September 2017) (emphasis added). MG, Vol. VI, Annex 150; *see also* UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 753. MG, Vol. II, Annex 40; Simon Lewis, Zeba Siddiqui, Clare Baldwin & Andrew R.C. Marshall, "Tip of the Spear", *Reuters* (26 June 2018). MG, Vol. IX, Annex 284.

[526] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1336. MG, Vol. II, Annex 40.

7.11 In Myanmar's official version of history, the Rohingya do not exist as a people. Those who call themselves "Rohingya" are mere "Bengalis", who are not native to Myanmar regardless of their place of birth (or their parents' or grandparents' places of birth) and who are not entitled to citizenship in Myanmar or any of the rights accorded to citizens. This has been a central theme expounded repeatedly by Senior-General Hlaing and other government officials, especially as justification for the "clearance operations". In September 2017, the Tatmadaw's Commander-in-Chief declared:

> "As regards the term Bengali, … as the Bengalis in Rakhine State came from Bengal region …, they have been termed Bengalis throughout the successive eras. It is known that in India people living in Bengal are also called Bengalis. The Bengalis calling themselves Rohingya has become a national cause. So we openly declare that 'absolutely, our country has no Rohingya race.'"[527]

7.12 The Senior-General disseminated the same propaganda again later in the same month, September 2017:

> "The term 'Rohingya' was not present in the country's history. The term 'Bengali' was used since the colonial era. The country could not accept and recognize the term 'Rohingya' by hiding the truth. Rakhine ethnics are only our indigenous people who

[527] Senior-General Min Aung Hlaing, "Entire government institutions and people must defend the country with strong patriotism" (2 September 2017). MG, Vol. VI, Annex 150; *see also* UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1330. MG, Vol. II, Annex 40.

> had long been living there since the time of their forefathers."[528]

7.13 The "Bengali problem" in Rakhine State, according to the Commander-in-Chief, is not a product of Myanmar's refusal to recognize the Rohingya as an ethnic group. To the contrary, it is caused by the refusal of those who identify themselves as Rohingya to accept their own non-existence. Thus, the "problem" lies, in Myanmar's official view, in the insistence by the Rohingya that their distinct ethnic identity be recognized, and in their demand for the rights of citizens, like those born in Myanmar of other ethnic groups. As the Senior-General explained during the "clearance operations" in October 2017:

> "[T]hey came from Bengal, so they were called Bengalis. [T]hose Bengalis are not Myanmar ethnics. ... Bengalis themselves needed to accept the fact that they were Bengalis, not Rohingya ...".[529]

7.14 According to the Commander-in-Chief, the Rohingya must not only stop identifying themselves as such; they must also stop demanding the rights of citizenship. In March 2018, he blamed the "tensions" in Rakhine State, which purportedly justified the most recent "clearance operations", on the Rohingya themselves, for having the audacity to insist that they be given citizenship in Myanmar despite their irredeemably foreign nature:

> "The Bengalis do not have any characteristics or culture in common with the

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[528] Senior-General Min Aung Hlaing, "Lack of country-loving spirits may lead to disunity and all citizens should have country-loving spirits, patriotic spirits and Myanmar spirits" (11 September 2017). MG, Vol. VI, Annex 151.

[529] Senior-General Min Aung Hlaing, "Crisis in Rakhine State Can Be Solved Only Through Comprehensive Knowledge of the Historical Facts" (16 October 2017). MG, Vol. VI, Annex 153.

> ethnicities of Myanmar. The tensions [in Rakhine State] were fuelled because the Bengalis demanded citizenship."[530]

7.15 In September 2018, Senior-General Hlaing again denounced the Rohingya's demand for citizenship, which he rejected, at the same time that he made clear that, in contrast to other ethnic groups, their "security and interest" would receive no protection from the Tatmadaw:

> "With regard to the issue of Rakhine State, Bengalis are not ethnic of Myanmar. Rohingya is not included on the list of Myanmar's ethnics. Bengalis intentionally demand to have the rights of ethnics as the name of Rohingya. The Tatmadaw on its part will give priority to safeguarding the security and interest of the ethnics while protecting the citizens residing in Myanmar."[531]

7.16 The Commander-in-Chief has regularly characterized the Rohingya as an existential threat to the ethnic Rakhine people and other recognized "national races", citing their purportedly rampant population growth and alleged attempts to seize all lands for themselves, a deliberate libel intended to incite those groups to violence against them, or at least win their support for the Tatmadaw's "clearance operations" aimed at destroying them:

> "[T]he Bengali population exploded and the aliens tried to seize the land of local ethnics. … Race cannot be swallowed by the ground

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[530] "Min Aung Hlaing Warns Against Anti-military Sentiment", *DVB* (21 March 2018). MG, Vol. IX, Annex 280; *see also* UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1328. MG, Vol. II, Annex 40.

[531] Senior-General Min Aung Hlaing, "Tatmadaw will practically realize possibilities in connection with peace based on embrace of multi-party democracy and observance of Our Three Main National Causes" (17 October 2017). MG, Vol. VI, Annex 154; *see also* UN Fact-Finding Mission, *Report of the Detailed Findings (2018)*, para. 1330. MG, Vol. II, Annex 40.

> but only by another race. All must be loyal to the State in serving their duties, so that such cases will never happen again."[532]

7.17 These were also the views of Myanmar's civilian authorities. They were officially espoused, for example, by Myanmar's Ministry of Foreign Affairs, which sent to "several UN offices" links to four propaganda videos containing anti-Rohingya messaging, including that Myanmar faces a "threat posed by 'encroaching Islamic forces' that wish to 'annihilate [the ethnic Rakhine community] and all other non-Muslims and destroy the deeply-rooted indigenous Buddhist culture, and even Buddhism itself'".[533] The UN Fact-Finding Mission found that it was "highly significant that the Ministry headed by Daw Aung San Suu Kyi took the initiative of sharing such videos with the United Nations".[534]

7.18 The Ministry of Foreign Affairs also condoned anti-Rohingya hate speech and incitement to violence on its social media platforms, including those of its embassies abroad. Myanmar's Embassy in Dhaka, for example, retained on its Facebook page a comment about the Rohingya, on a posting dated 30 April 2019, which read: "Kill them all so that there is no trouble."

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[532] Senior-General Min Aung Hlaing, "Gallant Efforts to Defend the HQ Against Terrorist Attacks and Brilliant Efforts to Restore Regional Peace, Security are Honoured" (20 September 2017). MG, Vol. VI, Annex 152.

[533] Emanuel Stoakes & Ben Dunant, "Myanmar foreign ministry emails UN agencies weblinks to anti-Rohingya film", *Frontier* (18 September 2018). MG, Vol. IX, Annex 297.

[534] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), note 3000. MG, Vol. II, Annex 40; Myanmar's Embassy in London also disseminated similar materials to a British parliamentary committee. Ben Dunant, "Yangon Region minister hosts American anti-Rohingya activist", *Frontier* (9 November 2018). MG, Vol. IX, Annex 301.

That message has remained on the Myanmar Embassy's Facebook page to this day.[535]

7.19 For more than half a century, Myanmar has clung tightly to its avowedly racist ideology that exalts certain racial groups above others as "pure of blood", and depicts them as under constant threat of extinction at the hands of other, "impure races". According to this theory, the "impure races", especially the Rohingya, originated elsewhere, came to the country illegally and reproduced themselves so rapidly—by multiple wives and offspring—that they are a threat to "swallow up" and render extinct the pure-blooded, "national races". This has been Myanmar's attitude toward the Rohingya since at least 1962, when the Head of State, General Ne Win, first articulated the proposition that: "The earth will not swallow a race to extinction but another race will."[536]

7.20 This precept has endured as an official policy of Myanmar to this day. The motto of the Ministry of Labour, Immigration and Population, for example, is that very sentence: "The earth will not swallow a race to extinction but another race will."[537] This is prominently displayed on the Ministry's website, in large blue font, even as of today, as shown in Figure 7.1 (following page 178).[538]

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[535] Union of the Republic of Myanmar, Myanmar Embassy Dhaka Facebook Page Comment, *Facebook* (30 April 2019). MG, Vol. VI, Annex 160.

[536] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 698-699. MG, Vol. II, Annex 40.

[537] *Ibid*., para. 1338.

[538] *Ibid*., paras. 699, 1338, note 2961. MG, Vol. II, Annex 40; Republic of the Union of Myanmar, *Official Website of Myanmar's Ministry of Immigration and Population* (last accessed 10 October 2020) (original and translation) (red box and annotations added to indicate identified text). MG, Vol. VI, Annex 148.

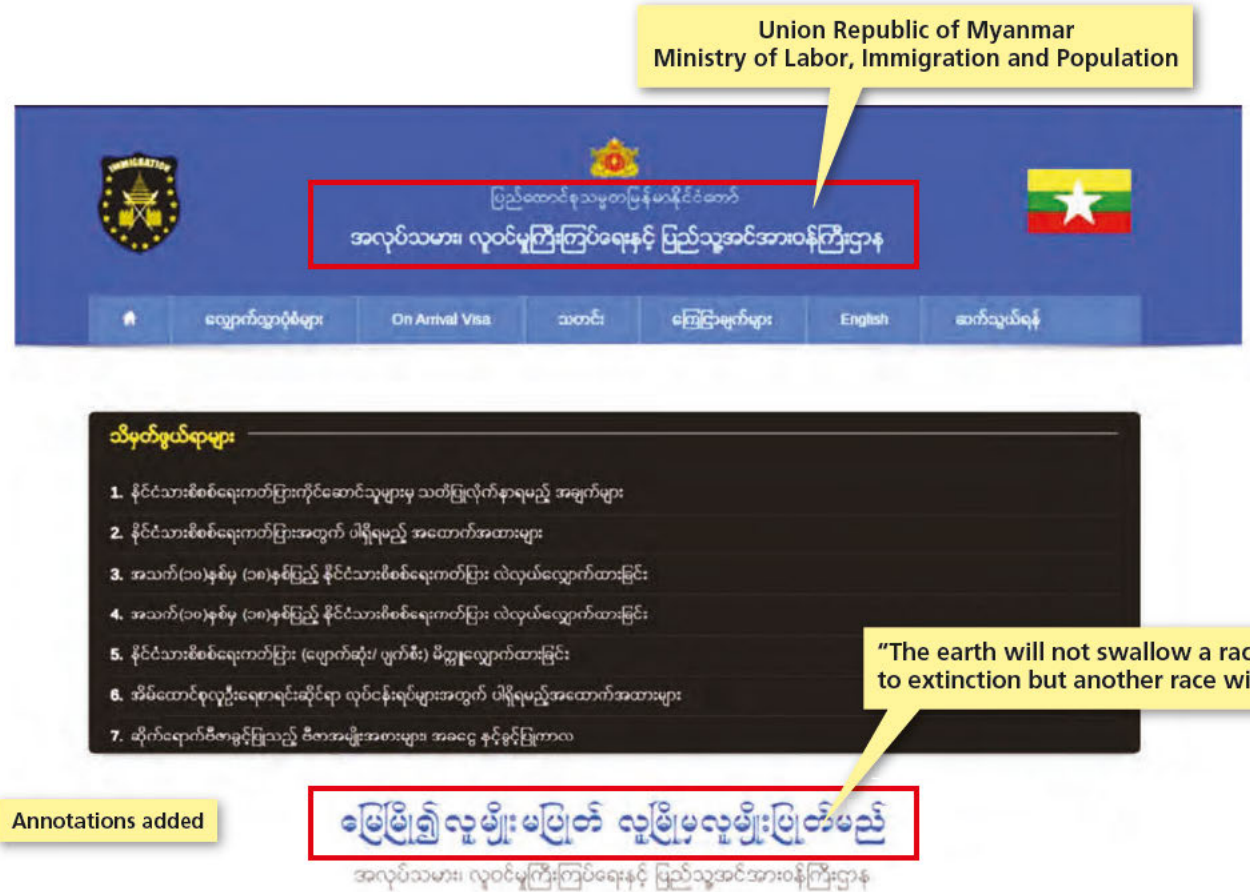
7.21 Myanmar's racially-oriented ideology, that the "impure races"—especially Rohingya Muslims—reproduce themselves prolifically and grow in numbers so rapidly that they threaten to "swallow" and extinguish the ethnically "pure" races, including Rakhine Buddhists, permeates not only the Tatmadaw and the Ministry of Labour, Immigration and Population, but the entire government. The Minister for Religious and Cultural Affairs, for example, publicly complained in November 2018 about the threat to Myanmar's "national races" represented by the "exploding population" of the "Bengalis", who, as Muslims, supposedly "take three or four wives and have families with 15 or 20 children".[539]

7.22 By this logic, the destruction of the Rohingya, by means of the "clearance operations", was necessary to *prevent genocide*, that is, the "genocide" against the "national races" that would have been perpetrated *by the Rohingya,* had not the Tatmadaw intervened to solve the "Bengali problem" once and for all. This was, in fact, the explanation for the "clearance operations" given by Senior-General Hlaing in December 2017:

> "During the latest terrorist attack in Rakhine State on 25 August 2017, … villages of local national races were threatened and many local national races people were murdered. … Although the government and Tatmadaw are carrying out the tasks under the rule of law, the international community received the false information. Our Tatmadaw have to safeguard the national races forever and carry out for them to live in unity and peace. *Tatmadaw must fully protect the ethnic*

[539] "Religion Minister Says 'Extreme Religion' Remarks Aimed at Rohingya", *The Irrawaddy* (4 December 2018). MG, Vol. IX, Annex 302.

Ministry of Labour, Immigration and Population
(screenshot of website homepage, http://www.mip.gov.mm, 10 October 2020)



Annotations added

Figure 7.1

minorities in Rakhine region not to have the genocide."[540]

7.23 The Senior-General made every effort to achieve the widest possible circulation of these comments, and the others cited above. To this end, he made them publicly available on his online social media accounts,[541] including the Facebook page for the Office of Commander-in-Chief, which had 2.9 million followers, and the separate Facebook page for Senior-General Hlaing himself, which had 1.4 million followers.[542] Both of these were eventually suspended by Facebook for propagating hatred of the Rohingya.[543] The Senior-General also disseminated his anti-Rohingya propaganda through local and international media. He was well aware, therefore, that up and down the chain-of-command all military personnel, including especially those charged with executing the "clearance operations" against the Rohingya, would understand that their mission was

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[540] Senior-General Min Aung Hlaing, "Try to be good officers who are reliable for higher officials, given respect by lower ranks, be trustworthy of the populace" (2 December 2017) (emphasis added). MG, Vol. VI, Annex 156.

[541] His personal website is at the address https://www.seniorgeneralminaunghlaing.com.mm.

[542] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1329. MG, Vol. II, Annex 40.

[543] Facebook removed his account for spreading "hate and misinformation". "Removing Myanmar Military Officials From Facebook", *Facebook* (28 August 2018). MG, Vol. IX, Annex 292; Antoni Slodkowski, "Facebook bans Myanmar army chief, others in unprecedented move", *Reuters* (27 August 2018). MG, Vol. IX, Annex 291. Russia's social media website, VKontakte, followed suit by suspending his account "due to a violation of the [VKontakte] terms of service", which prohibit users from publishing information that "propagandizes and/or contributes to racial, religious, ethnic hatred or hostility, [or] propagandizes fascism or racial superiority". VKontakte, *VK Terms of Service*. MG, Vol. X, Annex 331; Isabella Steger, "After getting kicked off Facebook, Myanmar's top general is banned from Russia's biggest social network", *Quartz* (17 September 2018). MG, Vol. IX, Annex 296. Twitter has also suspended the Senior-General's account for his use of hate speech. Jamie Fullerton, "Myanmar army chief's Twitter account suspended over anti-Rohingya hate speech", *The Guardian* (16 May 2019). MG, Vol. IX, Annex 308.

to attack the alien "Bengali" people whose presence in Myanmar threatened the existence of the "national races" who depended on the Tatmadaw's "protection".

7.24 Under the Senior-General's command, the Tatmadaw regularly spread the same anti-Rohingya messages on Facebook. Investigative reporting by *The New York Times* disclosed that the "Myanmar military were the prime operatives behind a systematic campaign on Facebook that stretched back half a decade and that targeted the country's mostly Muslim Rohingya minority group".[544] This campaign involved "hundreds of military personnel who created troll accounts and news and celebrity pages on Facebook and then flooded them with incendiary comments and posts timed for peak viewership".[545] Those accounts spreading the Myanmar Government's anti-Rohingya hate speech reached over 15 million people in Myanmar.[546]

7.25 Facebook confirmed the details of the *Times* report, and Facebook's Head of Cybersecurity Policy said the company, through its own investigation, had found "clear and deliberate attempts to covertly spread propaganda that were directly linked to the Myanmar military".[547] In 2018 and 2019, Facebook removed over 500 Facebook pages, 17 Facebook groups, 175 Facebook accounts and 16 Instagram accounts for engaging in

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[544] "A Genocide Incited on Facebook, With Posts From Myanmar's Military", *New York Times* (15 October 2018). MG, Vol. IX, Annex 299.

[545] *Ibid*.

[546] "Removing Myanmar Military Officials From Facebook", *Facebook* (28 August 2018). MG, Vol. IX, Annex 292; *see also* Nathaniel Gleicher, "Taking Down More Coordinated Inauthentic Behavior in Myanmar", *Facebook* (21 August 2019). MG, Vol. IX, Annex 314.

[547] "A Genocide Incited on Facebook, With Posts From Myanmar's Military", *New York Times* (15 October 2018). MG, Vol. IX, Annex 299.

"coordinated inauthentic behavior" that was "linked to the Myanmar military".[548] Facebook also banned "20 individuals and organizations from Facebook in Myanmar—including Senior-General Min Aung Hlaing … and the military's Myawady television network" in order to "prevent them from using our service [Facebook] to further inflame ethnic and religious tensions".[549]

7.26 In April 2020, Facebook reported that it had discovered and taken down, for the same reasons, a network of Facebook pages and accounts engaging in "coordinated inauthentic behavior" that was "linked … to members of the Myanmar Police Force", which is controlled by the Tatmadaw.[550] An independent analysis of the contents of the accounts linked to the Myanmar Police Force indicated that they "inflamed anti-Rohingya sentiment before, during and after" the "clearance operations" of 2017 by "presenting the Rohingya as terrorists, denying that atrocities against the Rohingya took place, amplifying reports of violence by the Rohingya on other groups, and dismissing the existence of the Rohingya in Myanmar".[551]

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[548] "Removing Myanmar Military Officials From Facebook", *Facebook* (28 August 2018). MG, Vol. IX, Annex 292; *see also* Nathaniel Gleicher, "Taking Down More Coordinated Inauthentic Behavior in Myanmar", *Facebook* (21 August 2019). MG, Vol. IX, Annex 314; DFRLab, "Inauthentic anti-Rohingya Facebook assets in Myanmar removed", *Medium* (5 May 2020). MG, Vol. IX, Annex 322.

[549] "Removing Myanmar Military Officials From Facebook", *Facebook* (28 August 2018). MG, Vol. IX, Annex 292.

[550] Facebook, *April 2020 Coordinated Inauthentic Behavior Report* (April 2020). MG, Vol. X, Annex 334.

[551] DFRLab, "Inauthentic anti-Rohingya Facebook assets in Myanmar removed", *Medium* (5 May 2020). MG, Vol. IX, Annex 322.

7.27 Official hate speech against the Rohingya did not commence with Senior-General Hlaing's arrival as Commander-in-Chief of the Tatmadaw in 2011. In fact, military and government leaders have long been making violent verbal attacks against the Rohingya, depicting them as subhuman, with no legal standing or right to live in the country, enemies of the State and the favoured "national races", and a threat to replace or "swallow" those races through rapid population growth and takeover of land. Each of these anti-Rohingya themes has been developed, advanced and mutually reinforced by the Tatmadaw and senior government officials (and, as shown in **Section II**, by Buddhist religious leaders) over many years.[552]

7.28 As early as the 1980s, the government distributed a book entitled *Fear of Extinction of the Race*, which presented Islam as an existential threat to Buddhism and called on Buddhists to "protect their race and religion" by, *inter alia*, boycotting Muslim shops, because "buying from them is like watering poisonous plants". [553] The book warned:

> "If we are not careful, it is certain that the whole country will be swallowed by the Muslim Kalars ... When we study world-history, we can see that different races of the world did not get swallowed to extinction by the earth, but only by other humans."[554]

7.29 A Tatmadaw training presentation, also entitled *Fear of Extinction of Race*, propagates the same narrative that the Rohingya pose a threat to

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[552] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1314-1317, 1328-1341. MG, Vol. II, Annex 40.

[553] *Ibid*., paras. 697-698.

[554] *Ibid*., para. 697.

Burmese racial and religious identity and existence. It contains the following passages:

- "[T]he danger of being swallowed up by Bangladeshi Chittagonian kowtow kalars truly exists."[555]
- "No race faces extinction from being swallowed up by the earth, but by human beings."[556]
- "Bengali Muslims ... infiltrate the people to propagate their religion."[557]
- "We need to protect our race and religion as much as possible. ... Otherwise, Buddhism may vanish".[558]

7.30 As these excerpts reflect, the Tatmadaw's training materials give prominence to the same admonition that originated with General Ne Win in 1962, and that has been part of Myanmar's guiding philosophy ever since, in slightly modified form: "No race faces extinction from being swallowed up by the earth, but by human beings."[559] The UN Fact-Finding Mission observed that through its training programme, the Tatmadaw indoctrinates cadets with the concept that Islam constitutes an existential threat to Buddhism, such that the "probability of (population) extinction…truly exists".[560] As shown above, the same ideology infects the civilian branches of government in Myanmar, including the Ministry of Labour, Immigration

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[555] Tatmadaw, Nyi Pyi Taw Divisional Military Headquarters, "Fear of Extinction of Race" (No. 13 Combatants Organizing School 2012) (original and translation), PDF p. 44. MG, Vol. VI, Annex 146.

[556] *Ibid*., PDF p. 45.

[557] *Ibid*.

[558] *Ibid*., PDF p. 49.

[559] *Ibid*., PDF p. 45.

[560] *Ibid*., PDF p. 44. *See also* UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 716. MG, Vol. II, Annex 40;

and Population, the Ministry of Religious and Cultural Affairs and the Ministry of Foreign Affairs.[561]

7.31 The political authorities in Rakhine State have expressed the same views. In June 2012, for example, the Rakhine Nationalities Development Party ("RNDP"), which at the time held the majority of seats in the Rakhine State legislature,[562] called for a "final solution" for the Rohingya, which it referred to as the "present population of Bengali".[563] It published the following passage in its magazine:

> "Today, the Union Government and the citizens collectively need to have a decisive stand on the issue of Bengali Muslims. We cannot afford to waste time. As long as we have our sovereignty, we do not need to care about any pressure … If we do not courageously solve these problems, which we have inherited from several previous generations … we will go down in history as cowards. *For our citizens, for the maintenance of Buddhism, for the protection of our culture, it is now time to sacrifice… Although Hitler and Eichmann were the greatest enemies of the Jews, they were probably heroes to the Germans. America had to drop nuclear bombs on Hiroshima and Nagasaki. Why? If inhumane acts are sometimes permitted to maintain a race, a country and the sovereignty ... our endeavours to maintain the Rakhine race and the sovereignty and longevity of the Union of*

[561] *See supra* paras. 7.17-7.21.

[562] The Rakhine Nationalities Development Party held 18 seats out of 35 seats in the Rakhine (Arakan) State parliament. *See* The Burma Fund UN Office, *Burma's 2010 Elections: A Comprehensive Report* (January 2011), p. 34, table 3. MG, Vol. II, Annex 24.

[563] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 713. MG, Vol. II, Annex 40.

> *Myanmar cannot be labelled as inhumane*."[564]

7.32 In the same month, the RNDP published a statement likening the presence of Rohingya to "a terrorist attack" on the Rakhine Buddhist people.[565] This followed the publication of *Paccima zone*, a magazine linked to senior Rakhine State officials, police chiefs and monks,[566] which included a series of anti-Rohingya articles with titles such as "Black tsunami in a pitiful disguise" and "Slow invasion".[567]

7.33 In May 2015, the Chair of the (so-called) Peace and Diversity Party, a political party in Myanmar that claims to oppose nationalism based on ethnicity or religion, had this to say about the Rohingya to an audience in Yangon:

> "I won't say much, I will make it short and direct. Number one, shoot and kill them! Number two, kill and shoot them! Number three, shoot and bury them! Number four, bury and shoot them! If we do not kill, shoot, and bury them, they will keep sneaking into our country!"[568]

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[564] *Ibid*., para. 1328 (some emphasis omitted).

[565] "Curfew imposed in Rakhine township amidst Rohingya terrorist attacks", *About Arakan* (8 June 2012). MG, Vol. IX, Annex 241; *see also* UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 708. MG, Vol. II, Annex 40.

[566] The first volume of the *Paccima zone* magazine contains a foreword drafted by the Maungdaw District Administrator, and lists some of the most senior State officials and police chiefs from Maungdaw and Buthidaung Townships as "patrons" and "committee Members". The volume also includes the name and pictures of monks who were "consultants". UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 701. MG, Vol. II, Annex 40.

[567] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 702. MG, Vol. II, Annex 40.

[568] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1328 (emphasis omitted), 1423. MG, Vol. II, Annex 40; *see also* Youtube, Video "SHOCKING

7.34 In February 2009, Ye Myint Aung, then Myanmar's Consul-General for Hong Kong and Macau, wrote in a letter disseminated to all heads of Mission and Consular Corps in Hong Kong and Macau:

> "In reality, Rohingya are neither 'Myanmar People' nor Myanmar's ethnic group. You will see in the photos that their complexion is 'dark brown'. The complexion of Myanmar people is fair and soft, good looking as well. (My complexion is a typical genuine one of a Myanmar gentleman and you will accept that how handsome your colleague Mr. Ye is.) It is quite different from what you have seen and read in the papers. (They are as ugly as ogres.)"[569]

7.35 In October 2016, when the first "clearance operations" began, the State-controlled *Global New Light of Myanmar* published an article entitled *The Thorn Needs Removing If It Pierces!* which depicted the Rohingya as "thorns" requiring "removal" because they are "foreigners who profess other religions", and are responsible for the "problems of offending the country's sovereignty, threatening the populace's lives and property, violating the rule of law and causing instability".[570] The article concluded: "In other words, the thorn has to be removed as it pierces."[571]

VIDEO! YOU WILL LOSE FAITH IN HUMANITY (Call for the Genocide of the Rohingya people)" (28 May 2015) *available at* https://www.youtube.com/watch?v=O59n9M6jB28; UN General Assembly, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. A/70/412 (6 October 2015), para. 31. MG, Vol. II, Annex 27.

[569] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1328. MG, Vol. II, Annex 40.

[570] *Ibid*., para. 1328. MG, Vol. II, Annex 40, quoting Khin Maung Oo, "The Thorn Needs Removing If It Pierces!", *The Global New Light of Myanmar* (31 October 2016). MG, Vol. IX, Annex 260.

[571] *Ibid*.

7.36 The next month, in November 2016, while the "clearance operations" were in full progress, the same State-run periodical published a similar article, likening the Rohingya to "fleas" that are "sucking our blood" and "trying to disintegrate our unity":

> "In fact, extremists, terrorists, ultra-opportunists and aggressive criminals can be likened as fleas that we greatly loathe for their stench and for sucking our blood. Those human fleas are destroying our world by killing people and harming others' sovereignty. *Likewise, our country is also facing the danger of the human fleas.* A flea cannot make a whirl of dust, but they are trying to combine with each other to amass their force. And they are trying to disintegrate our unity and strength in many ways, by waging armed attacks, spreading rumours and performing subversive activities. We should not underestimate this enemy. At such a time when the country is moving toward a federal democratic nation, with destructive elements in all surroundings, we need to constantly be wary of the dangers of detestable human fleas."[572]

7.37 As the UN Fact-Finding Mission observed, publications like these:

> "present the entire Rohingya population as terrorists; assert that the term 'Rohingya' was invented to take over the land; make reference to a 'Rohingya invasion'; challenge the claim that the Rohingya suffer human rights violations; portray the Rohingya as perpetrators of serious abuses;

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[572] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1328. MG, Vol. II, Annex 40, quoting Khin Maung Oo, "A Flea Cannot Make a Whirl of Dust, But", *The Global New Light of Myanmar* (26 November 2016) (emphasis added). MG, Vol. IX, Annex 261.

> and accuse the international community of believing 'Rohingya lies' and in prioritising Maungdaw and Buthidaung over other parts of Rakhine State. In one article, the Rohingya are referred to as the 'common enemy' of all the ethnic groups in Myanmar."[573]

7.38 Presenting the Rohingya as "terrorists" plotting the destruction of other ethnic groups inevitably incites and invites other groups to destroy them, as an act of self-preservation. The Nazis, for example, repeatedly accused the Jewish people of hatching a *Mordplot* (murderous plan) to eliminate non-Jews. In 1943, Reichsführer Heinrich Himmler told senior SS officers that "we had the moral right … to wipe out [the Jewish people] bent on wiping us out".[574] Rwandan Hutu propagandists employed the same strategy to instigate genocide against the Tutsis, justifying it on the ground that the Tutsis "only want to exterminate us: they have no other aim".[575] Likewise, in Bosnia, General Ratko Mladić, convicted of genocide by the ICTY, defended his forces' destruction of entire Muslim communities because, in his words, they were planning "the complete annihilation of the Serbian people".[576] As explained by the Dangerous Speech Project, headed by a Harvard University expert and former fellow at the USHMM: "To predict violence from another group is especially powerful (whether the

[573] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 702. MG, Vol. II, Annex 40.

[574] Dangerous Speech Project, *Dangerous Speech: A Practical Guide* (4 August 2020). MG, Vol. V, Annex 131.

[575] *Ibid*.

[576] *Ibid*.

threat is real, false, or exaggerated) since it makes violence against that group seem defensive and necessary."[577]

7.39 In July 2018, the Tatmadaw, through its Directorate of Public Relations and Psychological Warfare, published a 117-page treatise entitled *Myanmar Politics and the Tatmadaw: Part (I)*, which blamed the Rohingya for instigating armed conflict against other ethnic groups in Myanmar.[578] In that publication, the Tatmadaw sought to perpetuate this message by presenting fabricated evidence of Rohingya-initiated violence against Myanmar's "national races". As reported by *Reuters* in 2018, this Tatmadaw publication included a black-and-white photograph of a man with a hoe standing over two corpses along the bank of a river. The caption read: "Bengalis killed local ethnics brutally"; and the accompanying text said that the image showed Buddhists murdered by "Bengalis".[579] *Reuters*, however, determined that the photograph was actually taken in Bangladesh during that country's 1971 independence war, when hundreds of thousands of Bengalis were killed by Pakistani troops (see Figure 7.2, following page 190).[580]

7.40 Another black-and-white photograph published by the Tatmadaw showed a crowd carrying large bags and marching in a long line. It was captioned: "Bengalis intruded into the country after the British Colonialism

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[577] *Ibid*. (emphasis omitted).

[578] Poppy McPherson, "Exclusive: Fake photos in Myanmar army's 'True News' book on the Rohingya crisis", *Reuters* (30 August 2018). MG, Vol. IX, Annex 294.

[579] *Ibid*.

[580] *Ibid*.; Antoni Slodkowski & Shoon Naing, "Myanmar army apologizes for mistaken photos in book on Rohingya crisis", *Reuters* (3 September 2018). MG, Vol. IX, Annex 295; Republic of the Union of Myanmar, Myanmar Defence Services, *Myanmar Politics and the Tatmadaw: Part (I)* (July 2018), p. 14. MG, Vol. VI, Annex 159.

occupied the lower part of Myanmar".[581] This reinforced the message that the Rohingya arrived in Myanmar during the colonial era, and thus had no presence in Myanmar prior to 1824, which, under Myanmar's 1982 Citizenship Law, made them ineligible for citizenship (as discussed in Chapter 6). However, *Reuters* determined that the photograph was actually a distorted version of a colour photograph taken in 1996 of refugees who were fleeing the genocide in Rwanda, as shown in Figure 7.3 (following Figure 7.2).[582]

7.41 Another black-and-white photograph in the Tatmadaw publication depicted a boat full of people, accompanied by the caption "Bengalis entered Myanmar via the watercourse", which reinforced the message that the Rohingya in Myanmar are actually illegal immigrants from Bangladesh.[583] The photograph, however, was in fact a rotated and blurred version of another photograph sourced from Myanmar's Ministry of Information, depicting Rohingya who were *leaving* Myanmar in 2015, when tens of thousands fled to Thailand and Malaysia to escape violent attacks on them that year (see Figure 7.4, following Figure 7.3).[584]

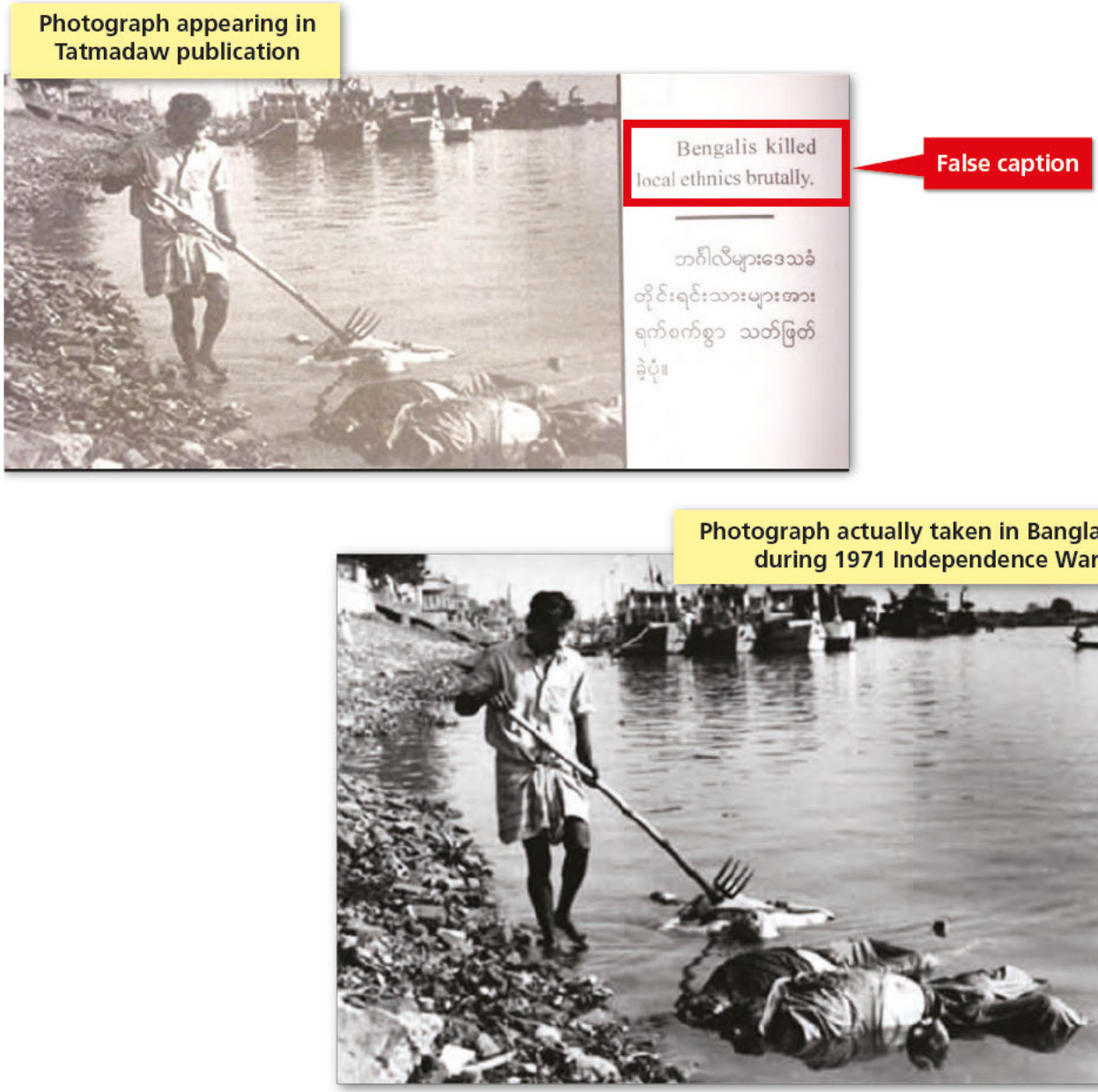
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[581] Poppy McPherson, "Exclusive: Fake photos in Myanmar army's 'True News' book on the Rohingya crisis", *Reuters* (30 August 2018). MG, Vol. IX, Annex 294.

[582] *Ibid*.; Antoni Slodkowski & Shoon Naing, "Myanmar army apologizes for mistaken photos in book on Rohingya crisis", *Reuters* (3 September 2018). MG, Vol. IX, Annex 295; Republic of the Union of Myanmar, Myanmar Defence Services, *Myanmar Politics and the Tatmadaw: Part (I)* (July 2018), p. 7. MG, Vol. VI, Annex 159.

[583] Poppy McPherson, "Exclusive: Fake photos in Myanmar army's 'True News' book on the Rohingya crisis", *Reuters* (30 August 2018). MG, Vol. IX, Annex 294.

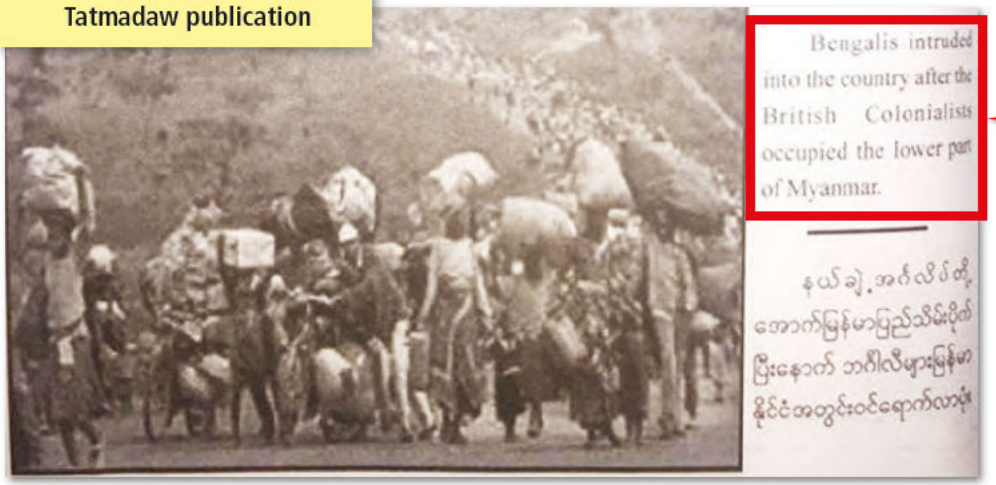
[584] *Ibid*.; Antoni Slodkowski & Shoon Naing, "Myanmar army apologizes for mistaken photos in book on Rohingya crisis", *Reuters* (3 September 2018). MG, Vol. IX, Annex 295; Republic of the Union of Myanmar, Myanmar Defence Services, *Myanmar Politics and the Tatmadaw: Part (I)* (July 2018), p. 6. MG, Vol. VI, Annex 159.



Sources: Myanmar Politics and the Tatmadaw: Part (I), p. 14 (top);
"Exclusive: Fake photos in Myanmar army's 'True News' book on the Rohingya crisis", Reuters (30 August 2018) (bottom).

Figure 7.2

Photograph appearing in Tatmadaw publication



False caption

Photograph actually taken of refugees fleeing Rwanda in 1996



Sources: Myanmar Politics and the Tatmadaw: Part (I), p. 7 (top);
"Myanmar army apologizes for mistaken photos in book on Rohingya crisis", Reuters (3 September 2018) (bottom).

Figure 7.3

Photograph appearing in Tatmadaw publication



False caption

Photograph actually taken of Rohingya fleeing Myanmar for Malaysia and Thailand in 2015



Sources: Myanmar Politics and the Tatmadaw: Part (I), p. 6 (top);
"Myanmar army apologizes for mistaken photos in book on Rohingya crisis", Reuters (3 September 2018) (bottom).

Figure 7.4

7.42 The anti-Rohingya hate campaign propagated by the Tatmadaw and other Myanmar Government officials and institutions was ubiquitous. The most senior military and civilian authorities repeatedly disseminated dehumanizing and offensive rhetoric that incited hatred of the Rohingya and justified violence against them. As the UN Fact-Finding concluded, Myanmar's official rhetoric was "part of a broader propaganda campaign, spreading demonstrably false information and inciting hatred, discrimination and violence".[585]

II. Anti-Rohingya Hate Speech Propagated by Religious Authorities

7.43 The same anti-Rohingya hate speech that has been disseminated by military and civilian authorities in Myanmar has also been propagated by the country's highest and most influential religious authorities.[586] The unchallenged leader was a Buddhist monk named Ashin Wirathu, who headed the Masoeyein monastery in Mandalay, Myanmar's second-largest city.[587] In 2013, he founded an anti-Rohingya organization known as Ma Ba Tha (in English, Association for the Protection of Race and Religion),

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[585] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1379. MG, Vol. II, Annex 40; *see also* UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. A/HRC/40/68 (5 March 2019), paras. 52, 54 (reporting that "hate speech and misinformation" coming from "public institutions linked to the military, its supporters, extremist religious groups and members of the Government continue to proliferate", and that the "pervasive nature of hate speech is alarming, particularly that it is used by senior Government officials"). MG, Vol. III, Annex 44; US Department of State, *Atrocities in Northern Rakhine* (2018), p. 9. MG, Vol. VII, Annex 194.

[586] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1303 ("High-profile monks, including Wirathu, Parmaukkha and Sitagu Sayadaw, have openly and actively espoused and promoted anti-Muslim narratives for many years."). MG, Vol. II, Annex 40.

[587] Anthony Kuhn, "Are Buddhist Monks Involved In Myanmar's Violence?", *NPR* (17 May 2013). MG, Vol. IX, Annex 242.

whose stated purpose was to defend and protect Theravada Buddhism in Burma.[588] However, many of the public declarations by Ma Ba Tha and its spiritual leader, Wirathu, were aimed at the Rohingya, likening them to an invasive species, branding them as mortal enemies of the Buddhist majority, and calling them a threat to "national security".[589] In Wirathu's own words:

> "Muslims are like the African carp. They breed quickly and they are very violent and they eat their own kind. Even though they are minorities here, we are suffering under the burden they bring us. … Because the Burmese people and the Buddhists are devoured every day, the national religion needs to be protected".[590]

7.44 The religious authorities' hate speech against the Rohingya was supported by Myanmar's military and civilian leaders, and even repeated by them.[591] This was a reflection of the cooperative relationship between the ultra-nationalist Buddhist establishment in Myanmar, led by Wirathu and other like-minded monks, and governmental authorities. As experts on

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[588] *UN Fact-Finding Mission, Report of the Detailed Findings* (2018), para. 90. MG, Vol. II, Annex 40.

[589] *See ibid*., para. 1321 ("Initially, MaBaTha focused on a more general anti-Muslim message. Its first major campaign was to propose the 'Four Race and Religion Laws' and their passage into law. MaBaTha propaganda, however, has gradually shifted to a more specific anti-Rohingya and nationalist rhetoric, focusing on the "illegal Bengali" who are invading the country and thus represent a threat to national security.").

[590] Tin Aung Kyaw, "Buddhist monk Wirathu leads violent national campaign against Myanmar's Muslims", *Global Post* (21 June 2013). MG, Vol. IX, Annex 246.

[591] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1329 ("A systematic analysis of statements and communications from government and security sector officials and of those in official settings indicates that—while mostly using less inflammatory language—they mirror and promote the same narratives espoused by MaBaTha and others."). MG, Vol. II, Annex 40.

Myanmar's history and politics have observed, during decades of military rule (from 1962 to 2011), the Tatmadaw senior officers who held executive power in the country sought and obtained legitimacy, in the absence of democratic elections and independent political parties, by associating themselves with Buddhist religious leaders,[592] who were the most respected and influential members of civil society in a country that is more than 88 percent Buddhist.[593]

7.45 Within that religious establishment, the military singled out and facilitated elevation to leadership positions of the most nationalistic monks, who shared its intolerance of religious and racial minorities, and subscribed to the "swallow a race to extinction" theory.[594] The Tatmadaw's sponsorship of extremist nationalist monks continued after 2011.[595] One former monk said that, "[m]ilitary leaders approached our fellow monks with offers of financial support and gifts ... This emboldened the monks to

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[592] D.B. Subedi & Johanna Garnett, 'De-mystifying Buddhist religious extremism in Myanmar: confrontation and contestation around religion, development and state-building' (2020) 20(2) Conflict, Security & Development 223, p. 231 ("the military government, formed after the 1962 military coup, began to manipulate religion (especially Buddhism) to consolidate religious nationalism as the mighty force to homogenise the nation-state. Buddhism also provided the military (the Tatmadaw) with power and legitimacy to subvert political dissents mostly coming at that time from people with non-Buddhist and non-Burman ethnic backgrounds. By appropriating Buddhist religious nationalism as a unifying force, the military authorities were able to co-opt Buddhist monks by promoting Buddhist religious revivalism".) (emphasis omitted). MG, Vol. VIII, Annex 235.

[593] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 87-88 ("Buddhism and the Buddhist monkhood have and retain a central place in Myanmar society and are a driving force within the politics of Myanmar."). MG, Vol. II, Annex 40.

[594] *Ibid*., para. 738 ("senior officials approached former leaders of the 2007 "Saffron revolution", upon their release from prison, and encouraged them to join 969 or Ma Ba Tha and offering financial and other incentives to do so. It is reported that some monks refused this, while others, notably Ashin Wirathu, accepted.").

[595] Fatima Lianes, "An Unholy Alliance: Monks and the Military in Myanmar", *Al Jazeera* (18 March 2019). MG, Vol. IX, Annex 305.

rise up and speak up in public to spread the pro-military propaganda, spreading hatred between religions".[596] Khin Zaw Win, a Yangon-based policy advocate on communal issues, confirmed that "[t]here is a lot of evidence, not made public, that the military is supporting the Ma Ba Tha. The Ma Ba Tha is flushed with cash. They've got lots of money."[597] Senior-General Min Aung Hlaing has donated directly to Wirathu, and photographs of the two together were widely circulated online in 2016.[598]

7.46 The Tatmadaw's direct support for the ultra-nationalist monks continues to this day. Its spokesperson, Brigadier-General Zaw Min Tun, in referring to the Buddha Dhamma Prahuta Foundation,[599] the successor organization to the Ma Ba Tha,[600] explained that "the group is necessary and should be supported in the name of Buddhism".[601] He defended the

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[596] *Ibid*.

[597] *Ibid*.

[598] Htet Naing Zaw, "MaBaTha is a Necessity: Military", *The Irrawaddy* (19 June 2019). MG, Vol. IX, Annex 311.

[599] *Ibid*.

[600] On 23 May 2017, the State entity regulating the Buddhist clergy, the Ma Ha Na, issued a statement banning the use of the name "Ma Ba Tha" because it was not formed in accordance with certain directives. This ban on the "Ma Ba Tha" name, however, did not amount to a ban on the movement it represented. Consequently, Ma Ba Tha members rebranded their organization as the Buddha Dhamma Parahita Foundation. The Myanmar government allowed the Buddha Dhamma Parahita Foundation to continue spreading anti-Muslim hatred and to incite violence against Muslims during the 2017 "clearance operations". Matthew J. Walton, "Misunderstanding Myanmar's Ma Ba Tha", *Asia Times* (9 June 2017). MG, Vol. IX, Annex 264. In July 2019, the Ma Ha Na declared the Buddha Dhamma Parahita Foundation illegal for criticizing the Government. Kyaw Htun Naing, "Ultranationalist Myanmar Monk Group Declared Illegal by Top Buddhist Organization", *Radio Free Asia* (30 July 2019). MG, Vol. IX, Annex 313.

[601] Htet Naing Zaw, "MaBaTha is a Necessity: Military", *The Irrawaddy* (19 June 2019). MG, Vol. IX, Annex 311.

group by stating that "the organization's only intention is to protect race and religion" in Myanmar.[602]

7.47 The principal target of the hate speech propagated by these Buddhist leaders were the "Bengali Muslims".[603] The extremist monks aimed despicable epithets at the Rohingya, referring to them not as human beings, but as germs, viruses, insects, or wild animals. Similar rhetoric characterising the members of a disfavoured group as "something other than human, or less than human", like "animals, insects, or even microorganisms such as bacteria or viruses" preceded genocidal acts in other countries.[604] This was the case during the Rwandan genocide, when the Hutu extremist media repeatedly referred to Tutsis as "cockroaches". In similar fashion, during the Cambodian genocide, the Khmer Rouge regime characterized its enemies as "microbes" and a "sickness" that needed to be extirpated.[605]

7.48 So, too, in Myanmar. A popular anti-Rohingya book, entitled *Influx Viruses: The Illegal Muslims in Arakan*,[606] makes clear from its very title that the Rohingya were to be treated as a communicable disease that was

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[602] *Ibid*.

[603] D.B. Subedi & Johanna Garnett, 'De-mystifying Buddhist religious extremism in Myanmar: confrontation and contestation around religion, development and state-building' (2020) 20(2) Conflict, Security & Development 223, p. 232 ("As Buddhist religious extremism complemented the state's behaviour towards the Rohingya, political violence—produced by the state authorities—and religious violence by the Buddhist extremist groups appeared to overlap."). MG, Vol. VIII, Annex 235.

[604] Dangerous Speech Project, *Dangerous Speech: A Practical Guide* (4 August 2020). MG, Vol. V, Annex 131.

[605] *Ibid*.

[606] U Shw Zan & Dr. Aye Chan, *Influx Viruses: The Illegal Muslims in Arakan* (Arakanese in United States 2005). MG, Vol. VIII, Annex 215.

infecting Myanmar society.[607] Within its pages, the book aggressively attacked the "Bengali Kalars" who were "swallowing other races".[608] Decades of this type of propaganda conditioned the Buddhist majority to regard the Rohingya as an existential threat to all "national races". As a prominent Buddhist intellectual put it: "we cannot accept Muslims and their behaviour at all. … If we allow them to stay here, we would be swallowed up. We would be wiped out."[609] Entire Facebook pages were created by ultra-nationalist Buddhist groups to promote violence against the Rohingya. Investigative reporting by *Reuters* revealed that "[o]ne Buddhist nationalist group set up a page called the 'Kalar Beheading Gang'"; another Burmese-language Facebook page was called, "We will genocide all of the Muslims and feed them to the dogs."[610]

7.49 Buddhist leaders have routinely reinforced these messages by referring to the Rohingya as "snakes" or "worse than dogs".[611] In June 2013, *The New York Times* reported Wirathu saying, in reference to the Rohingya: "You can be full of kindness and love, but you cannot sleep next to a mad dog".[612] The following month, Wirathu changed his

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[607] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 700. MG, Vol. II, Annex 40.

[608] *Ibid*.

[609] Al Jazeera, Video *Genocide Agenda* (October 2015) *available at* https://www.youtube.com/watch?v=UrQRYrpp2cI&has_verified=1&bpctr=1602253058 (video and transcript), p. 10. MG, Vol. V, Annex 134.

[610] Steve Stecklow, "Hatebook: Why Facebook is losing the war on hate speech in Myanmar", *Reuters* (15 August 2018). MG, Vol. IX, Annex 287.

[611] Hannah Beech, "Across Myanmar, Denial of Ethnic Cleansing and Loathing of Rohingya", *The New York Times* (24 October 2017). MG, Vol. IX, Annex 270; *see also* Burma Human Rights Network, *Monthly Situation Updates on Human Rights Abuses and Religious Intolerance in Burma* (August 2016), p. 16. MG, Vol. IV, Annex 95.

[612] Thomas Fuller, "Extremism Rises Among Myanmar Buddhists", *New York Times* (21 June 2013). MG, Vol. IX, Annex 247.

characterization of the Rohingya from dogs to fish, in an interview published in *Global Post*: "Muslims are like the African carp. They breed quickly and they are very violent and they eat their own kind. Even though they are minorities here, we are suffering under the burden they bring us".[613] He presented a variation on this theme in 2017: "Characteristics of catfish from Africa are: they grow up very fast, they breed very fast too. And then, they are violent. They eat their own species and destroy the resources of their environment. Muslims are exactly like this fish."[614]

7.50 In an interview with the *BBC*, Wirathu again referred to the Rohingya as animals: "Muslims are only well behaved when they are weak. … When they become strong, they are like a wolf or a jackal; in large packs they hunt down other animals."[615] On another occasion, he said: "We cannot live together with wild elephants",[616] a reference to the near trampling of the Buddha when his cousin and rival released a wild elephant in his path in the hope that he would be crushed.[617]

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[613] Tin Aung Kyaw, "Buddhist monk Wirathu leads violent national campaign against Myanmar's Muslims", *Global Post* (21 June 2013). MG, Vol. IX, Annex 246.

[614] Barbet Schroeder, Video "The Venerable W." (2017). MG, Vol. V, Annex 135; *see also* Kjell Anderson, "The Enemy Next Door: Hate Speech in Burma", *The Sentinel* (17 October 2014) (quoting Wirathu as saying: "It's a very dangerous situation because in some cases the whole village becomes Muslim….The African catfish have a very great population and they eat each other and destroy nature. These catfish are not allowed into the country to breed."). MG, Vol. IX, Annex 251.

[615] Jonah Fisher, "Anti-Muslim monk stokes Burmese religious tensions", *BBC* (29 August 2013). MG, Vol. IX, Annex 250; *see also* Burma Human Rights Network, *Monthly Situation Updates on Human Rights Abuses and Religious Intolerance in Burma* (November 2016), p. 25. MG, Vol. IV, Annex 96.

[616] Kjell Anderson, "The Enemy Next Door: Hate Speech in Burma", *The Sentinel* (17 October 2014). MG, Vol. IX, Annex 251.

[617] *Ibid*.

7.51 Widely shared social media posts "call the Rohingya or other Muslims dogs, maggots and rapists, suggest they be fed to pigs and urge they be shot or exterminated".[618]

7.52 As reflected in some of these animal comparisons—especially to fast-propagating species like African carp or catfish—one of the most oft-repeated anti-Rohingya messages that was propagated was that they multiply, or reproduce, rapidly and that their growing numbers threaten to swamp, or "swallow" other religious and racial groups. In June 2017, Ma Ba Tha published an article warning:

> "It started with a single weed. However, after days and months later, the weed grew uncontrollably, swallowing the other, more precious plants and flowers. Likewise, first, only one or two Bengali arrived. However, because of their plan to marry many wives and have as many children as possible, their population increased disproportionately."[619]

7.53 The warning continued: "If the Myanmar Government and the citizens are not careful, in a few years, Myanmar ethnic people, like the precious flowers will be swallowed to extinction by the weed-like Bengali."[620]

7.54 This type of messaging from Buddhist monks goes back many years. For example, on 9 July 2012, the association of monks in Mrauk-U

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[618] Steve Stecklow, "Hatebook: Why Facebook is losing the war on hate speech in Myanmar", *Reuters* (15 August 2018). MG, Vol. IX, Annex 287.

[619] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1316. MG, Vol. II, Annex 40.

[620] *Ibid*.

released a statement alleging that the Rohingya aimed to destroy the Rakhine (Arakanese) people:

> "The Arakanese people must understand that Bengalis [Rohingya] want to destroy the land of Arakan, are eating Arakan rice and plan to exterminate Arakanese people and use their money to buy weapons to kill Arakanese people. For this reason and from today, no Arakanese should sell any goods to Bengalis, hire Bengalis as workers, provide any food to Bengalis and have any dealings with them, as they are cruel by nature."[621]

7.55 To the same effect, an article published by Ma Ba Tha in November 2016 carried the title: *The Myanmar race can go extinct due to the Bengali*.[622] A village administrator near Yangon underscored this theme in an interview in 2017: "Kalar are not welcome here because they are violent and they multiply like crazy, with so many wives and children".[623] In November 2018, at a funeral ceremony for a prominent Buddhist monk, Myanmar's Minister for Religious and Cultural Affairs complained that "the followers of an extreme religion take three or four wives and have families with 15 or 20 children".[624]

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[621] Human Rights Watch, *"All You Can Do Is Pray": Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State* (2013), p. 26. MG, Vol. IV, Annex 90.

[622] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1315. MG, Vol. II, Annex 40.

[623] Hannah Beech, "Across Myanmar, Denial of Ethnic Cleansing and Loathing of Rohingya", *The New York Times* (24 October 2017). MG, Vol. IX, Annex 270.

[624] "Religion Minister Says 'Extreme Religion' Remarks Aimed at Rohingya", *The Irrawaddy* (4 December 2018). MG, Vol. IX, Annex 302.

7.56 A related message regularly disseminated by senior religious authorities is that Rohingya men seek to grow the Rohingya population at the expense of Buddhist ethnic groups by marrying or even raping Buddhist women. The UN Fact-Finding Mission highlighted such assertions by the Ma Ba Tha's predecessor organization, known as the 969 Movement, which the Mission observed "was especially forthright in establishing a narrative in which Muslims sought to 'take over' Myanmar through the marriage and conversion of Buddhist women".[625]

7.57 In a 2013 interview with the *BBC*, Wirathu said: "Over the past 50 years, we have shopped at Muslim shops and then they became richer and wealthier than us and can buy and marry our girls. ... In this way, they have destroyed and penetrated not only our nation but also our religion."[626] The same year, in a cover story in *Time* magazine, he was quoted as saying that Rohingya Muslims "are breeding so fast and they are stealing our women, raping them".[627] In another interview, in 2015, he said:

> "Rape by Muslims of Buddhist girls is a very frequent event in Burma … An everyday occurrence. I post as many of them as I can on my Facebook page, just to let people know how common it is. Today I'll post a case on my site that happened last month and the man has just been sentenced."[628]

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[625] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 89. MG, Vol. II, Annex 40.

[626] Jonah Fisher, "Anti-Muslim monk stokes Burmese religious tensions", *BBC* (29 August 2013). MG, Vol. IX, Annex 250.

[627] Hannah Beech, "The Face of Buddhist Terror", *Time* (1 July 2013). MG, Vol. IX, Annex 248.

[628] Alex Preston, "The Rohingya and Myanmar's 'Buddhist Bin Laden'", *GQ* (12 February 2015). MG, Vol. IX, Annex 252.

7.58 Other leading monks repeated the same message. A chief monk in a village near Sittwe said in 2015:

> "As a monk I shouldn't say this, but there is only one way to solve the problem: we must fight back. We must fight violence with violence. … Monks are still men, and as men, we won't stand by and watch our villages being taken over, our women raped."[629]

7.59 These and other ultra-nationalist Buddhist monks not only spread such anti-Rohingya messages, but they also directly lobbied the Government to expand and extend laws and policies that discriminated against the Rohingya. As discussed in Chapter 6, the Ma Ba Tha submitted a petition of over 1.3 million signatures to support a package of four "Race and religion" laws—the Buddhist Women's Special Marriage Law, the Population Control Healthcare Law, the Religious Conversion Law and the Monogamy Law—that targeted the Rohingya for discriminatory treatment.[630] In May and August 2015, the four laws were adopted.[631]

7.60 After the first wave of "clearance operations", which began in October 2016, Wirathu travelled throughout northern Rakhine State, visiting the Rohingya villages that the Tatmadaw attacked, and meeting with high-ranking military officers.[632] The UN Fact-Finding Mission reported that:

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[629] *Ibid*.

[630] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 600. MG, Vol. II, Annex 40.

[631] Hnin Yadana Zaw, "Myanmar's president signs off on law seen as targeting Muslims", *Reuters* (31 August 2015). MG, Vol. IX, Annex 257.

[632] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1160-1161. MG, Vol. II, Annex 40; *see also* Hannah Beech & Saw Nang, "He Incited Massacre, but

> "In early May [2017], Wirathu reportedly visited the locations of the 9 October 2016 attacks, among other villages, with an armed escort from the BGP. It was also reported that, as part of this trip, Wirathu had a private meeting with the Brigadier General of the BGP in Kyi Kan Pyin. At the end of this five-day trip, Wirathu was reportedly seen off by high-ranking military officials, including a colonel of the Western Command."[633]

7.61 Wirathu returned to Rakhine State in July 2017 and visited two villages in Rathedaung township that were subjected to "clearance operations" just weeks later.[634] According to the UN Fact-Finding Mission, "Wirathu first convened a meeting and delivered a sermon at the Zay Di Pyin monastery, reportedly attended by a large number of people, and travelled to nearby Chut Pyin the following day for a similar meeting."[635] Tensions immediately rose after his visit, with Rohingya villagers reporting increased harassment and messages from a village administrator that "This is not your land. This is not your country. Go away from here."[636]

7.62 In their defence of the Tatmadaw, Wirathu and other Buddhist monks sought to minimize the harm caused to the Rohingya during the

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Insulting Aung San Suu Kyi Was the Last Straw", *New York Times* (29 May 2019). MG, Vol. IX, Annex 309; *see also* International State Crime Initiative, *Genocide Achieved, Genocide Continues: Myanmar's Annihilation of the Rohingya* (2018), p. 32 ("Ashin Wirathu, a prominent extremist nationalist Buddhist monk and self-styled spiritual leader of the anti-Rohingya and anti-Muslim movement in Myanmar, visited Rakhine state a number of times after 9 October 2016 accompanied by security forces."). MG, Vol. IV, Annex 109.

[633] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1160. MG, Vol. II, Annex 40.

[634] *Ibid.*, para. 1161.

[635] *Ibid*.

[636] *Ibid*.

"clearance operations". The highest ranking monk in Myanmar, Sitagu Sayadaw, dismissed the genocide allegations against the Tatmadaw, and emphasized how much the Rohingya "breed":

> "Myanmar Buddhists have been accused of committing genocide against the Bengali, of making them go extinct. Actually, try collecting the number of people who died. In total, it was only 200. That race (the Rohingya) will never go extinct. Oh how they breed! (laughs) They are not going extinct, not in Myanmar. They breed so much here."[637]

7.63 That same monk, Sitagu, delivered a highly publicized sermon in October 2017, at a military training garrison in Karen State, in which he recounted a parable of monks comforting a King about killing 500,000 non-Buddhists by comparing those killed to animals who did not count as human beings:

> "There were about five hundred thousand non-religious and evil soldiers, who died in the war. Because of that, the King was not able to sleep at night, since, in Buddhism, killing humans is one of the worst sins. The eight monks who knew about this, told the King 'Don't worry, your Highness. Not a single one of those you killed was Buddhist. They didn't follow the Buddhist teachings and therefore they did not know what was good or bad. Not knowing good or bad is the nature of animals. Out of over five hundred thousand you killed, only one and a half were

[637] *Ibid.*, para. 1316.

> worth to be humans. Therefore it is a small sin and does not deserve your worry."[638]

7.64 In short, influential Buddhist monks have spread anti-Rohingya hate speech, calling for and justifying violence against the Rohingya, in collaboration, and with the support of, senior military and civilian leaders of Myanmar.

III. Influence and Effects of Myanmar's Official and Officially-Sanctioned Hate Speech

7.65 The influence exerted by the pervasive anti-Rohingya hate speech that Myanmar's military, civilian and religious authorities have propagated is reflected in the racial and religious slurs shouted by soldiers and Rakhine civilian volunteers as they carried out the "clearance operations" between 2016 and 2018, or posted by them online during these events. Examples include:

- "If it's kalar, get rid of the whole race".[639]
- "Kill all the kalars that you see in Myanmar; none of them should be left alive."[640]
- "May the terrorist dog kalars fall fast and die horrible deaths."[641]

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[638] *Ibid*., para. 1328.

[639] Steve Stecklow, "Hatebook: Why Facebook is losing the war on hate speech in Myanmar", *Reuters* (15 August 2018). MG, Vol. IX, Annex 287.

[640] *Ibid*.

[641] *Ibid*.

- "These non-human kalar dogs, the Bengalis, are killing and destroying our land, our water and our ethnic people. ... We need to destroy their race."[642]

- "Stuff pig's fat inside the damn kalar's mouth".[643]

- "Pour fuel and set fire so that they can meet Allah faster".[644]

- "Cut off those necks of the sons of the dog and kick them into the water".[645]

7.66 The UN Fact-Finding Mission documented how Tatmadaw officers and enlisted personnel expressed these sentiments during their execution of the "clearance operations". Typical are the remarks of Lieutenant Kyi Nyan Lynn of the 33rd Light Infantry Division, one of the officers dispatched to Rakhine State to carry out the "clearance operations", who posted on Facebook: "*If they're Bengali, they'll be killed.*"[646]

7.67 A Tatmadaw soldier deployed to Rakhine State during the "clearance operations" posted on his Facebook account: "I want to fight, please. I cannot control my patriotic urge for revenge."[647] On 27 August 2017, he posted a warning to "Muslim dogs": "The debt of people's blood I will collect with much interest".[648]

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[642] *Ibid*.

[643] *Ibid*.

[644] *Ibid*.

[645] *Ibid*.

[646] Simon Lewis, Zeba Siddiqui, Clare Baldwin & Andrew R.C. Marshall, "Tip of the Spear", *Reuters* (26 June 2018) (emphasis added). MG, Vol. IX, Annex 284.

[647] *Ibid*.

[648] *Ibid*.

7.68 The Commander of the 33rd Light Infantry Division told a group of Rohingya who had been summoned for the occasion that his unit had just come from the frontline of operations in Kachin State. He said, "We behaved very badly in Kachin—and they're citizens. You're not citizens, so you can only imagine how we'll be."[649] Another member of the 33rd Division told the Rohingya: "*The central government sent us specially to kill you Bengali people.*"[650]

7.69 The behaviour of the 99th Light Infantry Division was no different. As one member of that Division wrote in a Facebook post, he was eager to be deployed to Rakhine State, because each passing day the "Muslim dogs" were posing a threat to the citizens of Myanmar, and "on the battlefield, whoever is quick will get to eat you, Muslim dogs".[651] After the 99th Division was deployed to Rakhine State, a Commander told an assembled group of Rohingya: "If we find any terrorists … we'll burn your village to ashes. *Your future generations won't last.*"[652]

7.70 A Rohingya villager from Min Gyi (Tula Toli) village received a similar message from a soldier while he was detained by the Tatmadaw:

> "A soldier said, 'If there is violence again, *we'll destroy you all.' They said they would finish and kill all of us*. This was three or four

[649] *Ibid*.

[650] *Ibid*. (emphasis added).

[651] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1378. MG, Vol. II, Annex 40.

[652] Simon Lewis, Zeba Siddiqui, Clare Baldwin & Andrew R.C. Marshall, "Tip of the Spear", *Reuters* (26 June 2018) (emphasis added). MG, Vol. IX, Annex 284.

> days after the October violence happened."[653]

7.71 The UN Fact-Finding Mission took special note of the "derogatory language that regularly accompanied acts of violence"[654] during the "clearance operations":

> "Many Rohingya interviewees described in considerable detail the derogatory and dehumanizing language used against them by Tatmadaw soldiers. They described being referred to as 'Kalar' and 'Mout Kalar' and by the Myanmar phrase for 'unwanted person' (*Yay Myaw Kan Tin*). This frequently happened during beatings and arrests, and during sexual violence. The language used was not only insulting; it often also revealed an exclusionary vision. Many accounts described Rohingya being told that they should leave Myanmar as they are 'Bengali' or 'illegal Bengali' and that Myanmar is not their country. Several victims stated that they were told by the perpetrators to 'leave the country and never come back, or be killed'."[655]

7.72 Tatmadaw soldiers regularly told the Rohingya that "you don't belong here", "you are Bengali", "we will kill you all".[656] This is also reported by the US State Department:

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[653] Fortify Rights, *They Gave Them Long Swords* (2018), p. 59 (emphasis added). MG, Vol. IV, Annex 114.

[654] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1422. MG, Vol. II, Annex 40.

[655] *Ibid*., para. 1378.

[656] *Ibid*., para. 1422.

> "Those Rohingya who were able to understand their attackers frequently heard similar themes—soldiers, policemen, and civilians telling them that they did not belong in Burma and that they must leave or face death. During the attacks on their villages and rapes, many Rohingya reported hearing perpetrators using explicit language and calling them 'Bangladeshi/Bengali' or the racial slur 'Kalar.'"[657]

7.73 A Rohingya woman survivor who, along with her sister, was gang raped, recounted a member of the Tatmadaw saying: "*We are going to kill you this way, by raping. We are going to kill Rohingya. We will rape you. This is not your country*."[658] Another rape survivor, from Kha Maung Seik, Maungdaw Township, recalled her perpetrator calling her "Kalar" and saying "*We will rape you and kill you*".[659] A police officer who was involved in the "clearance operations" posted this message to his Facebook account on 27 August 2017: "Have been wanting to kill these 'Kalar' for so long. Only got to kill them just now."[660]

7.74 The PILPG, which interviewed over 1,000 Rohingya refugees, corroborated the UN Fact-Finding Mission's findings in regard to the racial hatred expressed by Tatmadaw soldiers in executing the "clearance operations". It found:

> "When the attackers referred to the Rohingya, it was almost always racially or

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[657] US Department of State, *Atrocities in Northern Rakhine* (2018), p. 9. MG, Vol. VII, Annex 194.

[658] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1422 (emphasis added). MG, Vol. II, Annex 40.

[659] *Ibid*., para. 932 (emphasis added).

[660] *Ibid*., para. 1422.

> ethnically discriminatory and disparaging", including "derogatory names" like 'Kalar' (literally meaning: black or dark-skinned), 'Bengali' (literally meaning: majority Muslim population of Bangladesh) and 'Sapakulu' and 'Mingy Liu' (… often translated as 'motherfucker' and 'bastard')".[661]

7.75 Nazmul Islam, an ethnic Rakhine resident of Min Gyi (Tula Toli) village and former member of the Tatmadaw who had converted to Islam, was held captive by the Tatmadaw during the "clearance operations". *The Guardian* reported, regarding his experience:

> "At one point, a helicopter landed nearby, carrying some senior officers. 'They gave bullets and guns. They ordered the military not to throw bodies into the water but to bury or burn them,' he says.
>
> The task was delegated to the local Buddhists, he says. 'If anyone disagreed, they would shoot,' he says. '*I heard a corporal saying, … "We have the order to kill everyone and will kill everyone who disagrees."*'
>
> The soldiers and villagers looted the homes that were still standing, taking rice, motorbikes and animals. He says he heard the locals talking about the dead 'Bengalis' and raped women. 'We couldn't bear to be inside the village because of the smell from the burning bodies,' says Islam.
>
> The soldiers beat and kicked him and tried to force him to denounce Islam, he says. They

[661] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 32. MG, Vol. IV, Annex 121.

> told him, 'You're our brother' and '*This is our country. Kalars don't live here anymore*,' using a derogatory word for Muslims."[662]

7.76 The derogatory, racist and exclusionary epithets used by Myanmar's security forces during the "clearance operations", like the extreme brutality and pervasive sexual violence that characterized those operations (as detailed in the next two chapters), demonstrate the impacts of the prolonged and persistent anti-Rohingya hate speech that was propagated by Myanmar's military, civilian and religious leaders over many years. All of these statements, from the top to the bottom of the military and civilian hierarchy, show that the "clearance operations" were, as described by Senior-General Hlaing, the Tatmadaw's effort to complete an "unfinished job" and finally "solve" the longstanding "Bengali problem".[663]

[662] Poppy McPherson, "Witness to a massacre: the former Myanmar soldier who saw his village burn", *The Guardian* (5 February 2018). MG, Vol. IX, Annex 278.

[663] Senior-General Min Aung Hlaing, "Entire government institutions and people must defend the country with strong patriotism" (2 September 2017). MG, Vol. VI, Annex 150.

CHAPTER 8
THE EXTREME BRUTALITY OF MYANMAR'S "CLEARANCE OPERATIONS"

8.1 Myanmar carried out its "clearance operations" of Rohingya villages with extreme brutality. As described below, the acts it perpetrated include the mass killing by shooting, beating, stabbing and burning alive the members of the Rohingya group in hundreds of villages all across northern Rakhine State. The destruction of lives extended to the targeted and systematic killing of infants and young children, the elderly and disabled, young girls of childbearing age and pregnant women. The Tatmadaw carried out these crimes with extraordinary cruelty, which included the widespread torture and mutilation of victims.

8.2 The extreme brutality of the "clearance operations" has been documented in meticulous detail. The UN Special Rapporteur on the situation of human rights in Myanmar, Ms. Yanghee Lee, conducted extensive fact-finding among Rohingya refugees. She reported to the Human Rights Council that she had obtained first-hand accounts of "attacks in which homes were set ablaze by security forces, in many cases with people trapped inside, and entire villages razed to the ground".[664] She documented parents "witnessing their young children being thrown into fires".[665] The Special Rapporteur reported that Myanmar's "security

[664] UN OHCHR, *Statement by Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 37th session of the Human Rights Council* (12 March 2018). MG, Vol. II, Annex 32.

[665] *Ibid.*

forces" had "call[ed] families out of their homes, separating men and boys to be executed in front of their families or taken away".[666]

8.3 The UN Special Advisor on the Prevention of Genocide, Mr. Adama Dieng, drawing upon his own fact-finding activities, including interviews with survivors who had fled to Bangladesh, stated:

> "Rohingya Muslims have been killed, tortured, raped, burnt alive and humiliated, solely because of who they are. All the information I have received indicates that the intent of the perpetrators was to cleanse northern Rakhine state of their existence, possibly even to destroy the Rohingya as such, which, if proven, would constitute the crime of genocide."[667]

8.4 The United States State Department's randomized survey of Rohingya refugees in Bangladesh showed that "the vast majority" of respondents had personally "experienced or directly witnessed extreme violence".[668] No fewer than 82 percent of the more than one thousand respondents had themselves witnessed at least one killing. One-in-five had seen a "mass-casualty event of killings or injuries (either in their villages or as they fled) with more than 100 victims".[669] The survey revealed, among a multitude of other horrors, eyewitness accounts of "soldiers or police" who had "grab[bed] infants out of their mother's arms to kill them" and had

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[666] *Ibid.*

[667] UN Secretary-General, *Note to Correspondents: Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide, on his visit to Bangladesh to assess the situation of Rohingya refugees from Myanmar* (12 March 2018). MG, Vol. II, Annex 33.

[668] US Department of State, *Atrocities in Northern Rakhine* (2018), p. 1. MG, Vol. VII, Annex 194.

[669] *Ibid.*

"physically brutaliz[ed] young children by stomping on them, beating them or throwing infants on the ground".[670]

8.5 The UN Fact-Finding Mission, based on its own investigation, concluded there "was not the least effort" by the "perpetrators" of the "clearance operations" to "make any distinction between ARSA fighters and civilians, or to specifically target a military objective or identify and repel an immediate threat".[671] Rather, it found: "Everyone was a target and no one was spared: mothers, infants, pregnant women, the old and infirmed all fell victim to the ruthless campaign." The UN Fact-Finding Mission concluded: "The brutality with which the underlying acts were carried out provides further support for a conclusion that they were committed with genocidal intent."[672]

8.6 In this Chapter, The Gambia presents the evidence of Myanmar's intention to destroy the Rohingya as a group as reflected in the scale and brutality with which it carried out the "clearance operations". The Gambia draws upon the evidence as set out in the findings of, *inter alia*, the United Nations, including the UN Fact-Finding Mission, the OHCHR, the Special Rapporteur on the human rights situation in Myanmar; the US State Department's Bureau of Intelligence and Research; highly reputable human rights NGOs; independent journalists; as well as witness testimony from both Tatmadaw soldiers and their victims.

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[670] *Ibid.*, p. 12.

[671] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1433. MG, Vol. II, Annex 40.

[672] *Ibid*.

8.7 This Chapter is organized in three parts. **Section I** demonstrates that, throughout northern Rakhine State (depicted in Figure 8.1, following page 214 and in Volume XII), the Tatmadaw killed members of the Rohingya group with extreme brutality. It shows that the Tatmadaw committed these crimes with exceptional cruelty, including by committing torture and mutilation, and by otherwise killing the victims in a manner calculated to maximize suffering. **Section II** shows that Myanmar systematically targeted even the most vulnerable members of the Rohingya group, including pregnant women, the elderly and infirm, young children and infants. Finally, **Section III** illustrates the brutality of the "clearance operations" on the ground, by presenting in detail the evidence of crimes committed by Myanmar in three villages, located in each of the townships where it carried out its "clearance operations".

I. The Brutality of Myanmar's Systematic Killing of Members of the Rohingya Group

8.8 During the "clearance operations", the Tatmadaw engaged in indiscriminate killing of members of the Rohingya group. The UN Fact-Finding Mission determined:

> "Many Rohingya were killed or injured by indiscriminate shooting. Rohingya villages were approached without warning, usually from more than one direction, and often in the early morning, by armed Tatmadaw soldiers. They were often accompanied by other armed security forces, including the [Border Guard Police], the Myanmar Police Force and riot police (known as *Ion htein*), and frequently by ethnic Rakhine civilians. Members of the security forces, primarily Tatmadaw soldiers of the Western Command


Buthidaung, Maungdaw, and Rathedaung Townships
Northern Rakhine State
MYANMAR
Mercator Projection, WGS-84 Datum
Scale accurate at 20°N
0 10 20
Kilometers
Prepared by: International Mapping
92°15'E
92°30'E
92°45'E
21°15'N
21°00'N
20°45'N
20°30'N
20°15'N
BANGLADESH
MYANMAR
Bay of Bengal
Buthidaung
Maungdaw
Rathedaung
Kyauktaw
Ponnagyun
Sittwe
Kha Maung Seik
Ta Man Thar
Khun Thi Pyin
Pa Da Kar Ywar Thit
Min Gyi (Tula Toli)
Aung Sit Pyin
Kyein Chaung
Laung Don
Doe Tan
Ngar Sar Kyu
Nga Khu Ya
Kyet Yoe Pyin
U Shey Kya
Ngan Chaung
Pwint Hpyu Chaung
Hpar Wut Chaung
Yae Khat Chaung Gwa Son
Dar Gyi Zar
Yin Ma Kyaung Taung
Hpaung Taw Pyin
Maung Nu
Chin Tha Mar
Wa Peik
Maung Gyi Taung
Lak Wei Dak Pyin Shey (La Ba Daung)
Kwan Dine (Kun Taing)
Myaung Nar
Gaw Du Thar Ra
Gu Dar Pyin
Du Oh The Ma
Myin Hlut
Chut Pyin
Kyauk Pan Du
Pae Youne
Inn Din
Koe Tan Kauk
Chein Khar Li
Area of map
RAKHINE STATE
Nay Pyi Taw
Villages mentioned in Chapter 8 of the Memorial
Township capital
Township boundary
State/Region boundary
International boundary

Figure 8.1

> and the 33rd and 99th [Light Infantry Divisions], shot assault rifles towards the Rohingya villages from a distance, not targeting any particular military objective or making any distinction between ARSA fighters and civilians. Men, women and children were all shot at. Many victims referred to the volume of gunfire, with some describing it as 'raining bullets.' Many were shot and kill or injured while attempting to flee."[673]

8.9 Likewise, according to the OHCHR:

> "Many victims reported that several of their family members and friends were killed by random firing and the use of grenades by the army, and provided their names to OHCHR. Many other eyewitnesses also stated that many innocent civilians were killed on the spot due to the random firing of bullets and use of grenades. Similar testimonies were received from victims from across the lockdown area, indicating the systematic, widespread and coordinated nature of such indiscriminate attacks by the army, the police and Rakhine villagers."[674]

8.10 The testimonies of former Tatmadaw soldiers describe how they carried out the "clearance operations".[675] One of them, whose unit carried out "clearance operations" in Maungdaw and Buthidaung Townships in September 2017, including in "U-Shin-Kyar, Ngan Chaung, Doe Tang, Zin Pai Nyar", among "many other villages", testified that he and his fellow

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[673] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 884. MG, Vol. II, Annex 40.

[674] UN OHCHR, *Flash Report* (2017), p. 14. MG, Vol. II, Annex 30.

[675] *See* Interview of Zaw Naing Tun (15 August 2020). MG, Vol. V, Annex 141; Interview of Myo Win Tun (15 August 2020). MG, Vol. V, Annex 142.

soldiers were "ordered to shoot and clear the villages".[676] This involved "surrounding the villages according to race" and then "search[ing] houses one after one".[677] He continued:

> "When the villagers were running away, we followed and shot them. For those arrested alive, we tied them with ropes and tortured. We kicked them. We tortured them by beating with rifles and helmets and punching with fists. We also killed them."[678]

8.11 Another former Tatmadaw soldier testified about the "clearance operation" that his unit, Battalion 565, carried out in Taung Bazaar village tract, in Buthidaung Township, in August 2017. He recounted how the unit's second-in-command, Than Htike, "ordered us to shoot every target in villages, to go for one village after another, to shoot at every sight of a person. He ordered us to shoot to clear like that. And to burn the villages".[679] In particular:

> "After we got to the villages, we went after the people and shot them when we saw them. When no one was left, we burned. We took chickens, cows, goats, and animals. We burned the villages. After that, we buried the dead bodies in dug holes."[680]

8.12 The testimonies of these former Tatmadaw soldiers coincide with accounts of the "clearance operations" given by survivors. A witness from

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[676] Interview of Zaw Naing Tun (15 August 2020), p. 5. MG, Vol. V, Annex 141.

[677] *Ibid.*

[678] *Ibid.*, p. 6.

[679] Interview of Myo Win Tun (15 August 2020), p. 4. MG, Vol. V, Annex 142.

[680] *Ibid.*

Taung Bazaar recalls observing one of the soldiers who gave the testimony quoted above participating in the "clearance operations" in his village in August 2017. He testifies:

> "In September 2020 I was shown a video of two soldiers who had deserted from the Myanmar military. I recognised one of the two men on the video. I had seen this man on many occasions. My house is very close to the military battalion base and this man has visited my house and eaten in my house. I have also seen him walking around the village. He is one of the Sai Groung [Battalion 565] military who do not stay in the village. They come to the village but they stay in the hills. I saw the man in the video on 25 August on the day my son was killed."[681]

8.13 Other survivors, from villages across northern Rakhine State, describe the Tatmadaw's conduct during the "clearance operations" in ways that match the descriptions given by the two former soldiers quoted above. At Wa Peik, in Maungdaw Township, a survivor recalled that the Tatmadaw entered the village and systematically killed Rohingya villagers:[682] "When the soldiers entered the village, they started shooting. … I saw them shoot at people as they fled."[683] Another witness recounted: "The military would go in a house, then it would set on fire, then they went to another house,

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[681] [redacted]. MG, Vol. XI, Annex 351.

[682] Matthew Smith, "Bringing Burma Back From the Brink", *Wall Street Journal* (15 February 2017). MG, Vol. IX, Annex 263.

[683] *Ibid*.; [redacted] MG, Vol. XI, Annex 352.

and fire would start. Everywhere they went a fire would start and smoke would rise."[684]

8.14 A survivor of the "clearance operation" at Doe Tan, in Maungdaw Township, similarly recounted:

> "The military came to our village on 10 October in the morning. First they started shooting into the air, people were scared and came out of their homes, and then they started killing people. They were shooting at people. We were all trying to flee, I was running and at that point I was shot and fell into the paddy field. Since I was running I am not sure on which side the bullet entered and where it exited. My cousin helped me and brought me home and treated my wound. My father was killed at the same time as I was shot."[685]

8.15 At Gu Dar Pyin, in Buthidaung Township, the Tatmadaw killed Rohingya trying to escape. A man described how his 15-year-old daughter was shot and killed while they were fleeing:

> "When we were running away, we were being followed by the soldiers. They were shooting … My daughter was shot as she was running with us … She was hit by two bullets, one in her left side, one in her left shoulder."[686]

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[684] Amnesty International, *"We Are At Breaking Point": Rohingya: Persecuted in Myanmar, Neglected in Bangladesh* (19 December 2016), p. 29. MG, Vol. IV, Annex 97 [**hereinafter** Amnesty International, *"We Are At Breaking Point"* (2016)].

[685] UN OHCHR, *Flash Report* (2017), p. 14. MG, Vol. II, Annex 30.

[686] Amnesty International, *"We Will Destroy Everything"* (2018), p. 80. MG, Vol. IV, Annex 112.

8.16 Some Rohingya in the village fled to the surrounding paddy fields and ponds, but the Tatmadaw gunned them down there, as well,[687] assisted by ethnic Rakhine, who killed Rohingya by slitting their throats.[688] Another witness from Gu Dar Pyin recounted:

> "The soldiers were shooting at the people, who were running from burning houses to save their lives. People were running everywhere, in the paddy fields, jumping into the river, and hiding in trees. I saw people burning, and people being cut."[689]

8.17 Similarly, a survivor from Kyein Chaung, in Maungdaw Township, told the UN Fact-Finding Mission:

> "The military, they were just shooting at whomever. They were shooting at people whenever they saw them, on the streets or in the houses. When they were shooting, there was no time to look back and are for those who were shot. As people were running, they were shooting at them. That is how my daughter died. She was hit fleeing".[690]

8.18 In Dar Gyi Zar, around 200 soldiers entered the village and shot indiscriminately, including firing at crowds of fleeing people. A witness recounted:

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[687] *Ibid.*

[688] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 821. MG, Vol. II, Annex 40.

[689] *Ibid.*, para. 823. [redacted] MG, Vol. XI, Annex 353.

[690] *Ibid.*, para, 888.

> "I saw the military … shooting people who were fleeing. When someone came in front of them, they shot them. Everyone was running. They [the military] were firing on the crowd …".[691]

8.19 A survivor reported seeing at least eight people being shot: "I saw myself the military shooting them. One person was shot in the head, another person on the waist, another on the thigh."[692] Another saw approximately 16 people shot.[693]

8.20 Another survivor described how, in Maungdaw Township's Thanda Washa village, the Tatmadaw "divided into two teams and came by foot to my village", entering "at the exact same time, but from different directions", with "[o]ne team enter[ing] from the east side, and the other time, about 50 members, who waited in the main road corner, enter[ing] from the south side".[694] The survivor recounted: "Once they enter[ed] my village, the military started firing at people randomly."[695]

8.21 Survivors likened the volume of gunfire to "raining bullets".[696] A witness stated: "[t]he whole village was under random fire like rain."[697]

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[691] Amnesty International, *"We Are At Breaking Point"* (2016), p. 18. MG, Vol. IV, Annex 97.

[692] *Ibid.*, p. 19.

[693] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1085. MG, Vol. II, Annex 40.

[694] [redacted] MG, Vol. X, Annex 344.

[695] *Ibid.*

[696] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 884. MG, Vol. II, Annex 40; UN OHCHR, *Flash Report* (2017), p. 15. MG, Vol. II, Annex 30.

[697] US Department of State, *Atrocities in Northern Rakhine* (2018), p. 10. MG, Vol. VII, Annex 194.

Others reported that "the military was shooting madly", "on everyone they saw", and "in every direction".[698]

8.22 The Tatmadaw deployed helicopters to shoot Rohingya.[699] Survivors of some "clearance operations" describe how bullets "rained" on them whilst they tried to run away.[700] A witness from Yae Khat Chaung Gwa Son recalled:

> "They were shooting from a helicopter when I was … visiting my grandmother. I was in front of her house, playing with some other boys when the helicopter came. I was shot from the helicopter, other boys were too. Six or seven of us were hit by bullets from the helicopter."[701]

8.23 In Dar Gyi Zar, in northern Maungdaw Township, the Tatmadaw employed helicopters from which "soldiers opened fire using automatic weapons".[702] For two hours, soldiers fired indiscriminately at villagers, including those who were fleeing.[703] A survivor described to the OHCHR:

> "The helicopters flew over the village for over 20 minutes, firing randomly at the villagers. The first round of attack was

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[698] [redacted] MG, Vol. X, Annex 336; Amnesty International, *"We Are At Breaking Point"* (2016), p. 20. MG, Vol. IV, Annex 97; PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 41. MG, Vol. IV, Annex 121.

[699] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1084. MG, Vol. II, Annex 40; UN OHCHR, *Flash Report* (2017), pp. 14-15. MG, Vol. II, Annex 30.

[700] UN OHCHR, *Flash Report* (2017), p. 15. MG, Vol. II, Annex 30.

[701] *Ibid.*

[702] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1084. MG, Vol. II, Annex 40.

[703] *Ibid.*

> carried out from a higher altitude, but in the second and third rounds, they flew just over the rooftops of the houses. Seven members of my brother's family in-law were killed in the helicopter attack."[704]

8.24 Another witness recounted: "If they saw someone, the helicopter shot …. They were shooting for a long time."[705] The shooting killed many people, inside houses and out in the fields.[706]

8.25 The UN Fact-Finding Mission documented "detailed accounts" of "corroborated mass killings" in which "hundreds, of men, women and children were killed" in "targeted attacks".[707] Soldiers "shot individual persons, including at point blank range, and executed people, including those injured, by slitting their throats using long knives".[708] In some places "these targeted killings occurred as Tatmadaw soldiers and other security forces systematically moved from house to house, pulling people out of their homes and executing them, or shooting them inside their houses, or as they left their houses, often in front of family members".[709]

8.26 A woman from Maung Seik, in Maungdaw Township, described how her husband was "taken away" and killed by the police: "They tied his hands behind his back … He was dragged out of the house and taken to the

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[704] UN OHCHR, *Flash Report* (2017), p. 15. MG, Vol. II, Annex 30.

[705] Amnesty International, *"We Are At Breaking Point"* (2016), p. 19. MG, Vol. IV, Annex 97.

[706] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1084. MG, Vol. II, Annex 40; Fortify Rights, *They Gave Them Long Swords* (2018), p. 147. MG, Vol. IV, Annex 114.

[707] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 892. MG, Vol. II, Annex 40.

[708] *Ibid.*, para. 893.

[709] *Ibid.*

bank of the river."[710] Two police "held him" while another "cut his throat".[711] The witness said: "I saw a lot of this type of violence."[712]

8.27 A man from Aung Sit Pyin, in northern Maungdaw Township, witnessed the killing of 10 people, including his family. He stated: "I saw my own children killed ... My three children and my mother were killed. They made them lie down on the ground and they cut the backs of their necks."[713]

8.28 An 11-year-old girl from Yae Khat Chaung Gwa Son described witnessing the killing of both her parents:

> "After entering our house, the army apprehended us. They pushed my mother on the ground. They removed her clothes and four officers raped her. They also slaughtered my father, a prayer leader just before raping my mother. After a few minutes, they burnt the house with a rocket, with my mother inside. All this happened before my eyes."[714]

8.29 A 10-year-old boy similarly described how his "father was shot dead [by the military] in front of [his] eyes. He died immediately".[715]

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[710] Fortify Rights, *They Gave Them Long Swords* (2018), p. 61. MG, Vol. IV, Annex 114.

[711] *Ibid.*

[712] *Ibid.*

[713] *Ibid.*, p. 60.

[714] UN OHCHR, *Flash Report* (2017), p. 17. MG, Vol. II, Annex 30.

[715] Save the Children, *"Horrors I will never forget": The stories of Rohingya children* (2017), p. 15. MG, Vol. IV, Annex 100.

8.30 A survivor from Kha Maung Seik, in Maungdaw Township, recalled:

> "The Rakhine people and [the police] were dragging people out of homes. They were cutting throats and bodies and arms. I watched it with my own eyes. More than 100 people were cut like this, from the age of eight to 15, men and women too. Some women were pregnant with babies inside and they cut their stomachs open."[716]

8.31 The Tatmadaw targeted the Rohingya's leadership—including religious leaders—for especially brutal treatment.[717] One imam was "shot, stabbed and his body hung on a tree".[718] The Tatmadaw forced another village's imam and his son-in-law to "lie down in the dirt" and then stabbed them to death, while villagers were "forced to watch".[719] On another occasion, the Tatmadaw poured kerosene down the throat of a senior imam and set him alight.[720] Six other imams were made to "walk across nails and glass", before they were killed.[721] In another case, the military publicly shot and killed a village imam and five members of his family.[722]

8.32 The Tatmadaw's deliberate infliction of extreme brutality included the systematic burning of Rohingya houses, often with the inhabitants

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[716] Fortify Rights, *They Gave Them Long Swords* (2018), p. 61. MG, Vol. IV, Annex 114.

[717] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 34. MG, Vol. IV, Annex 121.

[718] *Ibid.*, p. 35.

[719] *Ibid.*

[720] *Ibid.*

[721] *Ibid.*

[722] *Ibid.*

locked inside and unable to escape. The OHCHR determined that a "major cause of deaths was due to burning of houses".[723] It reported that "[n]umerous testimonies collected from people from different villages" had "confirmed that the army deliberately set fire to houses with families inside".[724] In some cases, the military "pushed Rohingya into already burning houses".[725] The OHCHR also reported instances where "the army or Rakhine villagers locked an entire family, including elderly and disabled people, inside a house and set it on fire, killing them all".[726]

8.33 The UN Fact-Finding Mission likewise "verified a pattern of Tatmadaw soldiers intentionally forcing people into houses that were either burning or about to be set alight, and even locking them inside".[727] A Witness from Ngan Chuang, in northern Maungdaw Township, who managed to escape, reported: "The military came into my village and burned the houses with launchers. I was inside my house with my children when they locked the door from the outside."[728]

8.34 A witness described seeing the Tatmadaw burn alive nine members of his family:

> "I saw several of my relatives sitting together. The soldiers took them one by one and threw them in the fire …. They threw all nine in the fire, one-by-one. Many soldiers

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[723] UN OHCHR, *Flash Report* (2017), pp. 16-17. MG, Vol. II, Annex 30.

[724] *Ibid.*

[725] *Ibid.*

[726] *Ibid.*

[727] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 908. MG, Vol. II, Annex 40.

[728] *Ibid.*

> together were throwing people into the fire. My cousin was young. They threw him in the fire, and he ran out, but they threw him back in … They were all thrown into a burning home."[729]

8.35 Another witness recounted the military seizing approximately 50 people, who they forced into a hut and then set on fire.[730] Another recalled her husband and several others going to a burning house to try to rescue those inside. The Tatmadaw prevented them from leaving the house. "Her husband and everybody in that house died. There were very many people."[731] Another described how soldiers tied people together, "poured petrol on them, and set them on fire".[732]

8.36 A survivor from Koe Tan Kauk recounted witnessing soldiers torching the village, including the house where his grandmother remained. When the military left and he returned to find her, "she was dead" and "her body was burnt very seriously".[733]

8.37 A 12-year-old boy from Gaw Du Thar Ra, in Maungdaw Township, told the UN Fact-Finding Mission:

> "[W]hen the soldiers had left, I went back to my village with my uncle. At my house we found the burned bodies of my parents. My one-year old sister was also dead, burned, in

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[729] Fortify Rights, *They Gave Them Long Swords* (2018), p. 146. MG, Vol. IV, Annex 114.

[730] *Ibid.*, p. 62.

[731] [redacted]. MG, Vol. X, Annex 336.

[732] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 42 MG, Vol. IV, Annex 121.

[733] Amnesty International, *"We Will Destroy Everything"* (2018), p. 77. MG, Vol. IV, Annex 112.

> my mother's lap. I saw many dead bodies in my village. Bodies were both inside the houses and outside. They had been shot, stabbed and burned. I couldn't bear it."[734]

8.38 A witness from Ngar Sar Kyu described the death of her five-year-old brother:

> "It was at around 3 a.m. in the morning, we were sleeping, when military attacked our village. We ran outside in panic, leaving my five-year-old brother behind in the house. The military came and set fire to the house, burning my brother alive. We found his burnt body in the morning, after the military had left the village."[735]

8.39 A 12-year-old boy described encountering a water reservoir in an abandoned village while fleeing to Bangladesh. He stated: "I saw at least 50 dead bodies floating in it. I can't forget the smell of the burning houses, or the sight of the bloated bodies. These are horrors I will never forget."[736]

8.40 Reports by the BBC from Maungdaw Township in September 2017 provided independent confirmation of the burning of Rohingya villages. In a witness statement, veteran BBC reporter Jonathan Head, who was present in Maungdaw at the time, recounts his observation of numerous burning or smoldering Rohingya villages, as well as Myanmar's false accusations that the Rohingya set fire to their own homes. Mr. Head quotes Colonel Phone Tint, the State Minister for Border Security, as stating, in response to a

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[734] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 949. MG, Vol. II, Annex 40.

[735] UN OHCHR, *Flash Report* (2017), p. 17. MG, Vol. II, Annex 30.

[736] Save the Children, *"Horrors I will never forget": The stories of Rohingya children* (2017), Foreword. MG, Vol. IV, Annex 100.

question about who was burning down the Rohingya villages, that "100 percent of them were being destroyed by the Muslims themselves".[737] Mr. Head himself discovered that photographs distributed by the Tatmadaw, and by chief government spokesperson Zaw Htey, purporting to show Rohingya burning their homes, were actually staged by Myanmar authorities:

> "My conclusion was that the photos had been staged quite close to the time of our arrival, in order to support the government's assertion that Muslim villages were being destroyed by their own inhabitants."[738]

He describes in his witness statement how he made this discovery.[739]

8.41 When the Tatmadaw was not burning Rohingya to death, it carried out mass executions of Rohingya men and boys in other particularly gruesome ways. In some villages, they were lined up, "with their hands tied and blindfolded" before they had their "throats slit or were shot in the back of the head".[740] In others, the Tatmadaw forced men and boys to lie on the ground before shooting them.[741]

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[737] Witness Statement of Jonathan Head (14 October 2020), para. 15. MG, Vol. XI, Annex 375.

[738] *Ibid*., para. 19.

[739] *Ibid*.

[740] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 42. MG, Vol. IV, Annex 121.

[741] *Ibid.*

8.42 A witness from La Ba Daung, in Buthidaung Township, saw the military "[take] the men aside and kill[] them all".[742] In Hang Cha Ma Gulang, also in Buthidaung Township, after an initial round of mass shooting, the Tatmadaw separated the men and the women, tying up the women in a room. A survivor recalled:

> "The military then brought the men out and they assembled them in the yard … The military used the scarves they took from … [the] women to blindfold the men. [They] tied all the men and boys up and started beating them with a large piece of wood. The boys would scream out in pain. After they beat them, they shot them. Some had their throat cut with a knife …".[743]

8.43 In that village, the Tatmadaw, after killing one group of men and boys, threw their bodies in a pile. The killing then "started again" and "continued all afternoon", stopping only when "every one of them was killed".[744]

8.44 A survivor whose brother-in-law, father-in-law and nephew were killed in a mass execution, recounted: "They put all the men in the yard of the house and started shooting them. We heard them screaming and the

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[742] Médecins Sans Frontières, *"No one was left": Death and Violence Against the Rohingya in Rakhine State, Myanmar* (2018), p. 10. MG, Vol. IV, Annex 110 [**hereinafter** MSF, *"No one was left"* (2018)].

[743] [redacted] MG, Vol. X, Annex 336.

[744] [redacted] MG, Vol. X, Annex 336.

sound of the guns. I saw them cutting their throats. I saw their dead bodies."[745]

8.45 A man described witnessing a mass killing in Hpaung Taw Pyin:

> "The military fired at the mosque and at people as they left the mosque. … Around 40 went to hide in a house. The military surrounded the house and killed everyone inside with knives—they slit their throats. Some soldiers held guns and some used knives to slit their throats".[746]

8.46 Another witness described a mass execution in the center of Hang Cha Ma Gulang in Buthidaung Township:

> "The men and boys were restrained by having their hands tied behind their backs and blind folds placed on them … [T]he group of men and boys grew. The military and BGP were rounding them up from not only their village but others surrounding. They were placed in separate lines each line contained about 30-40 people … There they were forced to kneel. The military lined up behind them and shot them from a distance of about 2-3 meters. All fell forward, some were still and others were moving a little. Those who were moving had the back of their necks cut with blades until they stopped."[747]

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745 [redacted] MG, Vol. X, Annex 336.

746 International State Crime Initiative, *Genocide Achieved, Genocide Continues: Myanmar's Annihilation of the Rohingya* (2018), p. 51. MG, Vol. IV, Annex 109.

747 [redacted] MG, Vol. X, Annex 336.

8.47 In another mass-execution near Buthidaung, a witness described how the Tatmadaw rounded up more than 200 people near a river. Their hands were tied and their eyes covered with tape. They were then "forced to lie down" and "beheaded".[748]

8.48 In Dar Gyi Zar, the Tatmadaw seized a group of approximately 200 men, women and children. They were taken to a paddy field, forced to kneel and severely beaten. Men and boys were then separated from the group, and the women and children taken to a mud-walled house. At sunset, after the soldiers left, the women and children saw that the dead bodies of approximately 40 of the men and boys had been put in a series of piles, and burned with "hay, harvested rice and the removed shirts".[749]

8.49 Mutilation and dismemberment of victims was common. In Kyet Yoe Pyin, a witness saw at least 20 dead bodies scattered in the field, their flesh "cut into pieces".[750] In Khun Thi Pyin, in Maungdaw Township, a survivor recalled how soldiers caught a young man, "cut his ears and nose" and "sliced his body with knives".[751] In Buthidaung Township's Kwan Dine village, the Tatmadaw abducted girls, cut their breasts and vaginas

[748] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), pp. 82-83. MG, Vol. IV, Annex 121.

[749] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1086-1087. MG, Vol. II, Annex 40.

[750] Fortify Rights, *They Gave Them Long Swords* (2018), p. 60. MG, Vol. IV, Annex 114.

[751] *Ibid.*

and beheaded them.[752] In Koe Tan Kauk, in Rathedaung Township, a witness saw a woman "cut in three parts by the military".[753]

8.50 Other witnesses recounted the cutting and spreading of entrails; the severing of limbs, hands and feet; the gouging out of eyes, including those of children; the castration of men; and the cutting off of tongues and testicles.[754] A witness recounted how a community leader, the Rohingya village chairman, had "his tongue and penis cut off and his eyes removed".[755] Another witness recalled how Islamic scholars had their "their tongues and hands cut off".[756] Others described seeing "hundreds of body parts hanging from trees"[757] and "heads floating in the river like footballs".[758]

8.51 A witness from Maungdaw Township reported:

> "I saw people without hands, with intestines pulled out spread across the village. They shoot people, if they don't die, the military uses cobra knives to cut them. If the

[752] [redacted] MG, Vol. X, Annex 336.

[753] [redacted] MG, Vol. X, Annex 336.

[754] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 49. MG, Vol. IV, Annex 121; US Department of State, *Atrocities in Northern Rakhine* (2018), p. 11. MG, Vol. VII, Annex 194.

[755] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 49. MG, Vol. IV, Annex 121.

[756] *Ibid.*

[757] *Ibid.*

[758] US Department of State, *Atrocities in Northern Rakhine* (2018), p. 12. MG, Vol. VII, Annex 194.

> intestines don't come out, they pull them out."[759]

8.52 The Tatmadaw shot at "columns of Rohingya as they were fleeing",[760] in order to kill them before they could cross the border to safety in Bangladesh. In Koe Tan Kauk, many Rohingya were shot and killed as they ran towards forested hills.[761] For many other Rohingya, the only way to escape was by crossing a river. However, the Tatmadaw opened fire at those who were trying to cross; many were shot or drowned.[762] A survivor described how the Tatmadaw "started shooting at people who were about to cross the river".[763] A witness from Myaung Nar, in Buthidaung Township, recalled "babies' bodies floating in the water".[764]

8.53 The UN Fact-Finding Mission found:

> "Tatmadaw soldiers shot at groups of Rohingya who were *en route*. At times, these attacked occurred in villages that were already burned, where fleeing Rohingya were seeking refuge on their journey. At other times, attacks took place in forested areas or when Rohingya were forced into the open, for example when crossing rivers."[765]

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[759] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 49. MG, Vol. IV, Annex 121.

[760] *Ibid.*, p. 41.

[761] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 837. MG, Vol. II, Annex 40.

[762] *Ibid.*, para. 995; Fortify Rights, *They Gave Them Long Swords* (2018), p. 65. MG, Vol. IV, Annex 114.

[763] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 995. MG, Vol. II, Annex 40.

[764] *Ibid.*, para. 993.

[765] *Ibid.*, para. 985.

8.54 Near the border crossing with Bangladesh, rather than allowing the fleeing Rohingya to leave Myanmar, the Tatmadaw created a "killing field" where they shot at "enormous crowds" of Rohingya.[766] On one occasion, the Myanmar Navy sank "four boats full of refugees".[767] A survivor of such an attack recalled: "[t]here were so many bodies and so much blood in the river, it looks like the river was bleeding."[768]

8.55 A witness from Chin Tha Mar, in Buthidaung Township, told the Mission how "after walking for two days, she and her group were near a river crossing when soldiers opened fire at people as they were crossing", killing two of them.[769] Another witness recounted how he and his family were waiting for a boat to ferry them across the river when a "soldiers and police opened fire at a boat carrying people across, killing four of the passengers".[770] Another described how nine of her cousins had "drowned in the river after their boat was sunk" by the Tatmadaw and the "soldiers beat them" as the "boat was going down to make sure they drowned".[771]

8.56 In some places along the Naf River, instead of shooting the fleeing Rohingya, the Tatmadaw cordoned them off, denied them access to food or medical treatment and left them to die of starvation or disease. On 7 November 2017, journalists Alex Crawford and Neville Lazarus of Sky

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[766] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 73. MG, Vol. IV, Annex 121.

[767] *Ibid.*

[768] *Ibid.*, p. 47.

[769] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 985. MG, Vol. II, Annex 40.

[770] *Ibid.*

[771] US Department of State, *Atrocities in Northern Rakhine* (2018), p. 13. MG, Vol. VII, Annex 194.

News came across a throng of Rohingya trapped on the riverbank at Dang Khali Saur, in Maungdaw Township. They have supplied a joint witness statement at Annex 374. In their words, "hundreds" of desperate Rohingya approached them:

> "Many were tugging and pulling at us, imploring, begging and showing us their physical condition. Each one wanted to tell us their story, showing their children to us, or their old and infirm and hurt. We started talking to them and asking questions and were told that some of them have been trapped on the beach for weeks, some for a month and some for two months….
>
> We saw horror in the eyes of men women and children. And we were told by them that there were thousands and thousands just on that strip of beach….
>
> It just seemed to us, absolutely cruel beyond belief that these people had been forced here and left to die on this little strip of the beach….
>
> We were told by the victims on the beach that the Myanmar military corralled them onto the beach and then laid land mines behind them to prevent them from going back. Narrow strips of land were left open like gates, which were manned by the military. Anyone trying to go back was severely beaten or taken away."[772]

[772] Witness Statement of Alex Crawford and Neville Lazarus (12 October 2020), paras. 24-30. MG, Vol. XI, Annex 374.

II. Myanmar Targeted Children and Other Vulnerable Members of the Rohingya Group

A. CHILDREN

8.57 The extreme brutality of the "clearance operations" is further reflected in the deliberate targeting of children and other vulnerable elements of the Rohingya population. In some villages, "[t]here were more children killed than adults".[773] According to the OHCHR, victims ranged in ages "from newborns to teenagers".[774] They included children who were "killed by live ammunition or stabbed while at home; while fleeing to safety; or while in farms or fields".[775] Many were very young. MSF estimates that between 734 and 2,109 children under the age of five died during the "clearance operations" or were killed during flight to Bangladesh.[776]

8.58 A mother of four from Pwint Hpyu Chang reported:

> "I fled together with my four children. I was holding and carrying the two youngest. My two oldest children, my daughter who was six years old and my son who was 10, were behind me. When the armed men were running after me, I hid behind some trees and bushes. The men caught my two oldest children and killed them. They used a knife

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[773] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 33. MG, Vol. IV, Annex 121.

[774] UN OHCHR, *Flash Report* (2017), p. 18. MG, Vol. II, Annex 30.

[775] *Ibid.*

[776] MSF, *"No one was left"* (2018), p. 5, note 6. MG, Vol. IV, Annex 110; Amnesty International, *"We Will Destroy Everything"* (2018), p. 60, note 361. MG, Vol. IV, Annex 112.

> of the kind we use to slaughter goats. I saw this from where I was hiding."[777]

8.59 A woman from Kyein Chaung, in northern Maungdaw Township, described how soldiers killed two of her children, while a third survived multiple stab wounds to her head:

> "Soldiers took to me into a house and beat me and my youngest child. He was one and a half years old, and he died as a result of the beating. My four year old son's hand was being held by my daughter, who was also stabbed in the head. He started crying and then the military stabbed him and he died. It was with a long knife, the length of a forearm."[778]

8.60 A witness from Dar Gyi Zar described how the Tatmadaw "didn't shoot the children" but "cut them" to death instead, and recounted witnessing them "cut five or six boys" between the ages of "five to ten".[779]

8.61 Survivors reported "babies being smashed against floors", "thrown out of windows", "thrown into wells" and "thrown up in the air and caught on a sword".[780] One witness told MSF how the Tatmadaw had "cut the little children's bodies into pieces".[781] The UN Fact-Finding Mission found that,

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[777] UN OHCHR, *Flash Report* (2017), p. 18. MG, Vol. II, Annex 30.

[778] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 894. MG, Vol. II, Annex 40.

[779] Fortify Rights, *They Gave Them Long Swords* (2018), p. 148. MG, Vol. IV, Annex 114.

[780] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 34. MG, Vol. IV, Annex 121.

[781] MSF, *"No one was left"* (2018), p. 10. MG, Vol. IV, Annex 110.

in many villages, Rohingya who returned after the "clearance operations" discovered children's bodies "with throats cut and decapitated heads".[782]

8.62 A father from Chein Khar Li told the Mission: "I found my six-month old son's body lying next to my wife's body. She had been shot. My baby son was stabbed in his stomach and his intestine and liver were coming out".[783] Two other young children were found with their "bodies sliced in half" from "head to toe".[784] Elsewhere, two children—four and six years old—were killed while looking for their mother. One had his throat slit; the other was stomped to death and his body thrown into a burning house.[785] A witness from Koe Tan Kauk saw a soldier take a baby from his mother's arms. He then "removed a knife from his belt" and "plunged the knife into the centre of the baby's chest", pulling it "downward toward his navel".[786]

8.63 A mother from Gu Dar Pyin described to the UN Fact-Finding Mission how the Tatmadaw went into her house and grabbed her young daughter and attacked her son who was trying to save his sister. Her husband later found the corpse of their son. The daughter was never located.[787]

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[782] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 837. MG, Vol. II, Annex 40.

[783] *Ibid.*

[784] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 74 MG, Vol. IV, Annex 121.

[785] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 945. MG, Vol. II, Annex 40.

[786] [redacted]. MG, Vol. X, Annex 336.

[787] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 825. MG, Vol. II, Annex 40.

8.64 Another mother, from Pwint Hpyu Chaung, told the OHCHR that while her family was fleeing the village's "clearance operations", armed men "caught my two oldest children and killed them. They used a knife of the kind we use to slaughter goats".[788]

8.65 In Ngan Chaung, a 12-year-old boy recounted how soldiers beat him and a 13-year-old relative with sticks and metal rods while they cried and begged for mercy.[789] In another village, the OHCHR reported that the Tatmadaw kicked a two-and-a-half year old boy until he lost consciousness.[790] In a separate incident, soldiers threw a five-year old girl against a wall when the Tatmadaw attacked her family's house. They "stomp[ed] on her and kick[ed] her with their combat boots".[791]

8.66 Many children burned to death when they were thrown by Tatmadaw soldiers into fires. A 14-year-old boy from Kyauk Pan Du, in Maungdaw Township, witnessed soldiers push 10 Rohingya, mainly children, into a house, and set it alight, killing everyone inside.[792] In Myin Hlut, a witness saw two children—around six or seven years old—trying to escape a burning house but "pushed back in" by the Tatmadaw.[793]

8.67 A mother of six children from Pwint Hpyu Chaung recounted how the "military took one of my twins and threw her into fire … I shouted and

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[788] UN OHCHR, *Flash Report* (2017), p. 18. MG, Vol. II, Annex 30.

[789] *Ibid.*, p. 27.

[790] *Ibid.*, p. 26.

[791] Physicians for Human Rights, *Shot While Fleeing: Rohingya Disabled by Myanmar Authorities' Targeted Violence* (June 2019), p. 4. MG, Vol. V, Annex 123.

[792] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 946. MG, Vol. II, Annex 40.

[793] *Ibid.*, para. 910.

cried, but they did not give my baby back … I counted about 12 [babies] killed".[794] At Kyauk Pan Du, in Maungdaw Township, a witness saw a soldier "stabbing a child, and then pushing the child inside the burning house".[795] The entire Rohingya family was burned alive.[796]

8.68 A mother of eight from Kyet Yoe Pyin described how soldiers pulled her two-year-old daughter from the arms of her 14-year-old daughter and threw her into a fire. Another mother, from Yae Khat Chaung Gwa Son, similarly told how, after "soldiers cut my husband's throat", they "threw my baby"—only six months old—"into the open fire".[797]

8.69 The UN Fact-Finding Mission found that "babies were thrown into the river by security forces and intentionally drowned".[798] In Maung Gyi Taung, in Buthidaung Township, a woman described seeing "soldiers throwing a number of infants and babies, taken from their mothers, into the river".[799] A witness from Kha Maung Seik, in Maungdaw Township, recounted how, after "their parents were killed", soldiers "threw the children in the river …. Even the newborns and the ones who could barely walk, they threw them in the river".[800]

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[794] Fortify Rights, *They Gave Them Long Swords* (2018), p. 148. MG, Vol. IV, Annex 114.

[795] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 910. MG, Vol. II, Annex 40.

[796] *Ibid.*

[797] Fortify Rights, *They Gave Them Long Swords* (2018), p. 149. MG, Vol. IV, Annex 114.

[798] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 996. MG, Vol. II, Annex 40.

[799] *Ibid.*

[800] Fortify Rights, *They Gave Them Long Swords* (2018), p. 67. MG, Vol. IV, Annex 114.

B. ELDERLY AND DISABLED

8.70 The Tatmadaw also targeted the elderly and disabled. Many helpless victims were caught while fleeing, and were beaten and slaughtered with knives.[801] The UN Fact-Finding Mission determined that the Tatmadaw used long knives and swords to kill the elderly and disabled, "most notably through the intentional slitting of throats".[802] One Rohingya villager witnessed a group of soldiers pull his 70-year-old mother from their house, and then slit her throat with a large knife.[803] Another similarly recounted how a "soldier took out a big knife and cut [her] mother's throat".[804]

8.71 The Tatmadaw also beat elderly Rohingya to death. A survivor from Laung Don described how an elderly villager was detained with 85 others, forced to sit in a stress position with his hands tied behind his back, and "beaten to death by five army officers" using "rifle butts and wooden sticks".[805] A village elder in Hpar Wut Chaung was stopped by the military as he was going to the mosque for morning prayers. Soldiers "kicked him and hit him with their fists".[806] The next day he was found headless in a

[801] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 849. MG, Vol. II, Annex 40; UN OHCHR, *Flash Report* (2017), p. 16. MG, Vol. II, Annex 30.

[802] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 896. MG, Vol. II, Annex 40.

[803] *Ibid.*

[804] *Ibid.*

[805] UN OHCHR, *Flash Report* (2017), p. 18. MG, Vol. II, Annex 30.

[806] Fortify Rights, *They Gave Them Long Swords* (2018), p. 145. MG, Vol. IV, Annex 114.

paddy field.[807] In Nga Khu Ya, an 80-year-old woman was "thrown on the ground", kicked and stomped on with boots by soldiers.[808]

8.72 The Tatmadaw kicked to death the "very elderly and frail" mother of a survivor from Buthidaung Township's Du Oh The Ma.[809] The same witness's elderly uncle was caught by three soldiers while he tried to flee. One soldier "hit him in the back of the head with a rifle"; another "grabbed his head with one hand, and cut his throat with the other".[810] In U Shey Kya, the military rounded up 12 elderly people outside a mosque, tied their hands and beat them.[811]

8.73 The Tatmadaw also set fire to and burned many elderly and disabled Rohingya to death.[812] A woman from Koe Tan Kauk witnessed soldiers tie her mother to a tree, pour petrol on her and set her alight.[813] In Yae Khat Chaung Gwa Son, the Tatmadaw dragged elderly villagers from their homes and set them on fire. Another survivor recounted seeing soldiers "push four disabled and elderly men who could not walk inside burning homes".[814]

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[807] *Ibid.*

[808] UN OHCHR, *Flash Report* (2017), p. 27. MG, Vol. II, Annex 30.

[809] [redacted] G, Vol. X, Annex 336.

[810] *Ibid.*

[811] UN OHCHR, *Flash Report* (2017), p. 26. MG, Vol. II, Annex 30.

[812] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 43. MG, Vol. IV, Annex 121.

[813] [redacted] MG, Vol. X, Annex 336.

[814] US Department of State, *Atrocities in Northern Rakhine* (2018), p. 13. MG, Vol. VII, Annex 194.

8.74 A witness from Yae Khat Chaung Gwa Son told the OHCHR:

> "The military dragged my grandmother and grandfather out of their house. First they were severely beaten, then tied to a tree. The military then put dried grass, woods around them and set them on fire."[815]

8.75 A survivor who returned to Kyauk Pan Du, in southern Maungdaw Township, "saw the burned corpses of ten elderly people and one younger person inside their houses".[816] In another village in Buthidaung Township, a survivor returned to find "12 bodies of elderly people who had been burned in their homes".[817] Another survivor, upon returning to Ta Man Thar, in northern Maungdaw Township, discovered the "charred bodies of a disabled man and two elderly people in their houses".[818]

C. PREGNANT WOMEN

8.76 Pregnant women were also targeted by the Tatmadaw. A girl from Koe Tan Kauk witnessed the Tatmadaw attack her pregnant mother. "One grabbed her legs and other her head" while a "third man took a knife from his belt and cut her, making an incision from the middle of the chest down to navel".[819] Another witness said: "I saw a soldier pour gasoline over a

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[815] UN OHCHR, *Flash Report* (2017), p. 17. MG, Vol. II, Annex 30.

[816] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 906. MG, Vol. II, Annex 40.

[817] *Ibid.*

[818] *Ibid.*

[819] [redacted] MG, Vol. X, Annex 336.

heavily pregnant woman, [and] set her on fire."[820] Another witness saw the Tatmadaw throw a pregnant woman into a dam.[821] Still another witness, from U Shey Kya, told the OHCHR that her pregnant sister was beaten by soldiers on her back, stomach, waist and buttocks with rifle butts, resulting in the death of the unborn baby.[822]

8.77 In Kyet Yoe Pyin, a woman was about to give birth when the Tatmadaw entered the village. The OHCHR reported how they dragged her out of the house and "hit her stomach with a big stick".[823] They then killed the new-born baby "by stomping on it with their heavy boots".[824] Rohingya who returned to Kyet Yoe Pyin after the "clearance operation" found the bodies of pregnant women with their stomachs cut open.[825]

8.78 A witness from Maungdaw Township stated: "I saw six women assisting a pregnant woman trying to give birth during the attack. Soldiers shot the women and cut up their bodies."[826] Similarly, a survivor from Yin Ma Kyaung Taung, in Buthidaung Township, recounted assisting her daughter with the birth of her child, along with two other women from the village. The Tatmadaw "slashed [the two women's] necks with their

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[820] Save the Children, *"Horrors I will never forget": The stories of Rohingya children* (2017), p. 6. MG, Vol. IV, Annex 100.

[821] [redacted]. MG, Vol. X, Annex 336.

[822] UN OHCHR, *Flash Report* (2017), p. 26. MG, Vol. II, Annex 30.

[823] *Ibid.*, p. 18.

[824] *Ibid.*

[825] Fortify Rights, *They Gave Them Long Swords* (2018), p. 145. MG, Vol. IV, Annex 114.

[826] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 39. MG, Vol. IV, Annex 121.

knives" and kicked her daughter's abdomen. When the baby was still-born, the soldiers "shot her daughter's vagina and then slashed her neck".[827]

III. The Tatmadaw's Extreme Brutality in Select Rohingya Villages

8.79 The preceding sections of this Chapter described the extreme brutality of the Tatmadaw's "clearance operations", drawing upon evidence from more than 30 villages throughout northern Rakhine State. This section presents a more detailed picture of Myanmar's conduct, as it occurred on the ground, by focusing on the events in three specific villages in different townships, and describing how the "clearance operations" were conducted in each of them. Although these villages are widely separated across northern Rakhine State, the evidence shows a consistent pattern of conduct in all three of them.

A. MIN GYI

8.80 Min Gyi (also known as Tula Toli) is a Rohingya village located in Maungdaw Township on the west bank of the Pyuma Stream. Its approximately 425 wood and bamboo houses were surrounded by paddy fields and waterways, and its residents cultivated rice and vegetables.

8.81 The "clearance operation" at Min Gyi began between 8 a.m. and 9 a.m. on 30 August 2017, when approximately 70 Tatmadaw soldiers entered the village after they had carried out a "clearance operation" in the

827 [redacted] MG, Vol. X, Annex 336.

Rohingya part of Pa Da Kar Ywar Thit, located to the east.[828] A 25-year-old survivor told the US Holocaust Memorial Musuem: "They tried to kill us all."[829]

8.82 The village is surrounded by the Purma River on three sides. Many Rohingya fled to a riverbank, hoping to "stay out of harm".[830] The Tatmadaw, however, opened fire at the crowds of fleeing people. A survivor recounted:

> "[E]veryone from my village was running towards the shore. While I was running, there was a lot of shooting and I saw many people hit and falling down. There were a huge amount of people at the shore. Five minutes after I arrived, the military moved to the shore and encircled the group."[831]

8.83 As the UN Fact-Finding Mission reported, this caused the Rohingya to be "effectively trapped, on one side by the river and on the other side by the soldiers".[832] The only escape route was to attempt to cross the river. Many tried but drowned, including children and the elderly.[833] Others were shot by soldiers while trying to swim across. A woman reported witnessing

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[828] *See* UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 758, 761. MG, Vol. II, Annex 40; United States Holocaust Memorial Museum, *"They tried to kill us all": Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar* (November 2017), p. 9. MG, Vol. VII, Annex 192.

[829] *Ibid.*, p. 1.

[830] Amnesty International, *"We Will Destroy Everything"* (2018), p. 73. MG, Vol. IV, Annex 112.

[831] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 761. MG, Vol. II, Annex 40.

[832] *Ibid.*, para. 763.

[833] *Ibid.*, para. 764.

soldiers shoot and kill her two sons in the water.[834] Another witness, a male teacher who had lived close to the river, testified that "[t]he military shot at those swimming as if they were 'shooting birds in a tree".[835] Another recounted that, as he was crossing the river, he saw dead bodies floating and heard shooting and screaming from the shore.[836] Another witness, a male shopkeeper and farmer, recalled that "many people were running towards the river, trying to cross the river" but "the people who could not cross, were surrounded and killed".[837]

8.84 [redacted][840]

[834] Human Rights Watch, *Massacre by the River: Burmese Army Crime Against Humanity in Tula Toli* (19 December 2017), p. 15. MG, Vol. IV, Annex 107 [**hereinafter** HRW, *Massacre by the River* (2017)].

[835] Witness Statement No. 009, signed on 13 September 2020, para. 31. MG, Vol. X, Annex 346.

[836] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 765. MG, Vol. II, Annex 40.

[837] Witness Statement No. 012, signed on 14 September 2020, para. 18. MG, Vol. X, Annex 349. *See also* Witness Statement No. 022, signed on 5 October 2020, para. 19 ("Some villagers were trying to swim across the river and they were about halfway across when the military started shooting at them."). MG, Vol. XI, Annex 360.

[838] Witness Statement No. 013, signed 23 September 2020, para. 18. MG, Vol. X, Annex 350.

[839] *Ibid.*

[840] *Ibid.*

8.85 Another survivor, a father of four, recounted: "People who were wounded during the initial shooting on the shore and who survived, were then killed by the military. I saw the military beating the survivors with metal rods, hitting them on the head, cutting their neck and slaughtering them with knives."[841] The teacher who had lived close to the river described: "On the beach, I saw the military making the people prostrate themselves as if they were praying. While the people were ben[t] in this position, the military went amongst them, killing the men."[842] Another witness testified: "I watched when the militaries started firing at all the gathered people on the riverside."[843]

8.86 The soldiers killed those who attempted to escape. A 51-year-old survivor recalled: "Whoever moved was shot. If they looked up or moved their heads, they were shot."[844] Children who were captured by the Tatmadaw were beheaded and thrown into the river.[845]

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[841] [redacted] MG, Vol. X, Annex 347.

[842] [redacted] MG, Vol. X, Annex 346.

[843] [redacted] MG, Vol. X, Annex 348.

[844] Fortify Rights, *They Gave Them Long Swords* (2018), p. 63. MG, Vol. IV, Annex 114.

[845] Jason Motlagh, "The Survivors of the Rohingya Genocide: An investigation into Myanmar's state-orchestrated murder of thousands of Rohingya Muslims—and the second tragedy unfolding in the refugee camps", *Rolling Stone* (9 August 2018). MG, Vol. IX, Annex 286. *See also, e.g.*, [redacted] MG, Vol. XI, Annex 365; MG, Vol. XI, Annex 364; [redacted]

8.87 Another survivor, a 35-year-old father of three, recounted how the "[m]ilitary were walking north to south along the beach shooting people".[846] He testified: "From the cover of [a] tree I saw my mother running on the beach. She was shot by the military and fell on the ground."[847]

8.88 According to the UN Fact-Finding Mission, the Tatmadaw separated the women and the children from the men. They forced the women to sit "in the water up to [their] chests and watch as, over the next three hours, the men were lined up and systematically shot, two three times apiece".[848] A witness described how the "first round of shooting was like a rain of bullets. The second round was slow as the soldiers killed the men individually. They aimed a gun at each man and shot".[849]

8.89 Those who survived the gunshots were killed with knives. A woman told the UN Fact-Finding Mission that she saw the Tatmadaw shoot her husband and then slit his throat.[850] Another survivor who lost seven children

[redacted] MG, Vol. XI, Annex 369.

[846] [redacted] MG, Vol. X, Annex 345.

[847] *Ibid.*, para. 19.

[848] Jason Motlagh, "The Survivors of the Rohingya Genocide: An investigation into Myanmar's state-orchestrated murder of thousands of Rohingya Muslims—and the second tragedy unfolding in the refugee camps", *Rolling Stone* (9 August 2018). MG, Vol. IX, Annex 286.

[849] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 766. MG, Vol. II, Annex 40.

[850] *Ibid.*, para. 767.

recounted: "Men who were not shot dead, who were struggling or severely injured, were killed with a knife."[851]

8.90 The Tatmadaw brought to the shore the men "they had captured in the village … and killed them as well".[852] A 24-year-old women survivor recounted how the soldiers "just kept catching men, making them kneel down and killing them".[853]

8.91 The Tatmadaw systematically killed children.[854] The UN Fact-Finding Mission determined that "some were shot, some thrown into the river, others thrown onto a fire".[855] A witness told the Mission that the "soldiers took infants from their mothers' laps and threw them into the river". Many children's bodies were seen "floating away".[856] A mother, Mumtaz Begum, recalled how three of her children were killed:

> "They threw my five-year-old into the river. I had my two-year-old baby on my hip. They grabbed the baby and threw him on the fire. My 11-year-old boy was lying half-dead with his throat cut."[857]

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[851] *Ibid. See also, e.g.,* [redacted] MG, Vol. XI, Annex 362.

[852] HRW, *Massacre by the River* (2017), p. 14. MG, Vol. IV, Annex 107.

[853] *Ibid.*, p. 15.

[854] Poppy McPherson, "Witness to a massacre: the former Myanmar soldier who saw his village burn", *The Guardian* (5 February 2018). MG, Vol. IX, Annex 278.

[855] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 770. MG, Vol. II, Annex 40.

[856] *Ibid.*

[857] "Myanmar's Killing Fields", Transcript, *Frontline* (8 May 2018). MG, Vol. V, Annex 139.

8.92 A witness described seeing a ten-year-old boy stabbed by soldiers as he was trying to run away.[858] Another recounted how her ten-year-old brother was shot to death while fleeing.[859] The father of four, testified: "I also saw some women with small children who had survived the initial shooting made to stand in the water in the river; then the military fired at them. I saw around 27 children's bodies floating in the water afterwards."[860]

8.93 The teacher who had lived near the river similarly reported:

> "I also saw the military … taking forcefully more than 20 children that were with their mothers. Some children were thrown in the fire; others were thrown in the river. I heard the mothers shouting …. Some children could swim, but others couldn't. I watched some children trying to climb back on the shore but they were beaten when they did."[861]

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[858] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 770. MG, Vol. II, Annex 40. *See also, e.g.*, [redacted] MG, Vol. XI, Annex 360.

[859] Jason Motlagh, "The Survivors of the Rohingya Genocide: An investigation into Myanmar's state-orchestrated murder of thousands of Rohingya Muslims—and the second tragedy unfolding in the refugee camps", *Rolling Stone* (9 August 2018). MG, Vol. IX, Annex 286.

[860] [redacted] MG, Vol. X, Annex 347. *See also, e.g.*, [redacted] MG, Vol. XI, Annex 362.

[861] [redacted]. MG, Vol. X, Annex 346.

8.94 The soldiers "hacked small children".[862] Some were of a "breastfeeding-age", others were "two years, three years, five years [old]."[863] A 50-year-old father of six recounted how the Tatmadaw:

> "[S]tomped on some small children with their feet. As the parents were holding their children, [the soldiers] shot the parent and then the children fell down. The soldiers picked them up and threw them down on the ground."[864]

8.95 [redacted]

[redacted]

8.96 Women and young girls were taken in groups to nearby houses or bushes, where they were severely beaten and stabbed, raped and killed. A survivor witnessed "groups of around ten soldiers [take] about six women three times" to the bushes of the riverbank. "[T]he women never came back."[866]

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[862] Fortify Rights, *They Gave Them Long Swords* (2018), pp. 61, 67. MG, Vol. IV, Annex 114.

[863] *Ibid.*

[864] *Ibid.*, p. 67.

[865] [redacted] MG, Vol. X, Annex 350.

[866] United States Holocaust Memorial Museum, *"They tried to kill us all": Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar* (November 2017), pp. 10-11. MG, Vol. VII, Annex 192.

8.97 [redacted]



8.98 [redacted]



[867] [redacted]. MG, Vol. X, Annex 350.

[868] *Ibid.*, para. 34. [redacted]

G, Vol. XI, Annex 365;

MG, Vol. XI, Annex 364;

MG, Vol. XI, Annex 362.

8.99 Other women were killed on the beach. The mother of three testified:

> "[O]n the beach, I saw all the women running east. There was nowhere to run that way because it was toward the river. The military were in line, ready with their guns. Then, I saw them shooting at the women as they ran. …
>
> I heard the wounded shouting for water. The military collected the wounded women, but they did not kill them right away. For about ten to twenty minutes, the military waited. I saw some of them talking on big black phones. The phones were not attached to anything. I know military, including the Bangladesh Army, uses those types of phones. They sounded like they were speaking Burmese, which I do not understand.
>
> Then, I saw the military hitting them. They used different weapons; some used shovels or wooden sticks that the villages had used to carry their personal things as they fled. …
>
> Some women who survived the shooting were lying down on the ground, very afraid. Those women were taken into the hole. Once they were done killing the wounded women, the military rested."[869]

8.100 Children and infants who were with their mothers were killed and often mutilated. A witness described how the military "beat to death" three children—ages five, six and ten—on the steps to the house" using "their

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[869] [redacted] MG, Vol. X, Annex 345.

gun butts and wooden sticks". Another described the killing of her baby while she was being raped:

> "I entered the house with four of my neighbours, and three of us had babies. … There were dead bodies on the floor, young boys and older men from our village. After we entered the house, one soldier raped me. They stabbed me in the back of my neck and in my abdomen. I was trying to save my baby who was only 28 days old but they threw him on the ground and he died. … I was the only one who survived in that room."[870]

8.101 The father of three recounted seeing "about ten to twelve children, who were about three to four year-old and barely walking, wandering around on the beach". She testified:

> "I saw them kicking the children, and after they had fell down, the military killed them by hitting them very violently with knives in their belly or by slitting their throats. They took their knives, which were not very long, from their pockets."[871]

8.102 Entire families were decimated.[872] A 27-year-old woman witnessed 11 family members killed by soldiers on the shore, including her 20-day-old baby who was stabbed with a knife and thrown on the ground.[873] A 65-

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[870] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 772. MG, Vol. II, Annex 40.

[871] [redacted] MG, Vol. X, Annex 345.

[872] HRW, *Massacre by the River* (2017), pp. 18-20. MG, Vol. IV, Annex 107.

[873] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 775. MG, Vol. II, Annex 40.

year-old man reported losing eight members of his family, with two more of his sons missing.[874]

8.103 Another witness, a 55-year-old rice farmer, counted the members of his family who were killed:

> "My wife [], 50; my first son [], 35; his daughter [], two to three, and his son [], six to seven months; my second son [], 12; my third son [], 10; my fourth son [], seven; my eldest daughter [], 25; her husband, [], 35; my second daughter [], 14; my third daughter [], six; my fourth daughter [], five; my sixth daughter [], two to three; my seventh daughter [], six months old".[875]

8.104 The Tatmadaw committed rape and other forms of sexual violence on a massive scale, as detailed in Chapter 9. At Min Gyi, after raping the women, the Tatmadaw locked them inside houses and set them on fire. A survivor who escaped recounted:

> "I woke up and realized I was in a pool of sticky blood. I tried to wake the others up but they didn't move. Then I broke through the [bamboo] wall and escaped. … When I escaped from the house, all the houses in the area were on fire. I could hear women

[874] Oliver Holmes, "Massacre at Tula Toli: Rohingya recall horror of Myanmar army attack", *The Guardian* (7 September 2017). MG, Vol. IX, Annex 266. *See also, e.g.*, [redacted] MG, Vol. XI, Annex 358.

[875] Oliver Holmes, "Massacre at Tula Toli: Rohingya recall horror of Myanmar army attack", *The Guardian* (7 September 2017). MG, Vol. IX, Annex 266.

> screaming from some of the other houses. They could not escape from the fires."[876]

8.105 The Tatmadaw did not spare the elderly at Min Gyi. A witness, Petam Ali, a 30-year-old rice distributor, saw an 85-year-old acquaintance shot in the chest and his body left on the road. In the ruins of his house, he found the decapitated corpse of his 75-year-old grandmother.[877]

8.106 Survivors saw "eight piles of burned bodies" in one location.[878] One 50-year-old witness described how "[s]ome of the people were burned and some were cut up". The survivor reported:

> "We counted up to 340 dead bodies. The bodies were all in the same area. Some were in piles, and some were laying around. I saw some throats were cut. One head wasn't completely separated but the bone was sticking out ... Most of the men were shot dead. I saw a big hole, and many bodies were burned, covered in hay. The children's bodies were burned. I saw one hole that was mostly children."[879]

8.107 The UN Fact-Finding Mission estimates that approximately 750 Rohingya were killed at Min Gyi.[880] As shown in Figure 8.2 (following page 258 and in Volume XII), the entire village was burned to the ground.

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[876] HRW, *Massacre by the River* (2017), p. 24. MG, Vol. IV, Annex 107.

[877] Oliver Holmes, "Massacre at Tula Toli: Rohingya recall horror of Myanmar army attack", *The Guardian* (7 September 2017). MG, Vol. IX, Annex 266.

[878] Fortify Rights, *They Gave Them Long Swords* (2018), p. 67. MG, Vol. IV, Annex 114.

[879] *Ibid.*, p. 68.

[880] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 774. MG, Vol. II, Annex 40.

B. CHUT PYIN

8.108 Chut Pyin is a village tract located in northern Rathedaung Township, on the west bank of the Mayu River. It included both a Rohingya village and an ethnic Rakhine hamlet, surrounded by rice paddies and forest.[881] The villagers were labourers and farmers who reared livestock, fish-farmed tilapia and were well-known for their cultivation of okra and bitter gourd.

8.109 The Tatmadaw began its "clearance operation" at approximately 2:00 p.m. on 27 August 2017, as many Rohingya families were "preparing to eat lunch" or praying in the mosque.[882]

8.110 The Tatmadaw, accompanied by other security forces and ethnic Rakhine, emerged from the Rakhine hamlet to the northeast and surrounded the village.[883] Witnesses described hearing "a huge amount of gun fire" and bullets "like rain falling from the sky".[884] As villagers ran toward surrounding paddy fields, the Tatmadaw fired at them, "kill[ing] whoever they could".[885] A woman reported that her baby daughter was shot in the

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[881] *Ibid.*, para. 779.

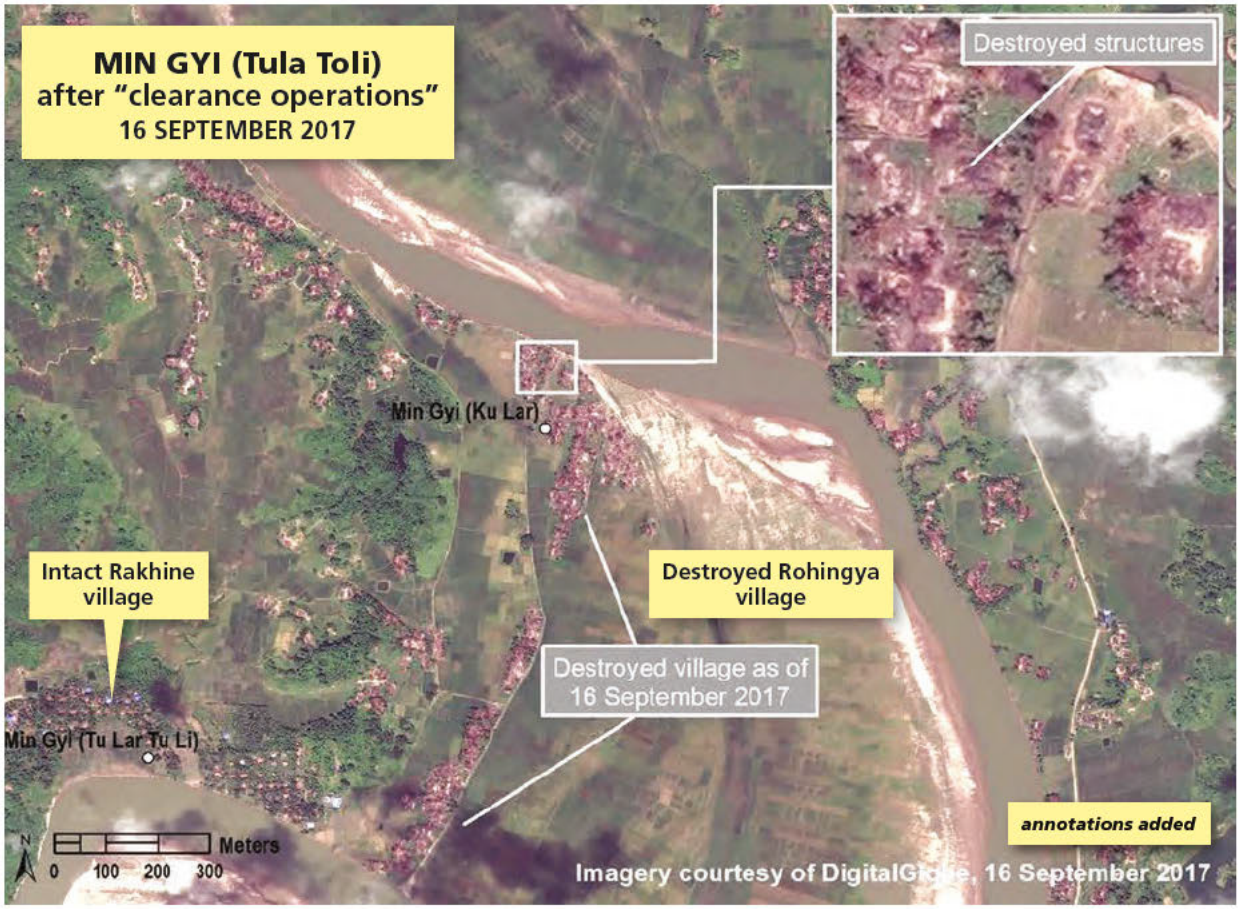
[882] Amnesty International, *"We Will Destroy Everything"* (2018), p. 65. MG, Vol. IV, Annex 112; [redacted] MG, Vol. X, Annex 336.

[883] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 782. MG, Vol. II, Annex 40.

[884] [redacted] MG, Vol. X, Annex 336.

[885] [redacted] MG, Vol. X, Annex 336. *See also* UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 783. MG, Vol. II, Annex 40; Amnesty International, *"We Will Destroy Everything"* (2018), p. 66. MG, Vol. IV, Annex 112.





Source: UN Human Rights Council, Report of the detailed findings of the International Fact-Finding Mission on Myanmar, 17 September 2018, p. 183.

Figure 8.2

head.[886] Another recounted seeing two relatives shot dead.[887] A witness described how "[t]he military were all around, shooting. … A bullet shot through my son's stomach, [opened it] and hit my hand. … I saw the blood coming out of his stomach, and I fainted."[888]

8.111 Throughout the village, the Tatmadaw dragged people out of their homes and shot them "at point blank range. Others were killed by having their throats cut with large knives."[889] A survivor recounted: "If people were not killed by the gunshots, they were slaughtered [with long knives] to make sure they were really dead".[890] Another reported: "Our village was full of dead bodies."[891]

8.112 Men and boys were systematically killed. In the northern part of Chut Pyin, from which many of the Tatmadaw entered, soldiers took several villagers to a school and carried out a mass execution of men and boys.[892] A 25-year old rape victim whose husband was killed recalled:

> "I saw so many bodies in front of the school. Some had been shot, some had been cut. All of the dead bodies were bound [their hands tied with rope]. There were bullets on the ground everywhere… There was so much

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[886] "Myanmar's Killing Fields", Transcript, *Frontline* (8 May 2018). MG, Vol. V, Annex 139.

[887] *Ibid.*

[888] Amnesty International, *"We Will Destroy Everything"* (2018), p. 65. MG, Vol. IV, Annex 112.

[889] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 783. MG, Vol. II, Annex 40.

[890] *Ibid.*

[891] *Ibid.*, para. 785.

[892] Amnesty International, *"We Will Destroy Everything"* (2018), p. 65. MG, Vol. IV, Annex 112.

> blood. The dead bodies were like stones in a field."[893]

8.113 As the Tatmadaw entered a woman's house, they took her husband and father-in-law "out in the compound and shot them".[894] In another instance, the Tatmadaw dragged a survivor's husband outside and "shot him numerous times in the chest".[895] Another woman watched the Tatmadaw take her husband and son, tie their hands and beat them. She described how "[b]oth were lying on the ground when one of the military stood above them and slaughtered them" by cutting their throats.[896] Soldiers dragged two elderly siblings out of their homes, beating one on the head until his brains came out.[897] Survivors witnessed the Tatmadaw abducting and taking away a group of 57 men and older boys, mostly teachers and other educated people. Their fate remains unknown.[898]

8.114 The Tatmadaw apprehended Rohingya who reached a paddy field. They separated the men and boys from the women, and had "their hands tied behind their backs".[899] The Tatmadaw then "shot all the men".[900]

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[893] *Ibid.*

[894] [redacted] G, Vol. X, Annex 336.

[895] [redacted] MG, Vol. X, Annex 336.

[896] [redacted]. MG, Vol. X, Annex 336.

[897] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 785. MG, Vol. II, Annex 40.

[898] *Ibid.*, para. 791.

[899] International State Crime Initiative, *Genocide Achieved, Genocide Continues: Myanmar's Annihilation of the Rohingya* (2018), p. 53. MG, Vol. IV, Annex 109.

[900] *Ibid.*

Women were raped, shot and killed in the fields.[901] Young children were burnt alive.[902]

8.115 A 41-year old survivor recounted how, after the Tatmadaw had left, he found the bodies of family members in the fields, including his sister-in-law and two nephews. "They had marks on their bodies from bullets and some had cuts." He reported: "My two nephews, their heads were off. One was six years old and the other was nine years old. My sister in law was shot with a gun."[903]

8.116 The Tatmadaw wrenched babies from their mothers' arms, threw them onto the ground, or into fires and burned them alive.[904] One survivor reported that, as she was being kicked and punched, she "felt her child ripped from her arms and saw one of the military men throw him on the ground. As soon as [he] hit the ground, he was shot and killed".[905] In another instance, soldiers shot a woman fleeing with her 20-month-old baby and eight-year-old child. The bullets killed her baby instantly; the eight-year-old died that night.[906] [redacted]

[901] "Myanmar's Killing Fields", Transcript, *Frontline* (8 May 2018). MG, Vol. V, Annex 139.

[902] *Ibid.*

[903] Fortify Rights, *They Gave Them Long Swords* (2018), p. 67. MG, Vol. IV, Annex 114.

[904] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 789. MG, Vol. II, Annex 40.

[905] [redacted] MG, Vol. X, Annex 336.

[906] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 789. MG, Vol. II, Annex 40.

[redacted][907] Other witnesses saw the Tatmadaw grab children, some as young as four, as they were running, and throw them into burning houses.[908]

8.117 In one instance, soldiers rounded up a large group of women and children. A witness, Rashida Khatum, a mother, described how they "snatched the children from their mothers' laps".[909] She recounted: "If any mother cried out for their baby, they shot them. They killed 10 women for that."[910] Soldiers dragged the children and babies to a nearby burning home, and "threw them into the flames alive".[911]

8.118 Another villager described the killing of a young boy:

> "[O]ne of [the soldiers] shot [him], and the other took a sword and swung it toward his body a number of times. A short time later, [his] head [was] lifted from his body along with his arms and legs. He had been cut into three different pieces".[912]

8.119 The UN Fact-Finding Mission estimates that 127 children aged five or under were killed during the "clearance operation" in Chut Pyin, among

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907 [redacted] G, Vol. X, Annex 336.

908 [redacted] MG, Vol. X, Annex 336.

909 "Myanmar's Killing Fields", Transcript, *Frontline* (8 May 2018). MG, Vol. V, Annex 139.

910 *Ibid.*

911 *Ibid.*

912 [redacted] MG, Vol. X, Annex 336.

the more than 358 Rohingya who were killed there.[913] One survivor recounted seeing dead bodies, including children, "strewn across the village, inside houses and outside compounds".[914] A man who passed through Chut Pyin after the "clearance operation" reported seeing "dead bodies everywhere", with many children "floating in the river".[915] Another 27-year-old survivor described the scene as he returned to the village after the Tatmadaw had departed:

> "I myself saw about 150 dead bodies. I couldn't go close to the camp—there were more there. Some dead bodies had gunshot wounds. Some were cut up. Some were beheaded, and some were cut into pieces, three separate pieces. I saw this myself."[916]

8.120 As shown in Figure 8.3 (following page 264 and in Volume XII), the village was destroyed by fire. By contrast, the adjacent ethnic Rohingya hamlet remained untouched.

C. MAUNG NU

8.121 Maung Nu, also known as Monu Para, is located in the Chin Tha Mar village tract of Buthidaung Township. It was home to 400 Rohingya households.[917] While most of its villagers were farmers, some engaged in fishing or cut and sold firewood and bamboo from the nearby forests and

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[913] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 796. MG, Vol. II, Annex 40.

[914] *Ibid.*, para. 792.

[915] *Ibid.*

[916] Fortify Rights, *They Gave Them Long Swords* (2018), p. 68. MG, Vol. IV, Annex 114.

[917] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 799. MG, Vol. II, Annex 40.

hills. Military and BGP posts were located to the south and northeast of the village. Before the "clearance operation" there, Maung Nu's Rohingya population had swelled to include Rohingya who had escaped Hpaung Taw Pyin, a nearby village where the Tatmadaw had carried out a "clearance operation" two days earlier.[918]

8.122 Between 10 and 11 a.m. on 27 August 2017, a large group of Tatmadaw soldiers arrived "in military trucks" and "small groups on foot".[919] Witnesses reported "several trucks full of soldiers" on the main road running from a nearby Tatmadaw base.[920] One 50-year old former resident testified that the "military suddenly came" from "the south, north and west" and "surrounded the whole village on the three sides".[921] They "started catching people from their houses and tying their hands" and "[w]hoever ran was shot at".[922]

8.123 Another witness, a 66-year-old male, described seeing from a hill the Tatmadaw "forming a circle around the village" and bringing the people "to the place where they were killed".[923]

8.124 Many Rohingya were gathered in two large and connected houses that shared a common courtyard.[924] The Tatmadaw pounded on the doors,

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[918] *Ibid.*, paras. 801-804.

[919] *Ibid.*, para. 805.

[920] Amnesty International, *"We Will Destroy Everything"* (2018), p. 69. MG, Vol. IV, Annex 112.

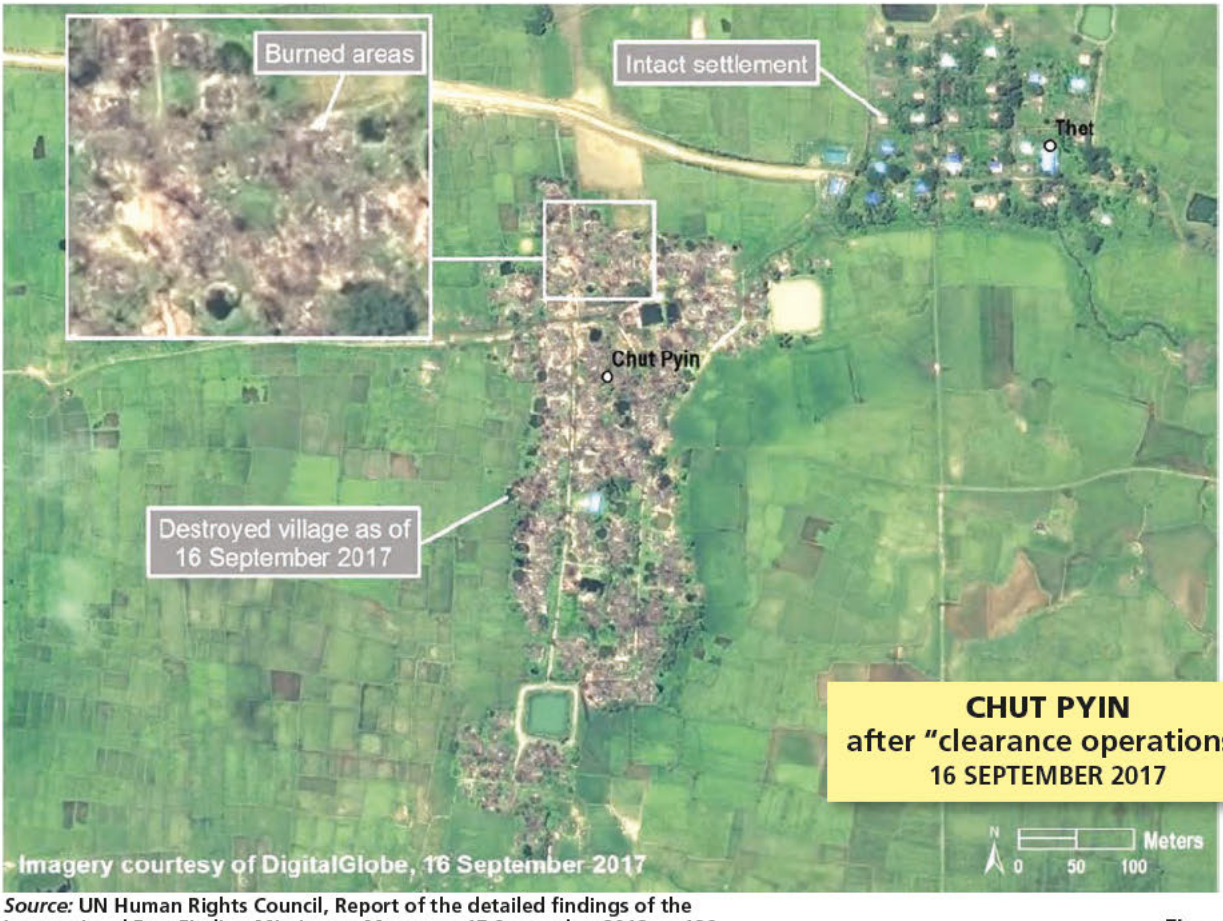
[921] [redacted] MG, Vol. X, Annex 342.

[922] *Ibid.*

[923] [redacted]. MG, Vol. X, Annex 341.

[924] Amnesty International, *"We Will Destroy Everything"* (2018), p. 69. MG, Vol. IV, Annex 112.





Source: UN Human Rights Council, Report of the detailed findings of the International Fact-Finding Mission on Myanmar, 17 September 2018, p. 186.

Figure 8.3

and ordered the Rohingya to come out,[925] threatening to set fire to the houses if the occupants did not obey.[926]

8.125 When they emerged, the Tatmadaw dragged them to the courtyard and separated the men and older boys from the women and younger children.[927] The men and the boys were ordered to lie face down on the ground, with their hands tied behind their backs. As a witness recounted:

> "The soldiers took the men out of the house and tied up their hands behind their back with a rope. When the rope had finished they used women's headscarves to tie them up. Soldiers forced them to lie with their chest and face down on the ground."[928]

8.126 The men were then beaten for hours.[929] During the beatings, the highest-ranking officer present, after speaking on the phone, told the soldiers: "We will kill them."[930] Five witnesses independently identified this officer as Major Thant Zaw Win, a commander of the 564th Light Infantry Battalion and the highest-ranking officer present during the "clearance operation" at Maung Nu. Major Win was known to the witnesses

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[925] *Ibid.*, p. 70.

[926] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 806. MG, Vol. II, Annex 40.

[927] Ibid., para. 807; Amnesty International, *"We Will Destroy Everything"* (2018), p. 70. MG, Vol. IV, Annex 112.

[928] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 808. MG, Vol. II, Annex 40.

[929] Amnesty International, *"We Will Destroy Everything"* (2018), p. 70. MG, Vol. IV, Annex 112.

[930] Fortify Rights, *They Gave Them Long Swords* (2018), p. 64. MG, Vol. IV, Annex 114. *See also* Amnesty International, *"We Will Destroy Everything"* (2018), p. 70. MG, Vol. IV, Annex 112.

because he had summoned Rohingya community leaders to meetings on previous occasions.[931]

8.127 Soldiers opened fire on the men and boys. The sound of guns "went on and on".[932] Those who survived had their throats slit with long knives and their bodies mutilated.[933] A witness estimated that approximately 250 Rohingya men and boys were killed in this manner, including 100 who were "shot at close range".[934] The remainder were killed with knives.[935]

8.128 Smaller groups of men were taken to other places in Maung Nu, where they were shot or hacked to death. A survivor, 18-year old Mohammadul Hassan, recounted how:

> "The soldiers took away people in groups of two and three and one-by-one hacked on the back of their necks. The three of us were taken to another place, near a pond. We were made to sit with our heads down. Six or seven military surrounded us, and then they shot us.

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[931] Amnesty International, *"We Will Destroy Everything"* (2018), p. 161. MG, Vol. IV, Annex 112. Major Win was assisted during the "clearance operation" by Staff Sergeant Ba Kyaw, who was recognized by Rohingya because he spoke the Rohingya language and interacted with Rohingya community eaders and villagers in Chin Tha Mar village tract. *Ibid.*, Chapter 4. Survivors witnessed Staff Sergeant Kyaw force Rohingya to open their houses under threat of burning them down with people inside; arrest and escort people to the compound where the massacre occurred; force men out into the courtyard for extrajudicial execution; and then personally carry out some of the killings.

[932] Amnesty International, *"We Will Destroy Everything"* (2018), p. 70. MG, Vol. IV, Annex 112.

[933] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 808. MG, Vol. II, Annex 40; Amnesty International, *"We Will Destroy Everything"* (2018), p. 70. MG, Vol. IV, Annex 112.

[934] International State Crime Initiative, *Genocide Achieved, Genocide Continues: Myanmar's Annihilation of the Rohingya* (2018), p. 53. MG, Vol. IV, Annex 109.

[935] *Ibid.*

> We fell down, and they unfastened our hands."[936]

8.129 The 50-year old former resident testified:

> "[T]hey began to take people away in groups. They took them somewhere behind the house and began to fire. They slaughtered the men. They cut necks of some and shot others. They also killed my brother."[937]

8.130 One survivor described how a group of men and boys was taken to a nearby area of scrubland where "[s]ome of them were shot first" and then had their throats slit; "[o]thers just had their throats slit".[938]

8.131 Another survivor, a community teacher, describes how "they called the men out and blindfolded them using the scarves that they had taken from the women. Then they tied their hands behind their backs. Then they began killing the men. They took the men to another compound then shot some and stabbed others".[939]

8.132 [redacted]

[redacted]

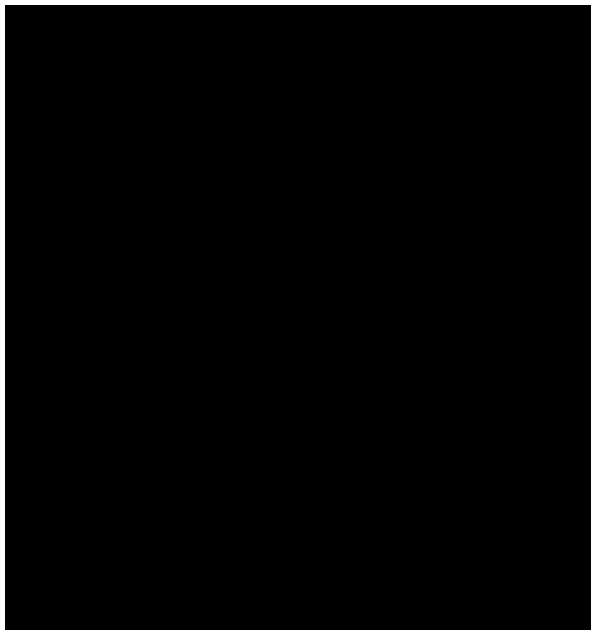
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[936] Fortify Rights, Witness Statement of Mohammadul Hassan (23 February 2018). MG, Vol. X, Annex 337.

[937] [redacted] MG, Vol. X, Annex 342; *See also* [redacted] MG, Vol. XI, Annex 361.

[938] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 808. MG, Vol. II, Annex 40.

[939] [redacted] MG, Vol. X, Annex 339.



8.133 [redacted]



8.134 The Tatmadaw killed children and elderly people, ranging in age from five to 90 years old.[942] One woman reported that her father-in-law, as well as her brother-in-law and his two sons, ages 16 and 18, were among

[940] [redacted] MG, Vol. X, Annex 340.

[941] *Ibid.*, para. 26.

[942] United States Holocaust Memorial Museum, *"They tried to kill us all": Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar* (November 2017), p. 9. MG, Vol. VII, Annex 192.

those killed.[943] Another woman told the Mission that the military killed her two nephews:

> "The soldiers killed the male members of my family. They shot at them first and then slit their throats. The courtyard was full of blood. They killed my husband, my father-in-law and my two nephews of 15 and eight years old. They even killed the child in the same way."[944]

8.135 A former teacher and shopkeeper described the killing of his relative:

> "I saw [my relative] killed. … They called him out from his house. His house is next to where Sawlim's house was. After leaving Sawlim's house the military caught [him] in his compound. The house I was in was up the hill a bit from Sawlim and [his] house. When [he] came out into his compound, one of the military said to him 'you are an old man, go back.' Then By Kyaw [an officer] said, 'No, we need to kill all the men first.'
>
> They did the same thing to [my relative] as they did to Mr Sawlim. They tied his hands and put tape on his mouth. They put him down on the ground and cut his neck from the back using a big knife. By Kyaw cut his neck. By Kyaw is from [Battalion] 564 and has three lines on his uniform on his shoulder. I

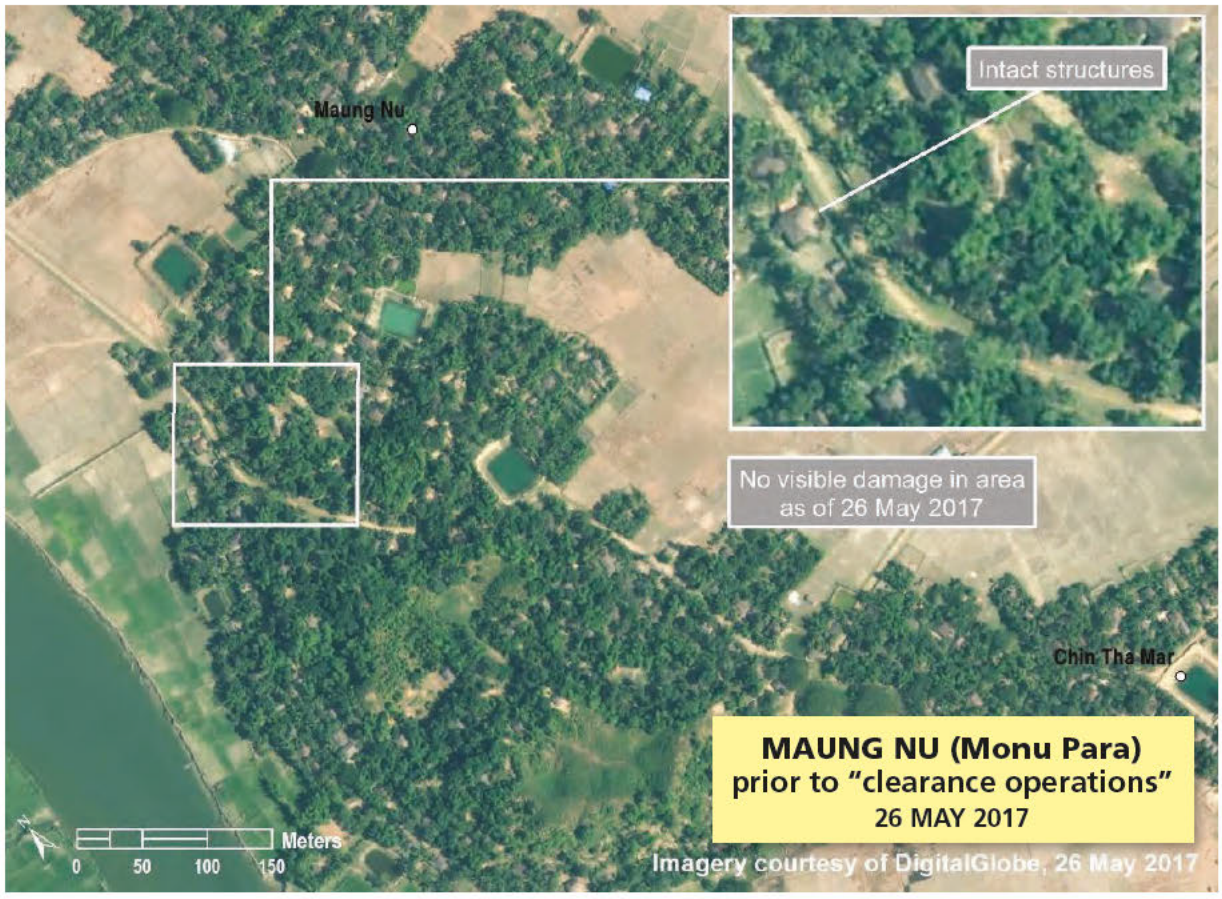
[943] *Ibid.*

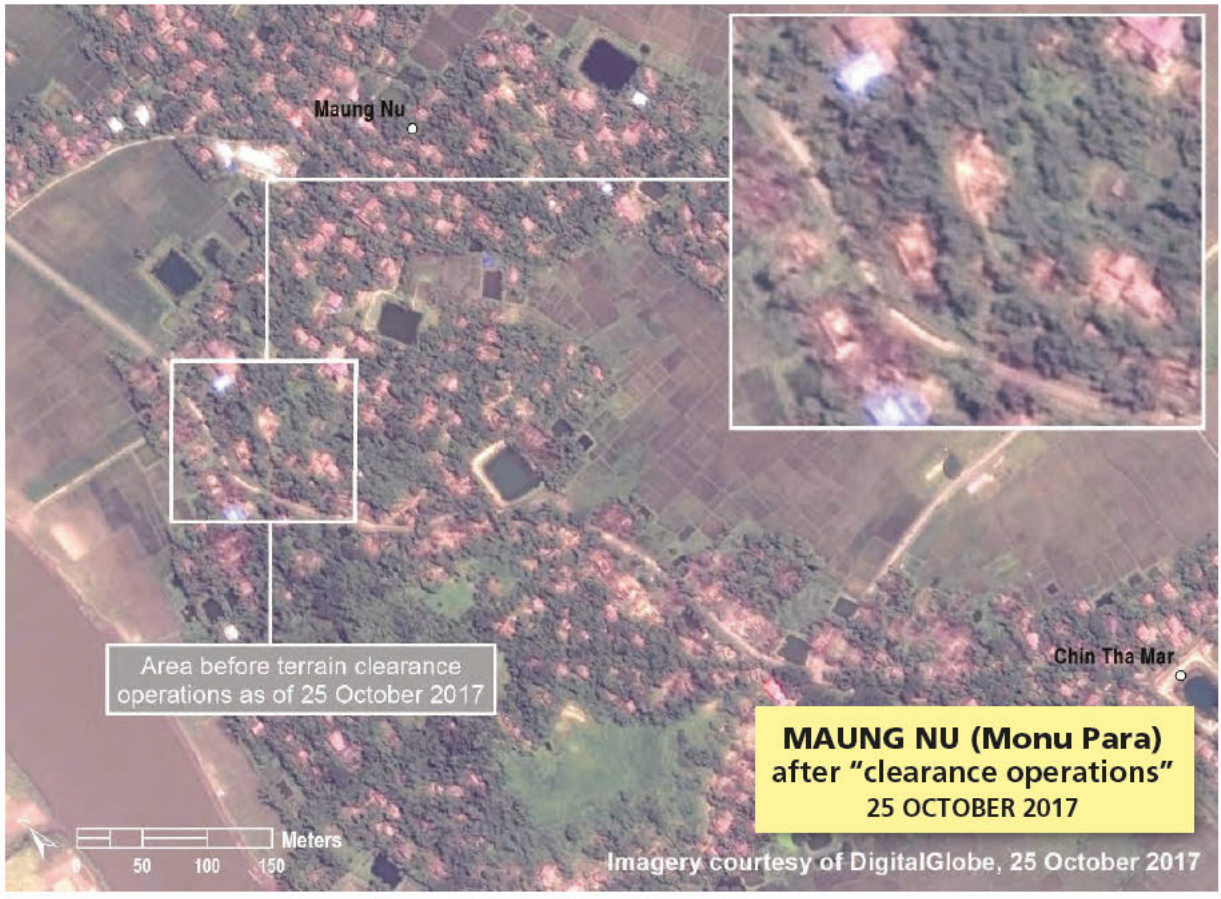
[944] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 809. MG, Vol. II, Annex 40.

> know him as he has previously come to [my relative's] house for business."[945]

8.136 As depicted in Figure 8.4 (following page 270 and in Volume XII), Maung Nu was completely destroyed during the "clearance operation."

[945] [redacted] MG, Vol. X, Annex 343.





Source: UN Human Rights Council, Report of the detailed findings of the International Fact-Finding Mission on Myanmar, 17 September 2018, p. 299.

Figure 8.4

CHAPTER 9
THE TATMADAW'S SEXUAL VIOLENCE AGAINST ROHINGYA WOMEN AND GIRLS

9.1 Sexual violence was integral to the "clearance operations" against the Rohingya. The Tatmadaw engaged in massive and extremely brutal rape, gang rape, sexual assault and genital mutilation of Rohingya women and girls in dozens of villages across northern Rakhine State.

9.2 The widespread sexual violence has been exhaustively documented. In 2018, the UN Secretary-General's Special Representative on Sexual Violence in Conflict, Ms. Pramila Patten, investigated the situation in northern Rakhine State. She reported that: "First-hand accounts from members of the Rohingya community confirm a pattern of widespread human rights violations, including rape, gang-rape and other forms of sexual violence against women and girls."[946]

9.3 Referring to her personal interviews of "dozens of women and girls" who had "dissolve[ed] to tears when recounting acts of unmitigated brutality", the Secretary-General's Special Representative stated: "I heard the most heartbreaking and horrific accounts of sexual atrocities, reportedly committed in cold blood out of a lethal hatred for these people, solely on the basis of their ethnicity and religion."[947] She reported that "almost every woman and girl I spoke with described patterns of rape, gang-rape, forced

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[946] UN Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, *Press Release: One year into the Rohingya crisis, Special Representative Patten calls for accountability for sexual violence crimes* (24 August 2018). MG, Vol. II, Annex 38.

[947] Steve Sandford, "UN Gathers Horror Stories from Rohingya Women Fleeing Myanmar", *Voice of America* (28 December 2017). MG, Vol. IX, Annex 273.

nudity and abduction for the purpose of sexual slavery during military campaigns of slaughter, looting and the razing of villages to the ground".[948]

9.4 Based on her consideration of the evidence, the Special Representative concluded: "Rape and other forms of conflict-related sexual violence were an integral part of the attack on the Rohingya community and were part of the pattern of persecution and collective punishment, which pushed an unprecedented number of Rohingya civilians out of Myanmar."[949]

9.5 The US State Department likewise found that Rohingya women and girls were systematically subjected to rape and gang rape by the Tatmadaw "in the hills, on the road, in front of their homes, wherever [the military] could find them".[950] The randomized survey it commissioned of over a thousand refugees in Bangladesh "uncovered widespread sexual assault and rape against Rohingya women by the military".[951] No fewer than 45 percent of respondents personally "witnessed a rape, and the majority of rapes witnessed were committed, in whole or in part, by the army".[952]

9.6 Physicians for Human Rights surveyed health care professionals, including physicians, nurses, midwives, community health care workers and mental and psychosocial support workers, who treated survivors in

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[948] UN Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, *Press Release: One year into the Rohingya crisis, Special Representative Patten calls for accountability for sexual violence crimes* (24 August 2018). MG, Vol. II, Annex 38.

[949] *Ibid.*

[950] US Department of State, *Atrocities in Northern Rakhine* (2018), p. 16. MG, Vol. VII, Annex 194.

[951] *Ibid.*, p. 14.

[952] *Ibid.*, p. 2.

Bangladesh. It reported: "interviews [with] health care providers give further credence to the allegation that the Tatmadaw … was the primary perpetrator of widespread and systematic sexual violence against the Rohingya in Myanmar … in August 2017".[953] In particular, Physicians for Human Rights reported that health care workers were told by their patients of "gang rape, sexual humiliation and other attacks on personal dignity, and sexual violence accompanied by other violent acts … by the Tatmadaw".[954] The health care workers "universally reported seeing evidence or being told of occurrences and patterns of sexual and gender-based violence", and that "physical evidence of injuries consequent to rape and patient histories related to sexual violence were most often revealed during provision of care for other reasons, such as gynecological complaints or pregnancy-related care".[955]

9.7 The UN Fact-Finding Mission's investigation also determined that "[r]ape and other sexual and gender-based violence", including rapes and gang rapes, sexually humiliating acts, sexual slavery and sexual mutilations, were "perpetrated on a massive scale".[956] It, too, found that the "main perpetrators were the Tatmadaw, although other security forces, and sometimes ethnic Rakhine men, were also involved".[957] The intentions of the perpetrators in inflicting these abuses were often communicated to the

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[953] Physicians for Human Rights, *Sexual Violence, Trauma, and Neglect: Observations of Healthcare Providers Treating Rohingya Survivors in Refugee Camps in Bangladesh* (October 2020), p. 22. MG, Vol. V, Annex 133.

[954] *Ibid.*, p. 2.

[955] *Ibid.*

[956] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 920. MG, Vol. II, Annex 40.

[957] *Ibid.*

victims in the clearest of terms. The UN Fact-Finding Mission reported that, according to a survivor of gang rape by the Tatmadaw, her assailants told her: "We are going to kill you this way, by raping. We are going to kill Rohingya. We will rape you. This is not your country."[958]

9.8 The Fact-Finding Mission determined that "the widespread sexual violence and the manner in which it was perpetrated was an intended effort, at least in part, to weaken the social cohesion of the Rohingya community and contribute to the destruction of the Rohingya as a group and the breakdown of the Rohingya way of life".[959]

9.9 This Chapter is organized in three parts. **Section I** recounts the evidence that the Tatmadaw engaged in widespread sexual violence against Rohingya women and girls throughout northern Rakhine State (see Figure 9.1, following page 274 and in Volume XII). **Section II** describes the especially brutal nature of these crimes, which included torture and mutilation of the victims, rape and gang rape of pregnant women and young girls, and cruel public humiliation of the victims. Finally, **Section III** reviews the evidence of the sexual violence visited upon women and girls in selected villages.

I. The Tatmadaw's Mass Rape and Gang Rape of Rohingya Women and Girls

9.10 Mass gang rape of women and girls was a hallmark of the Tatmadaw's "clearance operations". The UN Fact-Finding Mission

[958] *Ibid.*, para. 932.

[959] *Ibid.*, para. 941.


Buthidaung, Maungdaw, and Rathedaung Townships
Northern Rakhine State
MYANMAR
Mercator Projection, WGS-84 Datum
Scale accurate at 20°N
0
10
20
Kilometers
Prepared by: International Mapping
BANGLADESH
MYANMAR
92°15'E
92°30'E
92°45'E
21°15'N
21°00'N
20°45'N
20°30'N
20°15'N
Min Gyi (Tula Toli)
Kyein Chaung
Laung Don
Buthidaung
Kyet Yoe Pyin
Pwint Hpyu Chaung
Hpar Wut Chaung
Myaw Taung
Yae Khat Chaung Gwa Son
Dar Gyi Zar
Naung Dar Khar Li
Maung Nu
Chin Tha Mar
Dar Paing Sa Yar
Maung Gyi Taung
Maungdaw
Buthidaung
Kyauktaw
Maungdaw
Gu Dar Pyin
Bay of Bengal
Zoe Parang/Phet Leik
Chut Pyin
Ponnagyun
Thinn Baw Kway
Rathedaung
Inn Din
Rathedaung
Koe Tan Kauk
Chein Khar Li
Sittwe
MYANMAR
Area of map
RAKHINE STATE
Nay Pyi Taw
Villages mentioned in Chapter 9 of the Memorial
Township capital
Township boundary
State/Region boundary
International boundary

Figure 9.1

identified as a "notable pattern" the perpetration of "mass gang rape, involving multiple perpetrators and multiple victims in the same incident".[960] Victims were "commonly raped by more than one perpetrator, frequently by many perpetrators, sometimes as many as ten".[961] During attacks, "up to 40 women and girls were raped or gang raped together".[962]

9.11 The OHCHR similarly reported that the majority of the rape victims it interviewed were "raped by more than one soldier, usually three to four but even up to eight officers".[963] It found: "Rape by an individual soldier would typically occur alongside a gang rape—*i.e.*, several women would be targeted for rape within a particular house, school or mosque and the majority of them would be gang raped while some were raped by only one individual."[964]

9.12 The US State Department's randomized survey of refugees revealed that "[g]ang rape was reported across northern Rakhine State",[965] and that "[g]roups of women would be shoved into houses, latrines, schools and mosques, or taken out to fields and then raped, and in many cases killed".[966]

9.13 Physicians for Human Rights' survey of health care workers consistently reported "patterns of sexual violence perpetrated against the Rohingya, including gang rape and sexual violence accompanied by other

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[960] *Ibid.*, para. 921.

[961] *Ibid.*

[962] *Ibid.*

[963] UN OHCHR, *Flash Report* (2017), p. 21. MG, Vol. II, Annex 30.

[964] *Ibid.*

[965] US Department of State, *Atrocities in Northern Rakhine* (2018), p. 14. MG, Vol. VII, Annex 194.

[966] *Ibid.*, p. 16.

violent acts such as beatings, shooting, and killing of family members".[967] One nurse midwife reported that "[m]ost of the women tell me" a "very, very similar story"—the Tatmadaw or police "came to their house", beat and killed the men and took the women to an "empty house" where they "had to take off their clothes" and then the soldiers "raped those women" until they "became unconscious".[968] A nurse working at a primary health clinic "described an almost identical tactic … of separating and killing the men and raping the women".[969]

9.14 A former Tatmadaw soldier described the practice of his unit during the "clearance operations" it carried out in Maungdaw and Buthidaung Townships: "Regarding those women, I saw that the women were raped in front of the men while the men were tied with the ropes."[970] He testified that it is impossible to say how many women were raped in the "clearance operations" carried out by his unit since "[t]here were so many villages. When we clear house by house, there were rapes when they clear. But…how many?? There would be…many."[971] He testified that "[a]fter raping the women" some were "left behind after rape" while others were "killed after rape".[972]

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[967] Physicians for Human Rights, *Sexual Violence, Trauma, and Neglect: Observations of Healthcare Providers Treating Rohingya Survivors in Refugee Camps in Bangladesh* (October 2020), p. 8. MG, Vol. V, Annex 133.

[968] *Ibid.*, p. 9.

[969] *Ibid.*

[970] Interview of Zaw Naing Tun (15 August 2020), p. 8. MG, Vol. V, Annex 141.

[971] *Ibid.*, p. 9.

[972] *Ibid.*, p. 10.

9.15 Another former Tatmadaw soldier testified about specific rapes that he witnessed in Taung Bazaar, in Buthidaung Township.[973] In particular, Captain Tun Tun and Corporal Aung San Oo raped 3-4 women and "ordered" other troops "to do so" as well.[974] Then, after "we raped the women, [we] put the gun at their forehead and killed right away".[975]

9.16 The Tatmadaw committed mass rapes in Rohingya villages throughout northern Rakhine State. In Dar Gyi Zar, in Maungdaw Township, the Tatmadaw forced 25 young women and girls into a room and raped them.[976] In the same village, a survivor encountered 13 women: "They could not speak, they were just crying. They all had injuries. Their clothes had blood on them, around their private parts… they had marks on their necks from where they were held."[977] Similarly, at Laung Don, in Maungdaw Township, the Tatmadaw gathered together and raped 10 women in a mosque.[978] At Maung Gyin Hanut, in Buthidaung Townnship, a group of 13 women and girls were gang raped in a forest.[979]

9.17 A 14-year-old victim of mass gang rape from Maungdaw Township told the UN Fact-Finding Mission:

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[973] Interview of Myo Win Tun (15 August 2020). MG, Vol. V, Annex 142.

[974] *Ibid.*, pp. 6-7.

[975] *Ibid.*, p. 7.

[976] International State Crime Initiative, *Genocide Achieved, Genocide Continues: Myanmar's Annihilation of the Rohingya* (2018), p. 56. MG, Vol. IV, Annex 109.

[977] Amnesty International, *"We Are At Breaking Point"* (2016), p. 25. MG, Vol. IV, Annex 97.

[978] Amnesty International, *"We Will Destroy Everything"* (2018), p. 93. MG, Vol. IV, Annex 112.

[979] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 923. MG, Vol. II, Annex 40.

> "We were hiding in the forest and the soldiers took my sister, who was 12-years old, and eight other girls. Four of them were raped and killed. Then the soldiers took me. There were around 40 women and girls in the forest. I remember the first man who raped me, feeling all the pain. I became numb to the next three men and then I went unconscious. They were raping most of the women and girls."[980]

9.18 Another victim, from Borochora, in Maungdaw Township, described what took place after the soldiers "entered our homes" and "pointed guns at our hearts and dragged us out":

> "They took all the girls and women of the village to a rice field and lined us all up—maybe 40 or so—and forced themselves on us. To start with we were all screaming but in the end it was quiet, we could cry no more.
>
> I was gang-raped by five men, first one then the next. They beat me and slapped me and kicked me and bit me. I was too terrified to move. I saw two girls dead near me.
>
> By the time the sun came up I was barely conscious. When I came to, I tried to find my children. I couldn't walk but only crawl. There were bodies all around. Then I saw a small boy lying face down, shot in the back. It was Subat Alam, my eldest. He had been running towards me. He was 8."[981]

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[980] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1091. MG, Vol. II, Annex 40.

[981] Witness Statement of Christina Lamb (8 October 2020), p. 7. MG, Vol. XI, Annex 371.

9.19 A victim recounted how, in Pwint Hpyu Chaung, the "military surrounded the village" and "separated 15 girls".[982] They then "chose three women, one unmarried and two married, including me. They took us into the forest. One military person tied me up, and they raped me, one-by-one. Three men raped me. I was gone; I fainted after that."[983]

9.20 In Kyet Yoe Pyin, in Maungdaw Township, a large group of Tatmadaw who arrived in a military truck "went house-to-house" raping the women.[984] A victim described how the Tatmadaw took her and 20 to 30 other Rohingya women and girls to a large house in the village. They were then "taken to different rooms to be raped".[985] Another survivor reported that six members of her family were raped, including her two nieces, ages 10 and 15 years old.[986] Another related that she was gang raped by four soldiers in her home.[987] Still another described how eight soldiers came upon two young girls and one woman with her child. The woman was holding the child in her lap.[988] They "threw the child aside", and "five to six men raped her".[989] The two young girls were also raped and killed.[990] Elsewhere near the village, large groups of women were gang raped in

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[982] Fortify Rights, *They Gave Them Long Swords* (2018), p. 151. MG, Vol. IV, Annex 114.

[983] *Ibid.*

[984] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1092. MG, Vol. II, Annex 40.

[985] *Ibid.*, para. 923.

[986] *Ibid.*, para. 1092.

[987] *Ibid.*, para. 1093.

[988] *Ibid.*

[989] *Ibid.*

[990] *Ibid.*

forested areas. Women were seen coming out of forests "without clothes" and "crying".[991]

9.21 A woman from Thinn Baw Kway, in Maungdaw Township, was raped by soldiers inside her home after they shot and killed her husband.[992] Another victim was gang raped in her house while being "tied down" and "blindfolded", her mouth covered with a cloth and her legs held apart by two men.[993] The Tatmadaw gang raped another victim in Buthidaung Township's Dar Paing Sa Yar village, who told the UN Fact-Finding Mission: "Four to five military were guarding the house when one of them raped me. One after the other, they took turns in raping me … After the second rape, I fainted. I do not know how many men raped me."[994]

9.22 In some villages, women and girls were apprehended and then transported to military bases to be gang raped.[995] In Dar Gyi Zar, the Tatmadaw abducted more than 20 women and girls to a local military compound, where they were raped in a room for three full days. A survivor recalled hearing the girls scream when soldiers entered the room. After a

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[991] Fortify Rights, *They Gave Them Long Swords* (2018), p. 151. MG, Vol. IV, Annex 114.

[992] [redacted] MG, Vol. X, Annex 336.

[993] UN Human Rights Council, *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts*, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 83. MG, Vol. III, Annex 48.

[994] *Ibid.*, para. 89.

[995] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 929. MG, Vol. II, Annex 40; MSF, *"No one was left"* (2018), p. 19. MG, Vol. IV, Annex 110.

few hours, she saw their dead bodies carried out, with "blood in their genital area, and bite marks on their faces or scratches on them".[996]

9.23 The Tatmadaw also raped and gang raped women and girls as they fled to Bangladesh,[997] "often on the side of the road" or in the forest.[998] In Buthidaung Township's Chin Tha Mar, the Tatmadaw captured a woman and her husband while they were fleeing from the "clearance operation" in that village. As they beat her husband, three soldiers tore her clothes, pushed her to the ground and gang raped her.[999] Another victim described being attacked by soldiers after four days of flight: "[The soldiers] surrounded us … Almost everyone ran away, but they captured me and around 20 other women. I don't know how many times I was raped. I was unconscious for three days afterwards".[1000]

9.24 Many survivors fleeing to Bangladesh encountered naked bodies near the border.[1001] The UN Fact-Finding Mission observed that a "large number of interviewees saw dead bodies of women and girls *en route* to Bangladesh who they thought had been raped, because the bodies were

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[996] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 929. MG, Vol. II, Annex 40.

[997] Amnesty International, *"We Will Destroy Everything"* (2018), p. 89. MG, Vol. IV, Annex 112.

[998] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 38. MG, Vol. IV, Annex 121.

[999] UN Human Rights Council, *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts*, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 81. MG, Vol. III, Annex 48.

[1000] Amnesty International, *"We Will Destroy Everything"* (2018), p. 95. MG, Vol. IV, Annex 112.

[1001] *See, e.g.*, PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 38. MG, Vol. IV, Annex 121.

naked and large amounts of blood were visible between their legs".[1002] The Mission concluded that "[d]eath may have been caused by genital trauma, especially when a woman had been gang raped, or women and girls may have been raped with instruments, such as knives or sticks, which caused internal organ damage, leading to death".[1003]

II. The Extreme and Deliberate Cruelty of the Tatmadaw's Sexual Violence

9.25 The Tatmadaw carried out their mass sexual violence with extreme cruelty and depravity. Victims had their "legs tied to doors"; others were "strung up naked to trees in the forested areas, either by their hands or their hair".[1004] Many were kicked, or severely beaten with "guns, sticks, wire and fists" on their heads, breasts, abdomens and on their vaginas.[1005]

9.26 The UN Fact-Finding Mission reported that "[m]any victims were killed after being raped", with most having had their throats slit or burned to death.[1006] Others died from massive blood loss from their genital area, or due to genital trauma.[1007] In Koe Tan Kauk, a witness described finding a young girl "naked and bleeding" after she had been raped. She died shortly thereafter.[1008] In Pwint Hpyu Chaung, a rape victim, upon regaining

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[1002] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 927. MG, Vol. II, Annex 40.

[1003] *Ibid.*

[1004] *Ibid.*, para. 925.

[1005] *Ibid.*; UN OHCHR, *Flash Report* (2017), p. 22. MG, Vol. II, Annex 30.

[1006] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 927. MG, Vol. II, Annex 40.

[1007] *Ibid.*

[1008] *Ibid.*, p. 841.

consciousness, saw six dead bodies of women, naked and covered in blood.[1009] In another village, a group of 20 soldiers gang raped a group of five women, then murdered them by shooting or hanging them from trees.[1010]

9.27 In Rathedaung Township's Zoe Parang (also known as Phet Leik), a victim reported to *Médécins Sans Frontières*:

> "They tortured the women inside the school. I know that because I could hear the screams, and some people saw what happened. After one hour they killed all the women. I heard the gunshots."[1011]

9.28 Victims were beheaded, had their throats slit, breasts cut off, eyes gouged out and vaginas stabbed or cut.[1012] A witness from Yae Khat Chaung Gwa Son reported seeing Tatmadaw soldiers rape her older sister, then "cut her throat".[1013] Another witness, from Rathedaung Township, recounted how several young women had their breasts cut while being

[1009] Fortify Rights, *They Gave Them Long Swords* (2018), p. 150. MG, Vol. IV, Annex 114.

[1010] US Department of State, *Atrocities in Northern Rakhine* (2018), p. 17. MG, Vol. VII, Annex 194.

[1011] MSF, *"No one was left"* (2018), p. 19. MG, Vol. IV, Annex 110.

[1012] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 38. MG, Vol. IV, Annex 121.

[1013] Fortify Rights, *They Gave Them Long Swords* (2018), p. 151. MG, Vol. IV, Annex 114.

raped.[1014] Another recalled how her daughter was mutilated and killed, while her niece had her body sliced in half during a mass gang rape.[1015]

9.29 The Tatmadaw bit women and girls on their cheeks, neck, breasts and thighs. A victim from Naung Dar Khar Li, in Maungdaw Township, described being bitten repeatedly as four soldiers took turns raping her.[1016] A 15-year-old girl from the same township who had been gang raped by the Tatmadaw displayed "two violent bite marks, one on each cheek".[1017] Forensic analysis confirmed that a "substantial portion of women and girls" were bitten during rape, indicating "an intentional act akin to a form of branding".[1018]

9.30 The Tatmadaw raped and gang raped pregnant women.[1019] A woman in her eighth month of pregnancy lost her baby after soldiers beat and raped her "nine times, both anally and vaginally".[1020] She told the UN Fact-Finding Mission: "They stamped and kicked my stomach with their boots, and then stripped me naked. … I was blindfolded and hung by my wrists from a tree."[1021] The victim recounted that while "they were raping

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[1014] International State Crime Initiative, *Genocide Achieved, Genocide Continues: Myanmar's Annihilation of the Rohingya* (2018), p. 56. MG, Vol. IV, Annex 109.

[1015] US Department of State, *Atrocities in Northern Rakhine* (2018), p. 17. MG, Vol. VII, Annex 194.

[1016] Amnesty International, *"We Will Destroy Everything"* (2018), p. 93. MG, Vol. IV, Annex 112.

[1017] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 926. MG, Vol. II, Annex 40.

[1018] *Ibid.*

[1019] UN OHCHR, *Flash Report* (2017), p. 21. MG, Vol. II, Annex 30.

[1020] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 921. MG, Vol. II, Annex 40.

[1021] *Ibid.*

me, they bit me on my breasts and neck. They left me tied to the tree. My mother found me in the evening. My unborn baby died."[1022]

9.31 Another pregnant victim, who was from Boli Bazaar in Maungdaw Township, recounted that:

> "[A]round midnight they seized younger girls and married women and took us to a school. There were six of us, four young girls and two married women and me. Two of us were pregnant. I was eight months pregnant.
>
> They bound my hands and legs and lay me on the ground. I was raped by twelve soldiers, three at a time. I kept thinking about the baby and what would happen. They bit me. When I tried to resist they beat me with the gun, look I lost two teeth."[1023]

She continued:

> "After a while I was senseless then three more men came. One of them told me if you tell anyone we will kill you. Then another came in and shot me—they shot me twice, in my right knee and by my vagina."[1024]

9.32 A 20-year-old woman from Buthidaung Township was pregnant when she was captured in the forest. She was beaten and raped until she lost consciousness. After the rape, she miscarried. She said: "My life is

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[1022] *Ibid.*

[1023] Witness Statement of Christina Lamb (8 October 2020), para. 21. MG, Vol. XI, Annex 371.

[1024] *Ibid.*, para. 22.

destroyed."[1025] Another victim described how "[t]hree soldiers raped me. One kicked me and I fell unconscious … When I got my senses back, I saw that my fetus had come out dead".[1026] On other occasions, the Tatmadaw, after raping pregnant women, "cut babies out of [their mothers' wombs], or [slaughtered] both mother and child during or immediately after birth".[1027]

9.33 The Tatmadaw killed many children while raping and gang raping their mothers. As a mother from Kyet Yoe Pyin told OHCHR: "[The soldiers] held me tight and I was raped by one of them. My five-year-old daughter tried to protect me, she was screaming, one of the men took out a long knife and killed her by slitting her throat."[1028] Another mother from Yae Khat Chaung Gwa Son reported:

> "[The military] went into my house. Five of them took off my clothes and raped me. My eight-month-old son was crying of hunger … because he wanted to breastfeed, so to silence him, they killed him [] with a knife".[1029]

9.34 The UN Fact-Finding Mission reported that, in Chein Khar Li, the Tatmadaw killed a male survivor's three children—all under five years

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[1025] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 40. MG, Vol. IV, Annex 121.

[1026] US Department of State, *Atrocities in Northern Rakhine* (2018), p. 17. MG, Vol. VII, Annex 194.

[1027] *Ibid.*

[1028] UN OHCHR, *Flash Report* (2017), p. 18. MG, Vol. II, Annex 30.

[1029] *Ibid.*

old—after raping and killing his wife.[1030] In another case, a seven-year old boy "was beheaded while his mother was being raped".[1031]

9.35 The Tatmadaw specifically targeted young girls. The UN documented at least 41 cases of rape and sexual violence against children in 15 villages.[1032] Victims included girls as young as seven years old.[1033] Within two weeks of the start of the "clearance operations" that began on 25 August 2017, MSF had treated 230 victims of sexual violence in Cox's Bazar, Bangladesh, including at least 162 survivors of rape, ranging from nine to 50 years old.[1034] The majority of rape victims were younger than 18 years old; some were under the age of ten.[1035]

9.36 Sexual violence against young girls was committed throughout northern Rakhine State. A woman from Maungdaw Township watched her 14-year-old daughter being gang raped by two soldiers for four hours. Her daughter was then "shot in the head and killed".[1036] In Kyein Chaung, the Tatmadaw gang raped an 11-year-old girl while her mother was locked

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[1030] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 841. MG, Vol. II, Annex 40.

[1031] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 34. MG, Vol. IV, Annex 121.

[1032] UN Security Council, *Report of the Secretary-General on children and armed conflict in Myanmar*, UN Doc. S/2018/956 (29 October 2018), para. 21. MG, Vol. III, Annex 42.

[1033] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 37. MG, Vol. IV, Annex 121.

[1034] Amnesty International, *"We Will Destroy Everything"* (2018), p. 89. MG, Vol. IV, Annex 112; MSF, *"No one was left"* (2018), p. 18. MG, Vol. IV, Annex 110.

[1035] Fiona MacGregor, "Rohingya girls under 10 raped while fleeing Myanmar, charity says", *The Guardian* (25 October 2017). MG, Vol. IX, Annex 271.

[1036] UN Security Council, *Report of the Secretary-General on children and armed conflict in Myanmar*, UN Doc. S/2018/956 (29 October 2018), para. 25. MG, Vol. III, Annex 42.

outside the house.[1037] A girl from Hpar Wut Chaung reported that her 12-year old sister was gang raped for two hours by soldiers. She found her sister with "bite marks over her whole body" and "blood coming out of her vagina".[1038] Her sister could only say "please forgive me" before she died.[1039]

9.37 A paramedic and psychosocial support officer interviewed by Physician for Human Rights related the experience of a 12-13 year-old girl, who had been discovered—naked and covered in blood—after being gang raped with her mother, sister and aunt while seeking refuge in an abandoned house:

> "[F]our to five military officers attacked [them] there. They blindfolded their eyes and tied up their hands and feet. Once they were tied up, they became victims of gang rape. After the gang rape, they decided to burn these women…. One person's hand was tied up with another person's. But how this teenage girl managed to untie her hands only Allah knows that. She freed her hands. Then she removed the blindfolds off her eyes and saw that they were bringing … dried hay to burn these women. She was tied to her mother. Her mother was done for a long time and she was senseless. Her mother was not moving, she couldn't understand whether her

[1037] UN OHCHR, *Flash Report* (2017), p. 21. MG, Vol. II, Annex 30.

[1038] Fortify Rights, *They Gave Them Long Swords* (2018), p. 152. MG, Vol. IV, Annex 114.

[1039] *Ibid.*

> mother was alive, so she fled away from there."[1040]

9.38 A 14-year old girl from Chalipara (also known as Myaw Taung), in Maungdaw Township, recounted her experience:

> "Five or six of them came to our house. They were in uniform with black masks and rucksacks. One soldier took a grenade from his rucksack and threw it inside where my mum and dad and two little brothers were. Immediately there were flames and I could hear them screaming. I tried to run in but my friends pulled me back. Before our eyes the house burnt to ashes.
>
> We tried to run away as we knew the soldiers often took girls to rape. But they caught us. They took us to the jungle. I was scared and crying and screaming but one of the men put his hand over my mouth to stop me. They ripped my clothes, tied my hands behind me then two soldiers raped me, one after another. The second one was saying 'kill her' but I pleaded with them not to. I told them I already lost all my family, why kill me? Two of my friends bled so much they died. I can't say what they did to me because when I think about those incidents I cry."[1041]

9.39 Many of these crimes were committed publicly, "in front of family and neighbours".[1042] The Tatmadaw beat or killed those who tried to

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[1040] Physicians for Human Rights, *Sexual Violence, Trauma, and Neglect: Observations of Healthcare Providers Treating Rohingya Survivors in Refugee Camps in Bangladesh* (October 2020), p. 10. MG, Vol. V, Annex 133.

[1041] Witness Statement of Christina Lamb (8 October 2020), para. 19. MG, Vol. XI, Annex 371.

[1042] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 921. MG, Vol. II, Annex 40.

intervene.[1043] In Myaw Taung, for instance, the Tatmadaw forced elderly parents to watch their two teenage daughters being gang raped by eight soldiers.[1044] A mother from Inn Din recounted to the UN Fact-Finding Mission how she watched her daughter being raped by 10 men while her legs were tied to doors, before her throat was slit and her house set on fire.[1045]

9.40 Another woman from Kwanse Baung (also known as Kwan Thi Pin), in Maungdaw Township, reported to MSF that she was raped in her home in front of her family:

> "[The military] told me to lie down. They opened my blouse and raped me in front of my husband, my children and my parents. They stayed in the house for almost five hours. One raped me, it took one hour. Then the second, it took half an hour. The third one raped me for one and a half hours. I couldn't open my eyes."[1046]

9.41 Physicians for Human Rights similarly reported: "Multiple health care workers interviewed for this study reported hearing of instances where their patients were forced to witness acts of violence, including sexual violence, against family members".[1047]

[1043] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), pp. 37-38. MG, Vol. IV, Annex 121.

[1044] UN OHCHR, *Flash Report* (2017), p. 28. MG, Vol. II, Annex 30.

[1045] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 928. MG, Vol. II, Annex 40.

[1046] MSF, *"No one was left"* (2018), p. 19. MG, Vol. IV, Annex 110.

[1047] Physicians for Human Rights, *Sexual Violence, Trauma, and Neglect: Observations of Healthcare Providers Treating Rohingya Survivors in Refugee Camps in Bangladesh* (October 2020), p. 11. MG, Vol. V, Annex 133.

9.42 The UN Fact-Finding Mission concluded that sexual violence was also "commonly perpetrated in open public spaces",[1048] with some victims "raped in front of their entire village".[1049] Those who protested were beaten or shot.[1050] OHCHR reported on the public gang rape of a 14-year-old girl:

> "When the military came to [the] village, two of the soldiers grabbed a teenage girl. Then they gang raped her in front of the whole village … Those who tried to help her were beaten up by other soldiers ... Her parents had been killed trying to help her … [After the rape], she was bleeding heavily. After four days, she died."[1051]

9.43 The US State Department's randomized survey of refugees likewise found that:

> "[T]he military and police did not appear to hide the rapes from their peers or from those above them in their chain of command. Rather, rapes were largely public in nature, with many assaults either taking place in public view, or with the perpetrators leaving evidence of such assaults—including the victims' corpses which clearly portrayed marks of rape—in public view."[1052]

[1048] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 921. MG, Vol. II, Annex 40.

[1049] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 37. MG, Vol. IV, Annex 121.

[1050] *Ibid.*

[1051] Save the Children, *"Horrors I will never forget": The stories of Rohingya children* (2017), p. 8. MG, Vol. IV, Annex 100.

[1052] US Department of State, *Atrocities in Northern Rakhine* (2018), p. 14. MG, Vol. VII, Annex 194.

III. The Tatmadaw's Sexual Violence in Select Rohingya Villages

9.44 This Section recounts the extreme acts of sexual violence that the Tatmadaw committed in the villages of Min Gyi and Chut Pyin.

A. MIN GYI

9.45 As detailed in Chapter 8, Min Gyi was a Rohingya farming village in Maungdaw Township. The Tatmadaw conducted there a "clearance operation" on 30 August 2017. The UN Fact-Finding Mission determined that in Min Gyi "soldiers took women and children to houses where they were raped and gang raped, after which the doors were locked and the houses set on fire".[1053] Most victims, including "young children who had accompanied their mothers, were unable to escape and burned to death".[1054]

9.46 The Tatmadaw marched groups of women and girls, many accompanied by young children and infants, to certain houses.[1055] A witness, a father of four, testified:

> "They killed the men but the women were taken to one of the houses that remained standing. They took the women in groups of about 6 at a time. Then they returned without the women and took some more. They set the house in which the women were alight."[1056]

[1053] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 909. MG, Vol. II, Annex 40.

[1054] *Ibid.*

[1055] *Ibid.*, para. 771.

[1056] [redacted] MG, Vol. X, Annex 349.

9.47 Another witness, a rice miller, similarly testified that the Tatmadaw:

> "surrounded the remaining women and took 5 or 6 of them, sometimes 7 at a time, and took them inside some houses from where the people had fled. I saw the women forced to enter the houses, but never saw them coming out. … The military would usually stay inside the houses for half an hour to 45-50 minutes, then they would come out. They would go back, grab another group of 5 different women and take them again inside different houses. They did like that many times until the[re] were no more women on the beach. Then, I saw the houses where the women had been taken into being set on fire."[1057]

9.48 Victims who escaped describe what happen in the houses. One victim estimated that approximately 200 women and children had already been abducted when she was taken away.[1058] At the houses, they were "beaten, brutally raped, and frequently stabbed";[1059] some were hit in their vaginas with wooden sticks,[1060] or were cut with knives and machetes.[1061] Children and infants were thrown on the ground, stabbed or had their throats slit.[1062]

[1057] [redacted] MG, Vol. X, Annex 346.

[1058] HRW, *Massacre by the River* (2017), p. 21. MG, Vol. IV, Annex 107.

[1059] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 772. MG, Vol. II, Annex 40.

[1060] Amnesty International, *"We Will Destroy Everything"* (2018), p. 92. MG, Vol. IV, Annex 112.

[1061] HRW, *Massacre by the River* (2017), p. 21. MG, Vol. IV, Annex 107.

[1062] *Ibid.*, p. 28; UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 772. MG, Vol. II, Annex 40.

9.49 A 30-year-old survivor recounted:

> "They dragged me to a house and shut the door. My baby son was at my breast. They grabbed him and slit his throat. Then two of them held my arms while one of them raped me. At that time, my eldest daughter started shouting. My children tried to protect me. [The soldiers] stabbed each of them in the head. They raped and stabbed the other women too."[1063]

9.50 When the women and girls had died or been rendered unconscious, the Tatmadaw left them where they fell, locked the doors and set the houses on fire.[1064] A survivor recalled: "That evening, you could hear the women screaming in the burning houses. We lost all hope. The area was entirely filled with the bodies of burned people. It was all black."[1065]

9.51 Another survivor described being taken to a house with her two children, sister, mother and two neighbours. When she arrived, she saw other women being raped. Her own group was taken to an empty room where they were "robbed, undressed and raped".[1066] She awoke to find the house locked and on fire. She managed to escape with her daughter; her sister, mother and son were killed.[1067]

[1063] Amnesty International, *"We Will Destroy Everything"* (2018), p. 91. MG, Vol. IV, Annex 112.

[1064] *Ibid.*; UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 772. MG, Vol. II, Annex 40; HRW, *Massacre by the River* (2017), p. 21. MG, Vol. IV, Annex 107.

[1065] "Myanmar's Killing Fields", Transcript, *Frontline* (8 May 2018). MG, Vol. V, Annex 139.

[1066] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 772. MG, Vol. II, Annex 40.

[1067] *Ibid.*

9.52 In another house, soldiers took young girls to a room and raped them. Older women were stripped naked and hit on their breasts and private parts with wooden sticks and machetes.[1068] A survivor, 30-year-old Mumtaz Begun, recalled that they "just hit and hit".[1069] She lost consciousness because of the beatings and awoke "when the fire was already burning my legs and my body".[1070]

9.53 Another victim, 20-year-old Rajuma Begum, was taken by the Tatmadaw to a three-room bamboo house with her mother-in-law, infant son, three other women with children, a young girl and an older woman.[1071] As she entered a room, she heard women and girls screaming from the other rooms.[1072] Soldiers took her 16-month-old toddler and threw him on the ground and killed him with machetes. Other children were slaughtered in the same manner. All the women were gang raped for hours.[1073] Following the rapes, soldiers beat the women until they were "half-dead".[1074] She recounted: "I was hit twice afterward [with a heavy wooden stick], on my head and my chin".[1075] The Tatmadaw then set the house on fire.[1076]

[1068] HRW, *Massacre by the River* (2017), p. 26. MG, Vol. IV, Annex 107.

[1069] *Ibid.*

[1070] *Ibid.*

[1071] *Ibid.*, p. 22.

[1072] *Ibid.*

[1073] *Ibid.* p. 23.

[1074] *Ibid.*

[1075] *Ibid.*

[1076] *See also, e.g.,* [redacted] MG. Vol. XI, Annex 355.

9.54 Another middle-aged victim testified:

> "When I arrived at the house, there were dead women on the ground. … I saw the military rip off the clothing of the other women, rape them and kill them by beating. They slashed my throat and slashed my 3-month old girl, before throwing her onto the leg of a dead body on the ground. The military beat me with a big wooden stick and then I was raped by 5 of them. After doing this with me, they brought more women into the house. I was half dead but still alive. All other 4 women from my group were dead".[1077]

9.55 Sexual violence at Min Gyi was perpetrated throughout the village. The Tatmadaw raped the women and girls who remained trapped at the riverbank. Soldiers took girls to nearby trees, "tore off their clothes and touched them everywhere".[1078] A 16-year old witness recalled: "I was watching the girls being raped on one side, and the soldiers killing the men on the other side."[1079]

9.56 Rajuma Khatoum, age 35, described how her 16-year-old cousin was "raped by three soldiers" at the riverbank:

> "Two stood over her while the third one raped her. … We were hiding together and then the soldiers discovered her … She was thrown to the ground, and they opened her [sarong] and the soldier got on top of her and

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[1077] [redacted] MG, Vol. XI, Annex 360.

[1078] HRW, *Massacre by the River* (2017), p. 28. MG, Vol. IV, Annex 107.

[1079] *Ibid.*

> raped her. … When the soldier was done, he stood over her and shot her in the chest."[1080]

9.57 Medical evaluations of victims from Min Gyi confirm the brutality with which the Tatmadaw committed these acts of sexual violence. The UN Fact-Finding Mission reported that victims who escaped had "serious burn marks and stab wounds", consistent with accounts of extreme violence given my multiple witnesses, including those quoted above.[1081] MSF described a rape victim who sought treatment at their clinic: "Gashes carved her skull, and her torso was covered with bruises and cuts that had to be stitched up."[1082]

B. CHUT PYIN

9.58 In Chut Pyin, a village in northern Rathedaung Township described in Chapter 8,[1083] the rapes and gang rapes of Rohingya women and girls began upon the Tatmadaw's arrival at the village on 27 August 2017. Soldiers went from house to house, dragging inhabitants outside and summarily executing the men and boys and raping the women and girls.[1084]

[1080] *Ibid.*, p. 25.

[1081] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 772. MG, Vol. II, Annex 40.

[1082] Jason Motlagh, "The Survivors of the Rohingya Genocide: An investigation into Myanmar's state-orchestrated murder of thousands of Rohingya Muslims—and the second tragedy unfolding in the refugee camps", *Rolling Stone* (9 August 2018). MG, Vol. IX, Annex 286.

[1083] *See* Chapter 8, Section III.B.

[1084] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 782-790. MG, Vol. II, Annex 40; [redacted] MG, Vol. X, Annex 336.

9.59 In one instance, the Tatmadaw gang raped all four women in a family, including a mother and her three daughters. The women were blindfolded, dragged around the house and beaten.[1085] The mother recounted hearing her daughters screaming in another room.[1086] She "felt her clothes being ripped from her body" and was raped by at least six men.[1087] After regaining consciousness, she felt severe pain in her vagina and was bleeding from a "stab wound to her right wrist".[1088] She subsequently found the naked bodies of her daughters "lying on their backs, motionless".[1089]

9.60 A 27-year-old witness described the rape and murder of the wife of a local mullah:

> "I saw her taken from the house and raped by military soldiers. It happened outside, beside a house … After they raped her, they killed her … [S]he was taken to the road, and [one soldier] cut her neck and cut her breasts off".[1090]

9.61 Five soldiers dragged another victim out of her compound to a nearby forest. Two held her hands while the others took turns raping her.

[1085] [redacted] G, Vol. X, Annex 336.

[1086] *Ibid.*

[1087] *Ibid.*

[1088] *Ibid.*

[1089] *Ibid.*

[1090] Fortify Rights, *They Gave Them Long Swords* (2018), p. 69. MG, Vol. IV, Annex 114.

The victim lost consciousness; the soldiers left her in the forest when they were done.[1091]

9.62 In one case, a woman was leaving her house with her children as the Tatmadaw arrived. They took her and a group of women to a nearby stream where at least six men raped them.[1092] She recounted how "all the time she could hear her child and the other women screaming".[1093] In another instance, the Tatmadaw caught a woman who was fleeing with her two children.[1094] They ripped off her clothes and raped her.[1095] One of the soldiers stabbed her leg. She lost consciousness by the time of the third rape.[1096] During another incident, soldiers gang raped a 45-year-old woman and "cut her breasts [with a knife]".[1097] In another, a victim was shot in the head after being raped by two soldiers and an ethnic Rakhine civilian.[1098]

9.63 Dozens of villagers fled to a paddy field. They were pursued and captured by the Tatmadaw, who separated the women and girls from the men and boys. A survivor, Rohima Katum**,** a middle-aged woman,

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[1091] [redacted] MG, Vol. X, Annex 336.

[1092] [redacted] MG, Vol. X, Annex 336.

[1093] *Ibid.*

[1094] [redacted] G, Vol. X, Annex 336.

[1095] *Ibid.*

[1096] *Ibid.*

[1097] Amnesty International, *"We Will Destroy Everything"* (2018), p. 90. MG, Vol. IV, Annex 112.

[1098] [redacted] G, Vol. X, Annex 336.

described how the soldiers "touched [their bodies] everywhere".[1099] A group of seven women tried to flee but were "rounded up and taken into some bushes".[1100] When a woman resisted, she was shot dead; a soldier cut off one of her breasts and held it up as warning to the others.[1101] One of the victims, Nur Begum, recounted: "They did whatever they wanted. Four or five soldiers held me down and raped me."[1102]

9.64 Some of the village's younger women were taken to a nearby school, where a survivor reported "[t]here were some [women] already there".[1103] Soldiers raped the women in a room, threatening them with guns if they tried to resist.[1104] The 30-year-old survivor was gang raped while they "pinned her down under a long wooden bench".[1105] Another reported being blindfolded and raped.[1106] Others recalled being raped repeatedly, along with other women, for three hours.[1107] Due to the severity of their

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[1099] Amnesty International, *"We Will Destroy Everything"* (2018), p. 91. MG, Vol. IV, Annex 112.

[1100] "Myanmar's Killing Fields", Transcript, *Frontline* (8 May 2018). MG, Vol. V, Annex 139.

[1101] *Ibid.*

[1102] *Ibid.*

[1103] Amnesty International, *"We Will Destroy Everything"* (2018), pp. 90-91. MG, Vol. IV, Annex 112. *See also* [redacted] MG, Vol. X, Annex 336.

[1104] Amnesty International, *"We Will Destroy Everything"* (2018), p. 91. MG, Vol. IV, Annex 112.

[1105] *Ibid.*

[1106] [redacted]. MG, Vol. X, Annex 336.

[1107] [redacted] MG, Vol. X, Annex 336.

injuries, some of the victims who managed to escape—naked or clad in only their underwear—crawled back to the village.[1108]

9.65 Many rape victims in Chut Pyin were children.[1109] Others were pregnant and died, "bleeding uncontrollably",[1110] their naked bodies described by a witness as being "covered in blood from head to toe".[1111] One victim was raped 40 days after giving birth. As her baby was crying, a soldier "cut off the woman's breast and gave it to the child".[1112]

9.66 Survivors from Chut Pyin who received medical treatment after crossing into Bangladesh displayed stab wounds and other penetrating injuries, pelvic trauma, as well as blunt-force trauma.[1113] A medic described providing care to 92 rape victims: "We stitched them up. They were lacerated. Their breasts were cut. I treated them with whatever I had."[1114]

[1108] Amnesty International, *"We Will Destroy Everything"* (2018), p. 91. MG, Vol. IV, Annex 112; [redacted]. MG, Vol. X, Annex 336; Physicians for Human Rights, *"Please Tell the World What They Have Done to Us": The Chut Pyin Massacre: Forensic Evidence of Violence against the Rohingya in Myanmar* (July 2018), p. 25. MG, Vol. IV, Annex 115.

[1109] "Myanmar's Killing Fields", Transcript, *Frontline* (8 May 2018). MG, Vol. V, Annex 139.

[1110] [redacted]. MG, Vol. X, Annex 336.

[1111] [redacted] MG, Vol. X, Annex 336.

[1112] [redacted] MG, Vol. X, Annex 336.

[1113] Physicians for Human Rights, *"Please Tell the World What They Have Done to Us": The Chut Pyin Massacre: Forensic Evidence of Violence against the Rohingya in Myanmar* (July 2018), pp. 18-19, 25, 44, 57. MG, Vol. IV, Annex 115.

[1114] "Myanmar's Killing Fields", Transcript, *Frontline* (8 May 2018). MG, Vol. V, Annex 139.

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CHAPTER 10
THE ORGANIZED NATURE OF THE "CLEARANCE OPERATIONS"

10.1 The extreme brutality and pervasive sexual violence that characterized the Tatmadaw's "clearance operations", described in the previous Chapters, were neither random acts nor the unintended consequences of undisciplined soldiers run amok. To the contrary, they were deliberate elements of a plan conceived by the most senior military officers for the express purpose of "solving the Rohingya problem" once and for all;[1115] and were carried out by well-trained troops under the direct supervision of field-level officers who faithfully executed the orders they received from their superiors in the chain-of-command. The UN Fact-Finding Mission determined that this "organized nature of the Tatmadaw's destruction" constituted further proof of Myanmar's genocidal intent.[1116]

10.2 There can be no dispute about the "organized nature" of the "clearance operations". Although carried out in hundreds of villages across three townships (see Figure 10.1, following page 304 and in Volume XII), comprising more than 4,800 square kilometres, they had a common *modus operandi* that reflected planning and coordination at the highest levels of the Tatmadaw. According to the UN Fact-Finding Mission, the operations exhibited a "consistent pattern of conduct … demonstrating a tactical formula that is not only indicative of a significant level of pre-planning, but a level of coordination in its execution" which is "only possible when all troops are acting under the effective control of a single unified

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[1115] *See supra* para. 7.9.

[1116] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 244. MG, Vol. III, Annex 49.

command".[1117] In particular, such "[l]arge-scale military operations, during which the movement of multiple units are coordinated, often with air support, can only be planned, ordered and supervised at the level of the Commander-in-Chief."[1118]

10.3 It is not a secret that the Tatmadaw's Commander-in-Chief, Senior-General Min Aung Hlaing, together with his General Staff, planned and directed all aspects of the "clearance operations". Indeed, Senior-General Hlaing has personally and publicly taken credit for ordering them. And the UN Fact-Finding Mission has confirmed his responsibility for them, concluding that the "nature, scale and organization of the operations suggest[] a level of preplanning and design on the part of the Tatmadaw leadership consistent with the vision of the Commander-in-Chief, Senior-General Min Aung Hlaing".[1119]

10.4 It is well-documented that Senior-General Hlaing's "vision" was of a Myanmar without Rohingya. He was explicit in saying so: "We openly declare that 'absolutely, our country has no Rohingya race.'"[1120] According to this view, those who call themselves Rohingya are not "Myanmar ethnics", but illegal immigrants from Bangladesh: "They came from Bengal, so they were called Bengalis. ... Bengalis themselves needed to

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[1117] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1536. MG, Vol. II, Annex 40.

[1118] *Ibid.*, para. 1533.

[1119] *Ibid.*, para. 753.

[1120] Senior-General Min Aung Hlaing, "Entire government institutions and people must defend the country with strong patriotism" (2 September 2017). MG, Vol. VI, Annex 150.


Buthidaung, Maungdaw, and Rathedaung Townships
Northern Rakhine State
MYANMAR
Mercator Projection, WGS-84 Datum
Scale accurate at 20°N
0 10 20
Kilometers
Prepared by: International Mapping
BANGLADESH
MYANMAR
92°15'E
92°30'E
92°45'E
21°15'N
21°00'N
20°45'N
20°30'N
20°15'N
Min Gyi (Tula Toli)
Kyein Chaung
Kyin Tauk
Buthidaung
Yin Ma Kyaung Taung
Nga Yant Chaung
Taung Bazar
Maung Hnit Ma Gyi
Maung Nu
Hla Poe Kaung
Maungdaw
Buthidaung
Kyauktaw
U Hla Hpay
Maungdaw
Nyaung Chaung
Ah Lel Than Kyaw
Bay of Bengal
Zo Pa Ran (Tha Bay Daw)
Chut Pyin
Zay Di Pyin
Htet Nan Yar
Pyaing Taung
Ponnagyun
Rathedaung
Inn Din
Tha Win Chaung
Rathedaung
MYANMAR
Area of map
Nay Pyi Taw
RAKHINE STATE
Villages mentioned in Chapter 10 of the Memorial
Township capital
Township boundary
State/Region boundary
International boundary
Sittwe

Figure 10.1

accept the fact that they were Bengalis, not Rohingya".[1121] Their very presence in Myanmar was unacceptable for the true "Myanmar ethnics" and the State as a whole, because "[t]he Bengalis do not have any characteristics or culture in common with the ethnicities of Myanmar."[1122] For Senior-General Hlaing, their procreation constituted an existential threat to other, legally recognized "national races" in Myanmar: "The Bengali population exploded and the aliens tried to seize the land of local ethnics. … Race cannot be swallowed by the ground but only by another race."[1123]

10.5 The "clearance operations" were launched because, in Senior-General Hlaing's own words:

> "The Bengali problem was a long-standing one which has become an unfinished job despite the efforts of the previous governments to solve it. The government in office is taking great care in solving the problem."[1124]

10.6 Not only the Tatmadaw, but all forces in Myanmar, civilian as well as governmental, were called upon to contribute to "solving the problem". For Senior-General Hlaing: "All must be loyal to the State in serving their

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[1121] Senior-General Min Aung Hlaing, "Crisis in Rakhine State Can Be Solved Only Through Comprehensive Knowledge of the Historical Facts" (16 October 2017). MG, Vol. VI, Annex 153.

[1122] "Min Aung Hlaing Warns Against Anti-military Sentiment", *DVB* (21 March 2018). MG, Vol. IX, Annex 280; UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1328. MG, Vol. II, Annex 40.

[1123] Senior-General Min Aung Hlaing, "Gallant Efforts to Defend the HQ Against Terrorist Attacks and Brilliant Efforts to Restore Regional Peace, Security are Honoured" (20 September 2017). MG, Vol. VI, Annex 152.

[1124] Senior-General Min Aung Hlaing, "Entire government institutions and people must defend the country with strong patriotism" (2 September 2017). MG, Vol. VI, Annex 150.

duties, so that such cases will never happen again."[1125] To this end, civilian militias, composed of ethnic Rakhine Buddhists, were attached to the Tatmadaw and placed under its command, joined with the Police Force and the Border Guards in attacking and killing thousands of Rohingya men, women and children, burning their homes, destroying their villages, raping and gang raping women and girls, and carrying out the other atrocities described in the preceding chapters.

10.7 For converting his "vision" into reality, the UN Fact-Finding Mission concluded that Senior-General Hlaing should be investigated and prosecuted for genocide.[1126] The United States and the United Kingdom followed up by imposing sanctions on him. The official notice issued by the United States Department of the Treasury (the "US Treasury Department") states:

> "**Min Aung Hlaing** is designated for his role as the Commander-in-Chief of the Burmese military forces, an entity that has engaged in or whose members have engaged in serious human rights abuse under his command. Min Aung Hlaing's military forces were responsible for the brutal security operation that began in August 2017 in Rakhine State and ultimately caused more than 500,000 people to flee to Bangladesh. During this time, members of ethnic minority groups were killed or injured by gunshot, often while fleeing, or by soldiers using large-bladed weapons; others were burned to death

[1125] Senior-General Min Aung Hlaing, "Gallant Efforts to Defend the HQ Against Terrorist Attacks and Brilliant Efforts to Restore Regional Peace, Security are Honoured" (20 September 2017). MG, Vol. VI, Annex 152.

[1126] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1553-1555. MG, Vol. II, Annex 40; UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 232. MG, Vol. III, Annex 49.

> in their own houses. There are credible claims of mass-scale rape and other forms of sexual violence committed by soldiers under Min Aung Hlaing's command."[1127]

10.8 Senior-General Hlaing is not the only Tatmadaw leader accused of genocide for conceiving, planning, ordering and supervising the "clearance operations" against the Rohingya. In the view of the UN Fact-Finding Mission, at least five other members of his General Staff and other General Officers are also worthy of prosecution. These include, among others:

- Deputy Commander-in-Chief, Vice Senior-General Soe Win;
- Commander, Bureau of Special Operations-3, Lieutenant-General Aung Kyaw Zaw;
- Commander, Western Regional Military Command, Major-General Maung Maung Soe;
- Commander, 33rd Light Infantry Division, Brigadier-General Aung Aung;
- Commander, 99th Light Infantry Division, Brigadier-General Than Oo.[1128]

10.9 This Chapter is divided into four sections. **Section I** describes the authority and command structure of the Tatmadaw and the powers conferred on and exercised by its Commander-in-Chief, the members of his General Staff and other senior officers. **Section II** addresses the Tatmadaw's objectives in launching the "clearance operations" and the planning by the Commander-in-Chief and his most senior colleagues that

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[1127] US Department of the Treasury, *Press Release: Treasury Sanctions Individuals for Roles in Atrocities and Other Abuses* (10 December 2019). MG, Vol. VII, Annex 198.

[1128] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1553-1556. MG, Vol. II, Annex 40.

preceded their commencement. **Section III** recounts the coordinated manner in which the "clearance operations" were carried out, in conformity with the orders passed down the chain-of-command. **Section IV** shows that, taken together, the evidence set out in this Chapter leaves no doubt that these operations were conceived and executed in a highly organized manner, and were aimed at the Rohingya population as a group, rather than at any armed groups that may have been active against the State.

I. Authority, Organization and Command Structure of the Tatmadaw

10.10 Under Myanmar's Constitution, the Tatmadaw is the "main armed force for the Defence of the Union" and is endowed with autonomy in all matters related to defence and security.[1129] The Constitution provides that "all the armed forces" in Myanmar "shall be under [its] command".[1130] Neither the Tatmadaw nor the forces under its command are subject to civilian authority. As the UN Fact-Finding Mission observed, the "constitutional powers of the civilian authorities afford little scope for controlling the actions of the Tatmadaw".[1131] That is because "security matters fall entirely within the purview of the Tatmadaw, without civilian oversight".[1132] In this way, Myanmar "deviates from most modern constitutional frameworks where the Head of State is usually the Supreme

[1129] Republic of the Union of Myanmar, *Constitution* (2008), art. 337. MG, Vol. VI, Annex 176.

[1130] *Ibid.*, art. 338.

[1131] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1546. MG, Vol. II, Annex 40.

[1132] *Ibid.*

Commander to whom the highest ranking military officers and institutions are subordinated".[1133]

10.11 Further establishing the Tatmadaw's unfettered authority over military and security matters, the "Ministers of Defence, Home Affairs and Border Affairs are appointed by the Tatmadaw".[1134] Through "these appointments, the Commander-in-Chief also controls the majority of votes in the National Defence and Security Council".[1135]

10.12 Figure 10.2 (following page 310) is an organization chart, based on a chart prepared by the UN Fact-Finding Mission, illustrating the command structure of the Tatmadaw, as it existed during the "clearance operations".[1136]

10.13 As indicated, the Tatmadaw's Commander-in-Chief is (as of the date of this Memorial) Senior-General Hlaing, who assumed that position in 2011, and held it throughout the "clearance operations" of 2016-2018.[1137] Each of the Tatmadaw's formal branches—the Army, Navy and Air Force—is subject to his personal and direct command.[1138] As supreme military commander, Senior-General Hlaing's authority extends to all of

[1133] *Ibid.*

[1134] *Ibid.*

[1135] *Ibid.*

[1136] *Ibid.*, p. 391.

[1137] *See* Amnesty International, *"We Will Destroy Everything"* (2018), pp. 143, 155. MG, Vol. IV, Annex 112.

[1138] Republic of the Union of Myanmar, *Constitution* (2008), art. 20(c). MG, Vol. VI, Annex 176.

Myanmar's security forces, including the Police Force, Border Guards and civilian militias.[1139]

10.14 Under Senior-General Hlaing's leadership, the Tatmadaw has been a tightly controlled hierarchy. Subordinate officers and units operate only pursuant to direct orders, deviation from which risks immediate sanction.[1140] Senior-General Hlaing has himself described "discipline and obedience" as the "backbone of the Tatmadaw" and emphasized that "[e]ach and every serviceman must strictly follow rules and regulations, orders and instructions".[1141]

10.15 The chain-of-command through which the Tatmadaw's orders are developed and carried out begins with the General Staff, also known as the War Office,[1142] which is chaired by Senior-General Hlaing and includes the commanders of the Army, Navy and Air Force. The General Staff sets the Tatmadaw's overall military strategy, upon which operational orders are based.[1143] The UN Fact-Finding Mission concluded that, during the "clearance operations": "The Commander-in-Chief led the Tatmadaw General Staff" which, in turn, was "responsible for formulating the

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[1139] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018) para. 1522. MG, Vol. II, Annex 40; Amnesty International, *"We Will Destroy Everything"* (2018), para. 143. MG, Vol. IV, Annex 112.

[1140] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1527. MG, Vol. II, Annex 40.

[1141] "Highlights of Snr-Gen Min Aung Hlaing's Armed Forces Day Speech", *The Irrawaddy* (28 March 2018). MG, Vol. IX, Annex 282.

[1142] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018) para. 1523. MG, Vol. II, Annex 40; Amnesty International, *"We Will Destroy Everything"* (2018), p. 143. MG, Vol. IV, Annex 112.

[1143] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018) para. 1523. MG, Vol. II, Annex 40; Amnesty International, *"We Will Destroy Everything"* (2018), p. 146. MG, Vol. IV, Annex 112.

TATMADAW ORGANIZATIONAL CHART

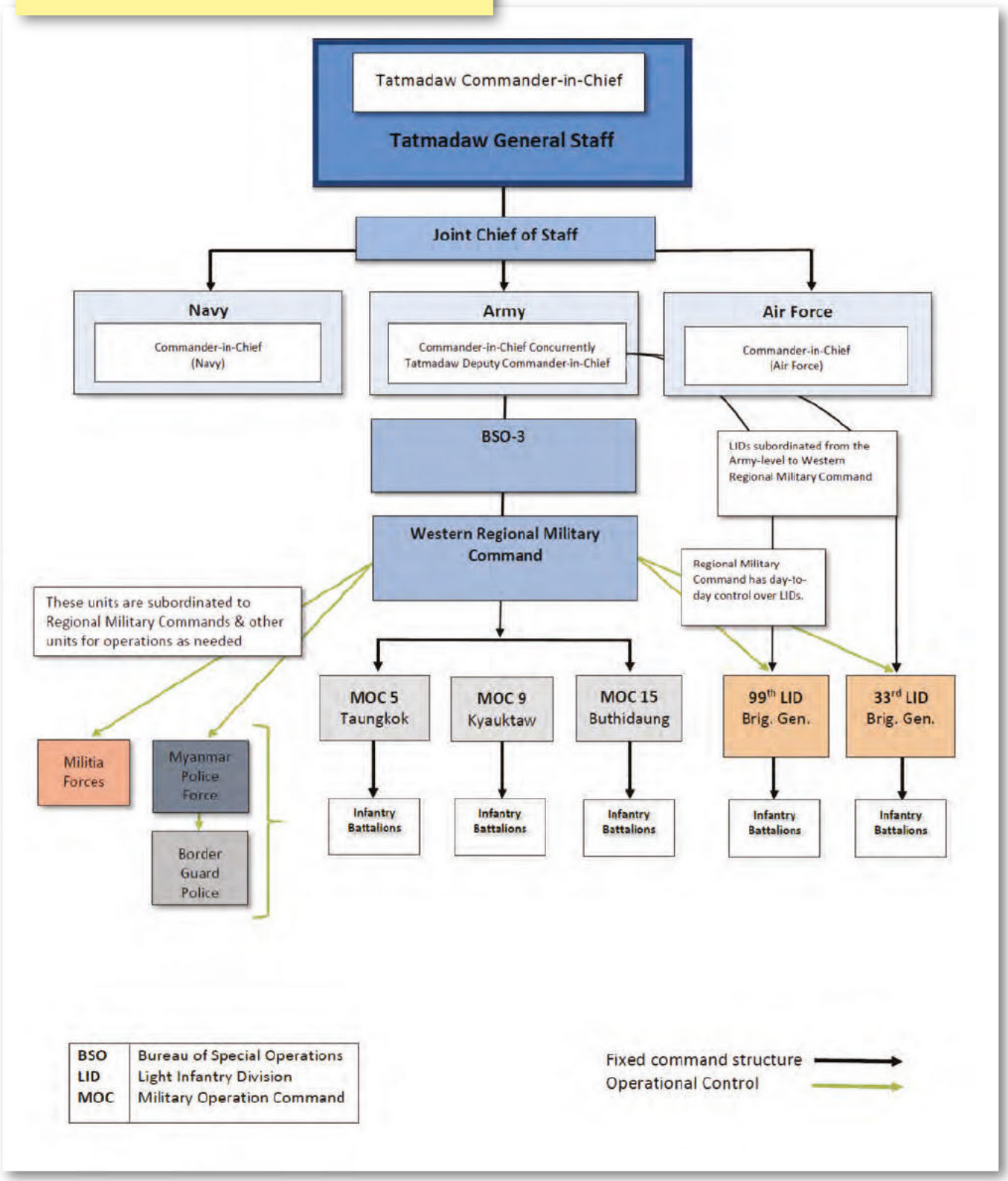


Figure 10.2

objectives and limits of military operations, the role and composition of the forces involved, the rules of engagement, and the necessary logistics".[1144]

10.16 The Army is under the direct command of the Commander-in-Chief of the Army, who also serves as the Tatmadaw's Deputy Commander-in-Chief, subordinate only to Senior-General Hlaing. During the "clearance operations", this was Vice Senior-General Soe Win.[1145] He was "heavily involved in formulating and managing major operations, including command decisions about whether to deploy combat divisions, and in what strength, the designation of key strategic objectives, and in some cases key tactical objectives".[1146] As indicated above, for his role in the "clearance operations", the UN Fact-Finding Mission determined that Vice Senior-General Win warranted investigation and prosecution for genocide.[1147] According to the Government of the United States, which imposed sanctions on him:

> "**Soe Win** is designated for his role as the Deputy Commander-in-Chief of the Burmese military forces, an entity that has engaged in or whose members have engaged in serious human rights abuse during his tenure. Soe Win has been heavily involved in directing major operations that occurred in 2017, including the decision to deploy combat divisions to Rakhine State and other regions where serious human rights abuses

[1144] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018) para. 1533. MG, Vol. II, Annex 40.

[1145] Amnesty International, *"We Will Destroy Everything"* (2018), pp. 143, 158. MG, Vol. IV, Annex 112.

[1146] *Ibid.*, p. 143. MG, Vol. IV, Annex 12.

[1147] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018) paras. 1553-1555. MG, Vol. II, Annex 40.

> occurred. Burmese military units responsible for some of the most serious violence, including many instances of sexual violence, reported directly to Soe Win."[1148]

10.17 Directly beneath the Army's Commander-in-Chief in the chain-of-command are the six Bureaus of Special Operations. The "primary purpose" of the Bureaus is to ensure that "subordinate levels in the chain of command effectively carry out the War Office's commands and assist them in doing so".[1149] Bureau commanders coordinate operations involving multiple branches of the Tatmadaw.[1150] Each Bureau is responsible for a specific geographic region, where authority is exercised by a Regional Military Command that executes the Army's operations in that region. Rakhine State falls under Bureau of Special Operations-3 and the "Western Regional Command".

10.18 During the "clearance operations", Bureau of Special Operations-3 and the Western Regional Command were led by Lieutenant General Aung Kyaw Zaw and Major General Maung Maung Soe, respectively.[1151] When Senior-General Hlaing visited Rakhine State in September 2017, he was greeted at the airport in Sittwe by Lieutenant General Zaw and Major General Soe, who briefed him on the progress of the operations.[1152] He paid

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[1148] US Department of the Treasury, *Press Release: Treasury Sanctions Individuals for Roles in Atrocities and Other Abuses* (10 December 2019). MG, Vol. VII, Annex 198.

[1149] Amnesty International, *"We Will Destroy Everything"* (2018), p. 159. MG, Vol. IV, Annex 112.

[1150] *Ibid.*

[1151] *Ibid.*, pp. 158-160.

[1152] *Ibid.*, p. 159.

tribute to their "brilliant efforts to restore regional peace".[1153] The UN Fact-Finding Mission recommended both of them for prosecution.[1154]

10.19 At the time of the "clearance operations", the Western Regional Command included various combat divisions, referred to as Military Operational Commands ("MOC").[1155] Each Military Operational Command had as many as ten infantry battalions.[1156] During the "clearance operations", the Western Regional Command had under its control combat divisions MOC-5, MOC-9 and MOC-15.[1157] These combat divisions were augmented by two Light Infantry Divisions, which are centrally based (as distinguished from permanently assigned to a particular Regional Command), and thus available for rapid deployment for specific combat operations. Light Infantry Divisions are considered the Tatmadaw's most experienced units.[1158] Light Infantry Divisions can be deployed only upon orders by the Army's Commander-in-Chief.[1159] During the "clearance operations", this was Vice Senior-General Soe Win.[1160]

[1153] Senior-General Min Aung Hlaing, "Gallant Efforts to Defend the HQ Against Terrorist Attacks and Brilliant Efforts to Restore Regional Peace, Security are Honoured" (20 September 2017). MG, Vol. VI, Annex 152.

[1154] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1553-1555. MG, Vol. II, Annex 40.

[1155] *Ibid.*, para. 1524.

[1156] *Ibid.*

[1157] *Ibid.*

[1158] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1525. MG, Vol. II, Annex 40.

[1159] *Ibid.*

[1160] *Ibid.*; Amnesty International, *"We Will Destroy Everything"* (2018), p. 145. MG, Vol. IV, Annex 112.

10.20 Shortly before the launch of the "clearance operations", the Tatmadaw deployed the 33rd and 99th Light Infantry Divisions to northern Rakhine State, and these divisions participated aggressively in the operations, under the direct command of Brigadier General Aung Aung and Brigadier General Than Oo, respectively.[1161] The UN Fact-Finding Mission recommended both for prosecution.[1162] The United States sanctioned General Aung, finding that:

> "**Aung Aung** is designated for being a leader of the 33rd LID, an entity that has engaged in or whose members have engaged in serious human rights abuse under his command. The 33rd LID participated in abuses in Rakhine State, including the August 27, 2017 operation in Chut Pyin village. This operation included extrajudicial killings, forced disappearances, and sexual violence, as well as firing on fleeing villagers. More than 100 people were reportedly killed in this one operation alone. The 33rd LID was designated pursuant to E.O. 13818 on August 17, 2018, for engaging in serious human rights abuse."[1163]

Likewise, in regard to General Oo, the United States stated:

> "**Than Oo** is designated for being a leader of the 99th Light Infantry Division (LID), an entity that has engaged in or whose members have engaged in serious human rights abuse under his command. In 2017, the 99th LID

[1161] Amnesty International, *"We Will Destroy Everything"* (2018), pp. 162-163. MG, Vol. IV, Annex 112.

[1162] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1553-1555. MG, Vol. II, Annex 40.

[1163] US Department of the Treasury, *Press Release: Treasury Sanctions Individuals for Roles in Atrocities and Other Abuses* (10 December 2019). MG, Vol. VII, Annex 198.

> deployed to Rakhine State and, while there, participated in serious human rights abuses alongside the 33rd LID and other security forces. In one operation in Tula Toli, hundreds of men, women, and children were reportedly forced to the nearby riverbank where the 99th LID opened fire, executing many of the men, and forced women and girls to nearby houses where they were sexually assaulted. A number of these women and children were later stabbed and beaten, with the houses set fire while they were inside. The 99th LID was designated pursuant to E.O. 13818 on August 17, 2018, for engaging in serious human rights abuse."[1164]

10.21 Although the Myanmar Police Force is a separate organization with its own chain-of-command,[1165] once it is deployed in joint operations with the Tatmadaw, it falls under the operational control of the Tatmadaw and is subordinate to those Tatmadaw combat units responsible for the specific area of operations.[1166] Similarly, during combat operations, the Tatmadaw has operational control over the BGP and Myanmar's civilian militias.[1167] During the "clearance operations", the Tatmadaw deployed and commanded all of these elements.

[1164] *Ibid.*

[1165] The Myanmar Police Force falls within the jurisdiction of the Minister of Home Affairs, who reports directly to the President. *See* Andrew Selth, 'Myanmar's Police Forces: Coercion, Continuity and Change' (2012) 34(1) Contemporary Southeast Asia 53, p. 59. MG, Vol. VIII, Annex 225.

[1166] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1534. MG, Vol. II, Annex 40.

[1167] *Ibid.*, para. 1535.

10.22 The Tatmadaw's organization chart accurately depicts how orders were given and disseminated through the chain-of-command during the "clearance operations". The General Staff issued orders and operational plans through its Bureau of Special Operations-3 to the Regional Military Command for the Western Region, which conveyed them to each of the combat divisions operating in that region.[1168] The Regional Military Command then exercised direct command authority over combat operations.[1169] Regional commanders regularly reported to the Bureau of Special Operations, which reported in turn to, and received orders from, the General Staff, chaired by Senior-General Hlaing.[1170] Military commanders at each level followed operational orders from above, since promotions depend on strict compliance.[1171] Thus, commanders on the ground "implement[ed] the special military operational responsibilities and enemy assault plan" set by superior levels of the chain-of-command.[1172]

10.23 To ensure control over military operations by the General Staff, the Tatmadaw imposed operational limitations on combat divisions. Controls included limiting the ability of divisions to conduct operations independently. Units in the field were subject to communication and logistical restrictions requiring higher-level control in all planning and coordination of operations.[1173] Units at the same level were forbidden from communicating with one another; this made each unit "dependent upon

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[1168] Amnesty International, *"We Will Destroy Everything"* (2018), p. 146 MG, Vol. IV, Annex 112.

[1169] *Ibid.*

[1170] *Ibid.*

[1171] *Ibid.*

[1172] *Ibid.*

[1173] Ibid, p. 147.

superior levels for information about the movement and activities of other units".[1174] Geographically distant units consequently could not coordinate their actions independently of superior commanders, assuring that any such coordination required decision-making by higher authorities.[1175] Subordinate units were also "dependent on superior levels for logistical support", making it impossible for them "to act independently for a sustained period".[1176]

10.24 To further ensure strict operational control by superior levels, battalion-level units were required to send operational reports on all "movements, engagements, troop loss, and weapons use" up the chain-of-command "every twelve hours according to a prescribed format".[1177] They were also ordered to submit "a daily intelligence report as well as detailed battle reports on a daily and monthly basis" describing "any encounter with an opposing force, including its estimated strength, as well as a summary of the battalion's plans".[1178] The reporting requirements extended to company-level units, which had to report to their battalion commander whenever they moved or entered a new area.[1179] Each combat unit was required to report on their operations to superior levels including the "duration, goals, operational area, and the battalion plan".[1180]

[1174] *Ibid.*

[1175] *Ibid.*

[1176] *Ibid.*, note 931.

[1177] *Ibid.*, p. 148.

[1178] *Ibid.*

[1179] *Ibid.*

[1180] *Ibid.*, p. 147.

10.25 In sum, the Tatmadaw's organization and structure, both on paper and on the ground, assured that operational plans and orders, which originated at the General Staff, presided over by the Commander-in-Chief, were communicated down the chain-of-command, faithfully observed at all levels and executed with strict discipline in the field. No operations could be undertaken without express authorization from above. The evidence thus makes clear that the "clearance operations" were carried out in a tightly controlled and organized manner, in conformity with the plans and orders issued by the General Staff. The actions taken with respect to the Rohingya, therefore, were neither accidental nor collateral damage inflicted in the fog of war. They were the intended consequences of the plans developed at the highest levels of the Tatmadaw. As a former Tatmadaw soldier has testified, the soldiers carrying out the "clearance operations" were "ordered" by their superior officers to "shoot at every sight of a person" and to rape the women.[1181]

II. Objectives and Planning of the "Clearance Operations"

10.26 In the months preceding the "clearance operations", the Tatmadaw prepared assiduously for them. It deployed specialized military units, including Light Infantry Divisions, to Rakhine State and undertook systematic efforts to prepare that attack on Rohingya villages across the State, and render the population defenceless. These included, *inter alia*, detaining and killing Rohingya leaders; seizing tools and implements that could be used for self-defence; imposing curfews that effectively subjected members of the Rohingya group to house arrest; denying them food and

[1181] Interview of Myo Win Tun (15 August 2020), pp. 5, 7. MG, Vol. V, Annex 142.

humanitarian assistance; and preventing independent observers and journalists from accessing the area. As the UN Fact-Finding Mission determined, the "clearance operations" were preceded both by "a build-up of military capacity" in northern Rakhine State and a "months-long campaign of oppression that involved the removal of protective fences around Rohingya homes and the confiscation of any kind of weapon or sharp implement from Rohingya", as well as the "arming of ethnic Rakhine groups and militias".[1182] The Mission concluded: "These elements suggest a level of pre-planning and preparation to the operations."[1183]

A. THE TATMADAW'S DEPLOYMENTS TO NORTHERN RAKHINE STATE

10.27 The Tatmadaw significantly increased its presence in northern Rakhine State in the weeks preceding the "clearance operations". On 10 August 2017, least 1,600 soldiers from the 33rd and 99th Light Infantry Divisions were airlifted to Rakhine State.[1184] As noted above, these divisions are under the direct command of the Commander-in-Chief of the Army and can only be deployed upon his orders.

10.28 The Tatmadaw also re-deployed other units in the period immediately preceding the "clearance operations". The UN Fact-Finding Mission reported that "as many as nine battalions from other Western Regional Command units" and "one Armoured Brigade consisting of 60 tanks and armoured personnel carriers" were shifted and attached to

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[1182] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1430. MG, Vol. II, Annex 40.

[1183] *Ibid.*

[1184] *Ibid.*, para. 1151.

Division MOC-15.[1185] In Maungdaw Township, hundreds of Tatmadaw personnel reinforced Border Guard camps.[1186] In Kyein Chaung, in northern Maungdaw, approximately 100 Tatmadaw soldiers arrived by truck at the Border Guard post in the evening of 24 August 2017.[1187] Further south, in Ah Lel Than Kyaw, the Border Guard regional headquarters camp, which usually had 25 guards, received 200 Tatmadaw soldiers.[1188] In Inn Din, witnesses reported seeing 200 soldiers arrive on foot at the village's Border Guard post.[1189] In Buthidaung, Division MOC-15's 552nd battalion received "five trucks of reinforcements" early in the morning of 23 August.[1190] In Rathedaung Township, three battalions from Division MOC-15—the 536th, 537th and 538th—were reported to have increased in size before the "clearance operations" commenced.[1191]

10.29 Further demonstrating the orchestrated nature of the "clearance operations", the Tatmadaw established new military bases and command centres in or near Rohingya villages. Soldiers occupied public buildings, including schools, mosques and monasteries, and established camps on riverbanks and other strategic sites near Rohingya settlements.[1192] A

[1185] *Ibid.*, para. 1152.

[1186] Kadalan Press Network, *Refugee testimonies contradict Burmese government version of the August 25 "terrorist attacks": An Investigative Analysis by Kadadan Press Network* (31 October 2017). MG, Vol. X, Annex 330.

[1187] *Ibid.*

[1188] *Ibid.*

[1189] *Ibid.*

[1190] *Ibid.*

[1191] International State Crime Initiative, *Genocide Achieved, Genocide Continues: Myanmar's Annihilation of the Rohingya* (2018) p. 37. MG, Vol. IV, Annex 109.

[1192] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018) p. 25. MG, Vol. IV, Annex 121.

Rohingya village administrator from Chut Pyin recounted how, one month before the village's "clearance operation", the Tatmadaw stationed between 150 and 200 soldiers in a school in the ethnic Rakhine part of the village tract.[1193] Tatmadaw soldiers were also deployed to border areas that were normally guarded by Border Guard units, arriving "in convoys of military vehicles", where they were "garrisoned inside military and other security force compounds".[1194]

10.30 Weapons and other military equipment were delivered to the Tatmadaw and other security forces before the "clearance operations" began. A witness reported to the UN Fact-Finding Mission:

> "Approximately four days before the ['clearance operation'] in my village, there were many vehicles arriving to the base. Five trucks were full of troops, and the other two trucks were full of equipment. The trucks with equipment were full of white sacks. When the new arrivals got out of vehicles, they were handing out the things inside the sack. I saw that they were distributing 'launchers'."[1195]

10.31 The Tatmadaw's deployments included heavy military vehicles and weaponry. The UN Fact-Finding Mission reported that eight MI-17 helicopters were dispatched to Rakhine State.[1196] Five large navy vessels

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[1193] International State Crime Initiative, *Genocide Achieved, Genocide Continues: Myanmar's Annihilation of the Rohingya* (2018) p. 37. MG, Vol. IV, Annex 109.

[1194] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1153. MG, Vol. II, Annex 40.

[1195] *Ibid.*, para. 1154.

[1196] *Ibid.*, para. 1152.

were seen operating off the coast of Rathedaung Township.[1197] Those helicopters and naval vessels subsequently participated in the "clearance operations".[1198] As noted above, only Senior-General Hlaing had the authority to order coordinated actions amongst the Tatmadaw's three branches.

10.32 In short, the military build-up that immediately preceded the "clearance operations" entailed complex logistics that involved multiple units and different branches of the Tatmadaw, requiring the direct participation of its most senior officers. As the UN Fact-Finding Mission concluded, the "clearance operations" were "planned and ordered" by the Tatmadaw "well in advance of 25 August 2017".[1199]

B. Recruitment and Training of Auxiliary Forces

10.33 In tandem with its deployment of military forces to northern Rakhine State, the Tatmadaw recruited, armed and trained ethnic Rakhine, for whom it created a new "Regional Police" operating under its authority.[1200] The UN Fact-Finding Mission found that the Chief Colonel of the Rakhine State Police had stated that these recruits would be provided

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[1197] Kadalan Press Network, *Refugee testimonies contradict Burmese government version of the August 25 "terrorist attacks": An Investigative Analysis by Kadalan Press Network* (31 October 2017). MG, Vol. X, Annex 330.

[1198] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1156. MG, Vol. II, Annex 40.

[1199] *Ibid.*, para. 1157.

[1200] Fortify Rights, *They Gave Them Long Swords* (2018), p. 43. MG, Vol. IV, Annex 114; UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1143. MG, Vol. II, Annex 40.

with "weapons, other equipment and compensation".[1201] Further, "[e]very Rakhine national wishing to protect their state" would be afforded the "chance to become part of the local armed police", including those "who would not otherwise meet the educational or physical requirements to join the Myanmar Police Force".[1202] By 17 November 2016, 116 new police recruits had started a 16-week "accelerated" training program in "martial arts, weapon use, and riot control tactics".[1203] These forces fell under the command of the Border Guard, and ultimately, under the Tatmadaw's operational command during the "clearance operations".[1204]

10.34 The Tatmadaw also armed and trained a militia force known as the Pyi Thu Sit or "People's Army",[1205] and provided other ethnic Rakhine militia groups with arms and "tactical weapon training up to an advanced level".[1206] Beginning in February 2017, "the military trained [the Rakhine] every night in their village".[1207] During the "clearance operations", these

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[1201] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1143. MG, Vol. II, Annex 40; Fortify Rights, *They Gave Them Long Swords* (2018), pp. 43-44. MG, Vol. IV, Annex 114.

[1202] Fortify Rights, *They Gave Them Long Swords* (2018), pp. 43-44. MG, Vol. IV, Annex 114; UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1143. MG, Vol. II, Annex 40.

[1203] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1143. MG, Vol. II, Annex 40; Fortify Rights, *They Gave Them Long Swords* (2018), pp. 43-44. MG, Vol. IV, Annex 114.

[1204] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1143. MG, Vol. II, Annex 40.

[1205] *Ibid.*, para. 1144.

[1206] *Ibid.*, para. 1145.

[1207] Fortify Rights, *They Gave Them Long Swords* (2018), pp. 44-45. MG, Vol. IV, Annex 114. [redacted] MG, Vol. X, Annex 338.

militia groups came under the command of the Tatmadaw combat units to which they were attached.[1208]

10.35 By training and arming non-Rohingya populations in Rakhine State, the Tatmadaw ensured it had tactical assets within targeted villages that could be deployed against the Rohingya. Video footage that first appeared online on 28 August 2017 shows how a Tatmadaw soldier incited non-Rohingya residents in Rakhine State to attack the Rohingya:[1209]

> "What these guys [the Rohingya] are doing is that they are having high rates of breeding, giving rise to population. And since their population is a lot, so they round up and threaten our native ethnic population with their big population. … We will crush their villages the soonest possible. … Therefore, there is nothing to be afraid of and anxious about. … We will … start clearing out the villages they live in. While clearing out (their villages), we have marked where the villages of our native ethnic people are. So that they don't spill towards the village of native ethnic people, one group from us will block the point at this side as necessary; another group will do clearance operation. We will start clearing them out in this way. … We have come here armed with guns and ammunitions with the spirit of killing these guys. … It has been three days since we

[1208] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1523. MG, Vol. II, Annex 40. Although formally distinct from the Tatmadaw, the Myanmar Constitution provides that "[t]he strategy of the people's militia shall be carried out under the leadership of the [Tatmadaw]." Republic of the Union of Myanmar, *Constitution* (2008), Chapter VII "Defense Services", art. 340. MG, Vol. VI, Annex 176. Further, the Directorate of People's Militia of the Army's General Staff is responsible for organizing, arming and training militias.

[1209] Fortify Rights, *New Release: Myanmar/Bangladesh: Video Provides Evidence of Crimes Against Rohingya in Myanmar* (27 September 2018). MG, Vol. IX, Annex 298.

> received the order. … When we are doing like this, groups from this village will need cooperate with us equally. We have to protect our village. We have to protect our land. … We are brave people. To show our bravery, from children to elderly people, holding whether sticks or swords, whatever you can get, we need to be able to face these guys courageously. … We all have to have the same courage to face these guys, Kulars."[1210]

C. THE TARGETING OF ROHINGYA LEADERS

10.36 The Tatmadaw's preparations for the "clearance operations" included a programme to arrest, torture and kill Rohingya leaders throughout northern Rakhine State. To this end, in early July 2017, the Border Guard arrested approximately 30 Rohingya men from Nga Yant Chaung and tortured them at its base in Taung Bazar.[1211] Similarly, in mid-July 2017, Tatmadaw and Border Guard forces entered Pyaing Taung, in Rathedaung Township, where they arrested eight men, torturing them for days at the Border Guard base in Zay Di Pyin.[1212]

10.37 On 15 August 2017, the Tatmadaw and the Border Guard came to U Hla Hpay early in the morning and arrested the village's men. A witness recounted how the police "proceeded from one end of the village to another", arresting "everyone they came across". The 52 men they detained were "tied up" and held under arrest at the BGP base at Nyaung Chaung.[1213]

[1210] Video IIMM00000000074 (28 August 2017). MG, Vol. V, Annex 136.

[1211] Amnesty International, *"We Will Destroy Everything"* (2018), p. 29. MG, Vol. IV, Annex 112.

[1212] *Ibid.*, p. 28.

[1213] *Ibid.*, p. 29.

The Tatmadaw later transferred 24 of them to prison in Buthidaung.[1214] Two large groups of Rohingya men were likewise arrested on 23 and 24 August 2017 in Htet Nan Yar, in Rathedaung Township.[1215]

10.38 The Tatmadaw specifically targeted wealthy, educated and influential men, including village and religious leaders, often arresting them after they were summoned to "mandatory meetings"[1216] or rounding them up during village sweeps.[1217] A Rohingya woman from Tha Win Chaung recounted how, one day in 2017, the Tatmadaw came to her house and arrested her husband "because he was a Mullah" and that "all Mullahs in the village were taken that day".[1218] Similarly, on 10 January 2017, in Buthidaung Township, the Tatmadaw detained the chairman of the Mosque and member of the village council, who they took to a neighbouring Rakhine village where he was beaten and raped at gunpoint. The soldiers told him that "because he is Muslim, Myanmar is not his country" and they "will do whatever [they] want to [him]".[1219] Similarly, on 20 January 2017,

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[1214] *Ibid.*

[1215] *Ibid.* At least 14 men were detained and tortured or ill-treated at the BGP base in Zay Di Pyin. One man was beaten to death. *Ibid.*

[1216] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 23. MG, Vol. IV, Annex 121.

[1217] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1102. MG, Vol. II, Annex 40; Amnesty International Amnesty International, *"We Are At Breaking Point"* (2016), p. 21. MG, Vol. IV, Annex 97. According to one witness, "[The military] would take the rich and educated and leaders and bring them to jail". PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 23. MG, Vol. IV, Annex 121.

[1218] [redacted] MG, Vol. X, Annex 336.

[1219] [redacted] MG, Vol. X, Annex 336. [redacted]

the Tatmadaw arrested, beat and raped a Rohingya religious leader from Yin Ma Kyaun Taung at their base.[1220]

10.39 Rohingya who were detained during this wave of arrests were subjected to torture, including by waterboarding, severe beatings, mutilation and starvation.[1221] A victim from Maungdaw recounted what he witnessed while detained in a military camp:

> "[The military] kept me for three days and three nights in a kneeling position with my hands tied behind my back. I was together with 25 other Rohingya men. We were not even offered water. They tortured us in many ways: they forced the barrel of the gun in our mouths, stubbed burning cigarettes into our flesh, and dripped hot wax onto our penises. Five men died from the torture."[1222]

[redacted] MG, Vol. X, Annex 336.

[1220] [redacted] G, Vol. X, Annex 336.

[1221] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 672. MG, Vol. II, Annex 40; Amnesty International, *"We Will Destroy Everything"* (2018), pp. 31-35. MG, Vol. IV, Annex 112; PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 24. MG, Vol. IV, Annex 121.

[1222] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1102. MG, Vol. II, Annex 40.

10.40 Many detainees never returned.[1223] Witnesses reported "special 'burial grounds'" for members of the Rohingya group killed while in prison in the run-up to the "clearance operations".[1224]

D. HEIGHTENING THE VULNERABILITY OF THE ROHINGYA TO DESTRUCTION

10.41 In the months prior to the "clearance operations", Tatmadaw soldiers and other security forces went house-to-house in Rohingya villages across Rakhine State, confiscating objects considered capable of being used for self-defence.[1225] Kitchen knives, spades, hoes, cooking utensils and agricultural tools were all seized.[1226] In some villages, soldiers forced local leaders to collect and hand over knives that the Rohingya used for domestic purposes.[1227] A witness from northern Maungdaw Township recounted how, in June 2017: "We had some knives, but the government came and seized them ... They ordered the village authority to hand over the knives … They took the knives [that we use] to cut the fish and chicken."[1228]

[1223] *See ibid.*, paras. 1105, 1109. MG, Vol. II, Annex 40; Amnesty International, *"We Are At Breaking Point"* (2016), p. 22. MG, Vol. IV, Annex 97; Amnesty International, *"We Will Destroy Everything"* (2018), p. 36. MG, Vol. IV, Annex 112; PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 22. MG, Vol. IV, Annex 121.

[1224] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 24. MG, Vol. IV, Annex 121.

[1225] Fortify Rights, *They Gave Them Long Swords* (2018), p. 41. MG, Vol. IV, Annex 114.

[1226] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 26. MG, Vol. IV, Annex 121.

[1227] Fortify Rights, *They Gave Them Long Swords* (2018), p. 42. MG, Vol. IV, Annex 114.

[1228] *Ibid.*; Fortify Rights, "Firsthand Testimonies from August-September 'Clearance Operations' in Myanmar", Statement #9. MG, Vol. X, Annex 338.

Another described how, as a result of these confiscations, "[t]hey did not leave a single small tool, not even to clean fish."[1229]

10.42 To further render the Rohingya defenceless, Myanmar authorities ordered the removal of barriers and fences around Rohingya homes and lands. On 9 June 2016, the General Administration Department informed village administrators in Maungdaw Township that it was thenceforth prohibited to use zinc sheets as fences,[1230] an order that was enforced in Rohingya villages across northern Rakhine State.[1231] Myanmar security forces "systematically tore down fencing around Rohingya homes" and "penalized Rohingya who erected new [ones]".[1232] The US State Department's survey of Rohingya refugees revealed that "[d]ozens reported that Burmese authorities removed fences before the attacks, either by doing so themselves or by forcing Rohingya villages to do so". The UN Fact-Finding Mission found that Rohingya who did not comply were beaten and fined.[1233]

[1229] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1124. MG, Vol. II, Annex 40.

[1230] *Ibid.*, para. 1125.

[1231] *Ibid.*, para. 1126.

[1232] *Ibid.*; Fortify Rights, *They Gave Them Long Swords* (2018), pp. 42-43. MG, Vol. IV, Annex 114.

[1233] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1126. MG, Vol. II, Annex 40. [redacted] MG, Vol. X, Annex 336.

10.43 The UN Special Rapporteur on the situation of human rights in Myanmar noted the widespread removal of fences in her report to the Human Rights Council:

> "One of the more remarkable observations made during the visit to Maungdaw was of 'hanging doors' … standing alone without fencing … which have made women feel particularly vulnerable and insecure as bathing and toilet facilities are normally enclosed within those fences."[1234]

10.44 These measures were accompanied by the imposition of curfews that forced the Rohingya to remain at home from 7 p.m. to 6 a.m.[1235] Violations were punished by arrest.[1236] In Buthidaung Township, approximately 1,500 Rohingya were arrested and jailed for breaking the curfew. Min Gyi's village administrator described how Rohingya villagers were arrested "on their way home from the madrassa in another village and were sent to jail in Buthidaung".[1237]

10.45 By the time of the August 2017 "clearance operations", the Rohingya could no longer leave their villages[1238] and were subject to a 24-

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[1234] Fortify Rights, *They Gave Them Long Swords* (2018), p. 43. MG, Vol. IV, Annex 114 *citing* UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar* (14 March 2017). MG, Vol. III, Annex 84.

[1235] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1115. MG, Vol. II, Annex 40.

[1236] *Ibid.*

[1237] International State Crime Initiative, *Genocide Achieved, Genocide Continues: Myanmar's Annihilation of the Rohingya* (2018), p. 36. MG, Vol. IV, Annex 109.

[1238] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1118. MG, Vol. II, Annex 40.

hour a day curfew.[1239] The Tatmadaw and Border Guard regularly summoned Rohingya village administrators and villagers to threaten them with death for violating the curfew.[1240] A witness from Min Gyi reported that, on 18 and 22 August 2017, the military and security forces forced Rohingya at gunpoint to sign an undertaking "not to leave [their] homes, not to go to the forest, the river, [and] … the market".[1241]

10.46 Another witness recounted how, on 10 August 2017, the Tatmadaw "ordered other villagers in Rathedaung township not to leave their villages", an instruction that "applied to all Muslim villages".[1242] The witness explained: "We were ordered not to go fishing and not to go to the mountains or forest to chop trees for wood, not to go to market, or anywhere."[1243] When asked "how can we support our lives?" the military responded: "We don't want to hear anything from you, just follow our orders … If you don't follow our orders, if we find someone at the market, river, forest, out of the home, we will shoot … We don't want to listen to your questions, we don't care if you're alive or dead, just follow our orders."[1244]

10.47 Rohingya who felt desperate enough to leave their houses were arrested or killed. In Tha Bay Daw, in Rathedaung Township, a victim was

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[1239] International State Crime Initiative, *Genocide Achieved, Genocide Continues: Myanmar's Annihilation of the Rohingya* (2018), p. 46. MG, Vol. IV, Annex 109.

[1240] *Ibid.*, pp. 44-45.

[1241] *Ibid.*, p. 46.

[1242] *Ibid.*, p. 45.

[1243] *Ibid.*

[1244] *Ibid.*, p. 46.

killed for going fishing.[1245] In Chut Pyin, "[t]he military and [Border Guard] slaughtered them, they cut the[] throats" of five people who tried to leave their houses.[1246] A survivor recounted:

> "We were not allowed to go to buy or sell at the market, we couldn't go to the river to fish. We survive by selling wood. If we're not allowed to go to market to sell, that means we have difficulty buying anything. We couldn't get wood from the forest. We were stuck in our homes. We felt like we were in jail, prisoners in our homes."[1247]

10.48 Other survivors described the humanitarian crisis that these measures precipitated. A witness from Kyin Tauk, in Buthidaung Township, reported that "children died from starvation; 14 died altogether, 5 women and 9 children."[1248] Another witness, from Maungdaw Township, explained: "We couldn't go outside and couldn't go to the paddies. People were dying because of hunger and a lack of medicine."[1249]

10.49 To further isolate and weaken the Rohingya, Myanmar cut off their humanitarian aid.[1250] A survivor from Maungdaw Township recalled: "We were getting rations from the UN before this happened" but "[t]he UN was unable to give food after the violence started" in October 2016.[1251] Ten

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[1245] *Ibid.*, p. 35.

[1246] *Ibid.*, p. 46.

[1247] *Ibid.*, p. 35.

[1248] *Ibid.*, p. 36.

[1249] Fortify Rights, *They Gave Them Long Swords* (2018), p. 47. MG, Vol. IV, Annex 114.

[1250] *Ibid.*

[1251] *Ibid.*, p. 46.

nutrition centres in Maungdaw Township that had been operated by Fortify Rights were shut down.[1252]

10.50 The UN Special Rapporteur on the human rights situation in Myanmar warned: "As at 4 November [2016], due to pre-existing humanitarian services having been suspended in most parts of northern Rakhine, more than 150,000 people went without their normal cash/food and nutrition assistance; 3,400 children already diagnosed with Severe Acute Malnutrition … did not have access to their usual life-saving treatment …".[1253]

10.51 Although Myanmar permitted the World Food Programme (WFP) to resume activities in early 2017, food-security remained dire, with an estimated 80,500 children under the age of five facing death from acute malnutrition.[1254] In July 2017, Myanmar reversed course and denied even the WFP access to Rohingya communities. According to a WFP employee:

> "Before the violence took place [in August 2017], the government banned the delivery of food for [] the whole month of July. [All the NGOs] reduced their activities because the government didn't provide the approval letter to deliver aid support. [A]fter WFP's letter expired, it couldn't do anything".[1255]

10.52 Myanmar's denial of food to the Rohingya in the period preceding the "clearance operations" was accompanied by the curtailment of access

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[1252] *Ibid.*, p. 48.

[1253] *Ibid.*, p. 49.

[1254] *Ibid.*, p. 48.

[1255] Fortify Rights, "Firsthand Testimonies from August-September 'Clearance Operations' in Myanmar", Statement #30. MG, Vol. X, Annex 338.

to health care. MSF had provided medical services in northern Rakhine State since 1994 and, just before the "clearance operations" it was operating four primary health care clinics and "providing over 11,000 primary and reproductive health care consultations per month, as well as emergency transport and assistance for patients requiring hospitalization".[1256] However, on 11 August 2017, MSF "lost government authorization to carry out medical activities in northern Rakhine".[1257] The "clearance operations" commenced 14 days later.

III. Coordinated Execution of the "Clearance Operations"

10.53 The Tatmadaw carried out its "clearance operations" in hundreds of Rohingya villages. They followed a strikingly similar pattern, which could only have occurred if all the different combat units were following the same orders from above. The common *modus operandi* was for hundreds of Tatmadaw soldiers to encircle targeted Rohingya villages, often in the early hours when villagers were still asleep and thus most vulnerable,[1258] and then converge on the villages in "jeeps and trucks" or "on foot from nearby military camps".[1259] They "typically came from different directions" surrounding the villages.[1260] A witness recounted: "The military entered

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[1256] Médecins Sans Frontières, *Myanmar Continues to Block Humanitarian Access in Rakhine State* (10 August 2018). MG, Vol. IV, Annex 116.

[1257] *Ibid.*

[1258] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 761, 801, 820, 846, 858, 866, 1077, 1085. MG, Vol. II, Annex 40.

[1259] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 29. MG, Vol. IV, Annex 121.

[1260] *Ibid.*; UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 821. MG, Vol. II, Annex 40.

from the east and the south of the village at the same time, it was a very clear plan."[1261] They split into separate groups to cover different areas and perform different tasks.[1262] Another witness described how one group of soldiers attacked while another "surrounded the village to prevent people from fleeing".[1263]

10.54 When the killings began, they followed a common operational plan. The Tatmadaw separated males from females. Men and boys were then killed in mass executions. Women were raped, gang raped and sexually mutilated. The Tatmadaw spared no one, shooting those trying to escape, killing the wounded and perpetrating atrocities against the elderly and young alike. The entire village was then systematically burned. That this happened virtually everywhere, in Rohingya villages throughout Rakhine State, demonstrates that it was by design, and ordered from above, and that those ultimately responsible, given the organizational structure and discipline of the Tatmadaw, included the Commander-in-Chief and the members of his General Staff.

10.55 The UN Fact-Finding Mission determined that Myanmar's "level of organization evidencing a plan of destruction" is "demonstrated by a number of facts", including "that the killings were perpetrated in a systematic manner, that types of weapons and methods employed by the attackers were consistent across attacks, and that the attackers employed a

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[1261] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 29. MG, Vol. IV, Annex 121.

[1262] *Ibid.*

[1263] *Ibid.*

consistent *modus operandi* across those attacks".[1264] Moreover, the "clearance operations" encompassed a "large geographic area and lasted for weeks, but victims and witnesses from across the three townships and many village tracts described the same patterns of conduct on the part of the security forces".[1265] The Mission concluded that there was:

> "remarkable similarity in the timing of the operations, the sequence of events, the types of weapons used, the assistance received from other security forces or ethnic Rakhine, the coordination and division of roles between perpetrators, the types of violations and the manner in which they were committed. The *modus operandi* of these attacks was recognisable and consistent throughout. *This could not have occurred in the absence of significant levels of forethought and organization.*"[1266]

10.56 The UN Fact-Finding Mission considered it of particular relevance that Tatmadaw units that carried out the attacks on the Rohingya operated under the control of the same command structure, led by the Commander of the Western Regional Command, Major General Soe. The Mission found that:

> "Units of the Western Command, the Regional Command responsible for Rakhine State, were directly involved throughout the 'clearance operations' in the perpetration of violations against the civilian population. Military units were shifted from other

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[1264] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1429. MG, Vol. II, Annex 40.

[1265] *Ibid.*

[1266] *Ibid.* (emphasis added).

> military bases and attached to Military Operational Command (MOC)-15, with Buthidaung as area of responsibility. It appears that as many as nine battalions from other Western Regional Command units were attached to MOC-15, as well as one armoured brigade consisting of up to 60 tanks and armoured personnel carriers."[1267]

10.57 The assault on the Rohingya was also carried out by the 33rd and 99th Light Infantry Divisions, which, upon their deployment to Rakhine State, also came under the command of the Regional Commander, Major General Soe. Each of these Light Infantry Divisions was recognizable by the distinct insignia bearing its number in Burmese numerals, affixed to the uniform on the arm just below the shoulder. During the "clearance operations", witnesses identified the 33rd and 99th LIDs by observing these insignias, shown in Figure 10.3 (page 337) as reproduced by the UN Fact-Finding Mission.

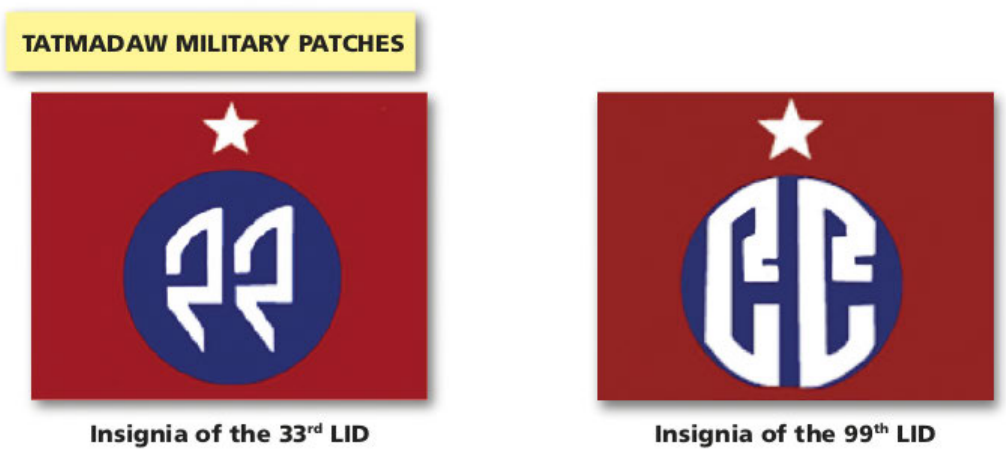


Figure 10.3

[1267] *Ibid.*, para. 1248.

10.58 The Tatmadaw's command structure, and use of the particular divisions that carried out the "clearance operations", assured that they would be executed in an organized manner in strict compliance with the plans and orders developed at the highest military levels. And that is precisely what happened: each of the units responsible for the "clearance operations", operating in different parts of northern Rakhine State, carried out the orders that emanated from their superior officers, commencing with Senior-General Hlaing and communicated downward through the chain-of-command.

10.59 The 33rd Light Infantry Division, under the command of Brigadier General Aung, operated in southern Maungdaw Township and Rathedaung Township.[1268] It was responsible for the "clearance operation" at Chut Pyin, in northern Rathedaung Township, among many others. There, the UN Fact-Finding Mission found, "a large group of hundreds of Tatmadaw soldiers, including members of the 33rd LID as well as other security forces, came out of" an adjacent ethnic Rakhine hamlet and "surrounded Chut Pyin".[1269] The soldiers "opened fire, shooting at villagers including those who were fleeing. Soldiers also dragged people from houses and shot some of them at point blank range. Others were killed by having their throats slit with large knives."[1270] A group of "57 men, mostly teachers and other educated people, were taken away by soldiers".[1271] The Mission further found that a "large number of women and children were victims of the

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[1268] Amnesty International, *"We Will Destroy Everything"* (2018). MG, Vol. IV, Annex 112.

[1269] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 782. MG, Vol. II, Annex 40.

[1270] *Ibid.*, 783.

[1271] *Ibid.*, para. 791.

attacks", that "[c]hildren, including infants and babies, were specifically targeted", and that "members of the Tatmadaw separated women and girls", who they "subjected to rape, gang rape, sexual mutilation and sexual humiliation".[1272]

10.60 The UN Fact-Finding Mission also determined that "[d]uring the course of the operation, structures in Chut Pyin were burned and destroyed", with the "security forces us[ing] 'launchers' to set houses on fire, including those still occupied".[1273] The "entire Rohingya village" was "destroyed".[1274]

10.61 The 99th Light Infantry Division, under the command of Brigadier General Oo, carried out the "clearance operations" in northern Maungdaw Township in a strikingly similar manner. These included the "clearance operation" at Min Gyi, where, the UN Fact-Finding Mission found, "Tatmadaw soldiers entered" the village "accompanied by armed ethnic Rakhine, members of other ethnic groups and police security forces".[1275] They "opened fire and began burning houses using 'launchers' from the village outskirts".[1276] The Mission further found that "[a]s the soldiers advanced, villagers fled" to a riverbank but the "soldiers then opened fire directly at the large number of people fleeing towards the shore".[1277] Those who "remained on the shore, who numbered in the hundreds, were then

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[1272] *Ibid.*, paras. 789-790.

[1273] *Ibid.*, para. 784.

[1274] *Ibid.*, para. 788.

[1275] *Ibid.*, para. 761.

[1276] *Ibid.*

[1277] *Ibid.*

rounded up".[1278] The "soldiers separated women and children from the men" and "systematically killed the men".[1279] They "then turned to the women and children who, after being separated from the men, were forced to sit in a lowered area on the shore. Some of the children were shot, some thrown into the river and others thrown onto a fire."[1280] Women and girls were taken away to be raped and gang raped. "During the course of the 'clearance operation', the houses and other structures in the various Rohingya hamlets of Min Gyi were completely burned and destroyed."[1281]

10.62 The 564th Light Infantry Battalion of MOC-15, also under the Western Regional Command, employed the same *modus operandi* when it carried out the "clearance operations" in Buthidaung Township. At Maung Nu, the UN Fact-Finding Mission determined that a "large group of Tatmadaw soldiers entered" the village, arriving "in military trucks and spread out in small groups on foot making their way towards" a large compound where approximately 200 Rohingya had sought refuge.[1282] Upon reaching the compound, "the soldiers ordered people to come out of the houses, with the threat that otherwise the houses would be set on fire".[1283] They then "broke down a door of the main house, and a number of them entered and continued to fire sporadically once inside".[1284] The UN Fact-Finding Mission found that when "people started to come out from the

[1278] *Ibid.*, para. 766.

[1279] *Ibid.*

[1280] *Ibid.*, para. 770.

[1281] *Ibid.*, para. 773.

[1282] *Ibid.*, para. 805.

[1283] *Ibid.*, para. 806.

[1284] *Ibid.*

houses, the soldiers separated women and children from men".[1285] They then killed the men and boys, with the "killings" becoming "more organized" as the soldiers blindfolded and tied up victims before shooting or slitting their throats.[1286] As elsewhere, "[w]omen and girls were also gang raped, killed and mutilated."[1287] The entire village was burned.[1288]

10.63 Other Tatmadaw units followed the same pattern in Rohingya villages throughout northern Rakhine State.[1289] As illustrated in Figure 1.3, the UN Fact-Finding Mission determined, based on its analysis of satellite imagery by UNITAR, that the Tatmadaw partially or completely destroyed at least 392 villages in Maungdaw, Buthidaung and Rathedaung Townships.[1290] The various military units, operating separately and often at large distances from one another, conspicuously engaged in the same or very similar destructive acts, especially in massively and randomly killing Rohingya, raping women and girls and comprehensively burning to the ground everything that belonged to the victims—rice mills, trees, crops, rice paddies, mosques, madrassas and houses.[1291] No fewer than 37,700 structures were destroyed.[1292]

[1285] *Ibid.*, para. 807.

[1286] *Ibid.*, para. 808.

[1287] *Ibid.*, para. 810.

[1288] *Ibid.*, para. 816.

[1289] *Ibid.*, paras. 761, 1077, 1085.

[1290] *Ibid.*, para. 959.

[1291] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 45. MG, Vol. IV, Annex 121.

[1292] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 960. MG, Vol. II, Annex 40.

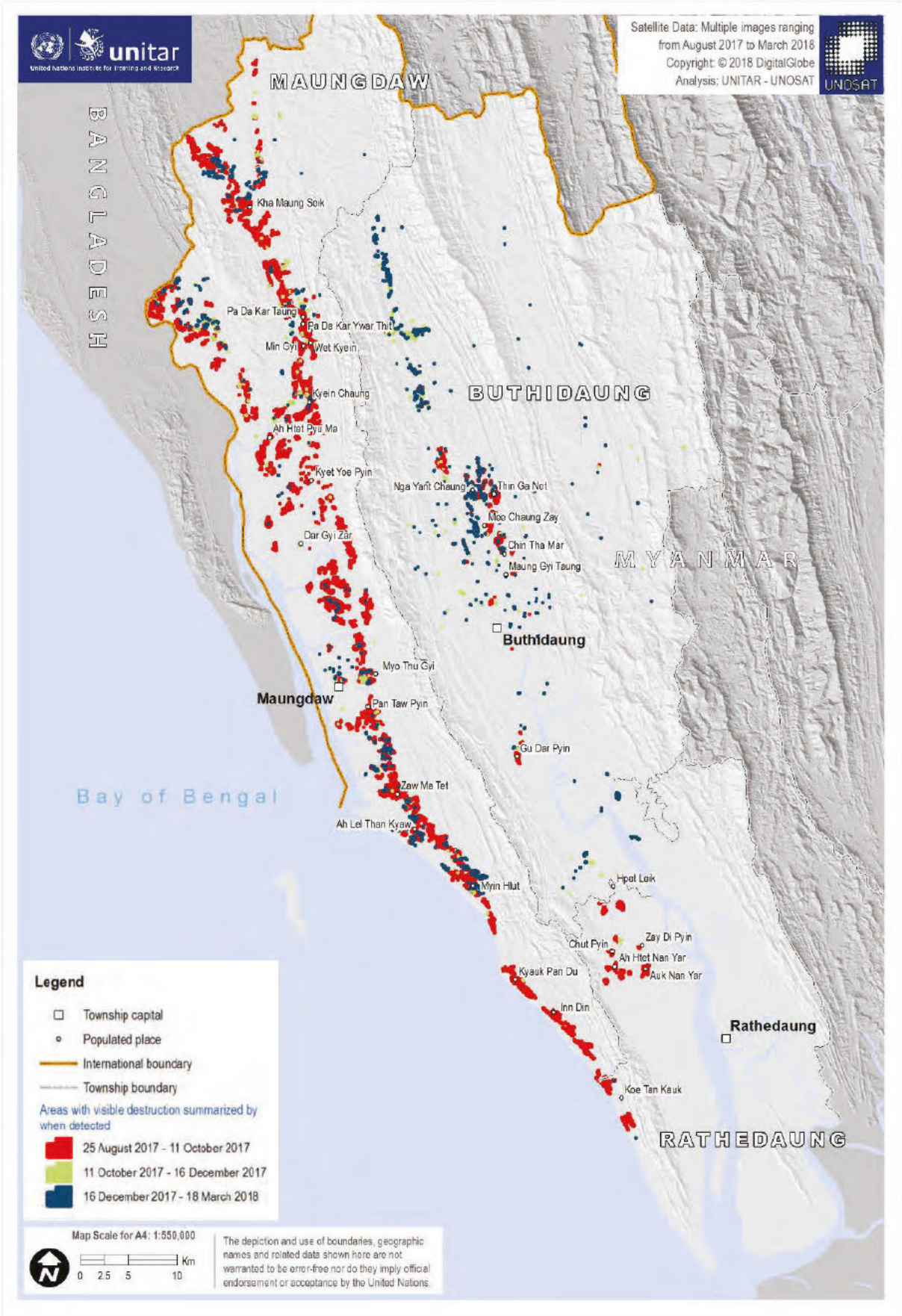
10.64 Figure 10.4 (following page 342 and in Volume XII), shows, based on satellite imagery analysis by UNITAR-UNOSAT, the large number of Rohingya villages across Rakhine State where this destruction was carried out. The Rohingya villages destroyed between 25 August 2017 and 11 October 2017 are shown in red. Those destroyed between 11 October 2017 and 16 December 2017 are shown in light green. And those destroyed between 16 December 2017 and 18 March 2018 are shown in blue.

10.65 The UN Fact-Finding Mission determined that the Tatmadaw carried out this mass-burning of Rohingya villages in a deliberate and organized fashion. In many of those villages, structures were separated by trees and other vegetation, such that "fire would not simply sweep through the village".[1293] The Tatmadaw were able to achieve such comprehensive destruction only by methodically burning buildings individually. A witness from Maung Hnit Ma Gyi, in northern Maungdaw, described the process: "[The military] started burning houses from one end of the [] village, and worked progressively and systematically until the entire area had been set ablaze."[1294] This is depicted in the image of Hla Poe Kaung village, reproduced at Figure 10.5 (following Figure 10.4 and in Volume XII), which shows numerous separate fires.[1295] As the UN Fact-Finding Mission

[1293] Amnesty International, *"We Are At Breaking Point"* (2016), p. 27. MG, Vol. IV, Annex 97.

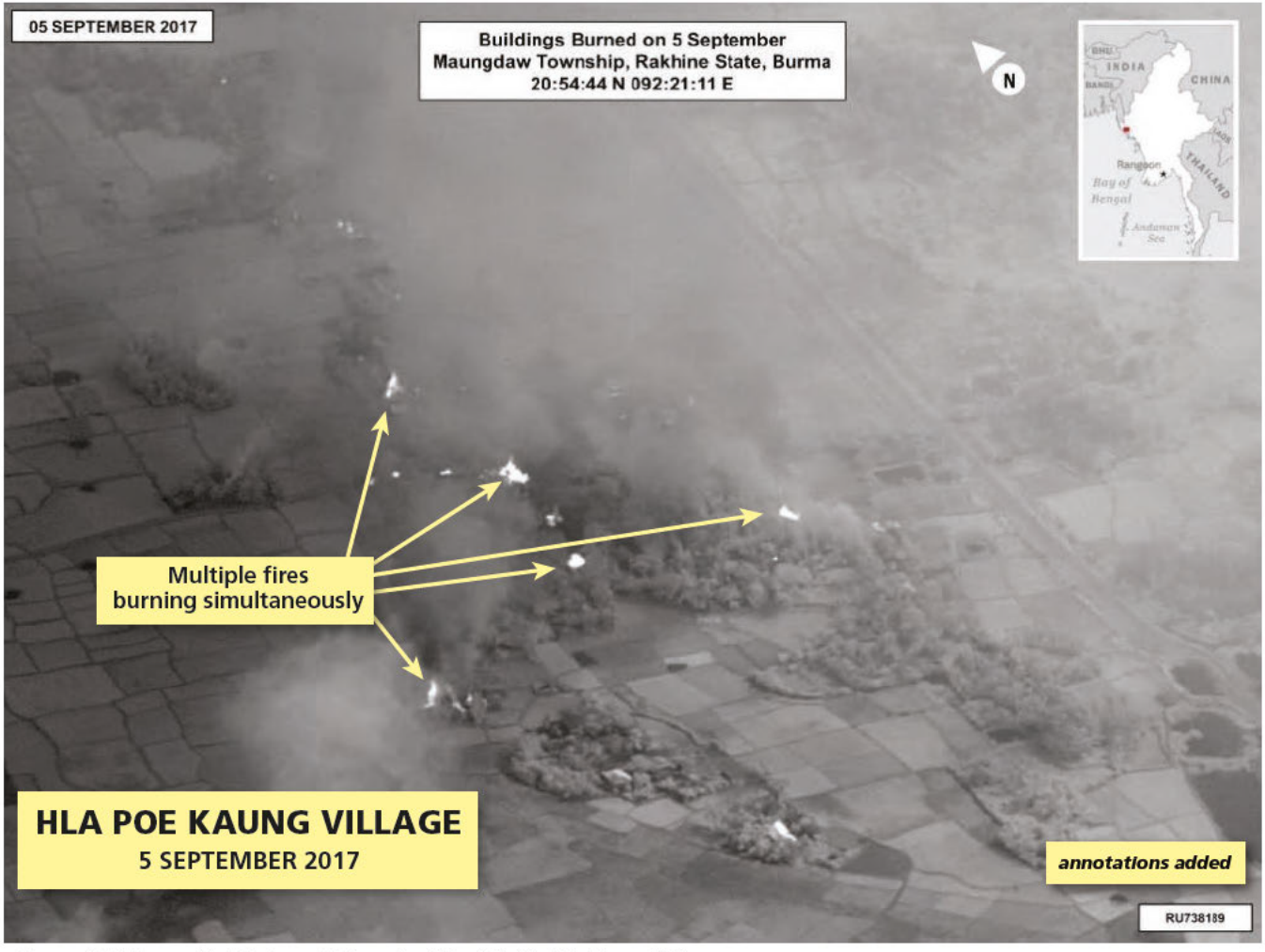
[1294] Amnesty International, *"My World Is Finished": Rohingya Targeted in Crimes Against Humanity in Myanmar* (October 2017) p. 30. MG, Vol. IV, Annex 99 [**hereinafter** Amnesty International, *"My World Is Finished"* (2017)].

[1295] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 971. MG, Vol. II, Annex 40.



Source: UN Human Rights Council, Report of the detailed findings of the International Fact-Finding Mission on Myanmar, 17 September 2018, p. 223.

Figure 10.4



Source: UN Human Rights Council, Report of the detailed findings of the International Fact-Finding Mission on Myanmar, 17 September 2018, p. 230.

Figure 10.5

concluded, the Tatmadaw undertook a "deliberate effort to burn down separate structures".[1296]

10.66 Tatmadaw units took care to target only Rohingya villages. Neighbouring non-Rohingya villages were untouched. The UN Fact-Finding Mission documented 22 locations where the two communities lived in close proximity to one another, and the Tatmadaw destroyed only the Rohingya areas, sparing those inhabited by the other group.[1297] This can be seen in Figure 10.6 (following page 344 and in Volume XII), which depicts the Rohingya village of Inn Din and an adjacent ethnic Rakhine village. The ethnic Rakhine village suffered no damage while Inn Din was completely destroyed.[1298]

10.67 The Tatmadaw's specific targeting of the Rohingya is similarly evident in mixed-ethnicity villages, where it destroyed only the Rohingya parts of the villages. This can be seen in the satellite image of Zay Di Pyin, in Rathedaung Township, found in Figure 10.7 (following Figure 10.6 and in Volume XII). As the UN Fact-Finding Mission concluded, the only parts burned were populated by Rohingya.[1299]

[1296] Amnesty International, *"My World Is Finished"* (2017), p. 30. MG, Vol. IV, Annex 99.

[1297] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 972. MG, Vol. II, Annex 40; Amnesty International, *"My World Is Finished"* (2017), p. 37. MG, Vol. IV, Annex 99.

[1298] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 974. MG, Vol. II, Annex 40; Amnesty International, *"My World Is Finished"* (2017), p. 32. MG, Vol. IV, Annex 99.

[1299] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 973. MG, Vol. II, Annex 40.

10.68 The same practice of distinction was made in numerous villages in Maungdaw Township, including Min Gyi, where Rohingya villagers reported that their houses near the river had been completely destroyed, while houses belonging to the ethnic Rakhine, which were located at a higher elevation in the south-western part of the village, were unaffected.[1300] This is confirmed by the satellite image reproduced at Figure 10.8 (following Figure 10.7 and in Volume XII).[1301]

10.69 In its 2019 Report, the UN Fact-Finding Mission found that, after carrying out the systematic burning of Rohingya villages described in Chapter 8, Myanmar undertook "a four-pronged approach of clearing, destroying, confiscating and building on land" previously inhabited by the Rohingya.[1302] This had the effect of both (i) "depriving [the Rohingya] of their ability to progress in healthy and safe communities and preventing them from engaging in livelihood activities that sustain them as a people" and (ii) "fundamentally altering the demographic landscape of the area by cementing the demographic re-engineering of Rakhine State that resulted from mass displacement that resulted in Myanmar".[1303] The UN Fact-Finding Mission concluded that the "manner in which the Government deprives Rohingya of land is one of several indicators that the Mission has

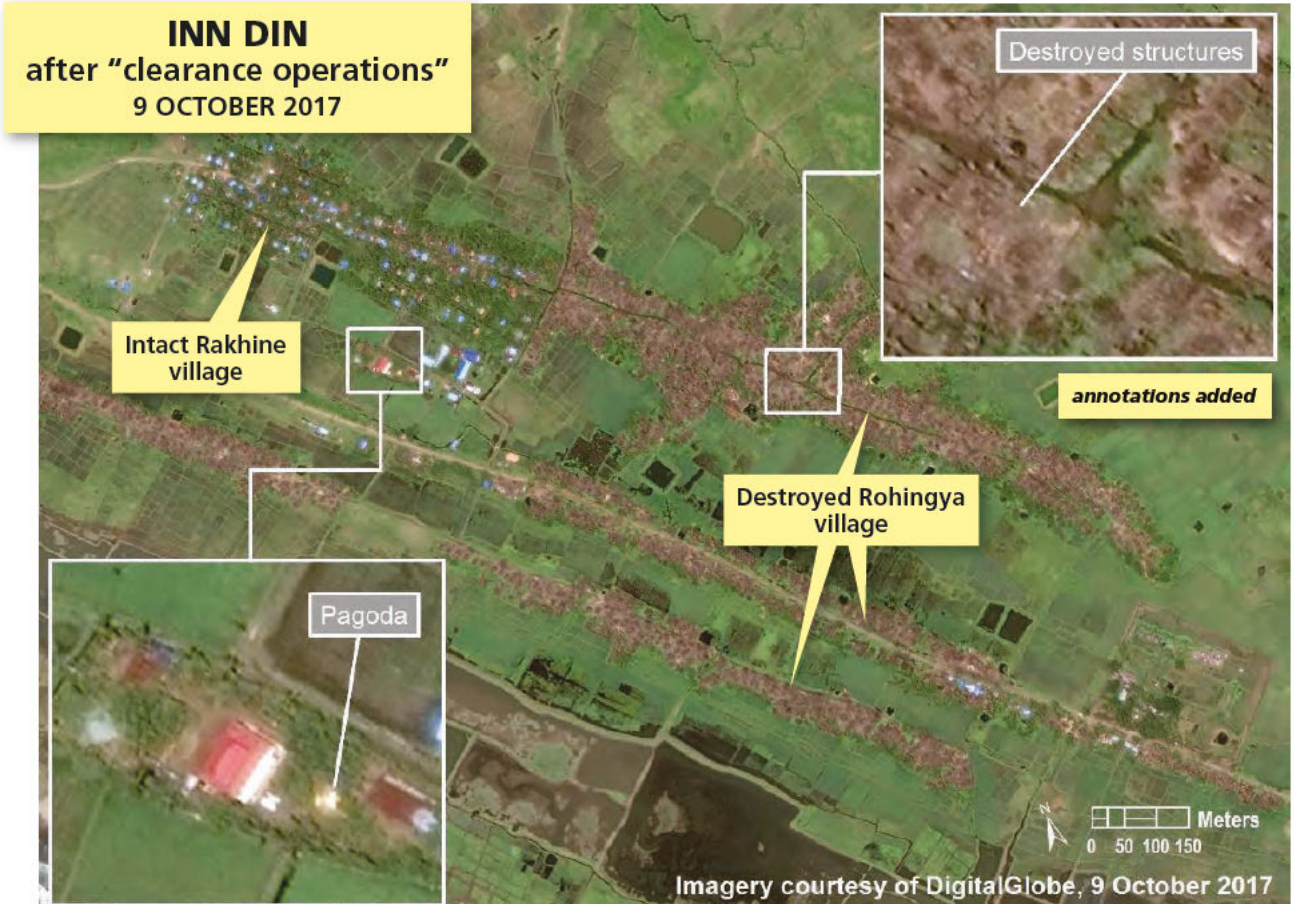
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[1300] Amnesty International, *"My World Is Finished"* (2017), p. 35. MG, Vol. IV, Annex 99.

[1301] The same pattern occurred throughout northern Rakhine State, including at Kayuk Pan Du, Tha Pyay Taw, Tha Yae Kone Tan and Zaw Ma Tet. *See* UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 976-977. MG, Vol. II, Annex 40.

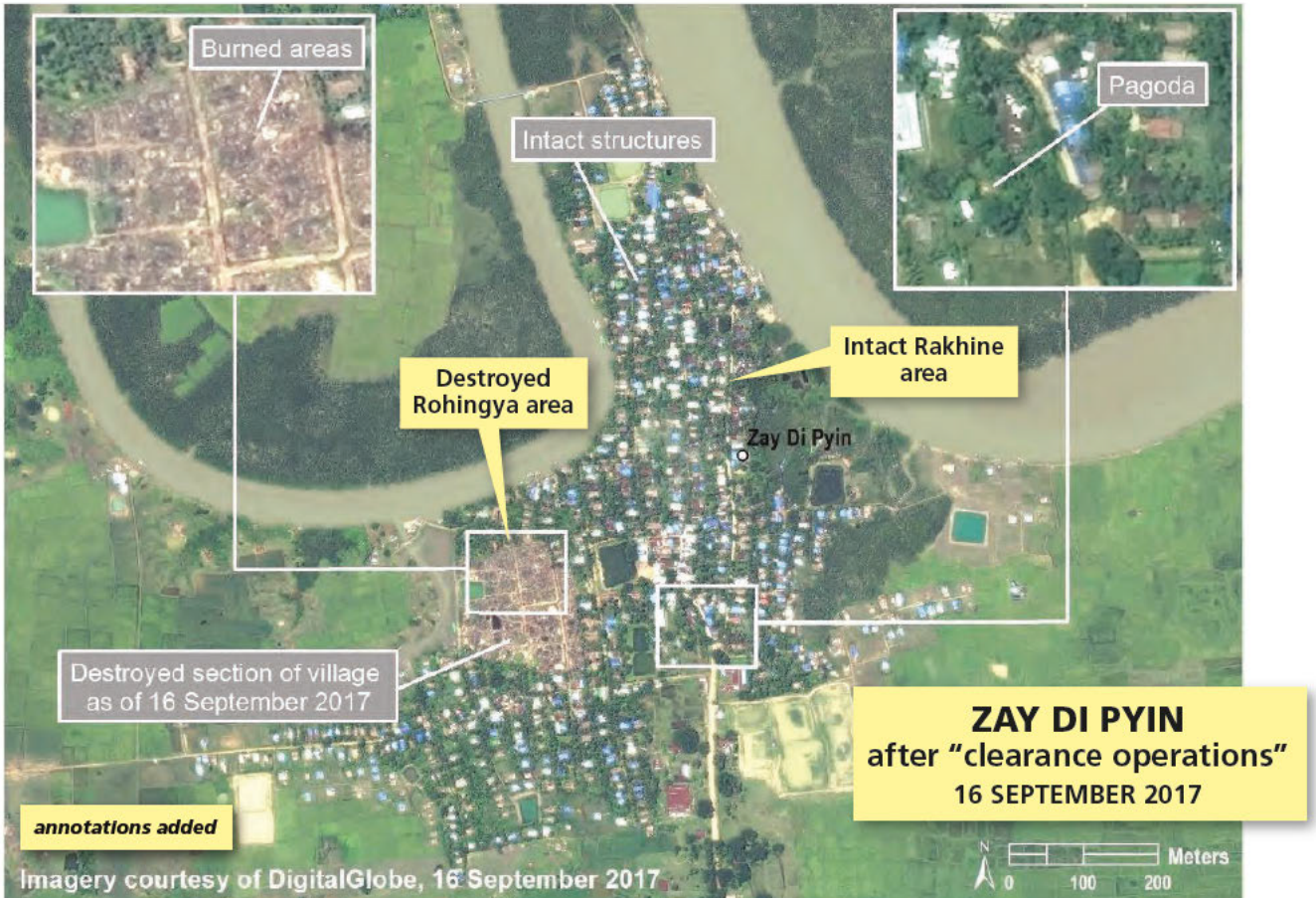
[1302] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 139. MG, Vol. III, Annex 49.

[1303] *Ibid.*



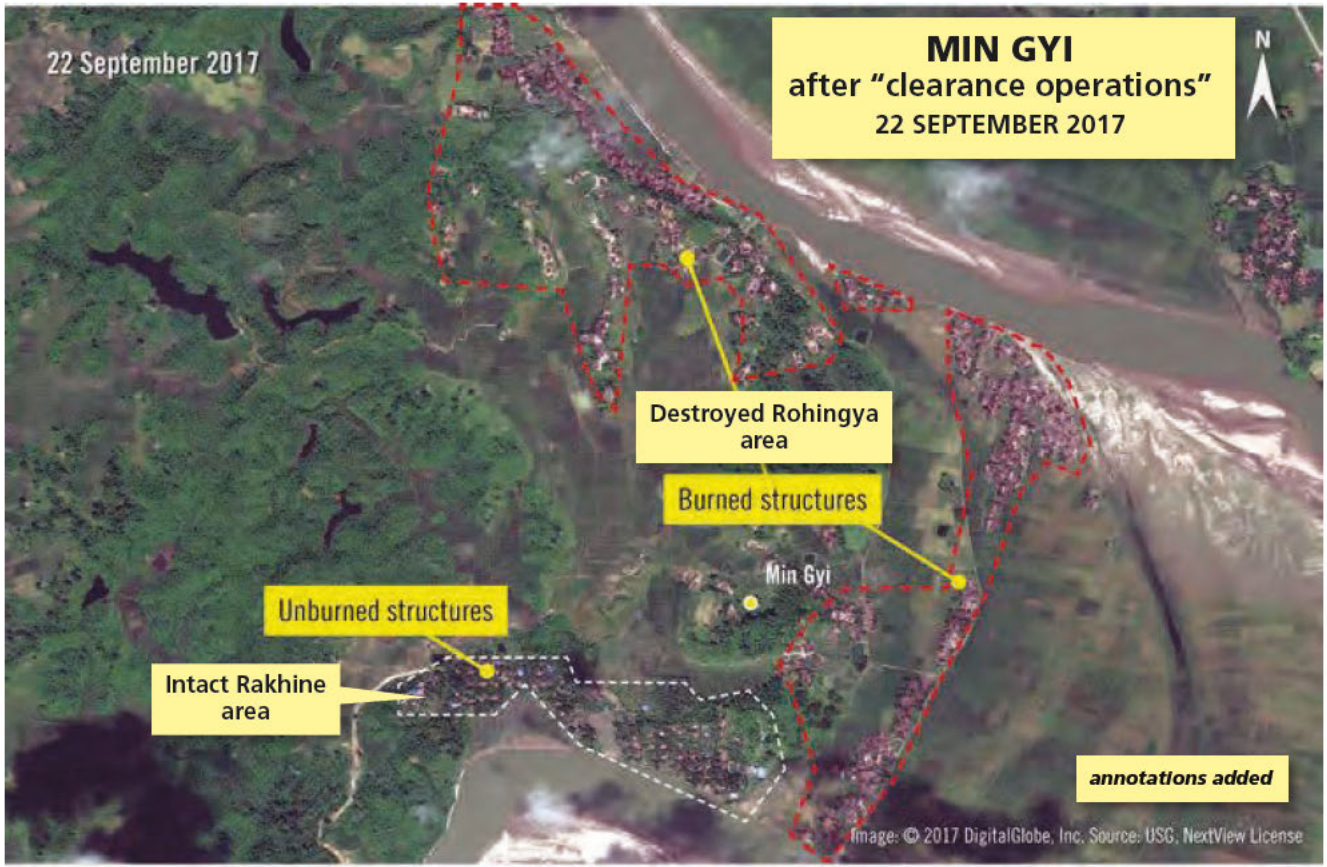
Source: UN Human Rights Council, Report of the detailed findings of the International Fact-Finding Mission on Myanmar, 17 September 2018, p. 232.

Figure 10.6



Source: UN Human Rights Council, Report of the detailed findings of the International Fact-Finding Mission on Myanmar, 17 September 2018, p. 232.

Figure 10.7



Source: Amnesty International, "My World Is Finished": Rohingya Targeted in Crimes Against Humanity in Myanmar (October 2017), p. 35.

Figure 10.8

identified to infer that the Government continues to harbor genocidal intent and that the Rohingya remain under serious risk of genocide".[1304]

10.70 Amnesty International similarly reported that, in the immediate aftermath of the "clearance operations" which "forced hundreds of thousands of Rohingya women, men and children from their homes and left hundreds of Rohingya villages burned to the ground, Myanmar authorities were remaking northern Rakhine State in their absence".[1305] Based on satellite imagery, videos and interviews with Rohingya in northern Rakhine State and Bangladesh, Amnesty International found "alarming" evidence of "a major operation to clear burned villages and to build new homes, security force bases and infrastructure in the region".[1306] As Amnesty International reported in November 2017, it found that, after the fires had run their course, Myanmar authorities were "demolishing buildings in Rohingya villages which remained intact and which could still have been usable or inhabitable".[1307] They were then bulldozed and cleared:

> "In village after village, burnt structures—at one time Rohingya homes, shops and businesses—have been bulldozed and cleared. Even surrounding trees and vegetation have been removed, rendering much of the landscape unrecognizable."[1308]

[1304] *Ibid.*, para. 140.

[1305] Amnesty International, *Myanmar: Remaking Rakhine* (2017), p. 3 ("The evidence is alarming: burnt remains of Rohingya villages are being bulldozed, potentially destroying evidence of military crimes, while surviving buildings are being demolished and trees and other vegetation cleared. In many areas, the landscape has been rendered virtually unrecognizable."). MG, Vol. IV, Annex 98.

[1306] *Ibid.*

[1307] *Ibid.*, p. 4.

[1308] *Ibid.*

10.71 The USHMM, based on its own evaluation, concurred that:

> "Since the 2016-2017 attacks on the Rohingya, the Myanmar government has instituted a number of measures resulting in the destruction and expropriation of land that belonged to the Rohingya before they were forcibly displaced. These actions have denied the Rohingya access to and the use of their own land, causing them significant economic and health hardships."[1309]

10.72 These actions included the large-scale confiscation of Rohingya lands through the Union Enterprise for Humanitarian Assistance, Resettlement and Developments in Rakhine ("UEHRD"), an initiative of State Counsellor Daw Aung San Suu Kyi. As the UN Fact-Finding Mission reported in September 2019, citing the Rakhine State Minister of Agriculture, Livestock, Forestry and Mining, the UEHRD "oversaw the harvesting and sale of 45,000 acres of 'ownerless Bengali land' in northern Rakhine State".[1310] The suddenly "ownerless" land was then sold or leased to ethnic Rakhine farmers. A Rakhine State lawmaker explained: "farmland formerly owned and cultivated by Rohingya would be leased out to local ethnic [Rakhine] farmers and private rice-growing companies".[1311]

[1309] United States Holocaust Memorial Museum, *Practical Prevention: How the Genocide Convention's Obligation to Prevent Applies to Myanmar* (24 June 2020), p. 7. MG, Vol. VII, Annex 195.

[1310] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 123. MG, Vol. III, Annex 49.

[1311] *Ibid.*, *citing* Min Aung Khine, "Rakhine Govt Undecided on How to Use Farmland Abandoned by Rohingya Refugees", *The Irrawaddy* (31 May 2018). MG, Vol. IX, Annex 283.

10.73 Myanmar enabled confiscation of Rohingya lands through amendments in 2018 to the Vacant, Fallow and Virgin Law Act of 2012.[1312] Pursuant to these amendments, anyone living on land categorized as "vacant, fallow, or virgin" is required to apply for a permit to continue using it. Failure to do so results in harsh criminal sanctions, including imprisonment and fines.[1313] As a result, an estimated 42% of the land in Rakhine State land suddenly became "vacant, fallow or virgin".[1314] Since the law only permits "national citizens" to apply for land permits, it enables what amounts to the "confiscation of the land owned by nearly one million forcibly displaced and deported Rohingya".[1315]

10.74 These confiscations serve Myanmar's longstanding objective of eliminating the Rohingya and remaking the demography of Rakhine State. According to Amnesty International: "[S]ince early 2018, Myanmar authorities have overseen rapid new construction across northern Rakhine State".[1316] This construction has taken place on the sites of former Rohingya

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[1312] Republic of the Union of Myanmar, *The Vacant, Fallow and Virgin Lands Management Law* (2012) (original and translation). MG, Vol. VI, Annex 179; Republic of the Union of Myanmar, *The Law Amending the Vacant, Fallow and Virgin Lands Management Law* (11 September 2018) (original and translation). MG, Vol. VII, Annex 188.

[1313] Republic of the Union of Myanmar, *The Law Amending the Vacant, Fallow and Virgin Lands Management Law* (11 September 2018) (original and translation), para. 20.b. MG, Vol. VII, Annex 188; UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 124. MG, Vol. III, Annex 49.

[1314] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 124. MG, Vol. III, Annex 49.

[1315] Republic of the Union of Myanmar, *The Law Amending the Vacant, Fallow and Virgin Lands Management Law* (11 September 2018) (original and translation), art. 5.a. MG, Vol. VII, Annex 188. MG, Vol. VII, Annex 188; UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 124. MG, Vol. III, Annex 49.

[1316] Amnesty International, *"We Will Destroy Everything"* (2018) p. 123. MG, Vol. IV, Annex 112.

homes, lands, mosques and businesses. As Amnesty International observed: "Almost as soon as villages are cleared, signs of new construction and development emerge".[1317] New construction of security structures in the village of Inn Din in Maungdaw Township, shown in Figure 10.9 (following page 348 and in Volume XII), exemplifies this pattern.

10.75 In Buthidaung Township, for example, Myanmar authorized and carried out the construction on Rohingya lands of "state-built villages which are inhabited by individuals and families who have been transferred from other parts of the country".[1318] In the first stage of this project, according to Amnesty International, military and township officials ordered the Rohingya villagers to stop farming their land, and then, a month later, "planted flags across a large area of the land".[1319] Two weeks after that, they summoned the villagers to a meeting and "announced that the area where they had planted the flags had been confiscated and they would be building a security post and a NaTaLa [*i.e.*, model] village".[1320]

10.76 The Food and Agriculture Organization ("FAO") and WFP have confirmed that Rohingya lands in Rakhine State have "been confiscated to accommodate new 'model villages', constructed by the Ministry for the Progress of Border Areas and National Races (subsequently renamed the Ministry of Border Affairs), to host relocated Burman and Arakan

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[1317] Amnesty International, *Myanmar: Remaking Rakhine* (2017), p. 7. MG, Vol. IV, Annex 98.

[1318] *Ibid.*

[1319] *Ibid.*

[1320] *Ibid.*, pp. 7, 17 (noting one interviewee from a hamlet west of Ah Lei Chaung stated "Myanmar authorities have announced their intention to build new houses for 'ethnic nationals', leading to fears that lands used by Rohingya who have fled to Bangladesh will be confiscated for new NaTaLa villages.").



Source: UN Human Rights Council, Report of the detailed findings of the International Fact-Finding Mission on Myanmar, 17 September 2018, p. 302.

Figure 10.9

people".[1321] FAO and WFP reported that this was "part of a scheme to remodel the demographics of Northern Rakhine State".[1322]

10.77 Rohingya lands have also been confiscated to make way for the construction of military facilities.[1323] A witness described to the UN Fact-Finding Mission how "the military marked the land by placing a military flag—a sign indicating that the land had been confiscated".[1324] Another witness described the scene in Buthidaung Township, where military construction on Rohingya lands was taking place:

> "As I arrived, I found the entire village demolished. The authorities were constructing a huge compound. It looked like a military compound or an IDP camp. The area was fenced and the compound was constructed on around 200 hectares of land. I saw huge bulldozers, vehicles and construction materials. The construction of the building was yet to begin. I couldn't stay in the village for fear of arrest."[1325]

10.78 The UN Fact-Finding Mission concluded, in its 2019 Report, that the destruction of Rohingya villages, the confiscation of their lands, and the development of new, model villages for ethnic Rakhine and other Buddhist groups "contribute to an overall condition that makes it unsafe, inhumane,

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[1321] UN Food and Agriculture Organization, *Special Report: The 2018 FAO/WFP Agriculture and Food Security Mission to Rakhine State, Myanmar* (12 July 2019). p. 8. MG, Vol. III, Annex 46.

[1322] *Ibid.*

[1323] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 126. MG, Vol. III, Annex 49.

[1324] *Ibid.*

[1325] *Ibid.*

unsustainable and impossible for Rohingya who remain in Rakhine State and those who might be allowed to return to Myanmar".[1326]

[1326] *Ibid.*, para. 140.

CHAPTER 11
THE TATMADAW'S IMPUNITY AND DESTRUCTION OF EVIDENCE

11.1 The three chapters immediately preceding this one, Chapters 8 through 10, have described in detail the acts committed by the Tatmadaw against the Rohingya during the "clearance operations" of 2016-2018, and the organization and planning that preceded and accompanied them. The UN Fact-Finding Mission concluded that the acts were carried out under orders from the Tatmadaw's senior leadership, including the Commander-in-Chief, Senior-General Hlaing, and at least five other general officers under his command.[1327]

11.2 Yet Myanmar has failed to investigate, let alone prosecute, a single one of these military officers for crimes against the Rohingya. Instead, it adopted a deliberate policy of *not* investigating the Tatmadaw officers responsible for planning, organizing or carrying out the "clearance operations", resulting in their complete and total impunity. As the UN Fact-Finding Mission found, "[n]umerous reports from other UN mechanisms, civil society, and investigative journalists similarly exposed information that constituted evidence of underlying acts of genocide. Despite this, the State has not undertaken an effective investigation into genocide".[1328]

11.3 In response to the international community's repeated calls to hold the perpetrators accountable, Myanmar has turned a blind eye and denied any wrongdoing. Further, it has destroyed evidence in an effort to cover up

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[1327] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1384, 1554-55. MG, Vol. II, Annex 40.

[1328] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 227. MG, Vol. III, Annex 49.

the atrocious acts committed by its military forces against the Rohingya. Instead of investigating and prosecuting the perpetrators, it has instituted and maintained a system of absolute impunity that condones even the gravest of offences and encourages their repetition.

11.4 Myanmar has consolidated and defended this system through hollow enquiries and sham trials that have served only to exonerate and pardon the responsible parties. The most recent of these exercises, the government-established "Independent Commission of Enquiry" ("ICOE"), presented its report to the Myanmar government in January 2020, on the eve of the Court's Provisional Measures Order.[1329] According to Myanmar's report on implementation of the Provisional Measures Order, submitted to the Court on 22 May 2020, the ICOE identified 139 cases for prosecution—but not a single one was against a member of the military.[1330] To the contrary, most of the 139 cases involve crimes allegedly committed *by* the Rohingya, not *against* them.[1331] Thus, Myanmar still has not found any cause to investigate or prosecute any members of the Tatmadaw for the atrocities committed against the Rohingya.

11.5 Myanmar's state-sanctioned impunity for members of the Tatmadaw is not the result of careless omission but of calculated design. As the UN Fact-Finding Mission concluded,[1332] it demonstrates "a pattern of

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[1329] Republic of the Union of Myanmar, *Independent Commission of Enquiry Final Report, Press Release* (20 January 2020). MG, Vol. VI, Annex 166.

[1330] Myanmar's Report pursuant to Provisional Measures Order, paras. 98-101.

[1331] *Ibid.*

[1332] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 225. MG, Vol. III, Annex 49.

conduct from which the only reasonable conclusion to be drawn is an intent on the part of the … authorities to destroy 'in part' the protected group".[1333]

11.6 This Chapter has five parts. It begins with a description of the system of impunity that Myanmar has created for the Tatmadaw and other security forces, which shields them from accountability for all crimes, regardless of their gravity (**Section I**). It then describes how the "military justice system" operates to ensure the impunity of officers and enlisted personnel in regard to the actions that they ordered or carried out against the Rohingya (**Section II**). The next part recounts the concerns expressed by UN organs and Member States about Myanmar's failure to investigate or prosecute the perpetrators of crimes against the Rohingya (**Section III**). The fourth part addresses Myanmar's systematic destruction of evidence to cover up the crimes committed against the Rohingya (**Section IV**). The final part reviews Myanmar's efforts to deflect these concerns through the creation of a series of State-controlled "investigative commissions" which, predictably, have failed to identify any Tatmadaw officers or enlisted personnel responsible for a single crime (**Section V**).

I. Myanmar's System of Impunity for the Tatmadaw

11.7 Myanmar has refused to initiate any credible investigation or prosecution of the planners or the perpetrators of the "clearance operations" against the Rohingya. As the UN Fact-Finding Mission emphasized in 2018, "[t]he authorities of Myanmar, both military and civilian, have failed

[1333] *Croatia v. Serbia*, Judgment (2015), para. 404.

to condemn, investigate or punish perpetrators".[1334] A year later, the Mission reiterated that "[t]he Government of Myanmar has not taken the necessary measures to effectively investigate or prosecute those responsible".[1335] Similarly, the UN High Commissioner for Human Rights found in March 2019 that "[t]he Government has not … taken any serious action to address impunity".[1336] Even after the Court issued its Provisional Measures Order, the UN Special Rapporteur on the situation of human rights in Myanmar observed, on 29 April 2020: "Having faced no accountability, the Tatmadaw continues to operate with impunity."[1337]

11.8 As indicated previously,[1338] the UN Fact-Finding Mission accused six top commanders of the Tatmadaw of responsibility for genocide against the Rohingya, and recommended that they be prosecuted.[1339] These include the Commander-in-Chief, Senior-General Min Aung Hlaing, the Deputy Commander-in-Chief, Vice Senior-General Soe Win and the Commanders of the two Light Infantry Divisions primarily responsible for carrying out the "clearance operations" against the Rohingya: Brigadier-General Aung Aung and Brigadier-General Than Oo, Commanders of the 33rd and the

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[1334] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1620. MG, Vol. II, Annex 40.

[1335] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 7. MG, Vol. III, Annex 49.

[1336] UN Human Rights Council, *Situation of human rights of Rohingya in Rakhine State, Myanmar,* UN Doc. A/HRC/40/37 (11 March 2019), para. 55. MG, Vol. III, Annex 73.

[1337] UN OHCHR, *UN Special Rapporteur Yanghee Lee: "Possible war crimes and crimes against humanity ongoing in Rakhine and Chin State"* (29 April 2020). MG, Vol. III, Annex 54.

[1338] *See supra* Chapter 10, para. 10.8.

[1339] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1553-56. MG, Vol. II, Annex 40.

99th Divisions, respectively.[1340] They also include the Commander of the Bureau of Special Operations-3, Lieutenant-General Aung Kyaw Zaw and the Commander of the Western Regional Military Command, Major-General Maung Maung Soe.[1341]

11.9 All six commanders, as well as additional officers in the top echelons of the Tatmadaw, are the subject of sanctions by the European Union,[1342] the United States,[1343] and the United Kingdom.[1344] The official announcement by the US Treasury Department declared that "[s]uch abuses and the continuing impunity must stop … Burma's military must address the climate of impunity and cease abuses and violations of universally accepted human rights".[1345]

11.10 Impunity for the Tatmadaw is, in fact, built into Myanmar's constitutional and legal structure. Myanmar's Agent acknowledged this during the oral proceedings on provisional measures, when she told the Court that, "if war crimes have been committed by members of Myanmar's Defence Services, they will be prosecuted through our military justice

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[1340] *Ibid*., para. 1555.

[1341] *Ibid*.

[1342] Council of the European Union, *Council Implementing Regulation (EU) 2018/898 of 25 June 2018 implementing Regulation (EU) No 401/2013 concerning restrictive measures in respect of Myanmar/Burma* (25 June 2018). MG, Vol. VII, Annex 193; Council of the European Union, *Press Release: Myanmar/Burma: Council prolongs sanction* (29 April 2019). MG, Vol. VII, Annex 196.

[1343] US Department of the Treasury, *Press Release: Treasury Sanctions Individuals for Roles in Atrocities and Other Abuses* (10 December 2019). MG, Vol. VII, Annex 198.

[1344] United Kingdom Foreign Commonwealth Office, *UK announces first sanctions under new global human rights regime* (6 July 2020). MG, Vol. VII, Annex 200; United Kingdom Foreign Commonwealth Office, *UK Sanctions List* (29 September 2020). MG, Vol. VII, Annex 201.

[1345] US Department of the Treasury, *Press Release: Treasury Sanctions Individuals for Roles in Atrocities and Other Abuses* (10 December 2019). MG, Vol. VII, Annex 198.

system, in accordance with Myanmar's Constitution".[1346] However, as she continued: "It is never easy for armed forces to recognize self-interest in accountability for their members, and to implement a will to accountability through actual investigations and prosecutions."[1347]

11.11 Indeed, Myanmar's military justice system has not resulted in a single prosecution for war crimes, including genocide, because the very same individuals whom the UN Fact-Finding Mission identified as bearing direct responsibility for acts of genocide against the Rohingya are the ones who oversee it. During the oral proceedings on provisional measures, the Agent explained that any prosecution must be led by Myanmar's Judge Advocate General,[1348] Lt. General Aung Lin Dwe—who is under the direct command of Senior-General Min Aung Hlaing and the Deputy Commander-in-Chief, Vice Senior-General Soe Win, both of whom are among those accused by the UN Fact-Finding Mission of genocide.[1349] As the Mission concluded, "impunity for human rights violations in Myanmar—especially where committed by security forces—is largely structural. It is built into the legal framework and the system of governance".[1350]

[1346] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures*, Verbatim Record CR 2019/19 of Public Sitting Held on 11 December 2019, at 10 a.m., p. 18, para. 28.

[1347] *Ibid*., p. 16, para. 19.

[1348] *Ibid*., p. 16, para. 17.

[1349] UN Human Rights Council, *Independent International Fact-Finding Mission on Myanmar: The economic interests of the Myanmar military*, UN Doc. A/HRC/42/CRP.3 (5 August 2019), para. 60. MG, Vol. III, Annex 76; UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1555. MG, Vol. II, Annex 40.

[1350] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1577. MG, Vol. II, Annex 40.

11.12 Myanmar's 2008 Constitution, written and adopted by the Tatmadaw during a prolonged period of military governance, cannot be altered without military consent.[1351] It provides that members of the armed forces can only be prosecuted through Myanmar's military justice system and grants the military the right to independently administer and adjudicate all of its affairs.[1352] It makes the Commander-in-Chief's decisions concerning military justice matters "final and conclusive", with no right of appeal.[1353] "These legal provisions", the UN Fact-Finding Mission observed, "provide broad immunities and make the Tatmadaw accountable only to itself".[1354]

11.13 During the oral proceedings on provisional measures, Myanmar's Agent explicitly recognized the link between impunity and genocidal intent when she asked: "Can there be genocidal intent on the part of a State that actively investigates, prosecutes and punishes soldiers and officers who are

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[1351] Republic of the Union of Myanmar, *Constitution* (2008), paras. 433-36. MG, Vol. VI, Annex 176. The Constitution guarantees that 25% of Parliamentary seats are reserved for the military and requires that Constitutional amendments be passed with more than 75% of Parliamentarians voting in favor of an amendment. This ensures a military veto over any attempts to limit its power. UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1581. MG, Vol. II, Annex 40.

[1352] Republic of the Union of Myanmar, *Constitution* (2008), paras. 20(b), 293(b), 319, 343. MG, Vol. VI, Annex 176. According to the UN Fact-Finding Mission, the Defence Services Act (1959) also provides that military personnel on active service who commit serious crimes against a civilian (murder, culpable homicide, rape) shall be tried by military tribunals. The Act defines "active service" in such broad manner that military personnel would effectively always fall under military courts' jurisdiction. UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1579. MG, Vol. II, Annex 40.

[1353] Republic of the Union of Myanmar, *Constitution* (2008), para. 343(b). MG, Vol. VI, Annex 176; UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1579. MG, Vol. II, Annex 40.

[1354] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1580. MG, Vol. II, Annex 40.

accused of wrongdoing?"[1355] Even if the answer to the Agent's question is "no", there is no evidence that Myanmar is such a State. It has done the opposite of what its Agent suggests would be necessary to disprove genocidal intent. Instead of investigating, condemning and punishing the perpetrators of the crimes committed against the Rohingya, Myanmar's authorities have, in the words of the UN Fact-Finding Mission, "categorically denied violations, created legal obstacles to accountability, destroyed evidence of crimes and actively nurtured and perpetuated a climate of impunity that has emboldened perpetrators".[1356] Former Tatmadaw soldiers who carried out the "clearance operations", under orders from their commanding officers, confirmed that "there was no punishment" and that perpetrators were promoted instead.[1357]

11.14 As the UN Special Rapporteur on the human rights situation in Myanmar observed, "[t]hose responsible for these violations enjoy impunity which perpetuates the devastating cycle of abuse".[1358] This is because "[t]he emboldened military leadership retains a firm grip on politics and the economy, while the government has so far proved unwilling or unable to make any significant move against it".[1359] Under the present conditions, the Special Rapporteur concluded, Myanmar is simply

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[1355] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures*, Verbatim Record CR 2019/19 of Public Sitting Held on 11 December 2019, at 10 a.m., p. 17, para. 23.

[1356] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1620. MG, Vol. II, Annex 40.

[1357] Interview of Zaw Naing Tun (15 August 2020), p. 9. MG, Vol. V, Annex 141.

[1358] Isabel Todd & Yanghee Lee, "Myanmar's military companies should be sanctioned", *Al Jazeera* (26 November 2019). MG, Vol. IX, Annex 318.

[1359] *Ibid.*

"incapable of delivering accountability".[1360] In the same vein, the UN Fact-Finding Mission found that "[u]nless the Myanmar military and other security forces are held accountable for past, current and future crimes, violence and associated atrocity crimes will happen again".[1361] Yet "criminal accountability at the domestic level, in particular for those who bear the greatest responsibility, is unattainable and will remain so for the foreseeable future".[1362]

11.15 In September 2020, the UN OHCHR concluded that:

> "There has been no tangible progress towards accountability for serious human rights violations. To ensure progress in ending impunity, and associated cycles of discrimination, violence and abuse, both the Government and the Tatmadaw have to go beyond closed and arcane processes whereby the military leadership claims to hold itself accountable through its own chain of command. Statements made at the International Court of Justice in December 2019 that Myanmar would investigate and prosecute those allegedly responsible for grave violations through Myanmar's military justice system reflect this approach. It embodies a view of a military which is above the law, both national and international, and which is accountable to no one but itself."[1363]

[1360] *Ibid.*

[1361] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1624. MG, Vol. II, Annex 40.

[1362] *Ibid*., para. 1648.

[1363] UN Human Rights Council, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN Doc. A/HRC/45/5 (3 September 2020), para. 59. MG, Vol. III, Annex 56.

II. The Military Justice System Ensures a Lack of Accountability for Crimes Committed Against the Rohingya

11.16 In respect of crimes committed against the Rohingya, there have only been two prosecutions to date, both of them initiated in direct response to international pressure. They illustrate the Tatmadaw's impunity for such crimes.

11.17 Each of the two cases were initiated after the news media had published eyewitness accounts, accompanied by photographic evidence, of mass killings of Rohingya by the Tatmadaw. Both prosecutions targeted junior, low-level military personnel, rather than those higher up in the chain-of-command whose orders they were executing. Both lacked transparency in regard to the investigations, the charges, the proceedings, or the sentences imposed. Neither prosecution was for the crime of genocide. The UN Fact-Finding Mission found that "[t]he rare cases, brought mostly before military courts without transparency, are wholly insufficient to counter the overall trend of impunity".[1364] Underscoring their insignificance, Myanmar's report on implementation of the Provisional Measures Order, submitted to the Court on 22 May 2020, addresses them in only two paragraphs.[1365]

11.18 The first prosecution, a court martial in the village of Inn Din in 2018, arose from the Tatmadaw's summary execution of ten Rohingya men, while on their knees with their hands tied behind their backs. It ended with

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[1364] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1621. MG, Vol. II, Annex 40.

[1365] Myanmar's Report pursuant to Provisional Measures Order, paras. 87, 103.

the Commander-in-Chief, Senior-General Hlaing, pardoning and releasing the perpetrators after only a few months of confinement.[1366]

11.19 Initially, the Tatmadaw denied any wrongdoing at Inn Din, declaring that the "security forces did not commit shooting at innocent villagers" and did not "arrest, beat and kill the villagers".[1367] However, Reuters journalists went to Inn Din and uncovered evidence of the ten executions. The evidence included a series of photographs taken by a local villager, showing the men kneeling in front of soldiers, with their hands bound together behind their backs, and police officers hovering above them brandishing assault rifles,[1368] and the same ten men, dead, in a shallow grave, some of them dismembered.[1369] As the journalists set out to identify the perpetrators in the photographs, they received "insider descriptions" from members of the paramilitary police, "confirming that the military played the lead role in the campaign".[1370]

11.20 Upon learning of the Reuters news report, the Tatmadaw made an arrest—not of the soldiers who committed the massacre, but of the two

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[1366] *Ibid*., para. 87, note 31.

[1367] Republic of the Union of Myanmar, President Office, *Information released by the Tatmadaw True News Information Team on the findings of the Investigation Team in connection with the performances of the security troops during the terrorist attacks in Maungtaw region, Rakhine State* (13 November 2017). MG, Vol. VI, Annex 155. *See also* "Information released by the Tatmadaw True News Information Team on the findings of the Investigation Team in connection with the performances of the security troops during the terrorist attacks in Maungtaw region, Rakhine State", *The Global New Light of Myanmar* (14 November 2017). MG, Vol. IX, Annex 272.

[1368] Tom Lasseter, "Dangerous News: How two young reporters shook Myanmar", *Reuters* (8 August 2018). MG, Vol. IX, Annex 285.

[1369] *Ibid.*

[1370] Wa Lone, Kyaw Soe Oo, Simon Lewis & Antoni Slodkowski, "Massacre in Myanmar: How Myanmar forces burned, looted and killed in a remote village", *Reuters* (8 February 2018). MG, Vol. IX, Annex 279.

Reuters reporters. They were tried by a military court, convicted of violating the Official Secrets Act and sentenced to seven years of imprisonment.[1371] The Myanmar National Human Rights Commission ("MNHRC") urged the authorities to ensure that the journalists would not be tortured, and to provide them access to healthcare and family visits—but did not address whether the detention itself was arbitrary.[1372] On 22 April 2019, the Supreme Court of Myanmar rejected the journalists' appeal, without explanation.[1373] Only after a massive outcry from the international community were the journalists freed, on 6 May 2019, after having spent a year-and-a-half in detention.[1374]

11.21 While the reporters were incarcerated, the military announced that a court martial had found that "ten Muslim men had been summarily executed in Inn Din village" and "sentenced four officers and three soldiers each to ten years in prison with hard labour".[1375] Only seven months later, however, Senior-General Min Aung Hlaing pardoned and released each of

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[1371] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1296. MG, Vol. II, Annex 40.

[1372] *Ibid*., para. 1617.

[1373] Shoon Naing & Simon Lewis, "Myanmar's top court rejects final appeal by jailed Reuters journalists", *Reuters* (23 April 2019). MG, Vol. IX, Annex 306.

[1374] "Key facts about Reuters reporters Wa Lone and Kyaw Soe Oo", *Reuters* (7 May 2019). MG, Vol. IX, Annex 307.

[1375] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures*, Verbatim Record CR 2019/19 of Public Sitting Held on 11 December 2019, at 10 a.m., p. 17, para. 20.

the seven convicted soldiers.[1376] This contrasted with the imprisonment of the Reuters journalists, which lasted for 18 months.[1377]

11.22 The message was not that the Tatmadaw would be held accountable for crimes against the Rohingya, but the opposite. Myanmar's Agent, who as State Counsellor occupies the highest civilian post in Myanmar's government, lamented that "[a]fter serving a part of their sentences, [the soldiers] were given a military pardon. Many of us in Myanmar were unhappy with this pardon".[1378] Unhappy with the pardon or not, the civilian authorities were powerless to prevent or reverse it, given the Tatmadaw's absolute and unfettered discretion in respect of the operation of the military justice system. As the UN OHCHR concluded in its 3 September 2020 Report on the Situation of human rights of Rohingya Muslims and other minorities in Myanmar, "[b]oth process and pardon highlight the lack of transparency and independence in the military justice system in Myanmar and the Commander-in-Chief's influence over cases".[1379]

[1376] Myanmar's Report pursuant to Provisional Measures Order, para. 87, note 31.

[1377] "Key facts about Reuters reporters Wa Lone and Kyaw Soe Oo", *Reuters* (7 May 2019). MG, Vol. IX, Annex 307.

[1378] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures*, Verbatim Record CR 2019/19 of Public Sitting Held on 11 December 2019, at 10 a.m., p. 17, para. 20.

[1379] UN Human Rights Council, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN Doc. A/HRC/45/5 (3 September 2020), para. 23. MG, Vol. III, Annex 56. At the Hearing on Provisional Measures, Myanmar's Agent stated that "The Gambia has not challenged the quality of the military justice in the *Inn Din* case, only the pardon". *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures*, Verbatim Record CR 2019/21 of Public Sitting Held on 12 December 2019, at 4:30 pm, p. 35, para. 1. This is incorrect. The pardon was not the only problem. The Gambia challenges the entire process, including (1) the Tatmadaw's failure to initiate a thorough and independent investigation in the first place, and its initial denials of wrongdoing; (2) the Tatmadaw's reluctant and extremely limited investigation that began only after the Reuters journalists were arrested; (3) the fact that only a small number of lower-ranked officers and soldiers were prosecuted,

11.23 The second of the two cases brought against members of the Tatmadaw was a court martial, initiated on 26 November 2019 (that is, 18 days after The Gambia filed its *Application* and *Request for Provisional Measures*) for the mass killing of Rohingya in the village of Gu Dar Pyin.[1380] This proceeding, like the one addressing the killings at Inn Din, was commenced in direct response to international criticism resulting from a widely circulated news report.

11.24 In this case, it was an Associated Press report, which documented, through time-stamped cell phone videos, satellite images and interviews, at least five mass graves of Rohingya civilians, and showed that bodies had been burned with acid in an apparent attempt to destroy evidence.[1381] As at Inn Din, the Tatmadaw denied any wrongdoing, stating that "no such things happened".[1382] Several months later, the Tatmadaw changed course and initiated a court martial, with military spokesman Brigadier General Zaw Min Tun stating that there were "grounds to believe the soldiers did not fully comply with the rules of engagement".[1383]

11.25 Beyond this, very little information about the case has been provided. Myanmar alluded to it during the oral proceedings on provisional

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for very limited offenses, but the responsibility of those who commanded them was ignored; and (4) the limited nature of the conviction, which was not for genocide.

[1380] "Court-Martial Trial on Incident of Gutapyin Commences", *Myanmar Digital News* (26 November 2019). MG, Vol. IX, Annex 317.

[1381] Foster Klug, "AP finds evidence for graves, Rohingya massacre in Myanmar", *AP News* (1 February 2018). MG, Vol. IX, Annex 276.

[1382] "Myanmar government denies AP report of Rohingya mass grave", *AP* (3 February 2018). MG, Vol. IX, Annex 277.

[1383] Htet Naing Zaw, "Myanmar Military to Court-Martial Troops over Mass Graves in Rakhine", *The Irrawaddy* (2 September 2019). MG, Vol. IX, Annex 315.

measures, but provided no details.[1384] In its report of 22 May 2020, Myanmar likewise provided only a few words about the case, stating that "[t]hese court-martial proceedings were ongoing when the Court issued its Order on 23 January 2020."[1385]

11.26 More recently, on 30 June 2020, the Tatmadaw announced, without going into any detail, that it had punished two officers and a soldier for not "performing their duties for defence, security and regional peace" in Gu Dar Pyin.[1386] It did not disclose the names and ranks of those convicted, their roles in the "clearance operations" at Gu Dar Pyin, or their punishments (if any).[1387] There was no indication that they had been found guilty of any crimes against the Rohingya.[1388] To the contrary, the military spokesperson emphasized that, in concluding the court martial, "[w]e have to consider their dignity and service … [w]e don't want this to affect the morale of Tatmadaw soldiers in performing their duties and their spirit of comradeship".[1389]

[1384] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures*, Verbatim Record CR 2019/19 of Public Sitting Held on 11 December 2019, at 10 a.m., p. 16, para. 17 ("On 25 November 2019, the Office of the Judge Advocate General announced the start of a court martial for allegations linked to the Gutar Pyin village incident".); p. 70, para. 14(d) ("On 25 November 2019, it was announced that the military court will begin court martial proceedings against a group of soldiers involved in fighting against the Arkan Rohingya Salvation Army in Gu Dar Pyin village, in Buthidaung township").

[1385] Myanmar's Report pursuant to Provisional Measures Order, para. 87.

[1386] Sai Wunna, "Tatmadaw Says 3 Soldiers Punished for Rakhine Violations", *Myanmar Times* (1 July 2020). MG, Vol. IX, Annex 323.

[1387] *Ibid.*

[1388] *Ibid.*

[1389] *Ibid.*

11.27 In its September 2020 Report on the Situation of human rights of Rohingya Muslims and other minorities in Myanmar, the OHCHR found that this was "[c]onsistent with previous military proceedings", as "[s]ecrecy and lack of independence characterize all Tatmadaw-run processes, making court-martial proceedings inadequate to render justice for crimes committed by military personnel against civilians."[1390]

11.28 As Human Rights Watch concluded:

> "[t]his latest case underscores the Myanmar government's longstanding efforts to conceal military crimes with hollow admissions of wrongdoing and claims of justice ... In reality, these court-martial proceedings reflect the military's unyielding impunity and the government's protection of it, scapegoating a few soldiers rather than seriously investigating the military leadership who oversaw the atrocity crimes."[1391]

III. The International Community's Calls for an End to Impunity

11.29 During the "clearance operations" between 2016 and 2018, and in their immediate aftermath, the international community repeatedly raised

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[1390] UN Human Rights Council, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN Doc. A/HRC/45/5 (3 September 2020), para. 23. MG, Vol. III, Annex 56.

[1391] Human Rights Watch, *Myanmar: Court Martial Latest Accountability Sham* (3 July 2020), p. 3. MG, Vol. V, Annex 132. On 15 September 2020, the Tatmadaw expressed its intention to bring about another court martial concerning events at Chut Pyin and Maung Nu villages in Rakhine State in 2017 before the end of 2020. "Press Statement of Tatmadaw True News Information Team about allegations regarding villages in Maungdaw area", *The Global New Light of Myanmar* (15 September 2020). MG, Vol. IX, Annex 324. As of the date of this filing, there is no further information about this intended proceeding.

concerns about the serious crimes being committed against the Rohingya, including genocide, and called on Myanmar to thoroughly investigate and prosecute the perpetrators. The message was clear and uniform. As the UN Fact-Finding Mission emphasized, "[i]gnorance on the part of the Myanmar civilian authorities was effectively impossible."[1392]

11.30 The calls came from, among others, the UN General Assembly, in 2018. In its Provisional Measures Order, the Court observed

> "that the United Nations General Assembly, in its resolution 73/264 adopted on 22 December 2018, expressed 'grave concern at the findings of the independent international fact-finding mission on Myanmar that there [was] sufficient information to warrant investigation and prosecution so that a competent court may determine liability for genocide in relation to the situation in Rakhine State'".[1393]

The Court pointed out that the General Assembly "call[ed] upon the Myanmar authorities to ensure that those responsible for violations of international law, including human rights violations and abuses, are held accountable and removed from positions of power".[1394]

11.31 Such calls were not new. In his 2016 report on the Situation of the Rohingya, the UN High Commissioner for Human Rights emphasized to

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[1392] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1548. MG, Vol. II, Annex 40.

[1393] Provisional Measures Order, para. 54, *citing* UN General Assembly, *Resolution adopted by the General Assembly on 22 December 2018 on the Situation of human rights in Myanmar*, UN Doc. A/RES/73/264 (22 December 2018), paras. 1-2. MG, Vol. III, Annex 72.

[1394] *Ibid.*

Myanmar the need for accountability. He noted that "[a]ccess to justice for victims of human rights violations and abuses has … been sorely lacking. The military and other security forces have generally enjoyed impunity".[1395] He recommended that Myanmar: "(a) Undertake a comprehensive inquiry into the situation…", and "(b) Ensure prompt, thorough, independent and impartial investigations into all alleged violations of human rights and international humanitarian law, including those committed by law enforcement officers and security officers, and subsequent prosecutions; and to that end, remove any legal or legislative barriers to criminal accountability".[1396] A year later, while the "clearance operations" were under way, he called on Myanmar "to end its current cruel military operation, with accountability for all violations that have occurred".[1397]

11.32 In November 2017, the UN Security Council stressed "the importance of undertaking transparent investigations into allegations of human rights abuses and violations, including sexual violence and abuse and violence against children, and of holding to account all those responsible for such acts to provide justice for victims".[1398]

[1395] UN OHCHR, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar, Report of the UN High Commissioner for Human Rights*, UN Doc. A/HCR/32/18 (29 June 2016), para. 12. MG, Vol. II, Annex 28.

[1396] *Ibid*., para. 77.

[1397] UN OHCHR, *Opening Statement by Zeid Ra'ad Al Hussein, UN High Commissioner for Human Rights at the 36th session of the Human Rights Council* (11 September 2017), p. 2. MG, Vol. III, Annex 62.

[1398] UN Security Council, *Security Council Presidential Statement Calls on Myanmar to End Excessive Military Force, Intercommunal Violence in Rakhine State*, UN Doc. SC/13055 (6 November 2017), p. 4. MG, Vol. III, Annex 64.

11.33 The following month, the UN Human Rights Council issued a resolution reiterating its call "upon the Government of Myanmar to take all measures necessary to provide justice to victims, ensure the full accountability of perpetrators and end impunity for all violations and abuses of human rights, including, in particular, those perpetrated against persons belonging to the Rohingya Muslim community".[1399]

11.34 Beginning in 2018, various UN bodies concluded that genocide against the Rohingya had been committed, and called for Myanmar to fulfil its obligations under the Genocide Convention to investigate, prosecute and punish the perpetrators. As stated above, the UN Fact-Finding Mission, in the Summary of its September 2018 Report of the detailed findings to the UN Human Rights Council, urged that "named Senior-Generals of the Myanmar military" be "investigated and prosecuted in an international criminal tribunal for genocide".[1400]

11.35 The UN Special Rapporteur on human rights in Myanmar also observed, in 2018: "I am becoming more convinced that the crimes committed following 9 October 2016 and 25 August 2017 bear the hallmarks of genocide and call in the strongest terms for accountability."[1401] The following year, the Special Rapporteur stated that the Commander-in-Chief of Myanmar's military and other responsible individuals "should be

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[1399] UN Human Rights Council, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN Doc. A/HRC/RES/S-27/1 (5 December 2017), para. 5. MG, Vol. III, Annex 65.

[1400] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), p. 1. MG, Vol. II, Annex 40.

[1401] UN OHCHR, *Statement by Ms Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 37th session of the Human Rights Council* (12 March 2018). MG, Vol. II, Annex 32.

held accountable for genocide in Rakhine".[1402] On 10 July 2019, the UN Deputy High Commissioner for Human Rights stated: "[o]ur information suggests that the authorities have taken no steps to investigate" attacks against the Rohingya.[1403]

11.36 Besides UN organs and entities, many States and international organizations have called on Myanmar to investigate and bring to justice the perpetrators of the crimes committed against the Rohingya. France declared that the attacks on the Rohingya amounted to genocide,[1404] and that "[t]hose responsible for crimes should be brought to justice".[1405] Australia similarly stated that offenders "must be held to account".[1406] Japan "repeatedly encouraged the Myanmar Government and Military to investigate the alleged human rights violations in a transparent and credible manner, and to take appropriate measures accordingly".[1407] Lebanon called on the Government of Myanmar to take the necessary measures to comply with its international obligations, stating that "impunity had to end".[1408]

[1402] "Myanmar army chief must be prosecuted for Rohingya 'genocide': U.N. Rights envoy", *Reuters* (25 January 2019). MG, Vol. IX, Annex 303.

[1403] UN Human Rights Council, *Statement by UN Deputy High Commissioner for Human Rights, Kate Gilmore* (10 July 2019). MG, Vol. III, Annex 75.

[1404] "France calls for UN action on Rohingya 'genocide'", *Anadolu Agency* (21 September 2017). MG, Vol. IX, Annex 268.

[1405] UN Security Council, *8060th Meeting of the UN Security Council: The Situation in Myanmar* UN Doc. S/PV.8060 (28 September 2017), p. 12. MG, Vol. III, Annex 63.

[1406] Ben Doherty, "Australia condemns Myanmar violence and says offenders 'must be held to account'", *The Guardian* (25 March 2018). MG, Vol. IX, Annex 281.

[1407] Ministry of Foreign Affairs of Japan, *Statement by Press Secretary Ohtaka Masato* (22 January 2020). MG, Vol. VII, Annex 199.

[1408] UN Human Rights Council, *Press Release: Council condemns alleged systematic and gross violations of human rights against Rohingya Muslims and other minorities in Myanmar* (5 December 2017). MG, Vol. III, Annex 66.

11.37 In the same vein, Ukraine emphasized that "any targeting of [the] civilian population, infringements on their human rights and other abuses are totally unacceptable" and "[i]mpunity of perpetrators must not be tolerated".[1409] Italy called for an immediate stop to violence and for bringing perpetrators to justice.[1410] Senegal stated that "[a]ppropriate measures should … be taken to ensure that all those found guilty of abuses are held to account".[1411] Sweden affirmed that "[t]hose responsible for human rights abuses and violations, as well as other crimes, must be brought to justice."[1412] Uruguay emphasized that it is important "for the Myanmar Government to step up its efforts to stop the violations and adopt all the measures necessary to ensure accountability and put an end to impunity. All complaints of violations of international human rights law and international humanitarian law must be investigated in an exhaustive, transparent, and independent manner".[1413] The United States also condemned "the terrible savagery" committed by Myanmar's security forces against the Rohingya,[1414] and stated that "[t]hose who have been accused of committing abuses should be removed from command responsibilities immediately and prosecuted for wrongdoing".[1415] The US

[1409] UN Security Council, *8060th Meeting of the UN Security Council: The Situation in Myanmar* UN Doc. S/PV.8060 (28 September 2017), p. 17. MG, Vol. III, Annex 63.

[1410] UN Human Rights Council, *Press Release: Council condemns alleged systematic and gross violations of human rights against Rohingya Muslims and other minorities in Myanmar* (5 December 2017). MG, Vol. III, Annex 66.

[1411] UN Security Council, *8060th Meeting of the UN Security Council: The Situation in Myanmar* UN Doc. S/PV.8060 (28 September 2017), p. 8. MG, Vol. III, Annex 63.

[1412] *Ibid*., p. 11.

[1413] *Ibid*., p. 18.

[1414] Cindy Saine, "US VP Condemns 'Terrible Savagery' Against Rohingya Muslims", *VOA News* (20 September 2017). MG, Vol. IX, Annex 267.

[1415] UN Security Council, *8060th Meeting of the UN Security Council: The Situation in Myanmar* UN Doc. S/PV.8060 (28 September 2017), p. 6. MG, Vol. III, Annex 63.

Secretary of State expressed concern "that the Burmese government has taken no actions to hold accountable those responsible for human rights violations and abuses".[1416] The European Union "consistently called for those responsible for such crimes to be held to account".[1417]

11.38 Prominent non-governmental organizations also urged Myanmar to hold the perpetrators of the attacks on the Rohingya accountable for genocide. As early as May 2015, the USHMM issued a report calling attention to numerous early warning signs of genocide, finding that "Burma is primed for future atrocities against Rohingya, including the possibility of genocide", and calling on Myanmar to "[i]nvestigate attacks on Rohingya and other minority groups, and hold perpetrators accountable in accordance with internationally recognized legal standards".[1418]

11.39 In 2017 and 2018, Human Rights Watch called on Myanmar to "prosecute recently removed army officers for their role in atrocities against ethnic Rohingya".[1419] In a publication from July 2018, Fortify Rights reported that Myanmar had "failed to properly investigate and prosecute perpetrators" and refused "to cooperate with international human rights monitors".[1420]

[1416] "US imposes sanctions on Myanmar's military leaders over Rohingya abuses", *The Guardian* (16 July 2019). MG, Vol. IX, Annex 312.

[1417] European Union Parliament, *Resolution of 19 September 2019 on Myanmar, notably the situation of the Rohingya 2019/2822(RSP)* (19 September 2019), para. I. MG, Vol. VII, Annex 197.

[1418] United States Holocaust Memorial Museum, *"They Want Us All To Go Away": Early Warning Signs of Genocide in Burma* (May 2015), pp. 11, 13. MG, Vol. VII, Annex 191.

[1419] Human Rights Watch, *Myanmar: Prosecute Dismissed Officers for Atrocities* (29 June 2018). MG, Vol. IV, Annex 113.

[1420] Fortify Rights, *They Gave Them Long Swords* (2018), p. 24. MG, Vol. IV, Annex 114.

IV. Myanmar's Destruction of Evidence and Refusal to Allow Independent and Impartial Fact-Finding on the Ground

11.40 Independent observers have found that Myanmar has destroyed evidence of the acts committed against the Rohingya during the "clearance operations", and has thwarted independent investigations. As the UN Fact-Finding Mission concluded, Myanmar's civilian authorities have "denied the Tatmadaw's wrongdoing; blocked independent investigations, including of the Fact-Finding Mission; and overseen the bulldozing of burned Rohingya villages and the destruction of crime sites and evidence".[1421]

11.41 Specifically, according to the Mission, Myanmar has destroyed, buried and disposed of the remains of many of the Rohingya victims.[1422] Witnesses described seeing security forces burning bodies in boats, houses and pits in Rathedaung Township, Maungdaw Township, Chut Pyin and

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[1421] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1548. MG, Vol. II, Annex 40.

[1422] *Ibid.*, paras. 1000-03. *See also* Shoah Foundation, Interview of Abdul Karim (11 March 2018), paras. 662-71 ("Again in the morning, they came at 8.00 am and piled all of the bodies, dead and alive. At the east side of Aung San Mia there was a straw pile. They were dragged there and the military light the straw pile on fire and threw all of them in there and burnt them. And towards the west side, there was another place. It was close to the mountains. Some of them were taken there ... women and men. There were about 20-60 of them taken there. All of them were piled in the straw and burnt as well."). MG, Vol. V, Annex 137; Shoah Foundation, Interview of Hansu Mala (13 March 2018), paras. 840-50 ("After beating and killing, they would get some holes dug for the bodies. They made the Rohingya people dig their own graves. All the able bodied males were told to dig the holes. In that hole, they threw all the bodies. After dumping all the bodies in there, they took all the clothes the Rohingyas brought with them, and scattered them in the hole with the bodies. A plane arrived shortly after carrying gasoline. They poured the gasoline into the hole all over the bodies and set it ablaze ... And those that were digging the holes, they shot and killed them too."). MG, Vol. V, Annex 138.

Min Gyi.[1423] In other locations, the security forces buried bodies in mass graves, or threw them in wells, rivers, ponds and paddy fields.[1424] These actions have been confirmed by former Tatmadaw soldiers who carried them out, under orders from their commanding officers. In a statement given to Bangladeshi officials, one testified: "We burned the villages. After that, we buried the dead bodies in dug holes."[1425]

11.42 Witnesses also saw the Tatmadaw carrying bodies away in military vehicles.[1426] According to the UN Fact-Finding Mission, "[t]he information points to a concerted effort by the Tatmadaw to dispose of Rohingya corpses following the 'clearance operations' in villages."[1427]

11.43 In Gu Dar Pyin, the Associated Press reported that soldiers used acid to burn away faces and hands so that the bodies could not be identified.[1428] Two days before the attack, witnesses saw soldiers buying large containers of acid at a nearby village's market.[1429] In videos of the Gu Dar Pyin mass graves obtained by the Associated Press, dating to 13 days after the killing began, blue-green puddles of acid sludge surrounded corpses without heads and torsos and stained the earth blue.[1430]

[1423] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1000. MG, Vol. II, Annex 40.

[1424] *Ibid*., para. 1001.

[1425] Interview of Myo Win Tun (15 August 2020), p. 5. MG, Vol. V, Annex 142.

[1426] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1003. MG, Vol. II, Annex 40.

[1427] *Ibid*., para. 1002.

[1428] Foster Klug, "AP finds evidence for graves, Rohingya massacre in Myanmar", *AP News* (1 February 2018). MG, Vol. IX, Annex 276.

[1429] *Ibid*.

[1430] *Ibid*.

11.44 The UN Fact-Finding Mission found that the destruction and disposal of bodies followed a pattern: "the preparation of large pits, both to burn bodies and to bury them, and the use of vehicles to transport corpses and the use of other equipment, suggests both a level of pre-planning and an intention to destroy criminal evidence".[1431]

11.45 After the "clearance operations", Myanmar bulldozed Rohingya structures and conducted massive terrain clearance. Large areas were razed across Maungdaw, Buthidaung and Rathedaung Townships,[1432] undermining the possibility of locating crime scenes and burial sites and of collecting evidence for forensic analysis.[1433] Satellite imagery analysis conducted by the UN Fact-Finding Mission showed that the Rohingya hamlets of Myin Hlut were burned and destroyed by 16 September 2017, and the area was bulldozed and cleared of all buildings and vegetation by 13 February 2018.[1434] At Inn Din, the Rohingya houses were burned and destroyed by 16 September 2017 and, within the following five months, the burned properties and all trees and vegetation were bulldozed and cleared.[1435] Structures that had not been burned were also bulldozed in the village tracts of Chein Khar Li, War Char, Gaw Du Thar Ra (Ywar Thit Kay), (Du) Chee Yar Tan and Myin Hlut, all in Maungdaw Township.[1436] Given that bodies were disposed of through burnings, terrain clearance and

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[1431] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1002. MG, Vol. II, Annex 40.

[1432] *Ibid*., para. 1220.

[1433] *Ibid*., para. 1243.

[1434] *Ibid*., para. 863.

[1435] *Ibid*., para. 879.

[1436] *Ibid*., para. 1222.

bulldozing, it is impossible to quantify the number of people killed or injured during the "clearance operations".[1437]

11.46 Myanmar has not denied its use of bulldozers to clear the burnt out Rohingya villages. It has claimed that this was "part of the process" to "prepar[e] facilities for the repatriation".[1438] The UN Fact-Finding Mission did not find Myanmar's explanation credible, observing that "[t]his amounts to a deliberate and concerted attempt to obstruct justice. It is in violation of the State's obligation to undertake prompt, effective and thorough, independent and impartial investigations, with a view to ensuring the prosecution and adjudication of those responsible for crimes."[1439]

11.47 The Court has recognized the need for Myanmar to preserve the evidence of its actions during the "clearance operations". Its Provisional Measures Order requires Myanmar to "take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the [Genocide] Convention".[1440] But the Court's Order, even if it succeeds in preventing the further destruction of evidence, cannot undo the destruction that Myanmar carried out prior to 23 January 2020.

11.48 There is also credible reporting that Myanmar has continued to destroy evidence subsequent to that date, despite the Court's Order. The

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[1437] *See ibid*., para. 1005.

[1438] Republic of the Union of Myanmar, President Office, *Rebuttal Statement at the Interactive Dialogue on the Situation of Human Rights in Myanmar during 37th Session of Human Rights Council* (13 March 2018). MG, Vol. VI, Annex 157.

[1439] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1244. MG, Vol. II, Annex 40.

[1440] Provisional Measures Order, paras. 86(3), 81.

UN High Commissioner for Human Rights, Michelle Bachelet, reported to the UN Human Rights Council on 30 June 2020 that the OHCHR had documented the "burning of villages" by the Tatmadaw in May 2020—five months after the Court's Order—including "large areas of Buthidaung township where Rohingyas lived before 2017".[1441] The High Commissioner noted that "[a]ccording to eyewitnesses and satellite images, areas where up to a dozen Rohingya villages once stood, lay in ashes."[1442] Invoking the Court's Order, she emphasized that "[t]hese villages were not only the homes Rohingya refugees hoped to return to; they also constituted evidence of what happened in 2017 … It is imperative that Myanmar take immediate and urgent measures to cease reckless military operations, and to preserve what remains in those areas."[1443] The OHCHR further reported that in May 2020, the Tatmadaw "burned the remaining remnants of Yin Ma Kyaung, Done Paing, Thin Ga Net, Soe Taung and Kone Taung villages", and that "the burning of these areas was unrelated to the conflict with the Arakan Army, since no clashes were occurring in the area".[1444]

11.49 Myanmar has also blocked efforts by others to conduct independent and impartial investigations. Since 2017, it has refused to cooperate with, or give access to, the Special Rapporteur on human rights in Myanmar,[1445]

[1441] UN Human Rights Council, *Oral update on the human rights situation of Rohingya people (S-27/1), Statement by Michelle Bachelet, High Commissioner for Human Rights* (30 June 2020). MG, Vol. III, Annex 81.

[1442] *Ibid.*

[1443] *Ibid.*

[1444] UN Human Rights Council, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN Doc. A/HRC/45/5 (3 September 2020), para. 29. MG, Vol. III, Annex 56.

[1445] UN OHCHR, *Myanmar refuses access to UN Special Rapporteur* (20 December 2017). MG, Vol. III, Annex 67.

"obstructing the execution of her mandate and fulfilling the duties tasked to her by the Human Rights Council".[1446] As the Special Rapporteur concluded, "[t]his declaration of non-cooperation with my mandate can only be viewed as a strong indication that there must be something terribly awful happening in Rakhine".[1447] Myanmar has also refused to cooperate with or give access to the UN Fact-Finding Mission, ignoring its questions and communications.[1448]

11.50 United Nations bodies have repeatedly called on Myanmar to cooperate with and grant access to UN and other international human rights investigators. In 2019, both the General Assembly and the Human Rights Council urged Myanmar to

> "cooperate fully with and to grant full, unrestricted and unmonitored access to all United Nations mandate holders and human rights mechanisms, including the Special Rapporteur on the situation of human rights in Myanmar, the Independent Investigative Mechanism for Myanmar and relevant United Nations agencies, and international and regional human rights bodies to independently monitor the situation of human rights, and to ensure that individuals can cooperate without hindrance with these

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[1446] UN General Assembly, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. A/74/342 (30 August 2019), para. 2. MG, Vol. III, Annex 77.

[1447] UN OHCHR, *Myanmar refuses access to UN Special Rapporteur* (20 December 2017). MG, Vol. III, Annex 67.

[1448] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1618. MG, Vol. II, Annex 40; UN Human Rights Council, *Report of the independent international fact-finding mission on Myanmar*, UN Doc. A/HRC/42/50 (8 August 2019), para. 4. MG, Vol. III, Annex 47.

> mechanisms and without fear of reprisal, intimidation or attack".[1449]

11.51 Myanmar has refused to heed these calls. In January 2020, Myanmar refused to allow the UN Special Rapporteur on human rights in Myanmar to visit the country and ignored a list of questions that the Special Rapporteur had sent.[1450]

V. Myanmar's Sham "Investigations"

11.52 Under pressure from the international community, Myanmar has created a series of "investigative commissions" with a mandate to enquire into the attacks committed against the Rohingya, *inter alia*. None of them has recommended prosecution of any military personnel or identified a single Tatmadaw officer or enlisted soldier responsible for crimes against the Rohingya. As the UN Special Rapporteur on Myanmar observed in

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[1449] UN General Assembly, *Resolution adopted on 27 December 2019 on Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN Doc. A/RES/74/246 (15 January 2020), para. 4. MG, Vol. III, Annex 79; UN General Assembly, *Resolution adopted by the Human Rights Council on 26 September 2019*, UN Doc. A/HRC/RES/42/3 (3 October 2019), para. 11 ("Urges the Government of Myanmar to cooperate fully with and to grant full, unrestricted and unmonitored access to all United Nations mandate holders and human rights mechanisms, including the Special Rapporteur on the situation of human rights in Myanmar, the ongoing independent mechanism established by the Human Rights Council in its resolution 39/2, referred to by the Secretary-General as the Independent Investigative Mechanism for Myanmar in his terms of reference for the Mechanism, relevant United Nations agencies and international and regional human rights bodies to independently monitor the situation of human rights, and to ensure that individuals can cooperate without hindrance with these mechanisms without fear of reprisal, intimidation or attack, and expresses deep concern that international access to affected areas of Northern Rakhine State remains severely restricted for the international community, including for United Nations agencies, humanitarian actors and international media"). MG, Vol. III, Annex 78.

[1450] UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. A/HRC/43/59 (29 April 2020), para. 2. MG, Vol. III, Annex 80.

September 2019, "despite there having been a proliferation of inquiries in Myanmar in recent years, none of them have resulted in steps taken towards an end of impunity".[1451] The UN High Commissioner for Human Rights similarly found that "[t]he establishment of commissions of inquiry has become routine after cyclical episodes of violence in Myanmar ... None of the previous commissions has led to the prosecution of any Tatmadaw official; all have indeed exonerated the army".[1452]

11.53 This Section describes the various bodies that Myanmar has established since 2016 to investigate the events that occurred during the "clearance operations" of 2016-2018.

A. THE ANNAN COMMISSION AND RELATED BODIES

11.54 In September 2016, Myanmar's State Counsellor's Office formed the Annan Commission, chaired by the late United Nations Secretary-General Kofi Annan.[1453] Most significantly, its mandate did not provide for the investigation of human rights abuses,[1454] and, accordingly, it did not attempt to address them. It did not, for example, address any of the crimes committed against the Rohingya, or attempt to assign any responsibility for them. According to Human Rights Watch, "[w]hile the commission's work

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[1451] UN OHCHR, *Special Rapporteur on the situation of human rights in Myanmar: Oral update to the Human Rights Council* (16 September 2019). MG, Vol. III, Annex 50.

[1452] UN Human Rights Council, *Situation of human rights of Rohingya in Rakhine State, Myanmar*, UN Doc. A/HRC/40/37 (11 March 2019), para. 57. MG, Vol. III, Annex 73.

[1453] Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on the Rakhine State* (August 2017), p. 6. MG, Vol. IV, Annex 103.

[1454] *Ibid*., p. 13 ("The Commission is not mandated to investigate specific cases of alleged human rights violations"), 17 (The Advisory Commission "does not investigate specific cases of alleged human rights abuses.").

and report received considerable praise, the government has used them to deflect criticism and calls for genuine action."[1455] Myanmar itself made clear its purpose in creating the Annan Commission, a majority of whose members it appointed. In an interview published on 10 July 2017, government spokesperson Zaw Htay acknowledged: "Whenever there is an accusation from the international community, we say we are taking action in line with the recommendations of the Kofi Annan [C]ommission. The [C]ommission is serving as a shield for us. [Were] it not for the Kofi Annan Commission, the allegations would be much worse, I think."[1456]

11.55 Despite the limitations of its mandate, the Annan Commission urged Myanmar to act quickly to promote accountability. It released an interim report on 16 March 2017, along with a statement from former Secretary-General Annan that called for "independent and impartial investigation of the allegations of crimes committed on and since 9 October 2016. We strongly believe that perpetrators of these crimes must be held to account".[1457] Since this was beyond the remit of the Annan Commission itself, the Commission called for the creation of a new body that would be empowered to exercise such responsibility.[1458]

[1455] Human Rights Watch, *Myanmar's Investigative Commissions: A History of Shielding Abusers* (September 2018), p. 6. MG, Vol. IV, Annex 119 [**hereinafter** HRW, *A History of Shielding Abusers* (2018)].

[1456] Htet Naing Zaw, "U Zaw Htay: Kofi Annan Commission is Govt 'Shield'", *The Irrawaddy* (10 July 2017). MG, Vol. IX, Annex 265.

[1457] Advisory Commission on Rakhine State, *Statement by Kofi Annan, Chair of the Advisory Commission on Rakhine State (Interim Report)* (16 March 2017). MG, Vol. VI, Annex 163.

[1458] Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on the Rakhine State* (August 2017), p. 55, para. 68. MG, Vol. IV, Annex 103.

11.56 On 24 August 2017, the Commission issued its final report.[1459] Despite the fact that it was not mandated to investigate human rights abuses, it emphasized that the situation in Rakhine State "represents a human rights crisis",[1460] and underscored the importance of accountability for the acts of security forces. Specifically, it reiterated its recommendation that "an impartial and independent investigation" be carried out, given that the "security forces have been accused of serious human rights violations", and emphasized that "a significant risk of renewed violence remains".[1461] Among other recommendations, it advised the Government to "establish a national complaint mechanism, through which individuals may seek redress in cases of abuse or neglect by security personnel. The body should be independent of the Government and report its findings publicly".[1462]

11.57 Myanmar has ignored all of these recommendations. Although it claims that it has implemented most of the Commission's recommendations, it has not addressed any of those relating to accountability.[1463]

11.58 Following the release of the report, on 12 September 2017 Myanmar established the Committee for Implementation of the Recommendations on Rakhine State**,** ostensibly to implement the recommendations of the Annan Commission.[1464] It was headed by the Minister for Social Welfare, Relief

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[1459] *Ibid.*

[1460] *Ibid.*, p. 9.

[1461] *Ibid.*, p. 15.

[1462] *Ibid.*, p. 55.

[1463] *Ibid.*

[1464] Republic of the Union of Myanmar, President Office, *Establishment of the Committee for Implementation of the Recommendations on Rakhine State* (9 October 2017). MG, Vol. VII, Annex 186.

and Resettlement, Dr. Win Myat Aye, and composed of 18 government officials, including the Chief Minister and Joint Chairman of the Rakhine State Government and representatives of ministries controlled by the Tatmadaw, including the Ministry of Home Affairs, the Myanmar Police Force and the Ministry of Border Affairs, as well as representatives of the Office of the President, the Office of the State Counsellor, the Union Government Office and other ministries.[1465] This Committee's mandate, like the Annan Commission's, did not include investigation of human rights abuses.[1466] The Committee released a 19-page report in June 2018.[1467] But it did not address the Annan Commission's accountability recommendations; nor did it address any of the allegations of human rights abuses by Myanmar's security forces.[1468]

11.59 Instead, the Committee found that police personnel, who, by law, fall under the Tatmadaw's jurisdiction and control, were executing their duties "in accordance with the standard operating procedures prescribed within the legal framework".[1469] It did not specify what those "procedures" were. The Committee also noted that "the Myanmar National Human Rights Commission and the Anti-Corruption Commission are also carrying out investigations upon receipt of complaints and taking actions if the

[1465] *Ibid.*

[1466] *Ibid.*

[1467] Republic of the Union of Myanmar, Committee for Implementation of the Recommendations on Rakhine State, *Report to the People on the Progress of the Implementation of Recommendations on Rakhine State* (January to April 2018). MG, Vol. VI, Annex 165.

[1468] *Ibid.*

[1469] *Ibid.*, p. 15.

accused is found guilty, in accordance with the laws and procedures".[1470] It provided no specific examples and no further information.

11.60 The MNHRC, which is dependent on the military,[1471] does not appear to have carried out any investigations. The International Coordinating Committee of National Human Rights Institutions has criticized the MNHRC's lack of compliance with the United Nations Paris Principles in part because of its failure to investigate crimes against the Rohingya.[1472] As the UN Fact-Finding Mission concluded, the MNHRC is not "a realistic option for pursuing accountability for gross human rights violations".[1473] The Mission found that the MNHRC "has undertaken no meaningful action in relation to the events in Rakhine State".[1474] Specifically, at no point did it "call for or conduct a full, independent investigation of the alleged human rights violations committed by the security forces. Nor did it address the systemic discrimination against Rohingya, despite this falling within its mandate".[1475]

11.61 On 14 December 2017, Myanmar established the Advisory Board for the Committee for Recommendations on Rakhine State to make proposals to the government on the implementation of the

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[1470] *Ibid.*

[1471] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 381. MG, Vol. III, Annex 49.

[1472] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1591-92. MG, Vol. II, Annex 40.

[1473] *Ibid*., para. 1585.

[1474] *Ibid*., para. 1617.

[1475] *Ibid.*

recommendations of the Annan Commission.[1476] Like the other bodies established by Myanmar, the Advisory Board was not tasked with investigating human rights abuses or ensuring accountability.[1477] It was composed of five international members, five domestic members and was led by Dr. Surakiart Sathirathai, a Thai diplomat.[1478] Its domestic members were U Win Mra, the Chairman of the MNHRC, U Tun Myat, Former United Nations Assistant Secretary-General, U Khin Maung Lay, Member of MNHRC, U Hla Myint, Former Ambassador and Myanmar Representative to the ASEAN inter-governmental Commission on Human Rights, and Dr Daw Khin Nyo, a member of the Health and Sport Development Committee.[1479]

11.62 Soon after the Board's establishment, two of its international members resigned in protest. Among them was Ambassador Bill Richardson, a former United States Permanent Representative to the United Nations. He resigned after the first round of meetings, in January 2018, denouncing the Board's so-called "investigation" as a "whitewash",[1480] expressing "great disappointment" and explaining that he could not in good

[1476] Republic of the Union of Myanmar, Ministry of the Office of the State Counsellor, *The Establishment of the Advisory Board for the "Committee for Implementation of the Recommendations on Rakhine State"* (14 December 2017). MG, Vol. VII, Annex 187.

[1477] *Ibid*.; HRW, *A History of Shielding Abusers* (2018), p. 6. MG, Vol. IV, Annex 119.

[1478] Republic of the Union of Myanmar, Ministry of the Office of the State Counsellor, *The Establishment of the Advisory Board for the "Committee for Implementation of the Recommendations on Rakhine State"* (14 December 2017). MG, Vol. VII, Annex 187.

[1479] *Ibid*.

[1480] HRW, *A History of Shielding Abusers* (2018), p. 6. MG, Vol. IV, Annex 119.

faith remain on a board that is "likely to become a cheerleading squad for government policy".[1481]

11.63 Ambassador Kobsak Chutikul, a Thai diplomat who served as the Board's Secretary, resigned six months later, in July 2018. He expressed concern that the Board's very existence was "going to divert attention from the issues, give a false impression that things are being done".[1482] Instead, he said, Myanmar government officials did no more than "defend[] the line ... that '[t]his is an internal matter, we are handling it, we haven't done anything wrong, this is a false narrative'".[1483] He concluded: "This just goes on and on. Next year, it will be another commission, another board … It's all for show—there is nothing real. It is a hoax".[1484] After the Board submitted its final report, which is still not public, on 16 August 2018, it was disbanded.[1485]

B. THE RAKHINE STATE INVESTIGATION COMMISSION

11.64 On 26 October 2016, the Rakhine State parliament announced the establishment of the Rakhine State Investigation Committee, which was composed of 11 regional legislators.[1486] The Committee's Chair, U Aung

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[1481] Eli Meixler, "U.S. Advisor Bill Richardson Refuses a Role in Myanmar's 'Whitewash' Crisis Panel", *Time* (25 January 2018). MG, Vol. IX, Annex 275.

[1482] HRW, *A History of Shielding Abusers* (2018), p. 6. MG, Vol. IV, Annex 119.

[1483] *Ibid*.

[1484] Shibani Mahtani & Wai Moe, "A year after the assault on the Rohingya, Myanmar's generals are unapologetic", *The Washington Post* (21 August 2018). MG, Vol. IX, Annex 290.

[1485] *Ibid*.; "Myanmar ditches Surakiart's Rohingya probe", *The Nation Thailand* (17 August 2018). MG, Vol. IX, Annex 288; "Rakhine Advisory Board submits Final Report", *The Global New Light of Myanmar* (17 August 2018). MG, Vol. IX, Annex 289.

[1486] HRW, *A History of Shielding Abusers* (2018), p. 2. MG, Vol. IV, Annex 119.

Win, gave an interview in November 2016.[1487] When asked about the widespread and well-documented rape of Rohingya women during the "clearance operations", he said it was "inconceivable", because "[t]hey are very dirty. The Bengali/Rohingya women have a very low standard of living and poor hygiene. They are not attractive. So neither the local Buddhist men nor the soldiers are interested in them."[1488]

11.65 This has been Myanmar's standard response to the evidence of massive rape and gang-rape perpetrated during the "clearance operations". When the State Minister of Border Security, Colonel Phone Tint, was asked by BBC reporter Jonathan Head about the Tatmadaw's sexual violence against Rohingya women and girls, in September 2017, he replied: "just look at the women making these accusations—they are not of a quality that anyone would want to do that to them".[1489]

11.66 The Rakhine State Investigation Committee submitted its interim report to the parliament on 27 December 2016,[1490] and its final report in March 2017, but the latter has not been made public.[1491] In its interim report, available only in Burmese, the Committee did not find any

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[1487] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1599. MG, Vol. II, Annex 40.

[1488] *Ibid*.

[1489] Witness Statement of Jonathan Head (14 October 2020), para. 15. MG, Vol. XI, Annex 375.

[1490] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1610. MG, Vol. II, Annex 40; Republic of the Union of Myanmar, Rakhine State Parliament, "Enquiry Committee on 9/10 Maungdaw and Rathedaung Bengali terrorist attacks summited its preliminary report to 3rd regular meeting's 9th day of Rakhine State Parliament of 3rd term", *Facebook* (27 December 2016) (original and translation). MG, Vol. VI, Annex 147.

[1491] The UN Fact-Finding Mission was unable to obtain a copy of the final report. UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1610. MG, Vol. II, Annex 40.

wrongdoing on the part of the security forces.[1492] As Human Rights Watch concluded, "[t]he report did not identify any perpetrators of abuses on either side, nor did it make any findings that could be used to promote accountability mechanisms."[1493]

C. THE INVESTIGATION COMMISSION ON MAUNGDAW IN RAKHINE STATE

11.67 During the oral proceedings on provisional measures, Myanmar addressed "the establishment (in December 2016) of the Investigation Commission on Maungdaw [the "Maungdaw Commission"] to probe into the background causes of the attacks on the Rohingya on 9 October, and from 12 to 13 November 2016".[1494]

11.68 The UN Special Rapporteur on the Situation of Human Rights in Myanmar,[1495] the UN Special Adviser on the Prevention of Genocide,[1496]

[1492] Republic of the Union of Myanmar, Rakhine State Parliament, "Enquiry Committee on 9/10 Maungdaw and Rathedaung Bengali terrorist attacks summited its preliminary report to 3rd regular meeting's 9th day of Rakhine State Parliament of 3rd term", *Facebook* (27 December 2016) (original and translation). MG, Vol. VI, Annex 147; UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1610. MG, Vol. II, Annex 40.

[1493] HRW, *A History of Shielding Abusers* (2018), p. 3. MG, Vol. IV, Annex 119.

[1494] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures*, Verbatim Record CR 2019/19 of Public Sitting Held on 11 December 2019, at 10 a.m., p. 70, para. 14(a).

[1495] UN OHCHR, *Statement by Ms Yanghee Lee, Special Rapporteur on the Situation of Human Rights in Myanmar at the 34th session of the Human Rights Council* (13 March 2017) ("[F]or investigations to be truly independent – members should be independent of any institution or agency that may be the subject of the inquiry. However, the Maungdaw Investigation Commission, whose members I was able to meet during my January visit, includes former members of the military and the currently serving Chief of the Myanmar Police Force."). MG, Vol. III, Annex 68.

[1496] United Nations, *Press Release: Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide following OHCHR's report on the situation in northern Rakhine State, Myanmar* (6 February 2017) ("The existing Commission is not a credible option to undertake the new investigation. I urge that any investigation be

and other independent observers[1497] concluded that the Commission lacked independence. It was composed of 13 members, and chaired by the Vice-President, Senior-General Myint Swe, who was appointed by the military.[1498] It also included Aung Kyi, a former Tatmadaw general and Major-General Zaw Win, the Chief of the Myanmar Police Force.[1499] In its first meeting, the Chair, Senior-General Myint Swe, referred to the critical reports of international organizations and said the Commission would work quickly to "reduce their worries".[1500]

11.69 On 3 January 2017, less than a month after the Commission was formed, it published a one-page interim report endorsing a statement by Myanmar's State Counsellor (its Agent in these proceedings) that reports of widespread rape and gang rape of Rohingya women and girls by the security forces during the "clearance operations" in 2016 were "fake". According to the Commission's report, "[c]oncerning the claims that women were raped, the Commission interviewed local villagers and women by using various methods and didn't find sufficient evidence to take legal

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conducted by a truly independent and impartial body that includes international observers."). MG, Vol. III, Annex 61.

[1497] International Commission of Jurists, *Achieving Justice for Gross Human Rights Violations in Myanmar* (January 2018), p. 23 ("[T]he Rakhine Commission is chaired by the military's constitutionally appointed Vice President and also includes the Chief of the MPF as a member. These, and other members, cannot reasonably be said to be free of preconceptions or bias and certainly cannot provide the appearance of independence and impartiality."). MG, Vol. IV, Annex 108.

[1498] *Ibid.*

[1499] *Ibid.*

[1500] *Ibid.*, p. 20.

action up to this date."[1501] The report repeated government and State media denials of these "fabricated rumours".[1502]

11.70 The statement that the Commission endorsed was published on the State Counsellor's Facebook page a week earlier, on 26 December 2016.[1503] It included several photos of a woman being interviewed and a banner with the words "fake rape".[1504] This prompted public ridicule of the woman, in comments on the State Counsellor's Facebook page, under her statement. According to the UN Fact-Finding Mission,

> "[a]s of August 2018, the 'most relevant' comment, with 119 likes and 25 replies, reads, 'Whore, no one wants to rape you with your fucking face. We don't even want to be within 10 feet vicinity from you, because you stink like a fucking Kalar.' Other comments included insults that Rohingya women are liars, unattractive, have bad hygiene, and are 'disgusting'."[1505]

Over a year and a half later, while the oral proceedings on provisional measures were in progress, these posts and comments still featured on the State Counsellor's Facebook page.[1506]

[1501] Republic of the Union of Myanmar, President Office, *Interim Report of the Investigation Commission on Maungtaw* (3 January 2017), para. 11. MG, Vol. VI, Annex 162.

[1502] *Ibid*., para. 16.

[1503] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1599. MG, Vol. II, Annex 40.

[1504] *Ibid*.

[1505] *Ibid*.

[1506] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures*, Verbatim Record CR 2019/18 of Public Sitting held on 10 December 2019, p. 43, para. 26.

11.71 The UN Fact-Finding Mission found that the Maungdaw Commission's "methodology and skills regarding sensitive human rights investigations have been called into question".[1507] Specifically, the commissioners lacked training in conducting sensitive human rights investigations,[1508] and the Commission did not have policies addressing witness protection or documentation of sensitive evidence.[1509] The UN Special Adviser on the Prevention of Genocide likewise concluded that the Maungdaw Commission was "not a credible option to undertake the new investigation".[1510]

11.72 Several international NGOs have underscored the problematic nature of the Commission's investigative methods. As Human Rights

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[1507] *Ibid*., para. 1607.

[1508] *Ibid*.

[1509] UN OHCHR, *Statement by Ms Yanghee Lee, Special Rapporteur on the Situation of Human Rights in Myanmar at the 34th session of the Human Rights Council* (13 March 2017). MG, Vol. III, Annex 68.

[1510] United Nations, *Press Release: Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide following OHCHR's report on the situation in northern Rakhine State, Myanmar* (6 February 2017). MG, Vol. III, Annex 61. This was particularly problematic with respect to its investigation of rape allegations. Video footage of an interview of a woman released by the Office of the President showed that she was publicly interviewed by the commissioners, recorded and filmed, while surrounded by a group consisting mainly of men, in breach of basic rules of human rights investigation regarding informed consent, privacy, confidentiality and security. UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1599. MG, Vol. II, Annex 40.The interviewers questioned her in a hostile tone, and the male interpreter did not convey many of the details of her testimony. *Ibid*. He even told her, in one instance, "Don't say that". *Ibid*. When the woman said that she had witnessed other women bleeding between their legs, the interpreter interrupted to ask, "But did you see them getting raped?" When she said, "No, I didn't, but…", he translated the entire exchange as "She did not see rape." *Ibid*. *See also* Amnesty International, *Myanmar: National efforts to investigate Rakhine State violence are inadequate* (21 February 2017), pp. 1-2 ("Amnesty International is not aware of the presence of any experienced human rights investigators, forensic specialists, medical experts or staff trained to work with survivors of sexual and other gender based violence or child victims. This lack of experience and skills undermines the work of the Commission and places victims, witnesses and their families at risk of re-traumatization."). MG, Vol. IV, Annex 101.

Watch stated in a May 2017 report, "the Burmese investigators badgered villagers, argued with them, told them not to say things, accused them of lying, and interviewed victims—including rape survivors—in large groups where confidentiality was not provided".[1511] Amnesty International also reported that it "received credible reports of villagers in northern Rakhine State being intimidated and harassed prior to and following Commission field trips".[1512]

11.73 In breach of confidentiality, the Commission allowed the publication in the media of personal identifying details of some of the survivors and eyewitnesses it interviewed, including their names and pictures.[1513] This "exposed individuals to reprisals and the risk of re-traumatisation", including "two rape survivors whose personal details were published in state media after speaking to the Commission … Both women, who spoke to media in December, later fled to Bangladesh fearing for their safety."[1514]

11.74 As the CEDAW Committee observed in 2019, Myanmar's "national justice systems, both civilian and military, do not have the independence, impartiality and capacity necessary to investigate, prosecute and sanction perpetrators of the serious human rights violations committed against Rohingya women and girls".[1515]

[1511] Human Rights Watch, *Burma: Army Investigation Denies Atrocities* (24 May 2017). MG, Vol. IV, Annex 102.

[1512] Amnesty International, *Myanmar: National efforts to investigate Rakhine State violence are inadequate* (21 February 2017), p. 2. MG, Vol. IV, Annex 101.

[1513] *Ibid.*

[1514] *Ibid.*

[1515] UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the report of Myanmar submitted under the exceptional reporting*

11.75 The Maungdaw Commission released a summary of its final report in August 2017,[1516] denying allegations of gang rapes, rapes of pregnant women, brutal killings of children and elderly people, torture and the burning of houses while Rohingya were still in them.[1517] On the issue of accountability, the Commission stated that "human rights violations and torture" were being investigated and in some cases, "action was taken", but it did not indicate what action, or against whom.[1518] Although it invited individuals to file complaints "in accordance with the law if the persons concerned so desired", it remarked that in the cases of complaints already filed, "evidence was insufficient or invalid and allegations appeared to be fabricated".[1519]

11.76 According to the UN Fact-Finding Mission, "statements absolving Tatmadaw troops, in the face of widespread, brutal and unjustifiable attacks on civilians, signal to these perpetrators that they are immune from sanctions for these crimes, and set the scene for their repetition".[1520] Less than three weeks after the Maungdaw Commission's report was published,

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procedure, UN Doc. CEDAW/C/MMR/CO/EP/1 (18 March 2019), para. 33. MG, Vol. III, Annex 74.

[1516] Contrary to the videos, photos and other information posted on social media, the Commission declared that it employed internationally-accepted techniques and interviewed women "in their own groups in separate spaces where privacy was ensured." Republic of the Union of Myanmar, *Summary of the Report of Investigation Commission for Maungdaw in Rakhine State* (8 August 2017), p. 2, para. 3. MG, Vol. VI, Annex 149.

[1517] *Ibid*., p. 10, para. 41.

[1518] *Ibid*., p. 9, para. 37.

[1519] *Ibid*., p. 13, para. 47.

[1520] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1383. MG, Vol. II, Annex 40.

the Tatmadaw launched another round of "clearance operations" against the Rohingya, on 25 August 2017.[1521]

D. THE TATMADAW INQUIRY BOARDS

11.77 On 9 February 2017, the Tatmadaw established a five-member Inquiry Board, led by Lieutenant-General Aye Win, the Inspector-General of the Defence Services,[1522] and composed solely of members of the military.[1523] Its task was to refute the findings of the OHCHR Flash Report on the 2016 "clearance operations" entitled "Interviews with Rohingyas fleeing from Myanmar since 9 October 2016".[1524] The Tatmadaw's Inquiry Board was not intended to, and did not, conduct an impartial investigation.

11.78 Although it claimed that it interviewed approximately 2,875 villagers in 29 villages in Rakhine State's Maungdaw Township from 10 February to 4 March 2017, Human Rights Watch determined that this was impossible. "To have interviewed the number of villagers it claims to have spoken to", Human Rights Watch found, the five-member team "would have had to interview at least 125 people each day while in Rakhine State".[1525]

[1521] *Ibid*., para. 1611.

[1522] *Ibid*., para. 1608.

[1523] Amnesty International, *Myanmar: National efforts to investigate Rakhine State violence are inadequate* (21 February 2017), p. 2. MG, Vol. IV, Annex 101.

[1524] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1608. MG, Vol. II, Annex 40.

[1525] Human Rights Watch, *Burma: Army Investigation Denies Atrocities* (24 May 2017). MG, Vol. IV, Annex 102; *see also* HRW, *A History of Shielding Abusers* (2018), p. 4. MG, Vol. IV, Annex 119.

11.79 As expected, the Inquiry Board categorically rejected all of the findings of the OHCHR. On 23 May 2017, the Tatmadaw's "True News Information Team" asserted that 12 out of 18 "accusations" made in the Flash Report were "totally wrong" and the remaining six were "untrue due to false accusations and exaggerations".[1526] Despite extensive evidence documented by the UN and international NGOs of crimes committed by the security forces against the Rohingya,[1527] the only offences found by the Inquiry Board were that one soldier had "used a motorbike without permission from its owner" and "three individuals had been involved in the beating of a village administrator and villagers".[1528] These acts—and only these acts—were reportedly punished.[1529]

11.80 In October 2017, the Tatmadaw established a second Inquiry Board, led again by Lieutenant-General Aye Win, the Inspector-General of the Defence Services.[1530] Like its predecessor, the Board was composed solely of members of the military. Its mandate was limited to investigating the

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[1526] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1608. MG, Vol. II, Annex 40.

[1527] Human Rights Watch, *Burma: Army Investigation Denies Atrocities* (24 May 2017). MG, Vol. IV, Annex 102; *see also* HRW, *A History of Shielding Abusers* (2018), p. 4. MG, Vol. IV, Annex 119.

[1528] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1608. MG, Vol. II, Annex 40.

[1529] *Ibid*.

[1530] Republic of the Union of Myanmar, President Office, *Information released by the Tatmadaw True News Information Team on the findings of the Investigation Team in connection with the performances of the security troops during the terrorist attacks in Maungtaw region, Rakhine State* (13 November 2017). MG, Vol. VI, Annex 155; International Criminal Court, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar: Request for authorisation of an investigation pursuant to article 15* ICC Doc. ICC-01/19 (4 July 2019), para. 237. MG, Vol. X, Annex 332.

2017 "terrorist attacks" and subsequent "military operation",[1531] and to "ascertain whether security troops conducted the military operations in accord with their duty assignments during the time the Tatmadaw was trying to restore regional peace and stability".[1532] It allegedly interviewed 3,217 villagers within 26 days between 13 October and 7 November[1533]—meaning that it again would have had to interview 123-124 people every day, seven days a week. Both the UN Fact-Finding Mission and the Prosecutor of the ICC pointed out that the Board failed to seek "the views of the 700,000 Rohingya who had fled to Bangladesh".[1534]

11.81 A month after the Board was formed, on 13 November 2017, the Tatmadaw's "True News Information Team" released its findings.[1535] The Board absolved and vindicated the military and emphasized that all of its members strictly followed the rules:

> "[t]he findings of the investigation have proved that all security members up from the

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[1531] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1005. MG, Vol. II, Annex 40.

[1532] Republic of the Union of Myanmar, President Office, *Information released by the Tatmadaw True News Information Team on the findings of the Investigation Team in connection with the performances of the security troops during the terrorist attacks in Maungtaw region, Rakhine State* (13 November 2017). MG, Vol. VI, Annex 155.

[1533] *Ibid*., para. 2.

[1534] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1612. MG, Vol. II, Annex 40; International Criminal Court, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar: Request for authorisation of an investigation pursuant to article 15* ICC Doc. ICC-01/19 (4 July 2019), para. 238 ("[T]he Investigation Team did not seek the views of members of the Rohingya population who had fled to Bangladesh."). MG, Vol. X, Annex 332.

[1535] This information was published by the *Global New Light of Myanmar* the next day. "Information released by the Tatmadaw True News Information Team on the findings of the Investigation Team in connection with the performances of the security troops during the terrorist attacks in Maungtaw region, Rakhine State", *The Global New Light of Myanmar* (14 November 2017). MG, Vol. IX, Annex 272.

> leaders to the privates were aware of and strictly abided by the orders and directives of superior bodies, especially the rules of engagement-ROE in connection with the rights of self-defence and in discharging duties during the armed conflicts and anti-terrorist operations."[1536]

11.82 Contrary to the findings of the UN Fact-Finding Mission,[1537] the Inquiry Board denied that there was any wrongdoing:

> "there was no death of innocent people. Although the Bengali villages where the engagements took place were burning and women and children were fleeing their homes, *not a single shot was fired on them*. The security forces were only fighting against the ARSA Bengali terrorists. *They never shot at the innocent Bengalis*."[1538]

11.83 The Board continued:

> "security forces did not commit shooting at innocent villagers and sexual violence and rape cases against women. They did not arrest, beat and kill the villagers. They did not totally destroy, rob and take property, gold and silver wares, vehicles and animals of villagers from the villages and displaced

[1536] *Ibid.*, para. 3.

[1537] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1005. MG, Vol. II, Annex 40.

[1538] "Information released by the Tatmadaw True News Information Team on the findings of the Investigation Team in connection with the performances of the security troops during the terrorist attacks in Maungtaw region, Rakhine State", *The Global New Light of Myanmar* (14 November 2017), para. 4 (emphasis added). MG, Vol. IX, Annex 272.

> villages. They did not set fire to the mosques in Bengali villages."[1539]

11.84 The Tatmadaw Inquiry Board thus concluded that "the security forces abided by the laws related to the wars in conducting area clearance operations. So, it is found that those security forces did not perform the use of excessive force".[1540]

11.85 The ICC Office of the Prosecutor found that the Tatmadaw's purported investigation of itself was not genuine, and was intended only to shield the perpetrators of atrocities committed against the Rohingya. It stated:

> "[t]he Investigation Team generally discounted the alleged responsibility of the *Tatmadaw* and other Security Forces for the commission of crimes. To the extent that members of the *Tatmadaw* and other Security Forces were cleared of wrongdoing as physical perpetrators, it appears that *the inquiry into these allegations was not conducted genuinely, but for the purpose of shielding them from criminal responsibility*."[1541]

11.86 After Reuters reported the massacre at Inn Din, discussed above in Section II,[1542] the Tatmadaw's Inquiry Board amended its conclusions, and released a new statement, acknowledging that ten Rohingya men were

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[1539] *Ibid*., para. 9.

[1540] *Ibid*., para. 5.

[1541] International Criminal Court, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar: Request for authorisation of an investigation pursuant to article 15* ICC Doc. ICC-01/19 (4 July 2019), para. 236 (emphasis in original and added). MG, Vol. X, Annex 332.

[1542] *See supra* Chapter 11, Section II, paras. 11.18-11.21.

killed at Inn Din: "[a]lthough [security forces] needed to hand over 10 Bengali terrorists to the police station under the procedures, it was found that decision was made to kill them at the cemetery."[1543] The statement alleged that the security forces were attacked by "about 200 people" who approached them "with knives and sticks".[1544] This is contradicted by the accounts of more than a dozen Rohingya and Rakhine witnesses, who reported no attack on security forces at Inn Din, and said that soldiers chose the ten men at random from among hundreds of men, women and children who had sought safety on a nearby beach.[1545]

E. THE INDEPENDENT COMMISSION OF ENQUIRY

11.87 On 30 July 2018, in a response to what it called "false allegations made by the UN agencies and other international communities",[1546] Myanmar announced the establishment of the ICOE.[1547]

11.88 As Human Rights Watch stated in a September 2018 report, "[t]he Myanmar government's own descriptions of the commission make clear

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[1543] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1614. MG, Vol. II, Annex 40.

[1544] Lun Min Mang, "Tatmadaw probe found soldiers responsible in Inn Din village killings", *Myanmar Times* (11 January 2018). MG, Vol. IX, Annex 274.

[1545] Wa Lone, Kyaw Soe Oo, Simon Lewis & Antoni Slodkowski, "Massacre in Myanmar: How Myanmar forces burned, looted and killed in a remote village", *Reuters* (8 February 2018). MG, Vol. IX, Annex 279.

[1546] "Myanmar rejects UN accusation of 'genocide' against Rohingya", *BBC* (29 August 2018). MG, Vol. IX, Annex 293.

[1547] It is composed of two international members, including its Chair, Ms Rosario Manalo of the Philippines, and Ambassador Kenzo Oshima of Japan, and two Burmese members, U Mya Thein, and Prof. Dr. Aung Tun Thet.

that the primary purpose of the commission is to deflect pressure from the international community".[1548]

11.89 The Commission's mandate appeared to confirm this: "The Commission is tasked to investigate allegations of human rights violations and related issues following *the terrorist attacks by the Arakan Rohingya Salvation Army in Rakhine State* with a view to seeking accountability and formulating recommendations on steps to be taken to ensure peace and stability in Rakhine State."[1549] Its Chair promptly made clear that there would be no "seeking of accountability". In her words: "there will be no blaming of anybody, no finger-pointing of anybody because we don't achieve anything by that procedure".[1550] To the contrary, she said, it would be "a very bad approach" to say to anyone that "you're accountable".[1551] Rather, seeking accountability was unhelpful because it amounted to "quarrelling".[1552]

11.90 The UN Fact-Finding Mission thus "concluded on reasonable grounds that this newly-created commission will not and cannot provide a real avenue for accountability, even with some international involvement".[1553] It confirmed in 2019 that "[t]here is no possibility that its

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[1548] HRW, *A History of Shielding Abusers* (2018), p. 7. MG, Vol. IV, Annex 119.

[1549] Republic of the Union of Myanmar, *Independent Commission of Enquiry*, *Mandate* (emphasis added). MG, Vol. VI, Annex 164.

[1550] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1619. MG, Vol. II, Annex 40.

[1551] Andrew Nachemson, "Myanmar to release its Rohingya crackdown investigation results", *Al Jazeera* (16 January 2020). MG, Vol. IX, Annex 320.

[1552] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1619. MG, Vol. II, Annex 40.

[1553] *Ibid*.

investigations will identify perpetrators, promote accountability and justice, and provide redress to victims."[1554]

11.91 The ICOE submitted its report to Myanmar's President on 20 January 2020, three days before the Court issued its Provisional Measures Order.[1555] The timing gave the impression that it was intended to distract attention from the impending Order and minimize its public impact. Only a summary of the report and selected annexes have been made public. According to the summary, the ICOE found that there were "reasonable grounds to believe" that members of Myanmar's security forces[1556] committed "war crimes, serious human rights violations, and violations of domestic law",[1557] including "the killing of innocent villagers and destruction of their homes",[1558] "intentionally"[1559] and "mostly [against] Muslims".[1560] Yet, it chose not to identify a single Tatmadaw officer or enlisted soldier responsible for these crimes. According to Myanmar's 22 May 2020 report to the Court pursuant to the Provisional Measures Order, of the 139 "cases of crimes" found by the ICOE, not a single one was attributed to any member of the Tatmadaw.[1561] Rather, they were

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[1554] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 231. MG, Vol. III, Annex 49.

[1555] Republic of the Union of Myanmar, *Independent Commission of Enquiry Final Report, Press Release* (20 January 2020). MG, Vol. VI, Annex 166.

[1556] The ICOE jointly refers to "Myanmar's Defence Services (Tatmadaw) and the Police Forces" as "security forces". Republic of the Union of Myanmar, *Independent Commission of Enquiry, Executive Summary* (21 January 2020), p. 1. MG, Vol. VI, Annex 167.

[1557] *Ibid.*, p. 12.

[1558] *Ibid.*

[1559] *Ibid.*, p. 9.

[1560] *Ibid.*

[1561] Myanmar's Report pursuant to Provisional Measures Order, paras. 98-101.

perpetrated—allegedly—by ARSA "members" and "their collaborators" (87 cases) or "local people" (29 cases).[1562] The remaining 23 of these "crimes" were said to have been committed by the BGP, none of whom has been prosecuted.[1563]

11.92 The ICOE was conscious of the proceedings before the Court. The Head of the ICOE's Secretariat, Ms Leena Ghosh—Senior Peace Advisor at the National Peace and Reconciliation Center, a Myanmar government body—was a member of Myanmar's official delegation to the oral proceedings on provisional measures.[1564] Photographs published by the ICOE and government ministries show that Ms Ghosh accompanied members of the Commission during field visits to Rakhine, travelling by convoy with them, and meeting with local government officials. Ms Ghosh herself has explained that the ICOE's Terms of Reference provide that the Myanmar government will supply the Commission with secretariat services, which "include all financial, administrative, technical and logistical assistance required to enable the ICOE to fulfil its mandate promptly and efficiently".[1565] Independent observers have noted that this presents a clear conflict of interest, as Ms Ghosh has exercised prominent

[1562] *Ibid*., paras. 99, 101.

[1563] *Ibid*., para. 100.

[1564] Andrew Nachemson & Lun Min Mang, "ICOE staffer embroiled in conflict of interest controversy", *Frontier* (29 January 2020). MG, Vol. IX, Annex 321.

[1565] *Ibid*. *See also* UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. A/HRC/40/68 (2 May 2019), para. 61 (expressing "concern[] about the independence of the Commission, given that its terms of reference state that it receives secretariat support from the Office of the President and such support could include legal counsel, research staff and specialist advisers."). MG, Vol. III, Annex 85.

roles in directing and administering both the body set up to investigate genocide, and the legal team denying that it occurred.[1566]

11.93 Other Commission members publicly denied that genocide had been committed even before the ICOE began its investigation. In March 2018, before taking up his appointment, Commissioner Aung Tun Thet declared that "there is no such thing in our country, in our society, as ethnic cleansing, and no genocide".[1567] Commissioner Aung Tun Thet also serves as the chief coordinator of the Government's UEHRD "which is mandated to implement development projects in Rakhine State. This has involved the overseeing of the bulldozing of burned Rohingya villages, which is likely to have destroyed criminal evidence".[1568]

11.94 These denials of genocide are reflected in the ICOE's statement that it "has not found any evidence suggesting that these killings or acts of displacement were committed pursuant to an intent or plan to destroy the Muslim or any other community in northern Rakhine State".[1569] It added that "[b]ased on the ICOE's findings, in responding to the ARSA attacks, individual members of Myanmar's Defence Services and Police Force and vigilantes used disproportionate or excessive force—without genocidal intent—and, in the course of doing so, have likely committed killings and acts of displacement amounting to war crimes and serious human rights

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[1566] Andrew Nachemson & Lun Min Mang, "ICOE staffer embroiled in conflict of interest controversy", *Frontier* (29 January 2020). MG, Vol. IX, Annex 321.

[1567] HRW, *A History of Shielding Abusers* (2018), pp. 7-8. MG, Vol. IV, Annex 119.

[1568] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1619. MG, Vol. II, Annex 40.

[1569] Republic of the Union of Myanmar, *Independent Commission of Enquiry, Executive Summary* (21 January 2020), p. 9. MG, Vol. VI, Annex 167.

violations".[1570] It concluded: "the allegations regarding genocidal intent on the part of members of Myanmar's Defence Services have not been substantiated".[1571] Rather, the ICOE opined "that the actions and reactions were triggered by individual fear, enmity, and historical grievances rather than by a plan, design or order".[1572]

11.95 The ICOE report's Executive Summary closely mirrors the narrative and language used by Myanmar in its defence at the oral proceedings on provisional measures one month before the report's publication. The ICOE report does not use the term "Rohingya". Like Myanmar's representatives at the hearings, the Commission refers to them only as "Muslim".[1573] Also in parallel with Myanmar's representatives, the Commission found that "[t]here were no credible statements on allegations of gang rape committed by Myanmar's security forces. Although some interviewees mentioned rape cases, these were all second-hand information heard from someone else."[1574] This conclusion ignores the evidence of widespread sexual violence reviewed by the UN Fact-Finding Mission, and the conclusions reached by the Mission.

11.96 In March 2019, the UN Fact-Finding Mission met with the ICOE chair in Geneva, and found that "[t]he limited information the chair provided about the Commission's resources and methodology raised

[1570] *Ibid*., p. 10.

[1571] *Ibid*., p. 12.

[1572] *Ibid*., p. 9.

[1573] *Ibid*., p. 1.

[1574] *Ibid*., p. 6.

serious concerns for the mission".[1575] Of particular concern to the Mission, "the chair confirmed that the interviews held during the field mission were undertaken in the presence of security forces".[1576] For similar reasons, the UN Special Rapporteur on Myanmar questioned "whether the commission is … another attempt to distract the international community, diffuse the pressure the Government is facing, and neutralise the calls to end impunity".[1577]

11.97 The OHCHR's most recent report, dated 3 September 2020, found that "[p]revious significant concerns about the structure, mandate, timing, independence and impartiality of this mechanism persist. As the national commission's mandate was focused narrowly on specific events that took place in Rakhine during a short period of 12 days, there was no investigation of broader patterns of violation, or of crimes committed in

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[1575] UN Human Rights Council, *Report of the independent international fact-finding mission on Myanmar*, UN Doc. A/HRC/42/50 (8 August 2019), para. 100. MG, Vol. III, Annex 47.

[1576] *Ibid*. According to the International Commission of Jurists, "[w]hile the ICOE Chairperson has given a verbal assurance of witness protection, no effective measures appear to be in place to ensure this in either law or practice, yet members of the ICOE have nonetheless commenced interviews with individuals in northern Rakhine State." International Commission of Jurists, *Myanmar: New Commission of Inquiry Cannot Deliver Justice or Accountability, International Response Required* (7 September 2018), p. 5. MG, Vol. IV, Annex 118. Various provisions in Myanmar law could be used to retaliate against and prosecute witnesses. *Ibid*. For example, Section 6 of the Enquiry Act notes that a false witness statement constitutes a criminal offense under Section 193 of the Penal Code, incurring a penalty of up to seven years imprisonment. *Ibid*. As the case against the Reuters journalists showed, "[u]njustified or politically-motivated criminal proceedings are often brought in Myanmar in retaliation against individuals who have made credible allegations of human rights violations by security forces." *Ibid*.

[1577] UN OHCHR, *Oral update by Ms Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 38th session of the Human Rights Council* (27 June 2018). MG, Vol. III, Annex 69.

other parts of the country. The authorities of Myanmar remain in denial that crimes in those areas have occurred".[1578]

11.98 According to the International Commission of Jurists:

> "the ICOE's mandate and its composition remain wholly inconsistent with international human rights law and standards. It is not impartial or independent, and as constituted and given the broader context in which it operates, is clearly incapable of providing meaningful accountability or redress for human rights violations".[1579]

F. THE CRIMINAL INVESTIGATION AND PROSECUTION BODY

11.99 On 24 January 2020, the day after the Court issued its Provisional Measures Order, Myanmar established a "Criminal Investigation and Prosecution Body" ("CIPB"). Myanmar's report to the Court of 22 May 2020 indicates that the CIPB has been commissioned "to undertake criminal investigations and prosecutions of those suspected of committing crimes during the internal armed conflict between the Myanmar Defence Services and ARSA in Rakhine State",[1580] and describes some of its initial work. However, the report fails to disclose that the jurisdiction of the CIPB does *not* extend to the members of the Tatmadaw.

[1578] UN Human Rights Council, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN Doc. A/HRC/45/5 (3 September 2020), para. 24. MG, Vol. III, Annex 56.

[1579] International Commission of Jurists, *Myanmar: New Commission of Inquiry Cannot Deliver Justice or Accountability, International Response Required* (7 September 2018), p. 4. MG, Vol. IV, Annex 118.

[1580] Myanmar's Report pursuant to Provisional Measures Order, para. 96.

11.100 According to Notification No. 19/2020 on the Formation of the Criminal Investigation and Prosecution Body of 24 January 2020,[1581] the *ratione personae* jurisdiction of the CIPB is limited to "members and collaborators of ARSA", "members of Myanmar's Police Force" and "civilians".[1582] The members of the Tatmadaw therefore fall outside its *ratione personae* jurisdiction. The CIPB, therefore, is not an instrument for holding Tatmadaw officers or enlisted personnel accountable.

11.101 On 14 September 2020, the UN High Commissioner for Human Rights, Michelle Bachelet, observed that the Human Rights Council and the General Assembly have both "emphasized the call for accountability. But regrettably, no concrete measures have been taken. National initiatives, including secretive and selective court martials and the national Commission of Enquiry, have been inadequate and fallen short of international standards".[1583]

11.102 The UN OHCHR's September 2020 Report on the Situation of human rights of Rohingya Muslims and other minorities in Myanmar concluded that:

> "so far, the steps taken through its national commission and military justice processes appear to have been insufficient and to have replicated past patterns of delaying effective accountability processes and maintaining

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[1581] *Ibid*., Annex 7, The Republic of the Union of Myanmar, Notification No. 19.20, Formation of the Criminal Investigation and Prosecution Body (24 January 2020).

[1582] *Ibid*., para. 2, a, b, c.

[1583] UN OHCHR, *Statement by Michelle Bachelet, UN High Commissioner for Human Rights on Enhanced interactive dialogue on the implementation of recommendations from the Fact-Finding Mission on the situation of human rights in Myanmar at the 45th Session of the Human Rights Council* (14 September 2020). MG, Vol. III, Annex 82.

> impunity … The available findings of the national commission either deny or reject responsibility, calling into question both the willingness of authorities to ensure genuine accountability and the independence of the national commission".[1584]

11.103 As the UN Fact-Finding Mission concluded in regard to all of Myanmar's investigative bodies, the failure to hold the Tatmadaw accountable for crimes committed against the Rohingya:

> "has reinforced its message to troops that they will face no consequences. This explains the recurrence of such violations across the country, and over such an extensive timeframe. The leadership refuses to accept responsibility itself. If, as the Tatmadaw Inspector-General found, 'all security members abided by the orders and directions of superior bodies', then those 'superior bodies', right up to the Commander-in-Chief, are responsible for the gravest crimes under international law and should be held accountable".[1585]

[1584] UN Human Rights Council, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN Doc. A/HRC/45/5 (3 September 2020), para. 26. MG, Vol. III, Annex 56.

[1585] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1384. MG, Vol. II, Annex 40.

CHAPTER 12
APPLICATION OF THE LAW TO THE FACTS

12.1 In this Chapter, the applicable law set out in Chapter 4 is applied to the facts, as described in Chapters 5 through 11. The Chapter is divided into two sections.

12.2 **Section I**, which comprises most of the Chapter, shows that Myanmar is internationally responsible for the commission of genocide, because the Tatmadaw and other *de jure* State organs carried out the *actus reus* of genocide with the specific intent to destroy the Rohingya group as such, in whole or in part.

12.3 Myanmar's longstanding and continuous campaign of discriminatory laws and policies, government-directed hate speech, violent "clearance operations" characterized by massive killings of unarmed civilians, destruction of homes and villages, extreme brutality and pervasive sexual violence, demonstrate that it acted purposefully to eliminate the Rohingya as a group, compelling the conclusion that it acted with genocidal intent.[1586] The indicators used by the UN Fact-Finding Mission to determine genocidal intent, all supported by the jurisprudence of the Court and other international tribunals, fully establish that the only inference that can reasonably be drawn from the voluminous evidence described in Chapters 5 through 11, and annexed to this Memorial, is that Myanmar specifically intended to destroy the Rohingya as a group.

[1586] *Croatia v. Serbia*, Judgment (2015), p. 121, para. 413; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, Trial Judgment (21 May 1999), para. 93.

12.4 **Section II** shows that Myanmar has violated various of its obligations under the Genocide Convention. Although The Gambia's principal claim is that Myanmar has violated the Convention by committing genocide, this Section demonstrates that Myanmar is also internationally responsible for direct and public incitement of genocide, conspiracy to commit genocide, attempt to commit genocide and complicity in genocide, as well as for failing to prevent and failing to punish genocide.

I. Myanmar's Commission of Genocide

12.5 As set out in Chapter 4 on Applicable Law, a State is responsible for the commission of genocide when its organs commit acts enumerated in Article II of the Convention with the specific intent to destroy a protected group, as such, in whole or in part. In this case, *de jure* State organs of Myanmar, including the Tatmadaw, the police and other security forces of Myanmar, committed the following such acts: (i) killing members of the Rohingya group; (ii) causing serious bodily or mental harm to members of the Rohingya group; (iii) deliberately inflicting on the Rohingya group conditions of life calculated to bring about its destruction in whole or in part; and (iv) imposing measures intended to prevent births within the Rohingya group. The evidence detailed in Chapters 5 through 11 leaves no doubt that these acts were committed with the intention to destroy the Rohingya as a group, in whole or in part.

A. THE *ACTUS REUS* OF GENOCIDE

1. Killing Members of the Rohingya Group

12.1 The Tatmadaw and other State organs killed members of the Rohingya group. The evidence establishes this beyond doubt. The UN Fact-Finding Mission determined:

> "The Tatmadaw and other security forces (often in concert with civilians) intentionally and unlawfully killed Rohingya men, women and children throughout the period under review, that is, since 2011, but particularly since 25 August 2017. These deaths were a direct or indirect result of the severe and systemic oppressive measures imposed on the Rohingya and the "clearance operations" in 2016 and 2017 in which they culminated. During these operations, killings occurred with horrifying intensity. The security forces entered village after village, opening fire on villagers and burning their houses. Villagers were killed both indiscriminately and in a targeted manner. They were locked in or thrown into burning houses, and lined up and executed. Accompanying ethnic Rakhine slit the throats of those too injured, young or old to escape."[1587]

12.2 Myanmar killed large numbers of the Rohingya group during the "clearance operations". The UN Fact-Finding Mission reported that although the "exact number of casualties may never be known", it "concluded on reasonable grounds that the 'clearance operations' that started on 25 August 2017"—that is, the second wave of "clearance

[1587] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1394. MG, Vol. II, Annex 40.

operations"—"alone have directly resulted in more than 10,000 deaths".[1588] These included "large-scale massacres" where "sometimes hundreds of villagers [were] killed."[1589] The Mission "verified, through multiple interviews and other information, 'clearance operations' in 54 separate locations, and it received first-hand accounts of additional 'clearance operations' in a further 22 locations".[1590] It determined: "The killing was widespread, systematic and brutal."[1591]

12.3 Similarly, the results of the randomised survey of over 1,000 Rohingya refugees in Bangladesh, commissioned by the US State Department and carried out by the PILPG "overwhelmingly show that Burmese security forces, and the army in particular, primarily are responsible for the violence."[1592] Indeed, "[t]hree-quarters" of respondents reported that they personally "witnessed a killing by a member of the army".[1593]

12.4 The widespread killing of members of the Rohingya group is confirmed by the evidence presented in Chapters 8 and 9, which describes killings committed by the Tatmadaw and other Myanmar security forces by means of shooting, beating, rape, cutting, stabbing, burning and drowning in more than 40 villages throughout northern Rakhine State.

[1588] *Ibid.*, para. 1395.

[1589] *Ibid.*

[1590] *Ibid.*

[1591] *Ibid.*

[1592] US Department of State, *Atrocities in Northern Rakhine* (2018), p. 7. MG, Vol. VII, Annex 194.

[1593] *Ibid.*

2. Causing Serious Bodily or Mental Harm to Members of the Rohingya Group

12.5 As set out in detail in Chapters 8 and 9, the Tatmadaw and other organs of the Myanmar State caused serious bodily and mental harm to members of the Rohingya group.

12.6 With respect to *physical harm*, the UN Fact-Finding Mission determined that "[t]he physical injuries of large numbers who survived the October 2016 and August 2017 'clearance operations' rise to the level of serious bodily harm."[1594] Specifically, the Mission concluded: "The scale and brutality of attacks, the close range of weapons, the widespread use of knives and the practice of burning people in their houses mean that many who survived the 'clearance operations' bear the after-effects of bullet, burn and knife wounds that cause not only disfigurement, but long-term and serious injury."[1595]

12.7 The UN Fact-Finding Mission underscored the serious physical harm inflicted on Rohingya women and girls through the prevalence of rape and other acts of sexual violence. The Mission referred, for instance, to the "[w]omen and girls who had their breasts cut off and those who lost limbs or parts of limbs", which qualifies as "suffer[ing] 'serious injury to external organs' rising to the level of serious bodily harm".[1596]

12.8 The UN Fact-Finding Mission further emphasized:

[1594] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1397. MG, Vol. II, Annex 40.

[1595] *Ibid.*

[1596] *Ibid.*

> "The rape, gang rape and other sexual violence inflicted on Rohingya women and girls before and during the 'clearance operations' was often accompanied by the additional infliction of serious bodily harm; victims were severely bitten or otherwise scarred on the face, breasts, thighs, and genitalia, and subjected to other mutilation of their reproductive organs. The bite-marks and other mutilations have left permanent scars and serve as a constant reminder to survivors, their families and community of the crimes to which they have been subjected. Given the substantial number of women and girls affected, it is difficult to believe that this was not an intentional act akin to a form of branding. Even without such permanent and disturbing reminders, rape and sexual violence are steps in the destruction of a group: 'the destruction of the spirit, of the will to live, and of life itself'. It has been recognized as demonstrating an intent to destroy a group 'while inflicting acute suffering on its members in the process'."[1597]

12.9 As to *mental harm*, the UN Fact-Finding Mission determined: "In addition to physical scars, the trauma suffered by those who manage to escape situations of mass killing or large-scale sexual violence constitutes 'serious mental harm'".[1598] In that connection, the Mission noted that "'[F]ear of being captured, and, at the moment of separation, the sense of utter helplessness and extreme fear for their family and friends' safety as

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[1597] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1397. MG, Vol. II, Annex 40 *citing Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber Judgment (2 September 1998), paras. 732-733.

[1598] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1398. MG, Vol. II, Annex 40.

well as for their own safety, is a traumatic experience from which one will not quickly, if ever, recover.'"[1599] The Mission further observed that "[f]or those who did not escape, the threat of death and knowledge of impending death also constitutes serious mental harm as a separate genocidal act from the killing itself."[1600]

12.10 The Mission cited, in particular, mental harm suffered by Rohingya women and girls who survived the sexual violence inflicted on them by the Tatmadaw and other Myanmar security forces:

> "The Mission received credible information and obtained an expert opinion indicating that many survivors of rape and other forms of sexual violence currently residing in the refugee camps in southern Bangladesh have become socially withdrawn, reluctant to eat and passive and fearful in their behaviour. Reports of self-injurious behavior and attempted suicides were received."[1601]

12.11 The Mission concluded that the serious mental harm that has been caused to members of the Rohingya group is long-lasting:

> "The infliction of serious mental harm does not stop with the cessation of violent acts. The survivors of the July 1995 Srebrenica killings in the former Yugoslavia, for example, were found to have suffered serious mental harm from both witnessing the killing operation, and the horrific circumstances of

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[1599] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1398. MG, Vol. II, Annex 40 *citing Prosecutor v. Blagojevic and Jokic*, IT-02-60-T, Trial Judgment (17 January 2005), para. 647.

[1600] *Ibid. citing Prosecutor v. Zdravko Tolimir*, IT-05-88/2-A, Appeals Chamber Judgment (8 April 2015), para. 206.

[1601] *Ibid.*

> their escape. The International Criminal Tribunal for the former Yugoslavia recognized that the painful separation process of family members, the fear and uncertainty of their fate, as well as those of missing relatives, the appalling conditions of the journey, the continuation of their profound trauma, as well as the financial and emotional difficulties they faced in their drastically changed lives, supported the conclusion that the women, children and elderly who were forcibly transferred from Srebrenica suffered serious mental harm."[1602]

12.12 The Mission noted the "clear parallels with the experiences and situations of the Rohingya refugees", who after having "survived the 'clearance operations' then faced a journey of significant risk, under appalling conditions, many having just suffered the trauma of losing and witnessing the loss of family and friends, their homes and villages".[1603]

12.13 The serious mental and emotional impact of these acts have been thoroughly documented by others as well. Physicians for Human Rights, which surveyed health care providers who treated Rohingya survivors in Bangladesh, concluded that sexual violence has had a "deep and long-lasting impact on the mental health of Rohingya survivors".[1604] One clinical psychologist who has worked with Rohingya rape victims since 2017

[1602] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1399. MG, Vol. II, Annex 40 a025 *citing Prosecutor v. Zdravko Tolimir*, IT-05-88/2-A, Appeals Chamber Judgment (8 April 2015), para. 210 and note 595.

[1603] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1399. MG, Vol. II, Annex 40.

[1604] Physicians for Human Rights, *Sexual Violence, Trauma, and Neglect: Observations of Healthcare Providers Treating Rohingya Survivors in Refugee Camps in Bangladesh* (October 2020), p. 23. MG, Vol. V, Annex 133.

recalled "most of them … suffering from PTSD" with "full blown symptoms".[1605]

3. Deliberately Inflicting on the Rohingya Group Conditions of Life Calculated To Bring About Its Physical Destruction in Whole or in Part

12.14 Myanmar, through its State organs, including especially the Tatmadaw, deliberately inflicted on the Rohingya group conditions of life calculated to bring about its physical destruction, in whole or in part.

12.15 The UN Fact-Finding Mission determined that the Rohingya are an "objectively vulnerable group" due to the "oppressive and systematic restrictions on all aspects of their life, amounting to persecution, which, on their face, appear calculated to bring about their physical destruction".[1606] Such measures include, *inter alia*, "movement restrictions", "restrictions on access to food and livelihood", "arbitrary and cumbersome procedures to access hospitals an heath facilities", "segregation from other communities" and the "regular blocking of humanitarian assistance in Rakhine State".[1607] These conditions "collectively … eroded the ability of the Rohingya to support themselves and to survive as a community in Rakhine State" by "expos[ing] them to destitution, immediate and long-term health risks, and preventable death.".[1608] The Mission pointed, in particular, to the "acute

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[1605] *Ibid.*, p. 12.

[1606] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1402. MG, Vol. II, Annex 40.

[1607] *Ibid.*, para. 1403.

[1608] *Ibid.*

levels of malnutrition in northern Rakhine State" as "attest[ing]" to those undeniable consequences.[1609]

12.16 Against this backdrop of extreme vulnerability, the Mission found that the Tatmadaw carried out a widespread and systematic programme of "extensive burning that destroyed Rohingya villages, followed by the bulldozing of lands to an unrecognizable state in many locations", with the result that Rohingya "villages" and "communities", as they "once existed in the three townships of northern Rakhine, have been erased forever".[1610]

12.17 The Mission's conclusions are confirmed by the PILPG survey of Rohingya refugees: "Eight-in-10 reported they saw the destruction of homes or villages".[1611] Further, "[i]magery analysis from August 30 to October 23, 2017 indicates that more than 38,000 buildings were destroyed by fire" and that "[m]ost villages where burning occurred were totally destroyed."[1612] Moreover, "[t]heft of livestock and personal property" was "commonplace".[1613] One-third of respondents reported that their "food resources were stolen or destroyed".[1614] Rohingya reported that the appropriation and destruction of livestock and agricultural lands left them with "virtually nothing with which to rebuild their lives".[1615]

[1609] *Ibid.*

[1610] *Ibid.*, para. 1405.

[1611] US Department of State, *Atrocities in Northern Rakhine* (2018), p. 9. MG, Vol. VII, Annex 194.

[1612] *Ibid.*, pp. 9-10.

[1613] *Ibid.*, p. 10.

[1614] *Ibid.*

[1615] *Ibid.*

12.18 As detailed in Chapters 8 and 10, Myanmar carried out a widespread campaign to deny the Rohingya access to the essentials of life, including shelter, food, water and medical care, by engaging in the wholesale destruction through burning of their homes, shops, mosques and schools, by destroying or stealing their food and by preventing humanitarian aid agencies from accessing the area. According to the UN Fact-Finding Mission, "the Government's movement restrictions, deprivation of food, restrictions on land use and denials of humanitarian relief" constitute "retrogressive measures" that "deny Rohingya access to food and put their health and lives at risk".[1616] On the basis of the same evidence, CEDAW concluded that Myanmar has imposed on the Rohingya "conditions of forced starvation".[1617]

4. Imposing Measures Intended to Prevent Births within the Rohingya Group

12.19 Myanmar imposed measures to prevent births within the Rohingya group. The UN Fact-Finding Mission determined that the "measures imposed on Rohingya women and girls, when considered both individually and cumulatively, appear targeted at the capacity of the group to 'live and reproduce normally'".[1618]

[1616] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 172. MG, Vol. III, Annex 49.

[1617] UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the report of Myanmar submitted under the exceptional reporting procedure*, UN Doc. CEDAW/C/MMR/CO/EP/1 (18 March 2019), para. 45. MG, Vol. III, Annex 74; UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), paras. 156, 160. MG, Vol. III, Annex 49.

[1618] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1409. MG, Vol. II, Annex 40 *citing Prosecutor v. Popović et al.*, IT-05-88-T, Judgment (10 June 2010), para. 855.

12.20 These measures were imposed against the backdrop of the "Myanmar authorities, including the Tatmadaw", having "actively propagated the false narrative of 'uncontrollable' Rohingya birth rates that constitute a threat to the nation".[1619] They led, *inter alia*, to "national laws to 'protect race and religion'" that "discriminate against" Rohingya women and girls for the express purpose of remedying "[c]oncerns that Rohingya would soon be outnumbering the 'native' groups".[1620]

12.21 The Fact-Finding Mission connected this "obsession with the procreation of the Rohingya, and the imperative of changing the demographic balance in Rakhine State" to the "high prevalence of rape and other brutal forms of sexual violence against women and girls" during the "clearance operations".[1621]

12.22 In particular, the Mission reported that the "majority of victims were either of childbearing age or younger, and the rapes were often accompanied by deliberate mutilation of genitalia".[1622] No fewer than "[e]ighty per cent of rape survivors interviewed by the Mission were victims of gang rape".[1623] The Mission concluded that the pervasive sexual violence inflicted on Rohingya women and girls was purposely intended to impair their ability and willingness to procreate:

> "Apart from the obvious physical destruction of the reproductive capacity in such cases,

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[1619] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1409. MG, Vol. II, Annex 40.

[1620] *Ibid.*

[1621] *Ibid.*, para. 1410.

[1622] *Ibid.*

[1623] *Ibid.*

> members of the Rohingya community who have experienced sexual violence are less likely to be able to procreate. Where Rohingya women or girls have been subjected to rape, gang rape or other forms of sexual violence, this significantly reduces the possibility of marriage. In some cases, Rohingya husbands have rejected spouses who have been subjected to sexual violence. This is largely due to the cultural stigma surrounding sexual violence, victimhood and perceived gender roles within the community. Rape 'can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate'. Members of security forces perpetrating sexual violence, and certainly their commanders who ordered or condoned it, would be aware of this dynamic."[1624]

12.23 As Physicians for Human Rights reported, based on its survey on health care workers:

> "Female survivors were reluctant to discuss and disclose sexual and gender-based violence that occurred in Myanmar out of fear they would not be able to get married or would be rejected by their husband."[1625]

12.24 In sum, State organs of Myanmar, including the Tatmadaw and other security forces, indisputably committed each and every one of the

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[1624] *Ibid. citing Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber Judgment (2 September 1998), para. 508.

[1625] Physicians for Human Rights, *Sexual Violence, Trauma, and Neglect: Observations of Healthcare Providers Treating Rohingya Survivors in Refugee Camps in Bangladesh* (October 2020), p. 14. MG, Vol. V, Annex 133.

aforementioned *actus reus* of genocide enumerated in Article II of the Convention.

B. THE *MENS REA* OF GENOCIDE

12.25 The evidence establishes that Myanmar committed each of the acts of genocide described above with the specific intention of destroying the Rohingya as a group, in whole or in part.

12.26 That was the conclusion of the UN Fact-Finding Mission, based on its evaluation of the following "indicators" of genocidal intent: (1) "the existence of discriminatory plans and policies"; (2) the "exclusionary utterances of Myanmar officials and others" and their tolerance of a "public rhetoric of hatred and contempt"; (3) "the Tatmadaw's extreme brutality during its attacks on the Rohingya"; (4) "the enormity and nature of the sexual violence"; (5) "the organized nature of the Tatmadaw's destruction" and (6) Myanmar's "failure to investigate and prosecute gross violations of international human rights law and serious violations of international humanitarian law".[1626]

12.27 The subsections that follow address each of these indicators in turn. They show that (i) the UN Fact-Finding Mission's reliance on the indicators was entirely justified in light of the well-established jurisprudence of the Court, and the authority of other international tribunals and learned commentary; and (ii) based on these indicators, individually and collectively, the evidence fully establishes that Myanmar acted with

[1626] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 224. MG, Vol. III, Annex 49.

genocidal intent, and rules out any other explanation for Myanmar's conduct.

1. Discriminatory Laws and Policies as Evidence of Genocidal Intent

12.28 The UN Fact-Finding Mission found evidence of Myanmar's genocidal intent in "the existence of discriminatory plans and policies that seek to change the demographic and ethnic composition of Rakhine State, the goal being to reduce the proportion of Rohingya".[1627] Specifically, the Mission found that Myanmar's genocidal intent is reflected in its long-standing laws and policies that are aimed at: (i) "the arbitrary deprivation of nationality of the Rohingya"; (ii) the "restrict[ion] of marriages and births among the Rohingya population";[1628] and (iii) the clearing, razing, confiscating and building of Buddhist "model villages" and military posts on land owned and inhabited by the Rohingya.[1629]

12.29 The connection between discriminatory laws and policies and genocide has been widely recognized. As one prominent commentator has observed, "genocide is not only the ultimate denial of human rights, it is, in the deepest sense, the logical outcome of discrimination".[1630] The UN High Commissioner for Human Rights made the same point in describing

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[1627] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1425. MG, Vol. II, Annex 40; UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 224. MG, Vol. III, Annex 49.

[1628] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1425. MG, Vol. II, Annex 40.

[1629] *Ibid.*

[1630] W.M. Reisman, 'Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination' (1971) 1(1) Denver Journal of International Law & Policy 29, p. 14. MG, Vol. VIII, Annex 210.

genocide as "the ultimate form of discrimination."[1631] In *Kupreškić*, the ICTY held that "when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide".[1632]

12.30 The Nuremberg Tribunal identified the adoption of a "series of discriminatory laws" as a significant milestone in the process that culminated in the Holocaust.[1633] Specifically, it found that the "Nuremberg Laws" of 1935, which preceded the mass murder of Jews by four years, were "designed to eliminate Jews from German life and economy".[1634] Their "most important effect", the Tribunal found, was to strip Jews of "their rights of citizenship".[1635] These laws were followed by other racially discriminatory measures that ultimately required all Jews to register as such, restricted their access to employment, confiscated their property, removed them from their homes and forced them to live in restricted

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[1631] United Nations, *High Commissioner's First Speech to the Human Rights Council* (September 2008). MG, Vol. III, Annex 57.

[1632] *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Trial Judgment (14 January 2000), para. 636.

[1633] International Military Tribunal (Nuremberg), Final Judgment of 1 October 1946, p. 78. The term "the Nuremberg Laws" collectively refers to the *Reich Citizenship Law*, which stripped the Jews off their German citizenship; the *Law for the Protection of German Blood and German Honour*, prohibiting marriage between Jews and non-Jews (both adopted on 15 September 1935); and the *Law for the Protection of the Hereditary Health of the German People*, imposing new marriage requirements (adopted on.18 October 1935). *See* United States Holocaust Memorial Museum, Holocaust Encyclopedia *The Nuremberg Race Laws*. MG, Vol. VII, Annex 202.

[1634] International Military Tribunal (Nuremberg), Final Judgment of 1 October 1946, p. 119.

[1635] *Ibid.*, pp. 20, 78.

areas.[1636] The Tribunal determined that: "these laws paved the way for the 'final solution'".[1637]

12.31 As detailed in Chapter 6, Myanmar has, for decades, adopted and implemented a succession of overtly racist laws and policies that also sought to denaturalize, isolate, dehumanize and persecute the Rohingya, to force them to register as foreign "Bengalis", to restrict their access to employment (as well as health care and food), to remove them from their homes and to confiscate their property.[1638] These actions "paved the way" for the "clearance operations" of 2016-2018.[1639]

12.32 Myanmar's campaign against the Rohingya began with its adoption of its 1982 Citizenship Law, a statute that defines citizenship in explicitly racial terms by limiting it to Myanmar's so-called "national races". The 1982 Citizenship Law had the effect of denationalizing the Rohingya and creating "the largest group of stateless persons in the world".[1640] Myanmar's then Head of State, General Ne Win, was candid about the purpose of the law. He said that the Rohingya were stripped of their citizenship because they are a race of people "who cannot be trusted

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[1636] *Ibid.*, pp. 79, 119, 144.

[1637] *Ibid.*, p. 119.

[1638] *See supra* Chapter 6.

[1639] *See* International Military Tribunal (Nuremberg), Final Judgment of 1 October 1946, p. 119.

[1640] UN Security Council, *Briefing by Security Council Mission to Bangladesh and Myanmar (28 April to 2 May 2018)*, UN Doc. S/PV.8255 (14 May 2018), pp. 10-11. MG, Vol. II, Annex 34.

fully".[1641] He added: "Racially, only pure-blooded nationals will be called citizens."[1642]

12.33 More recently, Myanmar has implemented a "citizenship verification" process, the central feature of which is the requirement that members of the Rohingya group formally register and identify themselves as foreign "Bengalis".[1643] Those who refuse to register or accept this designation are stripped of the limited rights afforded to them, including access to employment, medical care and sustenance.

12.34 Beyond depriving the Rohingya of citizenship and nationality, Myanmar has imposed upon members of the group a host of discriminatory laws and measures to separate them from Myanmar society. Scholars of genocide emphasize that the physical acts of genocide are often preceded by such state-sanctioned discrimination.[1644] Discriminatory laws and policies, especially when coupled with denationalization, result in the "classification" and "othering" of the targeted group. This, in turn, facilitates the dehumanization of the group's members and eventually enables what Lemkin described as the "destruction of the national pattern of the oppressed group".[1645]

12.35 Myanmar's discriminatory laws and policies fit this pattern. Since depriving the Rohingya of citizenship, Myanmar has sought to prevent the

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[1641] General Ne Win, "Speech at Meeting Held in the Central Meeting Hall" (President House, Ahlone Road, 8 October 1982), p. 4. MG, Vol. VI, Annex 144.

[1642] *Ibid.*, pp. 3-4.

[1643] *See supra* Chapter 6.

[1644] Gregory Stanton, 'The Seven Stages of Genocide' (1998) 12 Yale Center for International and Area Studies Working Paper Series, p. 2. MG, Vol. VIII, Annex 213.

[1645] Lemkin, *Axis Rule in Occupied Europe* (1944), p. 79. MG, Vol. VIII, Annex 208.

long-term survival of the group through forced segregation and confinement in internment camps, ghettos and isolated villages, especially since 2012 and continuing to the present.[1646] Myanmar further enforces the separation of the Rohingya from the rest of society through severe movement restrictions that, according to the UN Fact-Finding Mission's 2018 Report, "adversely impact every aspect of their life, including their access to food, livelihood, health and education – and in extreme cases leading to preventable deaths".[1647]

12.36 These restrictions are compounded by the confiscation of Rohingya homes, lands, farm animals and equipment to deprive them of the means of sustenance and make room for the development of model villages for other, favoured ethnic groups.[1648] The discriminatory measures have further diminished the Rohingya's ability to feed themselves, put a roof over their heads and earn a livelihood.[1649] The UN Fact-Finding Mission observed that these and related measures "contribute to an overall condition that makes it *unsafe, inhumane, unsustainable and impossible for Rohingya who remain in Rakhine State* and those who might be allowed to return to Myanmar".[1650]

[1646] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 111. MG, Vol. III, Annex 49; United Nations and Partners, *Humanitarian Response Plan, January–December 2019* (December 2018), p. 10. MG, Vol. III, Annex 43.

[1647] *See* UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 378, 517, 525, 534, 1403. MG, Vol. II, Annex 40.

[1648] *Ibid.*, paras. 1229-1230, 1425. MG, Vol. II, Annex 40.

[1649] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), paras. 139-140, 152-155. MG, Vol. III, Annex 49.

[1650] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 140 (emphasis added). MG, Vol. III, Annex 49.

12.37 The evidence fully supports the Mission's observation that the conditions imposed by Myanmar have made it increasingly difficult for the Rohingya to survive. By systematically "otherizing" the Rohingya, by severing all the links that ordinarily bind a people to their country, Myanmar gradually set the stage for the physical elimination of the group. As the UN High Commissioner for Human Rights observed, Myanmar's discriminatory laws and policies were part of a "protracted campaign to ensure [the Rohingya's] 'administrative destruction'".[1651]

12.38 Among Myanmar's many anti-Rohingya laws and policies, the ones that are most destructive of the group as a whole are those intended to limit their ability to procreate and renew themselves. This is also a well-recognized indicator of an intention to destroy a targeted group, which is why the UN Secretary General's Special Advisor on the Prevention of Genocide considers the "[d]evelopment of policies or measures that seriously affect the reproductive rights of women" to be indicative of genocidal intent.[1652] The ICTR has underscored that forced birth control and restrictions on marriages can be seen as measures "intended to prevent births within the group". In the *Akayesu* case, the Tribunal established that such measures include "sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages".[1653] In *Croatia v. Serbia*, the Court itself recognized that an

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[1651] UN Human Rights Council, *Oral Update of the High Commissioner for Human Rights on Situation of Human Rights of Rohingya People*, UN Doc. A/HRC/38/CRP.2 (3 July 2018), para. 33. MG, Vol. II, Annex 35.

[1652] United Nations, *Framework of Analysis for Atrocity Crimes: A tool for Prevention* (2014), p. 19. MG, Vol. III, Annex 60.

[1653] *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998), paras. 507-508. *See also Prosecutor v. Georges Rutaganda*, ICTR-97-20-T, Trial Judgment (6 December 1999), paras. 48, 53; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, Trial Judgment (21 May 1999), para. 117; *Prosecutor v. Alfred*

"intent to destroy the group physically, in whole or in part" can manifest itself in measures that "have consequences for the group's capacity to renew itself, and hence to ensure its long-term survival".[1654]

12.39 Myanmar's discriminatory laws and policies include those designed to prevent or limit Rohingya births by restricting marriages, imposing birth control measures and refusing to register or acknowledge Rohingya births.[1655] The goal of these measures has been made clear by Myanmar itself. In May 2013, the spokesperson of the Rakhine State Government explained that their purpose is to restrict the reproductive capacity of the Rohingya population: "they can only [have] two children … For Buddhist

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Musema, ICTR-96-13-A, Trial Judgment and Sentence (27 January 2000), para. 158 (all affirming *Akayesu*).

[1654] *Croatia v. Serbia*, Judgment (2015), p. 63, para. 136. Consistent with this longstanding jurisprudence, in the context of addressing Nazi sterilization policies during the Holocaust, the Supreme National Tribunal of Poland recognized how policies designed to "lower or destroy the reproductive power of the Jews, Poles, Czechs and other non-German nations" could constitute genocide. *See* Supreme National Tribunal of Poland, *Trial of Obersturmbannführer Rudolf Franz Ferdinand Hoess* (1948) 7 LRTWC 11, pp. 24-25. MG, Vol. X, Annex 325. Nor, as a commentator has observed, are such "measures" confined to "the classic action of sterilization" as "separation of the sexes, prohibition of marriages and the like are measures equally restrictive and produce the same results." Nehemiah Robinson, *The Genocide Convention - A Commentary* (Institute of Jewish Affairs 1960), p. 64. MG, Vol. VIII, Annex 209. Thus, in *United States v. Ulrich Greifelt*, the United States Military Tribunal ruled that policies to reduce reproduction and restrict marriages evidence the intention to prevent reproduction of the group. United States Military Tribunal, *United States v. Ulrich Greifelt et al.*, (1948) 13 LRTWC 1, pp. 17, 28. MG, Vol. X, Annex 326. It held: "Measures, concerning mainly inhabitants of Poland, were taken to prevent their reproduction and thus contribute to the destruction of non-German races. They took the form of various decrees, and were chiefly aimed at drastically curtailing marriages." *Ibid.* For instance, Lemkin found that in Nazi-occupied countries, "a policy of depopulation is pursued" in regard to so-called "people of non-related blood": "*Foremost among the methods employed for this purpose is the adoption of measures calculated to decrease the birthrate of the national groups of non-related blood*, while at the same time steps are taken to encourage the birthrate of the [ethnic Germans] living in these countries." Lemkin, *Axis Rule in Occupied Europe* (1944), p. 86 (emphasis added). MG, Vol. VIII, Annex 208.

[1655] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 463. MG, Vol. II, Annex 40.

people, we don't need that rule, because Buddhist people only have one wife … It's being implemented to control the population growth, because it's becoming too crowded there."[1656]

12.40 These comments reflect the prevailing State view. Senior government and military figures have regularly portrayed the Rohingya as a group that reproduces too much and too quickly, and have openly declared that these legal and policy measures are designed to prevent the Rohingya from "swallow[ing]" up non-Muslim "races".[1657] In its 2018 Report, the UN Fact-Finding Mission found that Myanmar's restrictions on childbearing by Rohingya women and girls, in particular, were intended to curtail the capacity of the Rohingya to perpetuate themselves as a group: "The measures imposed on Rohingya women and girls, when considered both individually and cumulatively, appear targeted at the capacity of the group to 'live and reproduce normally'".[1658]

2. Hate Speech as Evidence of Genocidal Intent

12.41 The UN Fact-Finding Mission determined that Myanmar's intent to destroy the Rohingya as a group is evidenced by the "specific utterances of government officials, politicians, religious authorities and military commanders, as well as of direct perpetrators prior, during and after the

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[1656] Paul Vrieze & Zarni Mann, "Gov't Sets Two-Child Limit for Rohingyas in Northern Arakan", *The Irrawaddy* (20 May 2013). MG, Vol. IX, Annex 243.

[1657] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1338. MG, Vol. II, Annex 40; UN Human Rights Council, *Report of the independent international fact-finding Mission on Myanmar*, UN Doc. A/HRC/39/64 (12 September 2018), para. 25. MG, Vol. II, Annex 39.

[1658] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1409. MG, Vol. II, Annex 40.

violence".[1659] It is manifest, the Mission found, in the Rohingya being "systematically referred to in derogatory and dehumanizing terms" with the "apparent intent and purpose" of exclud[ing] them from the Myanmar nation to which they once belonged, in pursuit of an exclusionary vision based on "national races". The Mission concluded that "[t]his process of "othering" the Rohingya has resulted in them systematically being called "Bengali" or "illegal immigrants" who, it is claimed, will "overrun and Islamise the country", and in their portrayal "as an existential threat both to the nation and to its Buddhist character".[1660]

12.42 Government-sponsored hate speech that targets a protected group is widely recognized as indicative of genocidal intent. In particular, international tribunals have accepted that words, utterances, speeches and the use of derogatory language targeting the group constitute evidence of genocidal intent.[1661] The ICTR, for example, found genocidal intent based on the utterance of anti-Tutsi phrases and songs by the perpetrators of the mass killings in Rwanda.[1662]

12.43 In the same vein, the *Framework of Analysis for Atrocity Crimes*, prepared by the UN Secretary-General's Special Advisor on the Prevention

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[1659] *Ibid.*, para. 1422.

[1660] *Ibid.*, para. 1420.

[1661] *Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, Trial Judgment (21 May 1999, paras. 93, 527; *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Judgment (10 June 2010), para. 1177; *Prosecutor v. Muhimana*, ICTR-95-1B-T, Trial Judgment (28 April 2005), para. 496; *Prosecutor v. Nahimana et al.*, Appeals Chamber Judgment, ICTR-99-52-A (28 November 2007), para. 693; *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998), para. 524; *Prosecutor v. Ntakirutimana et al.*, ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber Judgment (13 December 2004), paras. 360-364.

[1662] *Prosecutor v. Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber Judgment (13 December 2004), paras. 360-364.

of Genocide, includes among its signs of genocidal intent: "Official documents, political manifests, media records, or any other documentation through which a direct intent, or incitement, to target a protected group is revealed, or can be inferred in a way that the implicit message could reasonably lead to acts of destruction against that group"; "[r]esort to methods or practices of violence that are particularly harmful against or that dehumanize a protected group, that reveal an intention to cause humiliation, fear or terror to fragment the group, or that reveal an intention to change its identity"; and "[e]xpressions of public euphoria at having control over a protected group and its existence".[1663]

12.44 Scholarly commentary has also recognized that government-propagated hate speech, targeting a particular group, can be a component of or a precursor to genocide, and that it constitutes evidences of the perpetrators' genocidal intent: "Persistently, in cases of genocide and mass atrocity, supporters and perpetrators have referred to their victims as vermin (rats, cockroaches, foxes, or snakes), beasts (apes or baboons), or biological hazards (a virus, tumors, or an infection)."[1664] Dehumanizing rhetoric facilitates the commission of genocide because "[d]enial of the humanity of others is the step that permits killing with impunity".[1665] The "universal human abhorrence of murder of members of one's own group is overcome by treating the victims as less than human".[1666] Hence, "the target groups

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[1663] United Nations, *Framework of Analysis for Atrocity Crimes: A tool for Prevention* (2014), p. 19. MG, Vol. III, Annex 60.

[1664] Dangerous Speech Project, *Dangerous Speech: A Practical Guide* (4 August 2020). MG, Vol. V, Annex 131.

[1665] Gregory Stanton, 'The Seven Stages of Genocide' (1998) 12 Yale Center for International and Area Studies Working Paper Series, p. 3. MG, Vol. VIII, Annex 213.

[1666] *Ibid.*

are called disgusting animal names -- Nazi propaganda called Jews 'rats' or 'vermin'; Rwandan Hutu hate radio referred to Tutsis as 'cockroaches'".[1667]

12.45 In Myanmar, the official rhetoric persistently referred to the Rohingya as, among other things: viruses, weeds, dogs, and snakes.[1668]

12.46 The evidence of Myanmar's official and officially tolerated hate speech against the Rohingya is set out in detail in Chapter 7. It shows that Myanmar's hateful rhetoric toward the Rohingya, like the racially discriminatory laws and measures that it adopted against them, was integral to a concerted strategy to denaturalize them, deny their identity as nationals of Myanmar, dehumanize (or animalize) them, incite hatred of them and prepare the ground for genocidal violence against them.

12.47 Myanmar's strategy against the Rohingya was an outgrowth of its a racist ideology, articulated over 40 years ago, that exalts certain racial groups as being "pure of blood", and under threat of extinction from other, "impure races". According to this theory, the Rohingya are an impure race that originated elsewhere, came to the country illegally and reproduced so rapidly that they threatened to "swallow up" and supplant the pure-blooded, "national races". Myanmar has steadily propagated this racist message through its distribution of official publications, like *Fear of Extinction of the Race*, which exhort Buddhists to "protect their race and religion" from being "swallowed to extinction by the earth",[1669] and via Tatmadaw training

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[1667] *Ibid.*

[1668] *See supra* Chapter 7.

[1669] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 697. MG, Vol. II, Annex 40.

materials that warn of the need to safeguard Myanmar's "race and religion" lest "Buddhism may vanish".[1670]

12.48 This official message has been propagated continuously by the Tatmadaw, including its Commander-in-Chief, as well as by other military figures and senior civilian officials of the national and Rakhine State governments. It has stigmatized and dehumanized the Rohingya as an invasive, non-human species that has no place in Myanmar and poses an existential threat to its racial and religious purity. The Government's anti-Rohingya hate speech reached a crescendo during the "clearance operations" in September 2017, when the Tatmadaw's Commander-in-Chief, Senior-General Hlaing, invoked the oft-repeated "threat" posed by the Rohingya's mere presence in Myanmar, and assured the Buddhist majority that that Government was then in the process of "solving" the "long-standing" "Bengali problem" which, previously, had been an "unfinished job".[1671]

12.49 Tatmadaw soldiers, imbued with this rhetoric, showed no restraint in their efforts to finish this "job". As one Tatmadaw officer declared, "If they're Bengali, they'll be killed."[1672] Others, also taking the cue from Senior-General Hlaing, shouted aloud that the hour had come to "kill all the

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[1670] Tatmadaw, Nyi Pyi Taw Divisional Military Headquarters, "Fear of Extinction of Race" (No. 13 Combatants Organizing School 2012) (original and translation), p. 9. MG, Vol. VI, Annex 146.

[1671] Senior-General Min Aung Hlaing, "Entire government institutions and people must defend the country with strong patriotism" (2 September 2017). MG, Vol. VI, Annex 150. *See also* UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 753. MG, Vol. II, Annex 40; Simon Lewis, Zeba Siddiqui, Clare Baldwin & Andrew R.C. Marshall, "Tip of the Spear", *Reuters* (26 June 2018). MG, Vol. IX, Annex 284.

[1672] Simon Lewis, Zeba Siddiqui, Clare Baldwin & Andrew R.C. Marshall, "Tip of the Spear", *Reuters* (26 June 2018). MG, Vol. IX, Annex 284.

Bengalis" and "destroy their race"[1673] so that "none of them should be left alive".[1674] Recent Tatmadaw defectors have confirmed that their orders were to "kill all people, whoever come in front of us".[1675] In carrying out these orders, the Tatmadaw soldiers assaulted their Rohingya victims with, besides weapons of war, the same racial epithets that their leaders had been disseminating for years: "Muslim dog", "Kalar", "Bengali", "unwanted person".[1676]

12.50 Myanmar's official message of hatred and contempt for the Rohingya, and its incitement of soldiers and civilians to kill and destroy the Rohingya, was echoed and reinforced by prominent Buddhist religious leaders who, with the Government's encouragement, contributed to the dehumanization and destruction of the Rohingya by likewise calling for the eradication of Rohingya "snakes", "dogs", "wol[ves]" and "jackal[s]".[1677] Or by describing the Rohingya as an uncontrollable "weed" that threatened to "swallow" to "extinction" the "more precious plants and flowers".[1678] The most extreme, ultra-nationalist and anti-Rohingya Buddhist group, the Ma Ba Tha, worked closely with the Tatmadaw, and was supported by it,

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[1673] Steve Stecklow, "Hatebook: Why Facebook is losing the war on hate speech in Myanmar", *Reuters* (15 August 2018). MG, Vol. IX, Annex 287.

[1674] *Ibid.*

[1675] Interview of Myo Win Tun (15 August 2020), p. 4. MG, Vol. V, Annex 142.

[1676] *See supra* Chapter 7, Section III.

[1677] Hannah Beech, "Across Myanmar, Denial of Ethnic Cleansing and Loathing of Rohingya", *The New York Times* (24 October 2017). MG, Vol. IX, Annex 270; Jonah Fisher, "Anti-Muslim monk stokes Burmese religious tensions", *BBC* (29 August 2013). MG, Vol. IX, Annex 250; Thomas Fuller, "Extremism Rises Among Myanmar Buddhists", *New York Times* (21 June 2013). MG, Vol. IX, Annex 247.

[1678] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1316. MG, Vol. II, Annex 40.

in delivering hate-filled messages calling for the eradication of the Rohingya from Myanmar society.[1679]

12.51 Myanmar's longstanding and repeated use and encouragement of, and tolerance for, hateful, dehumanizing and exclusionary rhetoric towards the Rohingya constitutes further evidence of its genocidal intent. As the UN Fact-Finding Mission observed, the propagation of such hate speech:

> "demonstrates a willingness to debase and humiliate a group, in an attempt to strip it of its humanity in the eyes of the eventual direct perpetrators, and as such it is often a precursor to acts of violence to come".[1680]

12.52 The violence came. It was manifested in successive "clearance operations" between 2016 and 2018. The manner in which these were conducted, as described in Chapters 8 through 10 and summarized below, further demonstrates Myanmar's genocidal intent.

3. Extreme Brutality as Evidence of Genocidal Intent

12.53 The UN Fact-Finding Mission determined that Myanmar's genocidal intent is evident in "the Tatmadaw's extreme brutality during its attacks on the Rohingya".[1681] Such acts occurred during the Tatmadaw's "ruthless campaign" of "clearance operations" during which all members of the Rohingya group, including "mothers, infants, pregnant women, the

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[1679] *See supra* Chapter 7. Section II.

[1680] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1421. MG, Vol. II, Annex 40.

[1681] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 224. MG, Vol. III, Annex 49.

old and infirmed" were systematically killed. The Mission took particular note of "the brutality with which the underlying acts were carried out".[1682]

12.54 Inferring genocidal intent from the perpetrators' extreme brutality falls squarely within the jurisprudence of the Court and international criminal tribunals. In *Croatia v. Serbia*, the Court recognized that genocidal intent can be inferred from "the scale and allegedly systematic nature of the attacks, the fact that those attacks are said to have caused casualties and damage far in excess of what was justified by military necessity, the specific targeting of [members of the protected group] and the nature, extent and degree of the injuries caused to the [protected] population".[1683] The ICTY and the ICTR have adopted the same approach.[1684]

12.55 Similarly, the *Framework of Analysis for Atrocity Crimes* identifies as signs of genocidal intent the "[t]argeted physical elimination, rapid or gradual, of members of a protected group, including only selected parts of it, which could bring about the physical destruction of the group"; "[r]esort to means of violence that are particularly harmful or prohibited under international law … against a protected group"; and "[a]ttacks against or

[1682] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1433. MG, Vol. II, Annex 40.

[1683] *Croatia v. Serbia*, Judgment (2015), p. 121, para. 413.

[1684] *See Prosecutor v. Muhimana*, ICTR-95-1B-T, Trial Judgment (28 April 2005), para. 496; *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-T, Trial Judgment (21 May 1999), para. 93; *Prosecutor v. Alfred Musema*, ICTR-96-13-A, Trial Judgment and Sentence (27 January 2000), para. 166; *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998), paras. 118, 523; *Prosecutor v. Goran Jelišic*, IT-95-10-A, Appeals Chamber Judgment (5 July 2001), para. 47.

destructions of homes, farms, businesses or other livelihoods of a protected group and/or of their cultural or religious symbols and property".[1685]

12.56 The scale and systematic nature of the crimes committed against a group demonstrate genocidal intent in at least two ways. At a minimum, they evidence the "knowledge" of the State of the commission of such atrocities.[1686] They also "reflect a commonality of goals of the perpetrators, which would at least be consistent with the purpose of destroying the group".[1687] On this basis, the ICTR Trial Chamber in *Ndindabahizi* explained that an attack on several thousand members of an ethnic group "is itself indicative of the requisite intent to destroy [that group], in whole or in part".[1688] Similarly, in *Akayesu* an attack "on a massive scale" left no doubt that "the massacres were aimed at exterminating the group".[1689]

12.57 Myanmar carried out its first "clearance operations" against the Rohingya in northern Rakhine State in October 2016. After a brief hiatus, the Tatmadaw launched a second wave in August 2017, on a more massive and wider geographical scale. During these operations, the Tatmadaw acted with extreme brutality—indeed, savagery. It systematically attacked and killed members of the Rohingya group in a manner calculated to maximize physical and psychological suffering, including by torture, mutilation and

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[1685] United Nations, *Framework of Analysis for Atrocity Crimes: A tool for Prevention* (2014), p. 19. MG, Vol. III, Annex 60.

[1686] Guénaël Mettraux, *International Crimes: Law and Practice, Volume 1: Genocide* (OUP 2019), pp. 246-247. MG, Vol. VIII, Annex 234.

[1687] *Ibid.*

[1688] *Prosecutor v. Ndindabahizi*, ICTR-2001-71-T, Trial Judgment (15 July 2004), para. 461.

[1689] *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998), paras. 118, 163.

dismemberment. Such acts included, *inter alia*, the indiscriminate killing of members of the Rohingya group, including those trying to flee; the mass executions of men and boys; the targeted, often public, killing of community leaders; the systematic burning of Rohingya homes, frequently with the inhabitants locked inside; and the systematic targeting of even the most vulnerable members of the Rohingya group, including pregnant women, children and infants, the sick and the elderly.[1690]

12.58 The UN Fact-Finding Mission concluded that the Tatmadaw made "not the least effort" to "make any distinction between ARSA fighters and civilians, or to specifically target a military objective or identify and repel an immediate threat".[1691] Rather, it found: "Everyone was a target and no one was spared: mothers, infants, pregnant women, the old and infirmed all fell victim to the ruthless campaign."[1692]

12.59 More specifically, the UN Fact-Finding Mission determined:

> "Many Rohingya were killed or injured by indiscriminate shooting. Rohingya villages were approached without warning, usually from more than one direction, and often in the early morning, by armed Tatmadaw soldiers … Members of the security forces, primarily Tatmadaw soldiers of the Western Command and the 33rd and 99th [Light Infantry Divisions], shot assault rifles towards the Rohingya villages from a distance, not targeting any particular military objective or making any distinction between

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[1690] *See supra* Chapter 8.

[1691] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1433. MG, Vol. II, Annex 40.

[1692] *Ibid.*

> ARSA fighters and civilians. Men, women and children were all shot at".[1693]

12.60 The Mission also documented "detailed accounts" of "corroborated mass killings" in which "hundreds, of men, women and children were killed" in "targeted attacks".[1694] Soldiers "shot individual persons, including at point blank range, and executed people, including those injured, by slitting their throats using long knives".[1695] In some places "these targeted killings occurred as Tatmadaw soldiers and other security forces systematically moved from house to house, pulling people out of their homes and executing them, or shooting them inside their houses, or as they left their houses, often in front of family members".[1696] All of these factual findings have been comprehensively documented by other highly credible sources, as well.[1697]

12.61 The targeting of vulnerable members of the Rohingya group is particularly probative of genocidal intent. The wholesale slaughter of pregnant women, children and infants speaks to an intention to wipe out the Rohingya population, not merely to kill selected individuals. Such killings could not serve any legitimate purpose, military or otherwise, and are thus only consistent with an intent to destroy the group.[1698]

[1693] *Ibid.*, para. 884.

[1694] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 892. MG, Vol. II, Annex 40.

[1695] *Ibid.*, para. 893.

[1696] *Ibid.*

[1697] *See supra* Chapter 8.

[1698] *See Prosecutor v. Popović et al*, IT-05-88-T, Trial Judgment (10 June 2010), paras. 860-861.

12.62 The ICTR Trial Chamber in *Akayesu* underscored that the targeting of newborn babies and pregnant women on grounds that "the fetuses in their wombs were fathered by Tutsi men" showed an intention to "wipe out the Tutsi group in its entirety".[1699] Likewise, the mass killings of vulnerable members of a group—such as pregnant women, children and the elderly and disabled—were found to be evidence of the perpetrators' intention to destroy the group as a whole.[1700]

12.63 The targeting of community leaders has also been considered evidence of genocidal intent, due to "the impact that their disappearance would have on the survival of the group".[1701] Myanmar engaged in this hallmark of genocidal intent, as well. As documented in Chapters 8 and 10, Myanmar systematically detained, tortured and killed— often in public view—Rohingya community leaders, including religious leaders, throughout northern Rakhine State.

12.64 The extreme cruelty with which an attack is conducted, including the resulting bodily injuries to the victims, is probative of genocidal intent because it indicates the perpetrators' animus towards the targeted group, as well as the desire to inflict maximum suffering and thus ultimately cause the group's destruction. As the ICTR Trial Chamber held in *Kayishema*: "[T]he cruelty with which the attackers killed, wounded and disfigured their victims indicates that the [anti-Tutsi hate propaganda] unleashed on Rwanda had the desired effect, namely the destruction of the Tutsi

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[1699] *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998), para. 121.

[1700] *See Prosecutor v. Popović et al*, IT-05-88-T, Trial Judgment (10 June 2010), paras. 860-861.

[1701] *See Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Trial Judgment (21 May 1999), para. 263.

population".[1702] Similarly, in concluding that the accused acted with genocidal intent in the mass killings of Bosniaks in Srebrenica, the Court of Bosnia and Herzegovina in *Stupar* placed particular weight on the fact that the killings were carried out through the "indiscriminate" fire of heavy weapons that caused multiple wounds and mutilation of the victims.[1703]

12.65 Here, too, the Tatmadaw killed and tortured members of the Rohingya group indiscriminately, in a manner designed to inflict maximum harm. As described in Chapters 8 and 9, and as exhaustively documented by the UN Fact-Finding Mission and others, such horrors include, *inter alia*, on a mass scale the burning of victims alive, frequently by locking them in houses that were set alight; mutilating victims with knives; dousing them with petrol and setting them on fire; and stabbing, cutting, or beating to death young children and babies in front of their parents.

4. Sexual Violence as Evidence of Genocidal Intent

12.66 The UN Fact-Finding Mission determined that Myanmar's genocidal intent is evident in "the enormity and nature of the sexual violence perpetrated against women and girls during the 'clearance operations'".[1704] The Mission based that determination on its

> "analysis of the widespread and systematic killing of women and girls, the systematic selection of women and girls of reproductive ages for rape, attacks on pregnant women

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[1702] *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Trial Judgment (21 May 1999), para. 290.

[1703] Court of Bosnia and Herzegovina, *Prosecutor v. Stupar et al.*, No. X-KR-05/24, First Instance Verdict (29 July 2008), p. 120. MG, Vol. X, Annex 327.

[1704] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 224. MG, Vol. III, Annex 49.

> and on babies, the mutilation and other injuries to their reproductive organs, the physical branding of their bodies by bite marks on their cheeks, neck, breast and thigh, and so severely injuring victims that they may be unable to have sexual intercourse with their husbands or to conceive and leaving them concerned that they would no longer be able to have children".[1705]

12.67 The Mission's view that pervasive and extreme sexual violence is an indicator of genocidal intent reflects established international case law. Courts and tribunals have held that genocidal intent may be indicated by the perpetration of acts that "violate the very foundation of the group".[1706] Rape and sexual violence are such acts. The ICTR Trial Chamber in *Akayesu* held that sexual violence "forms an integral part of the process of destruction" of a group because of the physical and psychological harm it inflicts on women, and the far-reaching consequences on their families and communities.[1707] It destroys "the spirit, []the will to live, and [] life itself".[1708]

12.68 The manner and circumstances under which rape or other acts of sexual violence are carried out are also relevant to genocidal intent.[1709]

[1705] UN Human Rights Council, *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts*, UN Doc. A/HRC/42/CRP.4 (22 August 2019), para. 96. MG, Vol. III, Annex 48.

[1706] *Prosecutor v. Tharcisse Muvunyi*, ICTR-00-55A-T, Trial Judgment (11 February 2010), para. 29. *See also Prosecutor v. Karadžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, Consideration of the Indictment within the Framework of Rule 61 of the Rules of Procedure and Evidence (11 July 1996), para. 294.

[1707] *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998), para. 731.

[1708] *Ibid.*, para. 732.

[1709] *See Prosecutor v. Zdravko Tolimir*, IT-05-88/2-A, Appeals Chamber Judgment (8 April 2015), para. 253.

When acts of sexual violence are committed against women of a particular group on an enormous scale and with extreme brutality, the intent to destroy that group becomes especially evident. The *Akayesu* judgment underscored that acts of rape and sexual violence in Rwanda "were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public".[1710] These acts, the judgment found, were often "accompanied by the intent to kill", evidenced by the fact that many women were killed after the rapes and gang rapes.[1711] These facts pointed to "the determination to make Tutsi women suffer … the intent being to destroy the Tutsi group".[1712]

12.69 As detailed in Chapter 9, widespread rape and gang rape of women and girls were hallmarks of the Tatmadaw's "clearance operations". The UN Fact-Finding Mission identified as a "notable pattern" the perpetration of "mass gang rape, involving multiple perpetrators and multiple victims in the same incident".[1713] Victims were "commonly raped by more than one perpetrator, frequently by many perpetrators, sometimes as many as ten".[1714] During attacks, "up to 40 women and girls were raped or gang raped together."[1715]

12.70 No woman—or girl—was safe. Indeed, the Tatmadaw specifically targeted young girls. The UN documented at least 41 cases of rape and

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[1710] *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998), para. 731.

[1711] *Ibid.*, para. 733.

[1712] *Ibid.*

[1713] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 921. MG, Vol. II, Annex 40.

[1714] *Ibid.*

[1715] *Ibid.*

sexual violence against children in 15 different villages.[1716] Victims included girls as young as seven years old.[1717] Within just two weeks of the start of the "clearance operations" that began on 25 August 2017, MSF treated 230 victims of sexual violence, ranging in age from nine to 50 years old.[1718] The majority of rape victims were younger than 18; many were under the age of 10.[1719]

12.71 The Tatmadaw did not spare pregnant women.[1720] A woman in her eighth month of pregnancy lost her baby after soldiers raped her "nine times, both anally and vaginally."[1721] She told the UN Fact-Finding Mission: "They stamped and kicked my stomach with their boots, and then stripped me naked. … I was blindfolded and hung by my wrists from a tree." She continued: "[while] they were raping me, they bit me on my breasts and neck. They left me tied to the tree. My mother found me in the evening. My unborn baby died."[1722]

12.72 The Tatmadaw committed these atrocities with unspeakable depravity. Soldiers subjected many victims to torture and sexual mutilation. Victims had their "legs tied to doors"; others were "strung up naked to trees

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[1716] UN Security Council, *Report of the Secretary-General on children and armed conflict in Myanmar*, UN Doc. S/2018/956 (29 October 2018), para. 21. MG, Vol. III, Annex 42.

[1717] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 37. MG, Vol. IV, Annex 121.

[1718] Amnesty International, *"We Will Destroy Everything"* (2018), p. 89. MG, Vol. IV, Annex 112; MSF, *"No one was left"* (2018), p. 18. MG, Vol. IV, Annex 110.

[1719] Fiona MacGregor, "Rohingya girls under 10 raped while fleeing Myanmar, charity says", *The Guardian* (25 October 2017). MG, Vol. IX, Annex 271.

[1720] UN OHCHR, *Flash Report* (2017), p. 21. MG, Vol. II, Annex 30.

[1721] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 921. MG, Vol. II, Annex 40.

[1722] *Ibid.*

in the forested areas, either by their hands or their hair".[1723] Many were kicked, or severely beaten with "guns, sticks, wire and fists" on their heads, breasts, abdomens and on their vaginas.[1724] Many of the assaults were also perpetrated in public[1725] and/or in front of the victims' families to maximize their humiliation.[1726]

12.73 The UN Fact-Finding Mission reported that "[m]any victims were killed after being raped", with most having had their throats slit or being burned to death.[1727] Others died from massive blood loss from their genital area, or due to genital trauma.[1728]

12.74 The massive scale and sadistic nature of the sexual violence the Tatmadaw visited on Rohingya women is a powerful indicator that their actions were motivated by the intent to destroy the group in whole or in part. The physical and psychological harm that was intentionally inflicted on Rohingya women and girls, their families and their communities, were aimed at the very foundation of the group, and admit of no other purpose than bringing about its destruction.

12.75 The cruelty with which the Tatmadaw committed these acts of sexual violence also speaks powerfully to the intent to destroy. The evident

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[1723] *Ibid.*

[1724] *Ibid.*, para. 925; UN OHCHR, *Flash Report* (2017), p. 22. MG, Vol. II, Annex 30.

[1725] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 925. MG, Vol. II, Annex 40; UN OHCHR, *Flash Report* (2017), p. 22. MG, Vol. II, Annex 30.

[1726] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 37. MG, Vol. IV, Annex 121.

[1727] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 927. MG, Vol. II, Annex 40.

[1728] *Ibid.*

determination to make women suffer horribly, and the fact that many, including children and pregnant women, were tortured, mutilated and/or killed, testify to a seething animosity reflective of an intent to destroy the group as such.

12.76 The UN Fact-Finding Mission found that the sexual violence committed during the "clearance operations" continues to fracture Rohingya families and to "weaken the social cohesion of the Rohingya community".[1729] Because of the severe injuries and trauma sustained during their rapes, many victims are still unable to have sexual intercourse with their husbands. The UN Mission reported concern among Rohingya women that "their husband would leave them and that they would no longer be able to have children".[1730] Unmarried girls who had been subjected to sexual violence face barriers to marriage due to cultural stigmatization.[1731]

12.77 The brutal sexual violence that was deliberately inflicted on Rohingya women and girls during the Tatmadaw's "clearance operations" compels the conclusion that they were perpetrated with genocidal intent.

5. Organizational Planning as Evidence of Genocidal Intent

12.78 The UN Fact-Finding Mission determined that "[t]he organized nature of the Tatmadaw's attacks" on the Rohingya during the "clearance operations" evidenced Myanmar's genocidal intent.[1732] The Mission

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[1729] *Ibid.*, para. 941.

[1730] *Ibid.*, para. 934.

[1731] *Ibid.*, para. 937; Physicians for Human Rights, *Sexual Violence, Trauma, and Neglect: Observations of Healthcare Providers Treating Rohingya Survivors in Refugee Camps in Bangladesh* (October 2020), pp. 14-15. MG, Vol. V, Annex 133.

[1732] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 224. MG, Vol. III, Annex 49.

explained that this indicator refers to the "systematic nature" of the killings, the consistent *modus operandi* of weapons and methods employed by the perpetrators across the attacks and "the involvement of all levels of the Tatmadaw's chain of command".[1733] These facts collectively indicated "a level of planning and forethought" to the "clearance operations" that shows they were carried out with the intention to destroy the Rohingya as a group.[1734]

12.79 The UN Fact-Finding Mission's reliance on this indicator is consistent with the historical evidence that genocide occurs as the consequence of an organized plan of destruction of a targeted group. As Lemkin observed in *Axis Rule in Europe*, genocide is "intended" to "signify a coordinated plan of different actions aiming at the destruction of the essential foundations of the life of national groups".[1735] While not a legal element of the crime, the existence of a plan shows conscious deliberation and premeditation. It negates the possibility that the attacks were spontaneous, or that the resulting destruction was accidental. Accordingly, the existence of an organized plan has been confirmed by international tribunals as "an important factor in most cases" for establishing the specific intent to destroy the group.[1736]

[1733] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1429-1430. MG, Vol. II, Annex 40.

[1734] *Ibid.*, paras. 1431-1432.

[1735] Lemkin, *Axis Rule in Occupied Europe* (1944), p. 79. MG, Vol. VIII, Annex 208.

[1736] *Prosecutor v. Goran Jelišic*, IT-95-10-A, Appeals Judgment (5 July 2001), para. 48. *See also Prosecutor v. Krstić*, IT-98-33-A, Appeals Judgment (19 April 2004), para. 225; *Prosecutor v. Popović et al*, IT-05-88-T, Trial Judgment (10 June 2010), para. 830.

12.80 In the absence of an official record, the existence of a plan may be shown by circumstantial evidence.[1737] The fact that atrocities were perpetrated in a systematic and coordinated manner presupposes considerable organization and planning. In *Krstić*, for example, the ICTY found that the systematic killings of Bosnian Muslim military-aged men in Srebrenica indicated a plan to kill all such men, which in turn "constitutes an intent to destroy in part the Bosnian Muslim group".[1738]

12.81 In *Popović*, "a fundamental aspect of the Trial Chamber's conclusion that the murder operation [by the Serb Forces in Srebrenica] was undertaken with genocidal intent" was "the significant coordination with which the plan was carried out".[1739] Such coordination was evidenced by "the vast process [that] was put into place" for the massacre of men, and "a great deal of synchronization" in the large-scale separations, transportation, detention and killings that involved different military units and the expenditure of significant resources.[1740]

12.82 The existence of a plan of destruction can also be proved through evidence that the perpetrators employed a consistent ***modus operandi*** across multiple attacks. The *Popović* judgment highlighted how "certain aspects" of the "operation" were carried out in a "strikingly similar manner across various locations, by different individuals", and concluded that "the only

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[1737] *Prosecutor v. Goran Jelišic*, IT-95-10-A, Appeals Chamber Judgment (5 July 2001), para. 48.

[1738] *Prosecutor v. Krstić*, IT-98-33-T, Trial Judgment (2 August 2001), paras. 572, 598.

[1739] *Prosecutor v. Popović et al*, IT-05-88-T, Trial Judgment (10 June 2010), para. 882.

[1740] *Ibid.*, paras. 882-883.

reasonable inference to be drawn" was "the existence of a concerted agreement to destroy the Muslims of Eastern Bosnia".[1741]

12.83 Similarly, in *Kayishema*, the ICTR held that "the consistent [] pattern of killing is further evidence of the specific intent".[1742] It noted that across several crime sites the perpetrators surrounded and confined Tutsi refugees, denied them "food, medicine and sanitary facilities" and eventually massacred them.[1743] The Tribunal further observed that the same weapons and methods were used to kill the Tutsis; namely, grenades and guns to start the attack, and machetes to hack the victims to death.[1744] Such evidence enabled it to conclude that there was "beyond a reasonable doubt … the intent to destroy the Tutsi group in whole or in part".[1745]

12.84 Finally, the mobilization of military units to the scene of atrocities, the transportation of weapons and deployment of military vehicles, point to coordination at a high level of military command "to achieve a common purpose" that "must have been decided on previously".[1746] As both the Trial Chamber and the Appeal Chamber of the ICTY in *Tolimir* confirmed, "the implication of multiple levels of military command in a genocidal operation

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[1741] *Ibid.*, paras. 884, 886.

[1742] *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgment (21 May 1999), para. 535.

[1743] *Ibid.*, para. 535.

[1744] *Ibid.*, para. 537.

[1745] *Ibid.*, para. 540.

[1746] *See Prosecutor v. Popović et al*, IT-05-88-T, Judgment (10 June 2010), paras. 884-885.

can evidence the systematic nature of the culpable acts and an organized plan of destruction, which can be relied upon to infer genocidal intent".[1747]

12.85 The evidence presented in Chapter 10 establishes incontrovertibly that the "clearance operations" were carried out in a highly organized manner pursuant to a coordinated military plan. The Tatmadaw operate under a rigid and tightly controlled command structure that is entirely removed from civilian oversight. Operations are directed from above by the supreme military commander, the Commander-in-Chief, and obedience is strictly enforced. This was the structure within which the "clearance operations" were conducted. According to the UN Fact-Finding Mission: "[T]he Commander-in-Chief led the Tatmadaw General Staff" which, in turn, was "responsible for formulating the objectives and limits of military operations, the role and composition of the forces involved, the rules of engagement, and the necessary logistics".[1748]

12.86 The evidence detailed in Chapter 10 showed that the "clearance operations" were carefully planned well in advance: troops and equipment were moved into place, ethnic Rakhine militias were armed, and aid organizations and other external observers who might bear witness were expelled. In the prelude to the "clearance operations", the Tatmadaw took steps to render the Rohingya more vulnerable to the coming attacks by detaining and killing Rohingya leaders; seizing their tools and other household items that might be used for self-defence; ordering the removal of fences around homes; imposing strict curfews; and limiting the supply of food and other necessities. All of these elements, the UN Fact-Finding

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[1747] *Prosecutor v. Tolimir*, IT-05-88/2-A, Judgment (8 April 2015), para. 252.

[1748] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1533. MG, Vol. II, Annex 40.

Mission concluded, "suggest a level of pre-planning and preparation to the operations".[1749]

12.87 The organized nature of the "clearance operations" is further highlighted by the fact that the Tatmadaw carried them out by strikingly similar means across hundreds of Rohingya villages throughout northern Rakhine state. The common *modus operandi* was for Tatmadaw soldiers to encircle Rohingya villages, often in the early hours when villagers were still asleep,[1750] and then converge on them in "jeeps and trucks" or "on foot from nearby military camps".[1751] They "typically came from different directions", surrounding the villages.[1752] Once in the villages, the Tatmadaw separated the men and boys from the women and girls.[1753] The men and boys were killed in mass executions. The women and girls were raped, gang raped and sexually mutilated. Few were spared.[1754] The Tatmadaw shot those trying to escape and killed those left behind, including the wounded, elderly and infirm.[1755] The entire village was then methodically burned, often with people still inside buildings.[1756]

12.88 The Tatmadaw took great care to target only Rohingya villages. Neighbouring non-Rohingya villages were left in peace, entirely

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[1749] *Ibid.*, para. 1430.

[1750] *Ibid.*, paras. 761, 801, 820, 846, 858, 866, 1077, 1085.

[1751] PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya* (2018), p. 29. MG, Vol. IV, Annex 121.

[1752] *Ibid.*

[1753] *See supra* Chapter 10, Section III.

[1754] *See supra* Chapter 10, Section III.

[1755] *See supra* Chapter 10, Section III.

[1756] *See supra* Chapter 10, Section III.

untouched. The pattern was repeated all across Rakhine State. Different military units, separated by considerable distances, employed the same tactics.

12.89 The UN Fact-Finding Mission concluded that there was

> "remarkable similarity in the timing of the operations, the sequence of events, the types of weapons used, the assistance received from other security forces or ethnic Rakhine, the coordination and division of roles between perpetrators, the types of violations and the manner in which they were committed. The *modus operandi* of these attacks was recognisable and consistent throughout. *This could not have occurred in the absence of significant levels of forethought and organization."*[1757]

12.90 The meticulously organized manner in which the Tatmadaw conducted the "clearance operations" thus constitutes compelling evidence of Myanmar's intent to destroy the Rohingya group. Genocide is rarely spontaneous. More typically, it is the result of a considered plan of destruction. Organization and planning show deliberation on a central goal, and reflection on the means to achieve it. By definition, it is inconsistent with happenstance or inadvertence.

12.91 The fact that Myanmar's "clearance operations" were preceded by steps to lay the groundwork indicates preplanning. The mobilization of military units, the transport of heavy vehicles and weapons and the expulsion of foreign observers all point to coordination at the highest levels

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[1757] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1429 (emphasis added). MG, Vol. II, Annex 40.

of the Tatmadaw hierarchy to achieve a pre-determined purpose. The evidence fully establishes that this purpose was to destroy the Rohingya as a group.

6. Impunity as Evidence of Genocidal Intent

12.92 The UN Fact-Finding Mission also inferred Myanmar's genocidal intent to destroy the Rohingya as group from "the State's failure to investigate and prosecute gross violations of international human rights law and serious violations of international humanitarian law, both as they were occurring and after they occurred".[1758] The Mission emphasized that given "the official narrative of denying any violations against the Rohingya, the near-total impunity for the instigators and perpetrators of grave crimes against the Rohingya, and the lack of condemnation of violence against the Rohingya, it is difficult to view such statements as anything other than an official approval of discrimination and extreme violence against this group".[1759] The Mission further observed that the Tatmadaw leadership "has reinforced its message to troops that they will face no consequences" and that "[t]his explains the recurrence of such violations across the country, and over such an extensive timeframe."[1760] The UN Fact-Finding Mission determined that "there is no reasonable conclusion to draw, other

[1758] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 224. MG, Vol. III, Annex 49.

[1759] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1423. MG, Vol. II, Annex 40 *citing Prosecutor v. Karemera and Ngirumpatse*, Trial Judgment and Sentence, ICTR-98-44-T (2 February 2012), para. 1597.

[1760] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1384. MG, Vol. II, Annex 40.

than the inference of genocidal intent, from the State's pattern of conduct".[1761]

12.93 A State's failure to investigate and punish genocidal acts can give rise to the inference of genocidal intent. In *Akayesu*, the ICTR Trial Chamber found evidence of genocidal intent in the failure "to take the necessary or reasonable measures to prevent such acts or punish the perpetrators thereof".[1762] Likewise, in *Karemera*, the ICTR held that "[b]y not condemning, or even addressing, the recent massacre of more than 2,000 Tutsi civilians, which had taken place in the vicinity of the meeting venue, the speakers condoned the killings and instigated and incited the population to continue killing Tutsis."[1763]

12.94 The destruction or concealment of evidence, in order to prevent or frustrate accountability, can also establish genocidal intent. The ICTY held in *Krstić* that:

> "there is a strong indication of the intent to destroy the group as such in the concealment of the bodies in mass graves, which were later dug up, the bodies mutilated and reburied in other mass graves located in even more remote areas, thereby preventing any decent burial in accord with religious and ethnic customs and causing terrible distress to the mourning survivors, many of whom

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[1761] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 225. MG, Vol. III, Annex 49.

[1762] *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998), para. 479 ("if he or she knew that the subordinate was about to commit such acts or had done so").

[1763] *Prosecutor v. Karemera and Ngirumpatse*, Trial Judgment and Sentence, ICTR-98-44-T (2 February 2012), para. 1597.

> have been unable to come to a closure until the death of their men is finally verified".[1764]

12.95 As detailed in Chapter 11, Myanmar has adopted a deliberate policy of impunity for the perpetrators of genocidal acts against the Rohingya. This policy manifests itself in Myanmar's refusal to investigate, let alone prosecute, the military commanders who planned, ordered and supervised the "clearance operations", six of whom were accused of genocide in the 2018 Report of the UN Fact-Finding Mission. Indeed, far from investigating or prosecuting those who ordered or committed acts of genocide, or taking any other action that would signal its disapproval of those crimes, Myanmar has done the opposite: it has launched multiple sham investigative commissions, every one of which has cleared the Tatmadaw, its officers and its enlisted personnel of wrongdoing.

12.96 Notwithstanding the multiple international reports, including from the UN, that all point to the commission of massive crimes in the conduct of Myanmar's "clearance operations", Myanmar has failed to take any serious action. Instead of investigating, condemning and punishing the perpetrators of these genocidal acts, Myanmar's authorities have, in the words of the UN Fact-Finding Mission, "categorically denied violations, created legal obstacles to accountability, destroyed evidence of crimes and actively nurtured and perpetuated a climate of impunity that has emboldened perpetrators".[1765]

12.97 To date, Myanmar has conducted only two prosecutions. The first (for the massacre at Inn Din, described in Chapter 11, at paragraphs 11.17-

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[1764] *Prosecutor v. Krstić*, IT-98-33-T, Trial Chamber Judgment (2 August 2001), para. 596.

[1765] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1620. MG, Vol. II, Annex 40.

11.18) took place only in response to international pressure in the wake of Reuter's publication of photographic evidence of the mass killing of Rohingya civilians. Upon learning of the Reuters news article, the Tatmadaw's first reaction was to arrest, prosecute and incarcerate the journalists who reported on the events, not the soldiers who were responsible for them. Only later did the military announce that a court martial had found that "ten Muslim men had been summarily executed in Inn Din village" and "sentenced four officers and three soldiers each to ten years in prison with hard labour".[1766] Only seven months later, however, the Tatmadaw Commander-in-Chief pardoned all seven and they were released.[1767]

12.98 The second, and only other, prosecution was a court martial for the mass killing of Rohingya in the village of Gu Dar Pyin. Conspicuously, this court martial was initiated on 26 November 2019—18 days after The Gambia filed its *Application* instituting these proceedings, and shortly before the oral hearings on its *Request for Provisional Measures*. The timing speaks for itself. Even though this was plainly intended as a show-trial, very little information about it is available. On 30 June 2020, the Tatmadaw announced, without detail, that it had punished two officers and a soldier for "weakness in following the instructions" during the "Gu Dar Pyin incident".[1768] It did not disclose the names and ranks of those who

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[1766] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures*, Verbatim Record CR2019/19 of Public Sitting held on 11 December 2019, para. 20 (Aung San Suu Kyi).

[1767] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 232. MG, Vol. III, Annex 49.

[1768] Human Rights Watch, *Myanmar: Court Martial Latest Accountability Sham* (3 July 2020). MG, Vol. V, Annex 132.

were allegedly convicted, their role in the massacre at Gu Dar Pyin, the charges against them, or their sentences.[1769]

12.99 Beyond its failure to investigate the crimes committed by the Tatmadaw against the Rohingya, Myanmar actively tried to cover them up. Specifically, and among other things, Myanmar destroyed, buried and disposed of the remains of many of the Rohingya victims.[1770] Witnesses described seeing security forces burning bodies in boats, houses and pits at sites throughout Rakhine State.[1771] Witnesses also saw the Tatmadaw carrying bodies away in military vehicles.[1772] In still other locations, the security forces buried bodies in mass graves, or threw them into wells, rivers, ponds and paddy fields.[1773] According to the UN Fact-Finding Mission, "[t]he information points to a concerted effort by the Tatmadaw to dispose of Rohingya corpses following the 'clearance operations' in villages."[1774]

12.100 Myanmar has also destroyed evidence of the genocidal acts committed against the Rohingya by, as the UN Fact-Finding Mission determined, overseeing "the bulldozing of burned Rohingya villages and the destruction of crime sites and evidence".[1775]

[1769] *Ibid.*

[1770] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), paras. 1000-1003. MG, Vol. II, Annex 40.

[1771] *Ibid.*, para. 1000.

[1772] *Ibid.*, para. 1003.

[1773] *Ibid.*, para. 1001.

[1774] *Ibid.*, para. 1002.

[1775] *Ibid.*, para. 1548.

12.101 Rather than conduct genuine investigations in a good faith effort to ascertain the facts, and hold the perpetrators accountable, Myanmar instead established a series of sham commissions and enquiries the real purpose of which was to support the Government's narrative that nothing improper had happened. Its most recent such exercise—the so-called "Independent Commission of Enquiry"—failed to identify even a single crime committed by the Tatmadaw. Its Chair explained there will be no "seeking of accountability" or "blaming of anybody" because "we don't achieve anything by that procedure".[1776]

12.102 The UN Fact-Finding Mission concluded that Myanmar's refusal to hold the Tatmadaw accountable for genocidal acts against the Rohingya "has reinforced its message to troops that they will face no consequences". Its Report stated:

> "This explains the recurrence of such violations across the country, and over such an extensive timeframe. The leadership refuses to accept responsibility itself. If, as the Tatmadaw Inspector-General found, 'all security members abided by the orders and directions of superior bodies', then those 'superior bodies', right up to the Commander-in-Chief, are responsible for the gravest crimes under international law and should be held accountable."[1777]

12.103 The wholesale impunity enjoyed by the perpetrators of the Rohingya genocide powerfully evidences Myanmar's genocidal intent. As the UN High Commissioner for Human Rights has stated: "Impunity is an

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[1776] *Ibid.*, para. 1619.

[1777] *Ibid.*, para. 1384.

enabler of genocide: accountability is its nemesis".[1778] The evidence shows irrefutably that Myanmar chose to be an enabler of the genocide that was carried out against the Rohingya people. Its wholesale failure to take action against the perpetrators of genocidal acts that were committed against them cannot reasonably be understood as anything other than compelling evidence of its genocidal intent.

C. THE ONLY REASONABLE INFERENCE THAT CAN BE DRAWN

12.104 The only inference that can reasonably be drawn from the facts set out in Chapters 5 through 11, and summarized above, is that Myanmar acted with the intention to destroy, in whole or in part, the Rohingya group as such. Based on the voluminous evidence it gathered and studiously analysed, this was the conclusion reached by the UN Fact-finding Mission. In its 2019 Report, it determined, based on its extensive investigation, that all of the indicators of genocidal intent were present:

> "Every one of these indicators is linked to the acts or omissions of Myanmar State organs, including the military, other security forces, ministries, legislative bodies, the UEHRD and other civilian institutions. Collectively they demonstrate a pattern of conduct that infers genocidal intent on the part of the State to destroy the Rohingya, in whole or in part, as a group. For reasons explained in its 2018 report, *there is no reasonable conclusion to draw, other than the inference of genocidal*

[1778] UN Human Rights Council, *Statement by UN High Commissioner for Human Rights, Michelle Bachelet* (December 2018). MG, Vol. III, Annex 71.

> *intent, from the State's pattern of conduct."*[1779]

12.105 As indicated in the quoted language, the Mission had reached the same conclusion a year earlier, in its 2018 report. The difference was that the evidence of Myanmar's genocidal intent was *even stronger* in 2019 than it had been in 2018:

> "The Mission's second phase of investigation provided further evidence that strengthens the inference of genocidal intent identified in its report in September 2018. The Mission has also concluded on reasonable grounds that there is sufficient evidence for it to infer that the State continues to harbor genocidal intent. This is evident in the Government's acts and omissions that maintain a system of persecution and other discriminatory treatment against the Rohingya, depriving them of their fundamental rights so that they live in deplorable and inhumane conditions … All of these measures embody the discriminatory rationale for the underlying acts of genocide and all of them remain present in Myanmar at the time of writing. The Government is able but unwilling to bring them to an end. *This strengthens the inference of genocidal intent in the past and provides the basis for an inference that the State continues to harbor genocidal intent."*[1780]

12.106 During the oral proceedings on provisional measures in December 2019, Myanmar's Agent argued that the intent to commit genocide was not

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[1779] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 225 (emphasis added). MG, Vol. III, Annex 49.

[1780] *Ibid.*, para. 238.

the only reasonable inference that could be drawn from the facts, stating: "Surely, under the circumstances, genocidal intent cannot be the only hypothesis."[1781] The alternate hypothesis that she offered was that the "clearance operations" were counter-insurgency measures carried out in the context of "an internal armed conflict between ARSA [the "Arakan Rohingya Salvation Army"] and Myanmar's Defence Services".[1782]

12.107 This is the only other "inference" Myanmar attempted to put forward at the hearings. But, even taken at face value, *quod non*, it is not in any way inconsistent with the conclusion reached by the UN Fact-Finding Mission that the only reasonable conclusion to be drawn from Myanmar's actions against the Rohingya is that they were carried out with genocidal intent. The fact that Rohingya civilians—including infants, children, the aged and infirm and women and girls—were massively and mercilessly slaughtered and raped by the Tatmadaw during an armed conflict with an insurgent group *reinforces* the inference that these actions were carried out with genocidal intent. History teaches that when genocide is committed it is more often than not in the midst of an armed conflict, and against members of an ethnic or religious group that is considered alien or hostile to the perpetrators.

12.108 This was the situation in the most notorious recent cases of genocide, for example. In particular, the genocide that the Court found to have been committed against Bosnian Muslims at Srebrenica occurred during military operations conducted by irregular Serb forces in the Balkan

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[1781] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures*, Verbatim Record CR2019/19 of Public Sitting held on 11 December 2019, para. 16 (Aung San Suu Kyi).

[1782] *Ibid.*, para. 6.

war that followed Yugoslavia's disintegration in the 1990s. The genocide against Rwandan Tutsis in 1994 was carried out by Hutu militias (the "*Interahamwe*") and State security forces, at a time when the Rwandan Patriotic Front, a Tutsi-dominated insurgent group, was engaged in a major military offensive against the government. And the genocide against the Yazidis in northern Iraq, in 2014, was carried out by the so-called Islamic State during its military assault on Iraq and Syria.

12.109 Although genocide almost always occurs in the context of an armed conflict, not every armed conflict, nor every counter-insurgency operation, results in genocide. This depends on the specific actions of the alleged perpetrators and on their intentions in carrying them out. Myanmar's Agent made no effort to deny or refute the evidence compiled by the UN Fact-Finding Mission, or other reliable observers, in regard to the horrendous acts that the Tatmadaw carried out against the Rohingya during the "clearance operations" of 2016-2018. To the contrary, even as she tried to minimize the significance of the mass killings and rapes of unarmed civilians, she admitted that "it cannot be ruled out that disproportionate force was used by members of the Defence Services in some cases in disregard of international humanitarian law, or that they did not distinguish clearly enough between ARSA fighters and civilians".[1783]

12.110 What the Agent failed to explain was why the Tatmadaw "did not distinguish clearly enough between ARSA fighters and civilians". This was because, in fact—as the overwhelming body of evidence shows—they had no intention of drawing any such distinction. That was not their purpose in carrying out these operations. To the contrary, as revealed by the careful

[1783] *Ibid.*, para. 15.

organization and planning that preceded them, the extreme brutality with which they were carried out, the pervasive and barbaric sexual violence that was perpetrated, the hate-filled utterances of senior commanders and soldiers alike, and the absolute impunity afforded to all concerned, the purpose of the "clearance operations" was nothing other than the destruction of a despised racial and religious group considered alien to Myanmar and inimical to the racial and religious purity the State was determined to achieve by eliminating them from its midst.

12.111 It does not take an expert on counter-insurgency operations to reach this conclusion. The nature and extent of the violence deliberately wrought on the Rohingya during the "clearance operations" negate any reasonable inference that the attacks on them had a legitimate military purpose, or were aimed only or even primarily at armed insurgents, or that the victims were mere "collateral damage" in a civil conflict, or that the merciless destruction of the Rohingya, their homes and their villages was an unintended or an unauthorized consequence of undisciplined soldiers acting outside the control of their senior officers. Informed and unbiased observers, like the UN Fact-Finding Mission, have concluded that none of these excuses are plausible, and that the only reasonable explanation for Myanmar's conduct is a conscious and deliberate intention to destroy the Rohingya as a group.

12.112 An examination from a military perspective of what the Tatmadaw did during the "clearance operations" clearly rules out any inference other than an intent to destroy the Rohingya as a group. The UN Fact-Finding Mission concluded that although the "clearance operations" were "[o]stensibly to eliminate the 'terrorist threat' posed by ARSA", in reality "[t]he operations targeted and terrorised the entire Rohingya

population".[1784] In particular, the Mission determined that the "Tatmadaw's operations against the Rohingya" were:

> "marked by an equation between an entire civilian population, the Rohingya, and the non-State armed actor that was the perceived or stated threat. On the ground, this has facilitated a campaign of mass destruction. The horrific patterns described in this report make clear that no distinction whatsoever was made between civilians and civilian objects, on the one hand, and fighters and military objectives, on the other. Men, women and children were killed and subjected to unimaginable abuse. Entire villages were wiped off the map. The operations and use of force was not targeted at eliminating a specific and limited security threat posed by ARSA; they were targeted at eliminating ARSA's support base, if not the group the Rohingya, itself."[1785]

12.113 Military doctrine, especially counter-insurgency doctrine, confirms these findings: that the "clearance operations", as carried out by the Tatmadaw in Rakhine State, were not aimed at any insurgent group or groups, but at the civilian population, who were the actual targets of the operations. The Report of Professor Michael Newton, a military officer, law professor and distinguished expert on Counter-Insurgency and the Laws of War, who advises NATO and various national defence services on counter-insurgency strategy and tactics,[1786] is attached to this Memorial as Annex

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[1784] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 751. MG, Vol. II, Annex 40.

[1785] UN Fact-Finding Mission, *Report of the Detailed Findings* (2018), para. 1364. MG, Vol. II, Annex 40.

[1786] Professor Newton is Professor of the Practice of Law at Vanderbilt University Law School, Nashville, Tennessee, as well as Professor of the Practice of Political Science. He

359. Professor Newton reviewed the evidence gathered and analysed by the UN Fact-Finding Mission and reached the same conclusions: (1) the "clearance operations" were planned in advance at the highest levels of the military hierarchy, and carried out in conformity with orders passed down through the chain of command; (2) the manner in which they were executed demonstrates that their purpose was not counter-insurgency, because they violated the most fundamental principles and practices of counter-insurgency operations; and (3) the only reasonable conclusion that can be drawn from the evidence is that the "clearance operations" were aimed at the Rohingya population as a whole, and that their purpose was to destroy it.

12.114 Professor Newton begins his Report by describing what authentic counterinsurgency operations are, and what they are not:

> "Authentic counterinsurgency (COIN) seeks to counter the presence of insurgents within a given population. COIN operations thus have only one purpose: to end an insurgency.

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teaches courses on terrorism, international criminal law, human rights, law of armed conflict and diplomacy. Prior to Vanderbilt, he taught International Law in the Law Department of the United States Military Academy at West Point and the U.S. Army Legal Center and School, Charlottesville, Virginia. For more than 25 years, his academic focus has been on international humanitarian law, international human rights law, the legal regime related to terrorism, transitional justice mechanisms and the larger field of atrocity law. He has specialized, in particular, on the application of international law, including international criminal law, to armed conflict, both international and domestic. Professor Newton served in the United States Army from 1984 until his retirement in 2005, having held the rank of Lieutenant Colonel at the time of his retirement. During his active duty military service, he was deployed on multiple multinational operations and supported numerous combined training exercises and provided legal advice to commanders and policymakers at all levels of operations, including senior political officials. He has also provided expert advice upon request from governments and non-governmental organizations on counter-terrorism and the application of international criminal law. He has published more than 90 articles, books, and case comments on international criminal law, international humanitarian law and counter-terrorism.

> To accomplish this purpose, COIN requires comprehensive efforts to reassert the sovereign authority of the state, with the overall objective of establishing stable and secure peace that protects the civilian population. The conception of an enemy/adversary must therefore be strictly constrained by reference to the subset of the overall population who are armed insurgents. This means that, by definition, COIN applies state power against the insurgency rather than the entire civilian population. This tenet of counterinsurgency is the logical corollary to the mandate drawn from the law of armed conflict that prohibits all "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population." Regardless of the scope or nature of particular armed conflicts, the civilian population *per se* cannot constitute a lawful military target of COIN. The overarching objective of disaggregating the enemy from innocent civilians necessarily constrains such operations. Indiscriminate attacks directed at entire segments of a civilian population are thus entirely incompatible with COIN, and warrant the inference that the objective is not to defeat an insurgency, but to punish or destroy the civilian population."[1787]

12.115 Because the "overriding objective" in defeating an insurgency is "bolstering or restoring governmental legitimacy":

> "Securing the population, rather than regarding it as a monolithic enemy entity, is the first tactical goal at the outset of COIN. The welfare of the civilian population is the

[1787] Expert Report of Professor Michael A. Newton (October 2020), pp. 3-4. MG, Vol. XI, Annex 359.

> center of gravity for COIN planning. Counterinsurgency thus relies upon using 'every opportunity to help the local populace and meet its needs and expectations. Projects to improve economic, social, cultural, and medical needs can begin immediately. Actions speak louder than words.' Assistance towards the civilian population and coordination with local governance structures represent the *sina qua non* of genuine effort. …
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> By contrast, operations that are not designed to protect the civilian population and restore respect for the government undermine the fundamental objectives of COIN."[1788]

12.116 For these reasons, Professor Newton explains: "indiscriminate use of force against the civilian population is inconceivable as COIN strategy".[1789] To the contrary: "Any military operations that included indiscriminate killing of civilians, raping of women, burning of homes and destruction of villages would be the polar opposite of authentic COIN."[1790] Such operations would be even further removed from authentic COIN if the attacks on the civilian populations were intentional: "Deliberate efforts to destroy the well-being of the entire civilian population bear zero resemblance to COIN doctrine."[1791]

[1788] *Ibid.*, pp. 6-7, quoting US Department of the Army, 'Counterinsurgency' (2006) US Army Field Manual No. 3-24, Marine Corps Warfighting Publication No. 3-33.5, para. 5.75. MG, Vol. VII, Annex 190.

[1789] *Ibid.*, p. 9.

[1790] *Ibid.*

[1791] *Ibid.*

12.117 The Tatmadaw's "clearance operations", however, "demonstrated none of the normal characteristics or indicia associated with counterinsurgency".[1792] Based on the reports of the UN Fact-Finding Mission, Professor Newton concludes:

> "Neither the operational nor the tactical aspects of these "clearance operations" demonstrates the accepted principles or planning criteria for military efforts focused on countering insurgents or responding to terrorist threats. To the contrary, Tatmadaw commanders and soldiers treated all Rohingya civilians as enemy forces subject to indiscriminate lethal force."[1793]

12.118 Given the nature of military operations, the Tatmadaw's use of force against the civilian Rohingya population could only have been planned in advance at the highest levels of command authority:

> "Military operations of the armed forces of sovereign States, including counterinsurgency operations, are, by definition, highly planned and tightly controlled. Such operations are premised on an overarching objective that is framed as a mission statement to senior commanders. In every modern military, staff planners take such mission statements and separate them into detailed lists of specified and implied tasks. Rules of Engagement and tactical orders flow from this complex staff planning process. Logistics flow to the necessary areas and units are moved in a choreography of operational integration. Reinforcements are positioned and equipment replaced or

[1792] *Ibid.*, p. 12.

[1793] *Ibid.*

> upgraded as necessitated by the requirements of the specified and implied tasks. In this deliberate planning process, the intentions of the force become plain."[1794]

12.119 Viewed in this context:

> "the coordinated nature of the Tatmadaw's attacks against the civilian population employed strikingly similar tactics across a broad expanse of territory. The 'clearance operations' were planned and executed based on explicit command guidance and pursuant to orders. They were the primary, if not exclusive, avenue of effort rather than a necessary adjunct to an overarching political strategy. Tatmadaw operations were not random acts of spontaneous and uncoordinated violence conducted by renegade commanders of undisciplined outliers. Among numerous other telltale signs of the operational intent, Tatmadaw commanders provided no grid coordinates to secured safe zones. Instead, they permitted soldiers to kill escaping Rohingya without any countermanding orders. Noncombatants, especially women and children, are entitled to affirmative protections from the effects of hostilities under both international humanitarian law and human rights law. Tatmadaw commanders provided no protection for civilians desperate to avoid the deadly effects of the 'clearance operations,' nor did they provide food, baby formula, shelter, water, or any other relief to fleeing civilians. There is no conceivable basis under COIN doctrine for such deliberate targeting

[1794] *Ibid.*, p. 13.

directed against the civilian population."[1795]

12.120 Professor Newton concludes:

> "Any argument that the Tatmadaw's 'clearance operations' against the Rohingya represented authentic or appropriate counterinsurgency is not credible. The 'clearance operations' violated a wide variety of legal and moral constraints. There is no conceivable basis for such operations under modern military doctrine or developed state practice. The attacks were intentionally directed against the civilian population. They were juxtaposed against decades of oppression and human rights violations directed against the Rohingya on the basis of their ethnic and religious identity. The only plausible conclusion from the available evidence is that the 'clearance operations' were conceived, coordinated, and conducted with the intention of destroying the Rohingya population on the basis of their ethnic and religious identity."[1796]

12.121 It follows that the alternative "hypothesis" proposed by Myanmar's Agent—that the "clearance operations" were standard counter-insurgency exercises with a few unfortunate excesses—is entirely unsupportable. There is no evidence on which it can be reasonably defended. The Agent herself is a civilian leader who claims no military or counter-insurgency experience or expertise. Her characterization of the "clearance operations" as "counter-insurgency" measures can only be based on information provided to her by the senior Tatmadaw officers who are her colleagues in

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[1795] *Ibid.*

[1796] *Ibid.*, p. 15.

government. These are the same military officers, including the Commander-in-Chief, Senior-General Aung Min Hlaing, who, she acknowledged, operate entirely outside the civilian justice system and are accountable, if at all, only to military courts which they, as senior officers, completely control. They also include the same senior officers who have been accused of genocide by the United Nations Fact-Finding Mission.

12.122 It is unsurprising that these Tatmadaw commanders would deny to the Agent that the "clearance operations" were for the purpose of committing genocide against the Rohingya. Senior-General Hlaing, in his public statements, has refused to acknowledge that any non-combatants were killed, and has explained the desperate flight of many thousands of Rohingya to Bangladesh as an entirely voluntary departure. He wrote on his Facebook page in October 2017, while the "clearance operations" were still in progress, that it was an "exaggeration to say that the number of Bengalis fleeing to Bangladesh is very large".[1797] He referred to this as mere "instigation and propaganda" by the media.[1798] The real reason for the exodus, he said, was that: "The native place of Bengalis is really Bengal … They might have fled to the other country with the same language, race and culture as theirs by assuming that they would be safer there".[1799] General Hlaing repeated this false narrative the following month, in a November 2017 meeting with the Secretary of State of the United States, describing the "Bengalis" who fled to Bangladesh as "family" of the ARSA insurgents,

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[1797] AFP, "Min Aung Hlaing says Rakhine refugee exodus 'exaggerated'", *Frontier* (12 October 2017). MG, Vol. IX, Annex 269.

[1798] *Ibid.*

[1799] *Ibid.*

explaining that this was why "the number of people who fled had become large":

> "ARSA extremist Bengali terrorists were not successful in attacking the security outposts, and they fled to Bangladesh for fear of the retribution of the security troops. As the terrorist took their families together with them, the number of people who fled had become large."[1800]

12.123 Senior-General Hlaing's self-serving version of events, and his attempt to depict the "clearance operations" as legitimate counter-insurgency measures, are completely contradicted by the evidence in this case.

12.124 A different hypothesis was offered at the oral proceedings on provisional measures by Myanmar's counsel. After agreeing that the indicators of genocidal intent relied upon by the UN Fact-Finding Mission were rooted in international law (and claiming credit for helping to establish them as the correct indicators),[1801] he proceeded to dismiss the significance of the irrefutable evidence (which, indeed, he did not attempt to refute) that shows each and every one of these indicators is abundantly present in this case.[1802] Counsel for Myanmar contended, instead, that these indicators can be found *almost everywhere*, in many different countries, such that it would

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[1800] US Department of State, *Atrocities in Northern Rakhine* (2018), p. 9. MG, Vol. VII, Annex 194.

[1801] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures*, Verbatim Record CR2019/21 of Public Sitting held on 12 December 2019, para. 5 (Schabas).

[1802] *Ibid.*, paras. 6-7.

be unfair to hold Myanmar accountable for the fact that they are present here:

- "The indicators that were cited begin with 'extreme brutality'. We can well imagine how many countries will generate evidence of extreme brutality."[1803]

- "The second was the organized nature of the activities or of the acts. Again, this is present in many situations."[1804]

- "The third is sexual violence a phenomenon that regrettably occurs in many parts of the world and that we all condemn unequivocally."[1805]

- "The fourth, hate speech … Mr. President, Members of the Court, hate speech is a phenomenon that is not reserved to Myanmar." [1806]

- "The fifth of them is discriminatory policies about citizenship and residency. … But again, the existence of discriminatory plans and policies dealing with citizenship and mobility and entry to the country is hardly the monopoly of Myanmar in our modern world."[1807]

- "And finally, the failure to prosecute. … [T]his too is a problem that we confront in many parts of the world".[1808]

12.125 In other words, it was Myanmar's argument that its genocidal intent cannot be reasonably inferred from the fact that each and every one of the generally accepted indicators of genocidal intent has been proven to be present in this case. Instead, the evidence, and the indicators themselves,

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[1803] *Ibid.*, para. 7.

[1804] *Ibid.*

[1805] *Ibid.*

[1806] *Ibid.*

[1807] *Ibid.*, para. 11.

[1808] *Ibid.*, para. 13.

should be disregarded. Why? According to counsel: "because everybody does it", or, at least "almost everybody". Even if that were true, which it is not, it would not be an acceptable defence against a claim of genocide. Yet, that was the defence that was given at the oral proceedings in December 2019.

12.126 Tellingly, Myanmar did not propose how genocidal intent could *ever* be established if all of the indicators, despite being present in a particular case, can be *disregarded*. Counsel did not offer any other inferences that could be drawn from Myanmar's conduct, reasonable or otherwise, apart from genocidal intent. He simply called upon the Court to conclude that the recognized indicators of genocidal intent could not be relied upon to infer its existence here.

12.127 The Gambia disagrees. The relevant question is not whether acts of extreme brutality and sexual violence do or do not happen in other countries, or whether government officials in other States engage in, or tolerate, hate speech, or whether those responsible for international crimes in other States are shielded from individual criminal responsibility by their governments. What matters is the presence, scale and intensity of the evidence concerning these recognized indicators of genocidal intent in the particular case under examination. The evidence is abundant and irrefutable that, in Myanmar, all of these phenomena were present at once, on a massive scale, with extreme intensity, in the context of a years-long government-orchestrated campaign to persecute, marginalize, demonize and dehumanize the Rohingya, cast them as an enemy of majority racial and religious groups and incite those groups to violence against them. Accordingly, viewed collectively, in the particular circumstances of this case, each of the indicators the UN Fact-Finding Mission relied upon

points—and all of them together point—in the same direction to the only possible conclusion: Myanmar conducted the "clearance operations" with the intent to destroy the Rohingya as a group, in whole or in part. There is, quite simply, no other reasonable explanation for what occurred.

II. Myanmar's Other Violations of the Genocide Convention

12.128 For the reasons set out in the immediately preceding section, Myanmar is internationally responsible for the commission of genocide. It is, accordingly, unnecessary for the Court to make further determinations as to Myanmar's responsibility for the other punishable acts provided for in Article III of the Genocide Convention: conspiracy to commit genocide, direct and public incitement to genocide, attempt to commit genocide, and complicity in genocide. As the Court has held, where the requirements for finding a State responsible for committing genocide are fulfilled, there is "little point" in "making a judicial finding that they are also satisfied" for conspiracy to commit, and for direct and public incitement to commit genocide, and the "idea of holding the same State responsible" for not only committing genocide, but also attempting to commit and complicity in genocide, in relation to the same actions, would be "untenable both logically and legally".[1809] Nonetheless, for the sake of completeness, this Section shows that the requirements for finding Myanmar responsible for these additional punishable acts under the Genocide Convention are satisfied here. This Section also shows that Myanmar is responsible for failing to prevent genocide and failing to punish genocide.

[1809] *Bosnia v. Serbia*, Judgment (2007), p. 220, para. 380.

A. CONSPIRACY TO COMMIT GENOCIDE

12.129 A State is responsible for conspiracy to commit genocide under Article III(b) of the Convention when organs of the State enter into an agreement to commit the crime of genocide.[1810] Here, the existence of such an agreement can be inferred from the highly coordinated nature of the "clearance operations", which necessarily required agreement amongst the organizers. That agreement was entered into by, *inter alia*, senior commanders of the Tatmadaw's officer corps, including: the Commander-in-Chief of the Tatmadaw, Senior-General Min Aung Hlaing; members of the Tatmadaw's General Staff, including the Deputy Commander-in-Chief and Commander-in-Chief of the Army, Vice Senior-General Soe Win; and the commanders of the Tatmadaw units in the field that carried out the "clearance operations", including the commander of Bureau of Special Operations-3, Lieutenant-General Aung Kyaw Zaw; the commander of the Western Regional Military Command, Major-General Maung Maung Soe; and the commanders of the 33rd and 99th Light Infantry Battalions, Brigadier-General Aung Aung and Brigadier-General Than Oo, respectively. As set out in Chapter 10, the UN Fact-Finding Mission recommended that each of these individuals be investigated and prosecuted for genocide.

B. DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE

12.130 A State is responsible for direct and public incitement to commit genocide under Article III(c) of the Genocide Convention when a State organ speaks, publishes or displays in a public space words that provoke

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[1810] *Prosecutor v. Afred Musema*, ICTR-96-13-A, Trial Judgment and Sentence (27 January 2000), para. 191.

genocide, having regard to the audience and context in which the words are spoken, published or displayed. As detailed in Chapters 6 and 7, senior officers of the Tatmadaw and the civilian government openly and explicitly exhorted the military and others in Rakhine State to commit genocide against the Rohingya by, *inter alia*, decrying the Rohingya as foreign interlopers whose very existence and alleged out-of-control birth-rate threaten the purity and viability of Rakhine State's Buddhist majority and by calling for this "Bengali problem" to be finally "solved" through the "clearance operations".

12.131 In the context of incessant and longstanding vilification of the Rohingya as demonic, sub-human foreigners, by both the Myanmar Government and influential Buddhist monks, there could be no mistaking the genocidal appeal being made. Indeed, Myanmar's public incitements to genocide were understood—and heeded—by those who heard and read them, as attested by the actions and utterances made by those who carried out the genocidal acts perpetrated during the "clearance operations", as well as by those who ordered them to commit such acts.

C. ATTEMPT TO COMMIT GENOCIDE

12.132 For the reasons set out above, Myanmar is internationally responsible for committing genocide because it carried out the *actus reus* of genocide with the specific intention of destroying the Rohingya as a group as such, in whole or in part. Since Myanmar harboured such genocidal intent, it would be responsible for *attempting* to commit genocide, in breach of Article III(d) of the Convention, even if the actions it took to complete the *actus reus* of genocide were somehow incomplete, as—on the evidence set out in Chapters 5-10—Myanmar has incontestably taken substantial steps towards completing those acts.

D. COMPLICITY IN GENOCIDE

12.133 Myanmar is also internationally responsible for complicity in genocide in violation of Article III(e) of the Genocide Convention. State organs of Myanmar furnished to the individual perpetrators of the relevant acts of genocide aid and assistance in the commission of those genocidal acts. As detailed in Chapter 10, such aid and assistance included, *inter alia*: providing the weapons, including the guns, rocket launchers and knives used to commit killings, rapes and torture during the "clearance operations"; supplying the petrol and other flammable substances used to burn Rohingya villages, often with members of the Rohingya group locked inside their houses; and providing the training and logistical support necessary for the commission and covering up of these crimes.

E. FAILURE TO PREVENT GENOCIDE

12.134 Myanmar is internationally responsible for failing to discharge its obligation to prevent genocide. Myanmar took no action to prevent the individuals who planned, organized and carried out the "clearance operations" from committing the acts of genocide described above. To the contrary, their acts of genocide were committed at the direction of the Commander-in-Chief of the Tatmadaw and other senior officials and organs of the Myanmar state; indeed, Myanmar facilitated their commission. Myanmar has therefore manifestly failed to "employ all means reasonably available" to it to "prevent genocide so far as possible".[1811]

[1811] *Bosnia v. Serbia*, Judgment (2007), p. 221, para. 430.

F. FAILURE TO PUNISH GENOCIDE

12.135 Myanmar is internationally responsible for failing to punish genocide, as required by Articles I, IV, V and VI of the Genocide Convention. As described in Chapter 11, Myanmar has taken no meaningful action to investigate, much less prosecute and punish, the perpetrators of acts of genocide committed against the Rohingya. Not a single individual has been prosecuted for the crime of genocide.

12.136 Indeed, other than the handful of soldiers who participated in the mass executions at Inn Din and whose court martial was precipitated by international pressure but who were pardoned just months later, the only other members of the Tatmadaw who are alleged to have been brought to trial are unidentified soldiers who were court martialled for "weakness" in "following instructions". Their punishment—if any—has not been publicly disclosed. The January 2020 report of the ICOE, Myanmar's most recent sham inquiry, failed to identify a single crime committed by any member of the Tatmadaw. In short, Myanmar has manifestly failed to punish genocide.

G. FAILURE TO ENACT LEGISLATION

12.137 Article V of the Convention provides: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III".[1812]

[1812] Genocide Convention (1951), art. V. MG, Vol. II, Annex 1.

12.138 Myanmar, however, has enacted no such legislation. As the UN Fact-Finding Mission observed in its September 2019 Report:

> "The Mission also assessed Myanmar's criminal justice system to determine whether it is meeting its obligations under Article V of the Genocide Convention to enact the necessary legislation to give effect to the Convention and, in particular, to provide effective penalties for persons guilty of genocide and persons who incite genocide, attempt to commit genocide and are complicit in genocide. The Penal Code has no provisions on the crime of genocide. Part of this can be explained by the fact that Myanmar's Penal Code has not been substantially amended since it was first enacted in 1891, well before the term "genocide" was first used in 1943 and before it became part of international criminal law."[1813]

12.139 Continuing, the Mission observed:

> "At the time of writing, no provision in Myanmar's Penal Code reflected the substance, object, purpose, letter or spirit of the Genocide Convention. The Penal Code lacks provisions that contain the defining elements of the crime of genocide, including the element of intending to destroy a protected group. It does not contain 'ordinary' crimes' that could amount to the underlying acts of genocide."[1814]

[1813] UN Fact-Finding Mission, *Report of the Detailed Findings* (2019), para. 234. MG, Vol. III, Annex 49.

[1814] *Ibid.*, para. 235.

12.140 The Gambia is not aware of Myanmar having enacted any relevant legislation that would fulfil its obligation under Article V of the Convention since the UN Fact-Finding Mission's report.

12.141 Regardless, as the Mission concluded:

> "Even if Myanmar enacted domestic legislation to give effect to the Genocide Convention, Myanmar's Constitution allows Myanmar military personnel convicted of any crime to be pardoned or potentially protected from prosecution. Article 20(b) of the Constitution gives the military the 'right to independently administer and adjudicate all affairs of the armed forces' and Article 343(b) gives the Commander-in-Chief of the Defence Services the power to make final and conclusive decisions on military justice. Thus, the Commander-in-Chief not only has the power to pardon but he has demonstrated his willingness to use it, as he did when he pardoned seven soldiers convicted and sentenced to 10 years imprisonment for the killings of 10 Rohingya civilians in the village of Inn Din. The Mission therefore considers that Myanmar is also in breach of its Article V obligations because, at this time, Myanmar does not have a justice system capable of ensuring 'effective penalties for persons guilty' of the crime of genocide."[1815]

12.142 The Fact-Finding Mission's conclusions in respect of the impunity enjoyed by those responsible for the commission of genocide against the Rohingya are fully supported by the evidence set out in Chapter 11 of this Memorial.

[1815] *Ibid.*, para. 237.

CHAPTER 13
LEGAL CONSEQUENCES AND REMEDIES

13.1 This Chapter addresses the legal consequences of Myanmar's wrongful conduct, and the remedies it owes under the rules of State responsibility for its violations of the Genocide Convention (**Section I**) and for its violations of the provisional measures ordered by the Court on 23 January 2020 (**Section II**).

I. Legal Consequences and Remedies for Violations of the Genocide Convention

13.2 The jurisdiction of the Court under Article IX of the Convention extends to determining all the "legal consequences" of any breach of the Convention "[by] hav[ing] recourse … to the rules of general international law … on responsibility of States for internationally wrongful acts".[1816]

13.3 Addressing the standing of The Gambia in these proceedings, the Court made clear in its Order of 23 January 2020 that:

> "any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end".[1817]

13.4 As a State party to the Genocide Convention, The Gambia is entitled to seek from the Court a judgment that Myanmar has violated its obligations

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[1816] *Bosnia v. Serbia*, Judgment (2007), p. 105, para. 149.

[1817] Provisional Measures Order, para. 41.

under the Convention, as demonstrated in the preceding Chapters of this Memorial, and an order that Myanmar shall immediately desist from any ongoing violation of the Convention and take steps to ensure full compliance with its obligations under the Convention (**A**). Moreover, given the heinous nature of Myanmar's crimes against the Rohingya, and their extreme vulnerability to the forces that have sought their destruction, The Gambia is also entitled to ask that Myanmar be ordered to provide assurances and guarantees of non-repetition (**B**).

13.5 The Court is also called upon to declare that Myanmar must make reparation to the Rohingya victims for its genocidal acts (**C**). The primary form of reparation owed by Myanmar to the Rohingya victims is restitution (**D**). Where harm, loss or injury suffered by the Rohingya victims cannot be redressed by restitution, Myanmar must provide reparation through additional means (**E**).

A. MYANMAR MUST IMMEDIATELY CEASE ANY ONGOING VIOLATION OF THE CONVENTION

13.6 It is undisputed that a State responsible for an ongoing internationally wrongful act must cease it forthwith[1818] while remaining under a continuing duty to perform the obligation breached.[1819] Myanmar must therefore immediately desist from any continuing violation of the Convention and take steps to ensure full compliance with its obligations under the Convention. In addition to desisting from any ongoing act

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[1818] *See* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), reproduced in *Yearbook of the International Law Commission 2001*, Vol. II(2), art. 30(a). MG, Vol. II, Annex 15 [**hereinafter** ILC Articles on State Responsibility (2001)].

[1819] *See ibid.*, art. 29.

prohibited by Article II of the Convention, Myanmar must bring to an end its ongoing failure to ensure punishment of any person who has committed acts of genocide.

13.7 The obligation under Article IV to punish persons who have committed genocide or any of the acts prohibited under Article III (including incitement to commit genocide) entails an obligation to enact adequate domestic legislation for that purpose, including with "effective penalties" (Article V), to charge any such person, including "constitutionally responsible rulers, public officials or private individuals" (Article IV) and to try them before a "competent tribunal" (Article VI).

13.8 By its failure to fulfil its obligations under Articles IV, V and VI of the Genocide Convention, Myanmar has created a situation of ongoing impunity incompatible with the Convention. This situation must be brought to an end forthwith by taking immediate steps to ensure full compliance with the obligations under those provisions.

13.9 Those obligations are not obligations of conduct governed by the due diligence standard, but obligations of result for the State "in the territory of which the act was committed".[1820] Moreover, Myanmar cannot excuse any delay in the performance of its obligations by invoking the specificities of its constitution, its current political situation or its history. In particular, granting pardons or amnesties for the sake of national reconciliation is incompatible with its obligations under the Genocide Convention.[1821]

[1820] Genocide Convention (1951), art. VI. MG, Vol. II, Annex 1.

[1821] *See, e.g.*, UN OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties*, UN Doc. HR/PUB/09/1 (2009). MG, Vol. III, Annex 58; *see also* United Nations Secretary-General, *Remarks from Ban Ki-Moon to Security Council meeting on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Settings* (19 January 2012) ("I also

13.10 The conduct of two trials against a limited number of Tatmadaw soldiers does not relieve Myanmar from its punishment obligations under the Convention: as demonstrated above,[1822] those trials were a sham. However, even if they were not, the massive character of Myanmar's genocidal acts dwarfs the few instances of prosecution. Impunity for genocide remains rampant in Myanmar, in ongoing violation of the Convention. The Gambia calls upon the Court to order Myanmar to bring such impunity to an end.

B. MYANMAR MUST OFFER APPROPRIATE ASSURANCES AND GUARANTEES OF NON-REPETITION

13.11 In its *Note Verbale* of 11 October 2019, The Gambia "insist[ed] that Myanmar take all necessary actions to comply with [its obligations under the Genocide Convention and under customary international law], including but not limited to its obligation … to provide guarantees and assurances of non-repetition".[1823] Reiterated in the Application,[1824] that request is part of the dispute submitted to the Court. It conforms with the entitlement of The Gambia, as a non-injured State Party to the Genocide Convention within the meaning of Article 48 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, to invoke the

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encourage the Council to reject any endorsement of amnesty for genocide, war crimes, crimes against humanity or gross violations of human rights and international humanitarian law."). MG, Vol. III, Annex 59.

[1822] *See supra* Chapter 11.

[1823] *Note Verbale from* Permanent Mission of the Republic of The Gambia to the United Nations *to* Permanent Mission of the Republic of the Union of Myanmar to the United Nations, No. GPM/NV241/Vol.1(LY) (11 October 2019). OG (2 December 2019), Annex 1.

[1824] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Application Instituting Proceedings and Request for Provisional Measures* (11 November 2019), para. 112.

responsibility of Myanmar and "claim from the responsible State … assurances and guarantees of non-repetition".[1825] Assurances and guarantees of non-repetition having been defined by the ILC "in terms of an obligation of the responsible State and not as a right of the injured State",[1826] they can be claimed by a non-injured State.

13.12 The Gambia is aware that assurances and guarantees of non-repetition "will be ordered only 'in special circumstances'" because "there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed".[1827] However, The Gambia submits that the required "special circumstances" for ordering assurances and guarantees of non-repetition exist in this case.

13.13 The character of the obligations breached, the seriousness of the breaches, and the risk of repetition are the three factors to consider when assessing whether assurances and guarantees of non-repetition are

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[1825] ILC Articles on State Responsibility (2001), art. 48(2)(a). MG, Vol. II, Annex 15; *see also ibid.*, art. 30(b). Understandably, the Court did not refer in its Order of 23 January 2020 to assurances and guarantees of non-repetition when it addressed the standing of The Gambia in these proceedings (*see supra* para. 13.3 and note 1795), such matter appertaining to the merits of the case.

[1826] Sandrine Barbier, 'Assurances and Guarantees of Non-Repetition' in Crawford, Pellet, Olleson & Parlett (eds), *The Law of International Responsibility* (Oxford Commentaries on International Law, Oxford University Press 2010), Chapter 39, p. 552. MG, Vol. VIII, Annex 223.

[1827] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015*, p. 717, para. 141 *citing* the *Navigational and Related Rights case, I.C.J. Reports 2009*, p. 267, para. 150.

warranted.[1828] Since all are met in this case, the Court need not decide if those factors are cumulative or alternative.

13.14 Concerning the character of the obligations breached, the Court has already found the obligations under the Genocide Convention to be *erga omnes partes*[1829] while the "norm prohibiting genocide was assuredly a peremptory norm of international law (*jus cogens*)".[1830] The seriousness of the breaches derives from the specific character of the obligations under the Convention; they have been amply evidenced in this Memorial. The risk of repetition must be assessed considering all the circumstances of the case, including the seriousness of the breaches, because even if the risk of repetition is minimal, *quod non*, assurances and guarantees of non-repetition are warranted when the prior violations are, as in this case, of exceptional gravity.[1831]

13.15 Among the circumstances creating a real risk of repetition is the ongoing de-humanization of the Rohingya group and its deliberate exclusion from Myanmar's societal fabric through legal discrimination. It

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[1828] *See* UN General Assembly, *Report of the International Law Commission on the work of its fifty-second session (2000)*, UN Doc. A/CN.4/513 (15 February 2001), para. 57. MG, Vol. II, Annex 16.

[1829] *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 1996 (II)*, p. 616, para. 31; *see also* Provisional Measures Order, para. 41.

[1830] *Bosnia v. Serbia*, Judgment (2007), p. 111, para. 161 *citing Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo* v. *Rwanda), Judgment, I.C.J. Reports 2006*, p. 32, para. 64.

[1831] *See* UN General Assembly, *Report of the International Law Commission on the work of its fifty-second session (2000)*, UN Doc. A/CN.4/513 (15 February 2001), para. 57. MG, Vol. II, Annex 16; *see also* Sandrine Barbier, 'Assurances and Guarantees of Non-Repetition' in Crawford, Pellet, Olleson & Parlett (eds), *The Law of International Responsibility* (Oxford Commentaries on International Law, Oxford University Press 2010), p. 557. MG, Vol. VIII, Annex 223.

bears reminding that during the oral proceedings on provisional measures, Myanmar's Agent refused to use the term "Rohingya" to identify the group, referring to them only as "Muslims".[1832] The Court underscored in its Provisional Measures Order that Myanmar "has not presented to the Court concrete measures aimed specifically at recognizing and ensuring the right of the Rohingya to exist as a protected group under the Genocide Convention".[1833] Nothing has changed in that regard, and the Rohingya remain under the grip of the forces that have sought their destruction. Moreover, as demonstrated in this Memorial, Myanmar continues to be in breach of essential obligations under the Genocide Convention, while its official propaganda cynically denies the horrendous crimes perpetrated by its army.[1834]

13.16 Considering the exceptional and shocking nature of the facts, as well as the ongoing extreme vulnerability of the Rohingya who remain in Myanmar and survive under the constant threat of the Tatmadaw's next "clearance operation", The Gambia invites the Court to look beyond a formalistic presumption of good faith and requests that Myanmar be ordered to offer solemn assurances and guarantees of non-repetition.

[1832] The Agent used the word "Rohingya" twice, but only when she mentioned the full name of ARSA, the Arakan Rohingya Salvation Army. *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures*, Verbatim Record CR 2019/19 of Public Sitting Held on 11 December 2019, pp. 13 and 18, paras. 6 and 27.

[1833] Provisional Measures Order, para. 73.

[1834] *See, e.g.*, Human Rights Watch, *Myanmar: Crimes Against Rohingya Go Unpunished* (22 August 2019) ("'Two years since the Myanmar military carried out ethnic cleansing of the Rohingya population, the government still denies its troops committed any atrocities,' said Phil Robertson, deputy Asia director. 'The bulldozing of Rohingya homes to destroy evidence after the ethnic cleansing is emblematic of the government's campaign to whitewash its crimes.'"). MG, Vol. V, Annex 125.

13.17 The Gambia respectfully submits that any assurance and guarantee of non-repetition must aim at the full legal recognition and protection of the members of the Rohingya group under Myanmar's laws. It therefore requests the Court to order Myanmar to provide full and equal citizenship to all members of the Rohingya group who are present in Myanmar or have been displaced due to the events for which Myanmar bears responsibility under the Convention.

13.18 The Gambia would welcome any additional assurance and guarantee of non-repetition that the Court deems appropriate. In particular, The Gambia recalls that the UN General Assembly has considered that "[e]nsuring effective civilian control of military and security forces" should be included among the guarantees of non-repetition that a State responsible for gross violations of international human rights law must provide.[1835]

C. MYANMAR IS UNDER AN OBLIGATION TO MAKE REPARATION TO THE VICTIMS OF ITS GENOCIDAL ACTS

13.19 Myanmar is under an obligation to make full reparation to the victims of its genocidal acts.

13.20 The obligation of States to make reparation to victims of gross violations of international human rights law or of serious violations of international humanitarian law is well-established in contemporary international law. Because it protects the right to life and the right to physical and mental integrity of human persons as members of a national,

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[1835] UN General Assembly, *Resolution adopted on 16 December 2005 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147 (21 March 2006), para. 23(a). MG, Vol. II, Annex 22.On that resolution, *see infra* para. 13.21 and note 1815.

ethnical, racial or religious group, the Genocide Convention is rightly considered as an international human rights instrument.[1836] By definition, the acts prohibited under Article II of the Convention constitute gross violations of international human rights law.

13.21 At its 60th session in 2005, the UN General Assembly adopted without a vote a resolution entitled "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law".[1837] The Basic Principles and Guidelines are the outcome of a long deliberative process within the United Nations informed by State practice and international jurisprudence, and overwhelmingly welcomed by legal scholarship.[1838] They notably affirm that:

[1836] *See* United Nations Office on Genocide Prevention and the Responsibility to Protect, *Legal Framework. The Genocide Convention: Background*. MG, Vol. II, Annex 3.

[1837] UN General Assembly, *Resolution adopted on 16 December 2005 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147 (21 March 2006). MG, Vol. II, Annex 22; *see also* UN General Assembly, 60th Session, 64th Plenary Meeting, *Reports of the Third Committee*, UN Doc. A/60/PV.64 (16 December 2005), p. 10. MG, Vol. II, Annex 21. The UN Principles on Remedy and Reparation were previously adopted by the Commission on Human Rights, under Resolution E/CN.4/RES/2005/35 (2005). *See* UN OHCHR, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. E/CN.4/RES/2005/35 (20 April 2005). MG, Vol. II, Annex 19.

[1838] On the Basic Principles and Guidelines and, more generally, the right of individuals to reparation under international law, *see* Theo van Boven, 'Victims' Rights to a Remedy and Reparation: the United Nations Principles and Guidelines' in Ferstman & Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Brill 2020), pp. 15-37. MG, Vol. VIII, Annex 237. *See also* Pierre d'Argent, 'Le droit de la responsabilité internationale complété? Examen des *Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire*' (2005) 51 Annuaire français de droit international 27, pp. 27-55. MG, Vol. VIII, Annex 216; Kelly McCracken, 'Commentary

> "In accordance with its domestic laws and international legal obligations, a State *shall* provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law."[1839]

The use of "shall" indicates a mandatory requirement, and a clear distinction between *lex lata*, or existing obligations under customary international law, and *lex ferenda*.[1840]

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on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (2005) 76 Revue internationale de droit pénal 77, pp. 77-79. MG, Vol. VIII, Annex 217; I. Bantekas & L. Oette, *International Human Rights Law And Practice* (Cambridge University Press 2016), pp. 598-648. MG, Vol. VIII, Annex 228; Clara Sandoval, 'The Legal Standing and Significance of the Basic Principles and Guidelines on the Right to a Remedy and Reparation' (2018) 78 ZaöRV 565, pp. 565-568. MG, Vol. VIII, Annex 233; M. Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6(2) Human Rights Law Review 203, pp 203-279. MG, Vol. VIII, Annex 219; Koen De Feyter, Stephan Parmentier, Marc Bossuyt & Paul Lemmens (eds.), *Out of the Ashes: Reparations for Gross Violations of Human Rights* (Intersentia 2006); Pablo De Greiff (ed.), *The Handbook of Reparations* (Oxford University Press 2006); Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2015).

[1839] UN General Assembly, *Resolution adopted on 16 December 2005 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147 (21 March 2006), para. 15 (emphasis added). MG, Vol. II, Annex 22.

[1840] *See* Pierre d'Argent, 'Le droit de la responsabilité internationale complété ? Examen des *Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire*' (2005) 51 Annuaire français de droit international 27, p. 36. MG, Vol. VIII, Annex 216 *citing* UN Commission on Human Rights, *The right to a remedy and reparation for victims of violations of international human rights and humanitarian law*, UN Doc. E/CN.4/2005/59 (21 December 2004), p. 5, para. 11. MG, Vol. II, Annex 17; UN Commission on Human Rights, *Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni: The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, UN Doc. E/CN.4/2000/62 (18 January 2000), p. 3, para. 8. MG, Vol. II, Annex 10.

13.22 In fact, this restatement of the law by the UN General Assembly reflects the jurisprudence of the Court. In the *Wall* advisory opinion, basing its legal finding on the well-known pronouncement of the PCIJ in the *Chorzów Factory* case, the Court found "that Israel has the obligation to make reparation for the damage caused *to all the natural or legal persons concerned*".[1841] The Court went on to affirm that:

> "Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction."[1842]

13.23 Because Myanmar's obligation to make reparation to all victims of its genocidal acts is an elementary legal consequence of its egregious conduct, The Gambia insisted in its *Note Verbale* of 11 October 2019, "that Myanmar take all necessary actions to comply with [its obligations under the Genocide Convention and under customary international law],

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[1841] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 198, para. 152 (emphasis added).

[1842] *Ibid*., para. 153. *See* on that pronouncement: Pierre d' Argent, 'Compliance, Cessation, Reparation and Restitution in the Wall Advisory Opinion' in Dupuy, Fassbender, Shaw & Sommermann (eds), *Völkerrecht als Wertordnung/ – Common values in International Law, Festschrift für Christian Tomuschat/Essays in Honour of Christian Tomuschat* (N.P. Engel Verlag 2006), pp. 463-477, p. 475. MG, Vol. VIII, Annex 220.

including but not limited to its obligation to make reparation to the victims".[1843] Reiterated in the Application,[1844] that request is part of the dispute submitted to the Court. It conforms with the entitlement of The Gambia, as a non-injured State Party to the Genocide Convention within the meaning of Article 48 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, to invoke the responsibility of Myanmar and "claim from the responsible State… [p]erformance of the obligation of reparation …, in the interest of … the beneficiaries of the obligation breached".[1845]

13.24 The standing of non-injured States to invoke the responsibility of another State for violations of *erga omnes partes* or *erga omnes* obligations and claim from it the performance of the obligation of reparation in the interest of the beneficiaries of the obligation breached was conceptualized in the third report on State Responsibility submitted to the ILC by the Special Rapporteur.[1846] After some drafting changes,[1847] the necessity of

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[1843] *Note Verbale from* Permanent Mission of the Republic of The Gambia to the United Nations *to* Permanent Mission of the Republic of the Union of Myanmar to the United Nations, No. GPM/NV241/Vol.1(LY) (11 October 2019). OG (2 December 2019), Annex 1.

[1844] *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Application instituting proceedings and Request for provisional measures* (11 November 2019), para. 112.

[1845] ILC Articles on State Responsibility (2001), art. 48(2)(b) MG, Vol. II, Annex 15. Understandably, the Court did not refer in its Order of 23 January 2020 to reparation in the interest of the victims when it addressed the standing of The Gambia in these proceedings (*see supra* para. 13.3), such matter appertaining to the merits of the case.

[1846] *See* International Law Commission, *Third report on State responsibility by Mr. James Crawford, Special Rapporteur*, UN Doc. A/CN.4/507 and Add.1-4 (15 March 2000), p. 108, para. 413, note 828 (introducing art. 40 *bis.*). MG, Vol. II, Annex 11.

[1847] *See* International Law Commission, *State Responsibility: Draft articles provisionally adopted by the Drafting Committee on second reading*, UN Doc. A/CN.4/L.600 (21 August 2000), p. 13, art. 49. MG, Vol. II, Annex 12.

such provision was stressed by several members of the International Law Commission. In particular:

> "Take a case of genocide involving only the nationals of the responsible State. If the Commission endorsed the view that 'article 4[8]' States could only require cessation, then no State could claim reparation for the victims' benefit. In practice, that would be tantamount to condoning the breaches, even serious ones. Thus, article 4[8], paragraph 2 (*b*), should be retained."[1848]

13.25 The situation postulated above matches the facts of this case. The Gambia trusts that the Court will not condone Myanmar's breaches and will therefore recognize its legal standing to claim reparation from Myanmar in the interest of the Rohingya victims as beneficiaries of the Convention's breached obligations. The Court should indeed accept that the possibility codified under Article 48, paragraph 2 b) constitutes, in the words of the

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[1848] International Law Commission, *Summary record of the 2671st meeting*, extract from the *Yearbook of the International Law Commission 2001*, Vol. I, UN Doc. A/CN.4/SR.2671, para. 6 (Mr. Gaja). MG, Vol. II, Annex 13; *see also* Giorgio Gaja, 'States Having an Interest in Compliance with the Obligation Breached' in Crawford, Pellet, Olleson & Parlett (eds), *The Law of International Responsibility* (Oxford Commentaries on International Law, Oxford University Press 2010), Chapter 64, p. 961. MG, Vol. VIII, Annex 222. ("On the logical plane, in the absence of such provision, the responsible State could avoid fulfilling any obligation of reparation when there is no injured State. No State would in fact be able to invoke the responsibility of the wrongdoing State. In the case of heavy pollution of the high seas or unlawful harm to the ozone layer, the responsible State would have an obligation of reparation that would not be owed to any other State and would therefore remain theoretical. This would also imply that the obligations not to pollute the high seas and not to cause harm to the ozone layer would also be theoretical, for they could easily be breached without consequences. Similarly, in the case of human rights violations, at least when the violations concern nationals of the responsible State, there would be no State which could claim the reparation owed. Again, the obligation to protect human rights would not have any practical significance. It therefore seems that where an obligation is imposed on a State to protect a collective interest, it must follow that other States are entitled to request reparation in case of a breach of that obligation.")

Chairman of the ILC drafting committee, a "wise and useful principle worth retaining".[1849]

13.26 For these reasons, The Gambia calls upon the Court to declare in its forthcoming judgment that Myanmar is under an obligation to make full reparation to all Rohingya victims of its genocidal acts.

D. REPARATION MUST PRIMARILY TAKE THE FORM OF RESTITUTION

13.27 Under general international law, restitution is the primary form of reparation.[1850] It allows for the "re-establish[ment] [of] the situation which existed before the wrongful act was committed".[1851] Restitution should be awarded and made by the responsible State unless it is "materially impossible" or it "involve[s] a burden out of all proportion to the benefit deriving from restitution instead of compensation."[1852]

13.28 The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law consider that:

> "*Restitution* should, whenever possible, restore the victim to the original situation

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[1849] International Law Commission, *Summary record of the 2682nd meeting*, extract from the *Yearbook of the International Law Commission 2001*, Vol. I, UN Doc. A/CN.4/SR.2682, para. 46 (Mr. Tomka). MG, Vol. II, Annex 14.

[1850] *See generally, Factory At Chorzów, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*; *see also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*; International Law Commission, *Third report on State responsibility by Mr. James Crawford, Special Rapporteur*, UN Doc. A/CN.4/507 and Add.1-4 (15 March 2000). MG, Vol. II, Annex 11.

[1851] ILC Articles on State Responsibility (2001), art. 35. MG, Vol. II, Annex 15.

[1852] *Ibid.*

> before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property."[1853]

13.29 Myanmar must make reparation to the Rohingya victims of its genocidal acts primarily by way of restitution. In particular, Myanmar must:

- allow the safe and dignified return to their place of residence of displaced members of the Rohingya group, whether they are displaced within Myanmar or abroad;

- return to the members of the Rohingya group their individual and collective property, including their land, houses, places of worship and communal life, fields, livestock and crops, or replace them in kind;[1854]

- allow and facilitate the safe and dignified reunification of families;

- provide for the rehabilitation of the physically or mentally injured members of the Rohingya group. Such rehabilitation

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[1853] UN General Assembly, *Resolution adopted on 16 December 2005 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147 (21 March 2006), p. 7, para. 19. MG, Vol. II, Annex 22; *see also* UN General Assembly, 60th Session, 64th Plenary Meeting, *Reports of the Third Committee*, UN Doc. A/60/PV.64 (16 December 2005), p. 10. MG, Vol. II, Annex 21. The UN Principles on Remedy and Reparation were previously adopted by the Commission on Human Rights, under Resolution E/CN.4/RES/2005/35 (2005). *See* UN OHCHR, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. E/CN.4/RES/2005/35. MG, Vol. II, Annex 19.

[1854] On restitution in kind, *see* Ian Brownlie, *System of the Law of Nations, State responsibility* (Part I, OUP 1983), Chapter XX.

must include adequate medical and psychological care as well as legal and social services;[1855]

- facilitate the search for the disappeared and assist in the recovery, identification and reburial of the bodies of those killed in accordance with the expressed or presumed wishes of the victims, and the cultural and religious practices of the Rohingya group;[1856]

- ensure the protection of the members of the Rohingya group against discrimination and persecution;

- ensure the right of the members of the Rohingya group to identify as such;

- ensure the liberty and freedom of movement of the members of the Rohingya group within Myanmar and remove any restriction on their place of residence;

- remove any restriction or discrimination on the employment of the members of the Rohingya group.

E. ADDITIONAL FORMS OF REPARATION

13.30 Insofar as harm, loss or injury suffered by the Rohingya victims is not capable of redress by restitution, Myanmar should be ordered to provide full reparation by way of compensation and additional means of satisfaction.[1857]

[1855] *See* UN General Assembly, *Resolution adopted on 16 December 2005 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147 (21 March 2006), para. 21. MG, Vol. II, Annex 22.

[1856] *Ibid.*, para. 22(c).

[1857] On possible additional forms of satisfaction, s*ee ibid.*, para. 22.

13.31 Failing agreement between the Parties in that regard, The Gambia requests that the question of compensation be settled by the Court in a subsequent phase of the proceedings in this case.

II. Legal Consequences and Remedies for Breach of the Provisional Measures Order

13.32 The Order of 23 January 2020 by which the Court indicated provisional measures pursuant to its power under Article 41 of the Statute created new international obligations binding on Myanmar[1858] that are "effective pending final judgment".[1859] Even if violations of the Provisional Measures Order were to cease before the Judgment of the Court (*quod non* at the time of the filing of this Memorial), "what may have ceased is the breach, not the responsibility arising from the breach".[1860]

13.33 The new obligations created by Provisional Measures Order are distinct from the rights in dispute under the Convention. As a result, fulfilment of the obligations under the Provisional Measures Order is separately owed by Myanmar to The Gambia.[1861]

13.34 It is well established that the same conduct can constitute simultaneously a violation of the substantive obligations in dispute in a case

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[1858] *See* Provisional Measures Order, para. 84, *citing LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109.

[1859] *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I. C. J. Reports 2004*, p. 70, para. 152.

[1860] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015*, p. 713, para. 126.

[1861] *See* ILC Articles on State Responsibility (2001), art. 42(a). MG, Vol. II, Annex 15.

and a violation of the order indicating provisional measures.[1862] This may occur when an order indicating provisional measures incorporates as such substantive obligations in dispute or imposes additional obligations that, although related to those substantive obligations, are stricter than them by going beyond what they require. In the latter situation, a violation of the order indicating provisional measures may occur independently of a violation of the substantive obligations in the case. This may also be the case when the order imposes new obligations that have no correspondence in the substantive obligations in dispute but are necessary to protect the rights stemming from them.

13.35 Therefore, any breach of the Convention that occurred or continued to occur after 23 January 2020 also constitutes a violation of the Provisional Measures Order in so far as conduct prohibited under the Convention is also prohibited under the Order. Besides, in so far as the Provisional Measures Order imposes on Myanmar additional obligations that go beyond those under the Convention or have no correspondence in the Convention, Myanmar's conduct that does not violate the Convention could still be wrongful under the Order.

13.36 As made clear in The Gambia's Preliminary Observations of 5 June 2020 on Myanmar's Report of 22 May 2020, Myanmar has failed to fully and adequately implement the Provisional Measures Order. In particular, The Gambia recalls the ongoing oppressive and systematic restrictions imposed on the members of the Rohingya group currently present in Rakhine and the dire conditions of living imposed on them in internment

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[1862] *See Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015*, p. 714, para. 129.

camps and ghettos before and during the COVID-19 pandemic.[1863] There can be little doubt in that regard that Myanmar has failed and continues to fail to "take all measures within its power to prevent" the "deliberate[] inflicti[on]" "on members of the Rohingya group [living] in its territory" of "conditions of life calculated to bring about its physical destruction in whole or in part", in violation of paragraph 86(1) of the Order.[1864]

13.37 Killing members of the Rohingya group and causing them serious bodily or mental harm in violation of paragraph 86(1) of Provisional Measures Order has also continued after Myanmar submitted its first implementation report to the Court. In particular, Ms Michelle Bachelet, the UN High Commissioner for Human Rights, stated before the UN Human Rights Council on 30 June 2020:

> "My Office has been documenting a pattern of serious violations of human rights and international humanitarian law, including airstrikes, shelling of civilian areas, and the destruction and burning of villages in other areas. Last month, the Tatmadaw reportedly burned large areas of Buthidaung township where Rohingyas lived before 2017. According to eyewitnesses and satellite images, areas where up to a dozen Rohingya villages once stood, lay in ashes."[1865]

She added:

[1863] Myanmar's Report pursuant to Provisional Measures Order, paras. 10-13.

[1864] Provisional Measures Order, para. 86(1).

[1865] UN OHCHR, *Statement by Michelle Bachelet, UN High Commissioner for Human Rights on the human rights situation of Rohingya people at the 44th Session of the Human Rights Council* (30 June 2020). MG, Vol. III, Annex 55.

> "These villages were not only the homes Rohingya refugees hoped to return to; they also constituted evidence of what happened in 2017. Only five months ago, the International Court of Justice issued an order to prevent the destruction of evidence of allegations of genocide. It is imperative that Myanmar take immediate and urgent measures to cease reckless military operations, and to preserve what remains in those areas."[1866]

13.38 On 22 September 2020, the UN Special Rapporteur on the human rights situation in Myanmar, Mr. Thomas Andrews, in his report to the UN Human Rights Council, referred to the village of Khan Da Para (also known as Kan Kya), in Maungdaw Township, which was destroyed by a "clearance operation" in August 2017.[1867] The Special Rapporteur "showed a photo dated this year that showed a military installation where homes and villages once stood."[1868] Satellite images depicting the village prior to the "clearance operation"; shortly thereafter; and in 2020, after the construction of military facilities on the destroyed village, are reproduced at Figure 13.1 (following page 502 and in Volume XII).

13.39 By those military operations and actions, Myanmar thus acted also in violation of paragraph 86(3) of the Provisional Measures Order in that it grossly failed to "take *effective* measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the

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[1866] *Ibid.*

[1867] *See* UN OHCHR, *UN human rights expert calls for immediate end to military assaults on Rakhine villages, decries mounting death toll of children* (22 September 2020). MG, Vol. III, Annex 83.

[1868] *Ibid.*



Source: UN Special Rapporteur on the situation of human rights in Myanmar, Oral Update to UN Human Rights Council, 22 September 2020.

Figure 13.1

scope of Article II of the Convention".[1869] Myanmar's acts blatantly contradict its words on evidence preservation.[1870]

13.40 Moreover, in violation of paragraph 86(2) of the Provisional Measures Order, Myanmar has failed to "ensure that its military … and any organizations and persons which may be subject to its control, direction or influence" do not "direct[ly] and public[ly] incite[] to commit genocide". In April 2020, Facebook blocked accounts disseminating anti-Rohingya hate-speech following its own internal investigation, which found those accounts to have links to members of Myanmar's Police Force.[1871] Myanmar has also breached paragraph 86(2) of the Provisional Measures Order because by not duly prosecuting the perpetrators of genocide, it failed to "ensure" that "conspiracy to commit genocide, … attempt to commit genocide, or… complicity in genocide" would not be allowed to perpetuate.[1872]

13.41 Additional numerous violations of paragraph 86(1), (2) and (3) of the Provisional Measures Order are documented by the UN OHCHR, notably in its report of 3 September 2020.[1873]

13.42 Assuming that Myanmar submits, in November 2020, a second report on its purported compliance with the Order, as it is required to do under paragraph 86(4) of the Provisional Measures Order, The Gambia will

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[1869] Provisional Measures Order, para. 86(3) (emphasis added).

[1870] Myanmar's Report pursuant to Provisional Measures Order, Annex 4.

[1871] Myanmar's Report pursuant to Provisional Measures Order, paras. 14-15.

[1872] *See ibid*., pp. 6-7, paras. 16-18.

[1873] *See* UN Human Rights Council, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN Doc. A/HRC/45/5 (3 September 2020). MG, Vol. III, Annex 56.

avail itself of its right to present to the Court its comments on Myanmar's report, and any subsequent compliance reports that Myanmar may file.

13.43 Reserving its right to supplement, amplify or amend its claims concerning Myanmar's violations of the Provisional Measures Order of the Court, The Gambia considers that a declaratory finding by the Court that Myanmar has violated its obligation to comply with the provisional measures ordered on 23 January 2020 would constitute adequate reparation in the form of satisfaction for the violations of paragraph 86 of the Provisional Measures Order that have not directly caused bodily or mental injury, including death, to members of the Rohingya group or material injury to their property. The Gambia considers that any violation of paragraph 86(1), (2) or (3) that directly caused bodily or mental injury, including death, to members of the Rohingya group or material injury to their property must be made good by restitution to the fullest extent possible. Any such harm, loss or injury that is not capable of full reparation by restitution must be made good by compensation or any additional forms of reparation.

SUBMISSIONS

For the reasons given in this Memorial, and reserving the right to supplement, amplify or amend the present Submissions, the Republic of The Gambia respectfully requests the International Court of Justice to adjudge and declare:

1.) That the Republic of the Union of Myanmar is responsible for violations of the Convention on the Prevention and Punishment of the Crime of Genocide:

A.) in that members of its armed forces, police and other security forces, and also persons for whose conduct it is responsible, committed genocide against members of the Rohingya group on its territory by:

i.) killing members of the group;

ii.) causing deliberate bodily or mental harm to members of the group;

iii.) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and

iv.) imposing measures intended to prevent births within the group;

with the intent to destroy that group in whole or in part, contrary to Article II of the Convention;

B.) in that persons for whose conduct it is responsible conspired to commit the acts of genocide referred to in paragraph A.), were complicit in respect of those acts, attempted to commit further such acts of genocide and incited others to commit such acts, contrary to Article III of the Convention;

C.) in that, aware that the acts of genocide referred to in paragraph A.) were being or would be committed, it failed to take any steps to prevent those acts, contrary to Article I of the Convention;

D.) in that it has failed to bring to trial persons within its jurisdiction who are suspected on probable grounds of involvement in the acts of genocide referred to in paragraph A.), or in the other acts referred to in paragraph B.), and is thus in continuing breach of Articles I and IV of the Convention;

E.) in that it has failed to enact the necessary legislation to give effect to the provisions of the Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III, and is thus in continuing breach of Article V of the Convention.

2.) That, as a consequence of its responsibility for these breaches of the Convention, the Republic of the Union of Myanmar:

A.) must cease forthwith any ongoing internationally wrongful act referred to in paragraph 1.), in particular:

i.) take immediate and effective steps to enact the specific genocide criminal legislation referred to in paragraph 1.E.);

ii.) take immediate and effective steps to submit to trial before an independent and effective tribunal, including before an international penal tribunal, those members of its armed forces, police and other security forces or any other persons within its jurisdiction who are suspected on probable grounds of having committed acts of genocide as referred to in paragraph 1.A.), or any of the other acts referred to in paragraph 1.B), notably Senior-General Aung Min Hlaing, Vice Senior-General Soe Win, Lieutenant-General Aung Kyaw Zaw, Major-General Maung Maung Soe, Brigadier-General Aung Aung and Brigadier-General Than Oo, and to ensure that those persons, if convicted, are duly punished for their crimes;

iii.) take immediate and effective steps to suppress and prevent any direct and public incitement to commit genocide;

B.) must perform the obligation of reparation in the interest of the victims of genocidal acts who are members of the Rohingya group, and must:

i.) by way of restitution:

(1) allow the safe and dignified return to their place of residence of displaced members of the Rohingya group, whether they are displaced within Myanmar or abroad;

(2) return to the Rohingya their individual and collective property, including their land, houses, places of worship and communal life, fields, livestock and crops, or replace them in kind;

(3) allow and facilitate the safe and dignified reunification of families;

(4) provide for the rehabilitation of the physically or mentally injured members of the Rohingya group; such rehabilitation must include adequate medical and psychological care as well as legal and social services;

(5) facilitate the search for the disappeared and assist in the recovery, identification and reburial of the bodies of those killed in accordance with the expressed or presumed wishes of the victims and in accordance with the cultural and religious practices of the Rohingya;

(6) ensure the protection of the Rohingya against discrimination and persecution;

(7) ensure the right of the Rohingya to identify as such;

(8) ensure the liberty and freedom of movement of the Rohingya within Myanmar and remove any restriction on their place of residence;

(9) remove any restriction or discrimination on the employment or access to livelihoods of the Rohingya.

ii.) Compensate, and provide any additional forms of reparation, for any harm, loss or injury suffered by the Rohingya victims that is not capable of full reparation by restitution.

C.) must offer assurances and guarantees of non-repetition by notably providing full and equal citizenship to all members of the Rohingya group who are present in Myanmar or have been displaced due to the events for which Myanmar bears responsibility under the Convention.

3.) That the Republic of the Union of Myanmar has failed to fully and adequately implement the Provisional Measures Order and must:

A.) by way of restitution as referred to in paragraph 2.B.i.) above, make good any bodily or mental injury, including

death, suffered by members of the Rohingya group, or any material injury caused to their property, as a result of Myanmar's violations of paragraph 86(1), (2) or (3) of the Order;

B.) compensate, and provide any additional forms of reparation, for any harm, loss or injury referred to in paragraph 3.A.) above that is not capable of full reparation by restitution.

4.) That, failing agreement between the Parties on the amount of compensation and any additional forms of reparation referred to in paragraph 2.B.ii.) and paragraph 3.B.) above, the question will be decided by the Court in a subsequent phase of the proceedings in this case.

The Gambia reserves the right to supplement or amend these submissions in light of further pleadings and as necessary.

Respectfully submitted,



H.E. Mr. Dawda Jallow

Attorney General and Minister of Justice of the Republic of The Gambia

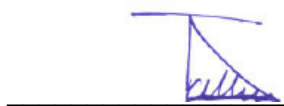
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CERTIFICATION

I certify that the Annexes are true copies of the documents referred to and that the translations provided are accurate.



H.E. Mr. Dawda Jallow

Attorney General and Minister of Justice of the Republic of The Gambia

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Annex 2 — United Nations, *Convention on the Prevention and Punishment of the Crime of Genocide: List of Participants*

Annex 3 — United Nations Office on Genocide Prevention and the Responsibility to Protect, *Legal Framework. The Genocide Convention: Background*

Annex 4 — UN General Assembly, 55th Plenary Meeting, *96 (I). The Crime of Genocide*, UN Doc. A/Res/96(I) (11 December 1946)

Annex 5 — United Nations, *Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide: Ratification with Reservations by Burma,* Reference C.N.25.1956.Treaties (29 March 1956)

Annex 6 — UN Commission on Human Rights, *Report submitted by Mr. Angelo Vidal d'Almeida Ribeiro, Special Rapporteur appointed in accordance with Commission on Human Rights resolution 1986/20 of 10 March 1986*, UN Doc. E/CN.4/1993/62 (6 January 1993)

Annex 7 — UN Commission on Human Rights, *Report on the situation of human rights in Myanmar, prepared by Mr. Yozo Yokota, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1992/58*, UN Doc. E/CN.4/1993/37 (17 February 1993)

Annex 8 — International Law Commission, Draft Code of Crimes Against Peace and Security of Mankind, with Commentaries (1996), reproduced in *Yearbook of the International Law Commission 1996*, Vol. II (Part Two)

Annex 9 — International Criminal Court, *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (17 July 1998)

Annex 10 UN Commission on Human Rights, *Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni: The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, UN Doc. E/CN.4/2000/62 (18 January 2000)

Annex 11 International Law Commission, *Third report on State responsibility by Mr. James Crawford, Special Rapporteur*, UN Doc. A/CN.4/507 and Add.1-4 (15 March 2000)

Annex 12 International Law Commission, *State Responsibility: Draft articles provisionally adopted by the Drafting Committee on second reading*, UN Doc. A/CN.4/L.600 (21 August 2000)

Annex 13 International Law Commission, *Summary record of the 2671st meeting*, extract from the *Yearbook of the International Law Commission 2001*, Vol. I, UN Doc. A/CN.4/SR.2671

Annex 14 International Law Commission, *Summary record of the 2682nd meeting*, extract from the *Yearbook of the International Law Commission 2001*, Vol. I, UN Doc. A/CN.4/SR.2682

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