

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 II
ANNEXES

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VOLUME II

ANNEXES

UNITED NATIONS DOCUMENTS

- Annex 1 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951), 78 UNTS 277
- 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
- Annex 15 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)
- Annex 16 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)
- Annex 17 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)
- Annex 18 United Nations International Commission of Inquiry on Darfur, *Report to the United Nations Secretary General* (25 January 2005)
- Annex 19 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)

- Annex 20 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)
- Annex 21 UN General Assembly, 60th Session, 64th Plenary Meeting, *Reports of the Third Committee*, UN Doc. A/60/PV.64 (16 December 2005)
- Annex 22 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)
- Annex 23 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)
- Annex 24 The Burma Fund UN Office, *Burma's 2010 Elections: A Comprehensive Report* (January 2011)
- Annex 25 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)
- Annex 26 UN OHCHR, *Myanmar: UN Rights Experts Express Alarm at Adoption of First of Four 'Protection of Race and Religion' Bills* (27 May 2015)
- Annex 27 UN General Assembly, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. A/70/412 (6 October 2015)
- Annex 28 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)
- Annex 29 UN High Commissioner for Refugees, *Study on Community Perceptions of Citizenship, Documentation and Rights in Rakhine State* (August 2016)
- Annex 30 UN OHCHR, *Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016: FLASH REPORT* (3 February 2017)

- Annex 31 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)
- Annex 32 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)
- Annex 33 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)
- Annex 34 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)
- Annex 35 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)
- Annex 36 United Nations Office for the Coordination of Humanitarian Affairs, *Myanmar: IDP Sites in Rakhine State as of 31 July 2018* (20 August 2018)
- Annex 37 UN General Assembly, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, UN Doc. A/73/332 (20 August 2018)
- Annex 38 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)
- Annex 39 UN Human Rights Council, *Report of the independent international fact-finding Mission on Myanmar*, UN Doc. A/HRC/39/64 (12 September 2018)
- Annex 40 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)

Annex 1

Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951), 78 UNTS 277

Convention on the Prevention and Punishment of the Crime of Genocide

**Approved and proposed for signature and ratification or accession by
General Assembly resolution 260 A (III) of 9 December 1948
Entry into force: 12 January 1951, in accordance with article XIII**

The Contracting Parties ,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided :

Article I

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.

Article II

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;
- (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.

Article III

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

Article IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article V

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.

Article VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article VII

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article VIII

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.

Article IX

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 Justice at the request of any of the parties to the dispute.

Article X

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

Article XI

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article XII

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

Article XIII

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a procès-verbal and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

Article XIV

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

Article XV

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

Article XVI

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

Article XVII

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following:

- (a) Signatures, ratifications and accessions received in accordance with article XI;
- (b) Notifications received in accordance with article XII;
- (c) The date upon which the present Convention comes into force in accordance with article XIII;
- (d) Denunciations received in accordance with article XIV;
- (e) The abrogation of the Convention in accordance with article XV;
- (f) Notifications received in accordance with article XVI.

Article XVIII

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member States contemplated in article XI.

Article XIX

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

Annex 2

United Nations, *Convention on the Prevention and Punishment of the Crime of Genocide: List of Participants*

CHAPTER IV
HUMAN RIGHTS

**1. CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF
GENOCIDE**

Paris, 9 December 1948¹

ENTRY INTO FORCE: 12 January 1951, in accordance with article XIII.

REGISTRATION: 12 January 1951, No. 1021.

STATUS: Signatories: 41. Parties: 152.

TEXT: United Nations, *Treaty Series*, vol. 78, p. 277.

<i>Participant²</i>	<i>Signature</i>	<i>Accession(a), Succession(d), Ratification</i>	<i>Participant²</i>	<i>Signature</i>	<i>Accession(a), Succession(d), Ratification</i>
Afghanistan.....		22 Mar 1956 a	Chile.....	11 Dec 1948	3 Jun 1953
Albania.....		12 May 1955 a	China ^{5,6,7}	20 Jul 1949	18 Apr 1983
Algeria.....		31 Oct 1963 a	Colombia.....	12 Aug 1949	27 Oct 1959
Andorra.....		22 Sep 2006 a	Comoros.....		27 Sep 2004 a
Antigua and Barbuda.....		25 Oct 1988 d	Costa Rica.....		14 Oct 1950 a
Argentina ³		5 Jun 1956 a	Côte d'Ivoire.....		18 Dec 1995 a
Armenia.....		23 Jun 1993 a	Croatia ²		12 Oct 1992 d
Australia.....	11 Dec 1948	8 Jul 1949	Cuba ⁸	28 Dec 1949	4 Mar 1953
Austria.....		19 Mar 1958 a	Cyprus ⁹		29 Mar 1982 a
Azerbaijan.....		16 Aug 1996 a	Czech Republic ¹⁰		22 Feb 1993 d
Bahamas.....		5 Aug 1975 d	Democratic People's Republic of Korea....		31 Jan 1989 a
Bahrain.....		27 Mar 1990 a	Democratic Republic of the Congo.....		31 May 1962 d
Bangladesh.....		5 Oct 1998 a	Denmark.....	28 Sep 1949	15 Jun 1951
Barbados.....		14 Jan 1980 a	Dominica.....		13 May 2019 a
Belarus.....	16 Dec 1949	11 Aug 1954	Dominican Republic.....	11 Dec 1948	
Belgium.....	12 Dec 1949	5 Sep 1951	Ecuador.....	11 Dec 1948	21 Dec 1949
Belize.....		10 Mar 1998 a	Egypt.....	12 Dec 1948	8 Feb 1952
Benin.....		2 Nov 2017 a	El Salvador.....	27 Apr 1949	28 Sep 1950
Bolivia (Plurinational State of).....	11 Dec 1948	14 Jun 2005	Estonia.....		21 Oct 1991 a
Bosnia and Herzegovina ^{2,4}		29 Dec 1992 d	Ethiopia.....	11 Dec 1948	1 Jul 1949
Brazil.....	11 Dec 1948	15 Apr 1952	Fiji.....		11 Jan 1973 d
Bulgaria.....		21 Jul 1950 a	Finland.....		18 Dec 1959 a
Burkina Faso.....		14 Sep 1965 a	France.....	11 Dec 1948	14 Oct 1950
Burundi.....		6 Jan 1997 a	Gabon.....		21 Jan 1983 a
Cabo Verde.....		10 Oct 2011 a	Gambia.....		29 Dec 1978 a
Cambodia.....		14 Oct 1950 a	Georgia.....		11 Oct 1993 a
Canada.....	28 Nov 1949	3 Sep 1952	Germany ^{11,12,13}		24 Nov 1954 a

<i>Participant²</i>	<i>Signature</i>	<i>Accession(a), Succession(d), Ratification</i>	<i>Participant²</i>	<i>Signature</i>	<i>Accession(a), Succession(d), Ratification</i>
Ghana.....		24 Dec 1958 a	Namibia		28 Nov 1994 a
Greece.....	29 Dec 1949	8 Dec 1954	Nepal.....		17 Jan 1969 a
Guatemala.....	22 Jun 1949	13 Jan 1950	Netherlands.....		20 Jun 1966 a
Guinea.....		7 Sep 2000 a	New Zealand ¹⁵	25 Nov 1949	28 Dec 1978
Guinea-Bissau.....		24 Sep 2013 a	Nicaragua.....		29 Jan 1952 a
Haiti	11 Dec 1948	14 Oct 1950	Nigeria		27 Jul 2009 a
Honduras.....	22 Apr 1949	5 Mar 1952	North Macedonia ²		18 Jan 1994 d
Hungary		7 Jan 1952 a	Norway	11 Dec 1948	22 Jul 1949
Iceland	14 May 1949	29 Aug 1949	Pakistan.....	11 Dec 1948	12 Oct 1957
India.....	29 Nov 1949	27 Aug 1959	Panama.....	11 Dec 1948	11 Jan 1950
Iran (Islamic Republic of).....	8 Dec 1949	14 Aug 1956	Papua New Guinea		27 Jan 1982 a
Iraq.....		20 Jan 1959 a	Paraguay	11 Dec 1948	3 Oct 2001
Ireland.....		22 Jun 1976 a	Peru.....	11 Dec 1948	24 Feb 1960
Israel	17 Aug 1949	9 Mar 1950	Philippines	11 Dec 1948	7 Jul 1950
Italy.....		4 Jun 1952 a	Poland		14 Nov 1950 a
Jamaica		23 Sep 1968 a	Portugal ⁷		9 Feb 1999 a
Jordan.....		3 Apr 1950 a	Republic of Korea.....		14 Oct 1950 a
Kazakhstan.....		26 Aug 1998 a	Republic of Moldova		26 Jan 1993 a
Kuwait		7 Mar 1995 a	Romania.....		2 Nov 1950 a
Kyrgyzstan.....		5 Sep 1997 a	Russian Federation	16 Dec 1949	3 May 1954
Lao People's Democratic Republic		8 Dec 1950 a	Rwanda		16 Apr 1975 a
Latvia.....		14 Apr 1992 a	San Marino		8 Nov 2013 a
Lebanon	30 Dec 1949	17 Dec 1953	Saudi Arabia		13 Jul 1950 a
Lesotho		29 Nov 1974 a	Senegal.....		4 Aug 1983 a
Liberia.....	11 Dec 1948	20 Jun 1950	Serbia ^{4,16}		12 Mar 2001 a
Libya.....		16 May 1989 a	Seychelles		5 May 1992 a
Liechtenstein.....		24 Mar 1994 a	Singapore.....		18 Aug 1995 a
Lithuania.....		1 Feb 1996 a	Slovakia ¹⁰		28 May 1993 d
Luxembourg.....		7 Oct 1981 a	Slovenia ²		6 Jul 1992 d
Malawi.....		14 Jul 2017 a	South Africa.....		10 Dec 1998 a
Malaysia.....		20 Dec 1994 a	Spain		13 Sep 1968 a
Maldives		24 Apr 1984 a	Sri Lanka.....		12 Oct 1950 a
Mali.....		16 Jul 1974 a	St. Vincent and the Grenadines		9 Nov 1981 a
Malta.....		6 Jun 2014 a	State of Palestine		2 Apr 2014 a
Mauritius.....		8 Jul 2019 a	Sudan		13 Oct 2003 a
Mexico	14 Dec 1948	22 Jul 1952	Sweden.....	30 Dec 1949	27 May 1952
Monaco		30 Mar 1950 a	Switzerland		7 Sep 2000 a
Mongolia.....		5 Jan 1967 a	Syrian Arab Republic		25 Jun 1955 a
Montenegro ¹⁴		23 Oct 2006 d	Tajikistan		3 Nov 2015 a
Morocco.....		24 Jan 1958 a	Togo.....		24 May 1984 a
Mozambique.....		18 Apr 1983 a	Tonga.....		16 Feb 1972 a
Myanmar.....	30 Dec 1949	14 Mar 1956	Trinidad and Tobago		13 Dec 2002 a
			Tunisia		29 Nov 1956 a

<i>Participant²</i>	<i>Signature</i>	<i>Accession(a), Succession(d), Ratification</i>	<i>Participant²</i>	<i>Signature</i>	<i>Accession(a), Succession(d), Ratification</i>
Turkey.....		31 Jul 1950 a	United States of America.....	11 Dec 1948	25 Nov 1988
Turkmenistan.....		26 Dec 2018 a	Uruguay.....	11 Dec 1948	11 Jul 1967
Uganda.....		14 Nov 1995 a	Uzbekistan.....		9 Sep 1999 a
Ukraine.....	16 Dec 1949	15 Nov 1954	Venezuela (Bolivarian Republic of).....		12 Jul 1960 a
United Arab Emirates....		11 Nov 2005 a	Viet Nam ^{17,18}		9 Jun 1981 a
United Kingdom of Great Britain and Northern Ireland.....		30 Jan 1970 a	Yemen ¹⁹		6 Apr 1989 a
United Republic of Tanzania.....		5 Apr 1984 a	Zimbabwe.....		13 May 1991 a

Declarations and Reservations

(Unless otherwise indicated, the declarations and reservations were made upon ratification, accession or succession. For objections thereto and territorial applications see hereinafter.)

ALBANIA²⁰

As regards article XII: The People's Republic of Albania declares that it is not in agreement with article XII of the Convention and considers that all the provisions of the Convention should extend to Non-Self-Governing Territories, including Trust Territories.

ALGERIA

The Democratic and Popular Republic of Algeria does not consider itself bound by article IX of the Convention, which confers on the International Court of Justice jurisdiction in all disputes relating to the said Convention.

The Democratic and Popular Republic of Algeria declares that no provision of article VI of the said Convention shall be interpreted as depriving its tribunals of jurisdiction in cases of genocide or other acts enumerated in article III which have been committed in its territory or as conferring such jurisdiction on foreign tribunals.

International tribunals may, as an exceptional measure, be recognized as having jurisdiction, in cases in which the Algerian Government has given its express approval.

The Democratic and Popular Republic of Algeria declares that it does not accept the terms of article XII of the Convention and considers that all the provisions of the said Convention should apply to Non-Self-Governing Territories, including Trust Territories.

ARGENTINA

Ad article IX: The Argentine Government reserves the right not to submit to the procedure laid down in this article any dispute relating directly or indirectly to the territories referred to in its reservation to article XII.

Ad article XII: If any other Contracting Party extends the application of the Convention to territories under the sovereignty of the Argentine Republic, this extension shall in no way affect the rights of the Republic.

BAHRAIN²¹

"With reference to article IX of the Convention the Government of the State of Bahrain declares that, for the submission of any dispute in terms of this article to the

jurisdiction of the International Court of Justice, the express consent of all the parties to the dispute is required in each case."

"Moreover, the accession by the State of Bahrain to the said Convention shall in no way constitute recognition of Israel or be a cause for the establishment of any relations of any kind therewith."

BANGLADESH

"Article IX: For the submission of any dispute in terms of this article to the jurisdiction of the International Court of Justice, the consent of all parties to the dispute will be required in each case."

BELARUS²²

The Byelorussian SSR declares that it is not in agreement with article XII of the Convention and considers that all the provisions of the Convention should extend to non-self-governing territories, including trust territories.

BULGARIA²³

As regards article XII: The People's Republic of Bulgaria declares that it is not in agreement with article XII of the Convention and considers that all the provisions of the Convention should extend to Non-Self-Governing Territories, including Trust Territories.

CHINA

1. The ratification to the said Convention by the Taiwan local authorities on 19 July 1951 in the name of China is illegal and therefore null and void.

2. The People's Republic of China does not consider itself bound by article IX of the said Convention.

CZECH REPUBLIC¹⁰

FINLAND²⁴

HUNGARY²⁵

The Hungarian People's Republic reserves its rights with regard to the provisions of article XII which do not define the obligations of countries having colonies with

regard to questions of colonial exploitation and to acts which might be described as genocide.

INDIA

"With reference to article IX of the Convention, the Government of India declares that, for the submission of any dispute in terms of this article to the jurisdiction of the International Court of Justice, the consent of all the parties to the dispute is required in each case."

MALAYSIA²⁶

"That with reference to article IX of the Convention, before any dispute to which Malaysia is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of Malaysia is required in each case."

"That the pledge to grant extradition in accordance with a state's laws and treaties in force found in article VII extends only to acts which are criminal under the law of both the requesting and the requested state."

MONGOLIA²⁷

The Government of the Mongolian People's Republic declares that it is not in a position to agree with article XII of the Convention and considers that the provisions of the said article should be extended to non-self-governing territories, including trust territories.

The Government of the Mongolian People's Republic deems it appropriate to draw attention to the discriminatory character of article XI of the Convention, under the terms of which a number of States are precluded from acceding to the Convention and declares that the Convention deals with matters which affect the interests of all States and it should, therefore, be open for accession by all States.

MONTENEGRO¹⁴

"The Federal Republic of Yugoslavia does not consider itself bound by Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide and, therefore, before any dispute to which the Federal Republic of Yugoslavia is a party may be validly submitted to the jurisdiction of the International Court of Justice under this Article, the specific and explicit consent of the FRY is required in each case."

MOROCCO

With reference to article VI, the Government of His Majesty the King considers that Moroccan courts and tribunals alone have jurisdiction with respect to acts of genocide committed within the territory of the Kingdom of Morocco.

The competence of international courts may be admitted exceptionally in cases with respect to which the Moroccan Government has given its specific agreement.

With reference to article IX, the Moroccan Government states that no dispute relating to the interpretation, application or fulfilment of the present Convention can be brought before the International Court of Justice, without the prior agreement of the parties to the dispute.

MYANMAR

"(1) With reference to article VI, the Union of Burma makes the reservation that nothing contained in the said Article shall be construed as depriving the Courts and Tribunals of the Union of jurisdiction or as giving foreign Courts and tribunals jurisdiction over any cases of genocide or any of the other acts enumerated in article III committed within the Union territory.

"(2) With reference to article VIII, the Union of Burma makes the reservation that the said article shall not apply to the Union."

PHILIPPINES

"1. With reference to article IV of the Convention, the Philippine Government cannot sanction any situation which would subject its Head of State, who is not a ruler, to conditions less favorable than those accorded other Heads of State, whether constitutionally responsible rulers or not. The Philippine Government does not consider said article, therefore, as overriding the existing immunities from judicial processes guaranteed certain public officials by the Constitution of the Philippines.

"2. With reference to article VII of the Convention, the Philippine Government does not undertake to give effect to said article until the Congress of the Philippines has enacted the necessary legislation defining and punishing the crime of genocide, which legislation, under the Constitution of the Philippines, cannot have any retroactive effect.

"3. With reference to articles VI and IX of the Convention, the Philippine Government takes the position that nothing contained in said articles shall be construed as depriving Philippine courts of jurisdiction over all cases of genocide committed within Philippine territory save only in those cases where the Philippine Government consents to have the decision of the Philippine courts reviewed by either of the international tribunals referred to in said articles. With further reference to article IX of the Convention, the Philippine Government does not consider said article to extend the concept of State responsibility beyond that recognized by the generally accepted principles of international law."

POLAND²⁸

As regards article XII: Poland does not accept the provisions of this article, considering that the Convention should apply to Non-Self-Governing Territories, including Trust Territories.

ROMANIA²⁹

As regards article XII: The People's Republic of Romania declares that it is not in agreement with article XII of the Convention, and considers that all the provisions of the Convention should apply to the Non-Self-Governing Territories, including the Trust Territories.

RUSSIAN FEDERATION²²

The Union of Soviet Socialist Republics declares that it is not in agreement with article XII of the Convention and considers that all the provisions of the Convention should extend to Non-Self-Governing Territories, including Trust Territories.

RWANDA³⁰

SERBIA^{16,31}

"The Federal Republic of Yugoslavia does not consider itself bound by Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide and, therefore, before any dispute to which the Federal Republic of Yugoslavia is a party may be validly submitted to the jurisdiction of the International Court of Justice under this Article, the specific and explicit consent of the FRY is required in each case."

SINGAPORE²⁶

"That with reference to article IX of the Convention, before any dispute to which the Republic of Singapore is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the Republic of Singapore is required in each case."

SLOVAKIA¹⁰**SPAIN³²****UKRAINE²²**

The Ukrainian SSR declares that it is not in agreement with article XII of the Convention and considers that all the provisions of the Convention should extend to Non-Self-Governing Territories, including Trust Territories.

UNITED ARAB EMIRATES

The Government of the State of the United Arab Emirates, having considered the aforementioned Convention and approved the contents thereof, formally declares its accession to the Convention and makes a reservation with respect to article 9 thereof concerning the submission of disputes arising between the Contracting Parties relating to the interpretation, application or fulfilment of this Convention, to the International Court of Justice, at the request of any of the parties to the dispute.

UNITED STATES OF AMERICA¹¹

"(1) That with reference to article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

(2) That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

"(1) That the term 'intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such' appearing in article II means the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial or religious group as such by the acts specified in article II.

(2) That the term 'mental harm' in article II (b) means permanent impairment of mental faculties through drugs, torture or similar techniques.

(3) That the pledge to grant extradition in accordance with a state's laws and treaties in force found in article VII extends only to acts which are criminal under the laws of both the requesting and the requested state and nothing in article VI affects the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside a state.

(4) That acts in the course of armed conflicts committed without the specific intent required by article II are not sufficient to constitute genocide as defined by this Convention.

Objections

(Unless otherwise indicated, the objections were made upon ratification, accession or succession.)

AUSTRALIA

"The Australian Government does not accept any of the reservations contained in the instrument of accession

(5) That with regard to the reference to an international penal tribunal in article VI of the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate."

VENEZUELA (BOLIVARIAN REPUBLIC OF)

With reference to article VI, notice is given that any proceedings to which Venezuela may be a party before an international penal tribunal would be invalid without Venezuela's prior express acceptance of the jurisdiction of such international tribunal.

With reference to article VII, notice is given that the laws in force in Venezuela do not permit the extradition of Venezuelan nationals.

With reference to article IX, the reservation is made that the submission of a dispute to the International Court of Justice shall be regarded as valid only when it takes place with Venezuela's approval, signified by the express conclusion of a prior agreement in each case.

VIET NAM

1. The Socialist Republic of Viet Nam does not consider itself bound by article IX of the Convention which provides the jurisdiction of the International Court of Justice in solving disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the Convention at the request of any of the parties to disputes. The Socialist Republic of Viet Nam is of the view that, regarding the jurisdiction of the International Court of Justice in solving disputes referred to in article IX of the Convention, the consent of the parties to the disputes except the criminals is diametrically necessary for the submission of a given dispute to the International Court of Justice for decision.

2. The Socialist Republic of Viet Nam does not accept article XII of the Convention and considers that all provisions of the Convention should also extend to Non-Self-Governing Territories, including Trust Territories.

3. The Socialist Republic of Viet Nam considers that article XI is of a discriminatory nature, depriving a number of States of the opportunity to become parties to the Convention, and holds that the Convention should be open for accession by all States.

YEMEN¹⁹

In acceding to this Convention, the People's Democratic Republic of Yemen does not consider itself bound by article IX of the Convention, which provides that disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the Convention shall be submitted to the International Court of Justice at the request of any of the parties to the dispute. It declares that the competence of the International Court of Justice with respect to disputes concerning the interpretation, application or fulfilment of the Convention shall in each case be subject to the express consent of all parties to the dispute.

of the People's Republic of Bulgaria, or in the instrument of ratification of the Republic of the Philippines.

"The Australian Government does not accept any of the reservations made at the time of signature of the

Convention by the Byelorussian Soviet Socialist Republic, Czechoslovakia, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics."

"The Australian Government does not accept the reservations contained in the instruments of accession of the Governments of Poland and Romania."

BELGIUM

The Government of Belgium does not accept the reservations made by Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics.

BRAZIL^{33,34}

The Government of Brazil objects to the reservations made to the Convention by Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, the Philippines, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics. The Brazilian Government considers the said reservations as incompatible with the object and purpose of the Convention.

The position taken by the Government of Brazil is founded on the Advisory Opinion of the International Court of Justice of 28 May 1951 and on the resolution adopted by the sixth session of the General Assembly on 12 January 1952, on reservations to multilateral conventions.

The Brazilian Government reserves the right to draw any such legal consequences as it may deem fit from its formal objection to the above-mentioned reservations.

CHINA³³

CUBA⁸

DENMARK

"In the view of the Government of Denmark this reservation is subject to general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty."

ECUADOR

The Government of is not in agreement with the reservations made to article IX and XII of the Convention by the Governments of the Byelorussian Soviet Socialist Republic, Czechoslovakia, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics and, therefore, they do not apply to Ecuador which accepted without any modifications the integral text of the Convention.

[Same communication, mutatis mutandis, in respect of the reservations made by Bulgaria.]

The Government of Ecuador does not accept the reservations made by the Governments of Poland and Romania to articles IX and XII of the Convention.

ESTONIA

"The Estonian Government objects to this reservation on the grounds that it creates uncertainty, as to the extent of the obligations the Government of the United States of America is prepared to assume with regard to the Convention. According to article 27 of the Vienna Convention on the Law of Treaties, no party may invoke the provisions of its domestic law as justification for failure to perform a treaty."

FINLAND

"In the view of the Government of Finland this reservation is subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty."

GREECE

We further declare that we have not accepted and do not accept any reservation which has already been made or which may hereafter be made by the countries signatory to this instrument or by countries which have acceded or may hereafter accede thereto.

The Government of the Hellenic Republic cannot accept the first reservation entered by the United States of America upon ratifying the Agreement on the Prevention and Punishment of the Crime of Genocide, for it considers such a reservation to be in compatible with the Convention.

In respect of the second reservation formulated by the United States of America:

[Same objection mutatis mutandis, as the one made by Denmark.]

IRELAND

"The Government of Ireland is unable to accept the second reservation made by the United States of America on the occasion of its ratification of the [said] Convention on the grounds that as a generally accepted rule of international law a party to an international agreement may not, by invoking the terms of its internal law, purport to override the provisions of the Agreement."

ITALY

The Government of the Republic of Italy objects to the second reservation entered by the United States of America. It creates uncertainty as to the extent of the obligations which the Government of the United States of America is prepared to assume with regard to the Convention."

MEXICO

The Government of Mexico believes that the reservation made by the United States Government to article IX of the aforesaid Convention should be considered invalid because it is not in keeping with the object and purpose of the Convention, nor with the principle governing the interpretation of treaties whereby no State can invoke provisions of its domestic law as a reason for not complying with a treaty.

If the aforementioned reservation were applied, it would give rise to a situation of uncertainty as to the scope of the obligations which the United States Government would assume with respect to the Convention.

Mexico's objection to the reservation in question should not be interpreted as preventing the entry into force of the 1948 Convention between the [Mexican] Government and the United States Government.

NETHERLANDS

"The Government of the Kingdom of the Netherlands declares that it considers the reservations made by Albania, Algeria, Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, India, Morocco, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics in respect of article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature at Paris on 9 December 1948, to be

incompatible with the object and purpose of the Convention. The Government of the Kingdom of the Netherlands therefore does not deem any State which has made or which will make such reservation a party to the Convention."

"As concerns the first reservation, the Government of the Kingdom of the Netherlands recalls its declaration, made on 20 June 1966 on the occasion of the accession of the Kingdom of the Netherlands to the Convention [...], stating that in its opinion the reservations in respect of article IX of the Convention, made at that time by a number of states, were incompatible with the object and purpose of the Convention, and that the Government of the Kingdom of the Netherlands did not consider states making such reservations parties to the Convention. Accordingly, the Government of the Kingdom of the Netherlands does not consider the United States of America a party to the Convention. Similarly, the Government of the Kingdom of the Netherlands does not consider parties to the Convention other states which have made such reservations, i.e., in addition to the states mentioned in the aforementioned declaration, the People's Republic of China, Democratic Yemen, the German Democratic Republic, the Mongolian People's Republic, the Philippines, Rwanda, Spain, Venezuela, and Viet Nam, on the other hand, the Government of the Kingdom of the Netherlands does consider parties to the Convention those states that have since withdrawn their reservations, i.e., the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic, and the Ukrainian Soviet Socialist Republic.

As the Convention may come into force between the Kingdom of the Netherlands and the United States of America as a result of the latter withdrawing its reservation in respect of article IX, the Government of the Kingdom of the Netherlands deems it useful to express the following position on the second reservation of the United States of America:

The Government of the Kingdom of the Netherlands objects to this reservation on the ground that it creates uncertainty as to the extent of the obligations the Government of the United States of America is prepared to assume with regard to the Convention. Moreover, any failure by the United States of America to act upon the obligations contained in the Convention on the ground that such action would be prohibited by the constitution of the United States would be contrary to the generally accepted rule of international law, as laid down in article 27 of the Vienna Convention on the law of treaties (Vienna, 23 May 1969)".

"The Government of the Kingdom of the Netherlands recalls its declaration made on 20 June 1966 on the occasion of the accession [to the said Convention].

[See declaration made under "Netherlands"]

Accordingly, the Government of the Netherlands declares that it considers the reservations made by Malaysia and Singapore in respect of article IX of the Convention incompatible with the object and purpose of the Convention. The Government of the Kingdom of the Netherlands does not consider Malaysia and Singapore Parties to the Convention.

On the other hand, the Government of the Kingdom of the Netherlands does consider Parties to the Convention those States that have since withdrawn their reservations in respect of article IX of the Convention, i.e., Hungary, Bulgaria and Mongolia."

NORWAY

"The Norwegian Government does not accept the reservations made to the Convention by the Government of the Philippines at the time of ratification."

"In the view of the Government of Norway this reservation is subject to the general principle of treaty interpretation according to which a party may not invoke

the provisions of its internal law as justification for failure to perform a treaty."

SPAIN

Spain interprets the reservation entered by the United States of America to the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations on 9 December 1948 [...] to mean that legislation or other action by the United States of America will continue to be in accordance with the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

SRI LANKA

"The Government of Ceylon does not accept the reservations made by Romania to the Convention."

SWEDEN

"The Government of Sweden is of the view that a State party to the Convention may not invoke the provisions of its national legislation, including the Constitution, to justify that it does not fulfil its obligations under the Convention and therefore objects to the reservation.

This objection does not constitute an obstacle to the entry into force of the Convention between Sweden and the United States of America."

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

"The Government of the United Kingdom do not accept the reservations to articles IV, VII, VIII, IX or XII of the Convention made by Albania, Algeria, Argentina, Bulgaria, Burma, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, India, Mongolia, Morocco, the Philippines, Poland, Romania, Spain, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics or Venezuela."

"The Government of the United Kingdom of Great Britain and Northern Ireland have consistently stated that they are unable to accept reservations in respect of article IX of the said Convention; in their view this is not the kind of reservation which intending parties to the Convention have the right to make.

Accordingly, the Government of the United Kingdom do not accept the reservation entered by the Republic of Rwanda against article IX of the Convention. They also wish to place on record that they take the same view of the similar reservation made by the German Democratic Republic as notified by the circular letter [...] of 25 April 1973."

"The Government of the United Kingdom have [...] consistently stated that they are unable to accept reservations to [article IX]. Likewise, in conformity with the attitude adopted by them in previous cases, the Government of the United Kingdom do not accept the reservation entered by Viet Nam relating to article XII."

"The Government of the United Kingdom of Great Britain and Northern Ireland have consistently stated that they are unable to accept reservations in respect of article IX of the said Convention; in their view this is not the kind of reservation which intending parties to the Convention have the right to make.

Accordingly the Government of the United Kingdom of Great Britain and Northern Ireland do not accept the reservation entered by the People's Democratic Republic of Yemen against article IX of the Convention."

"The Government of the United Kingdom have consistently stated that they are unable to accept reservations to article IX. Accordingly, in conformity with the attitude adopted by them in previous cases, the

Government of the United Kingdom do not accept the first reservation entered by the United States of America.

The Government of the United Kingdom object to the second reservation entered by the United States of America. It creates uncertainty as to the extent of the obligations which the Government of the United States of America is prepared to assume with regard to the Convention."

"The Government of the United Kingdom of Great Britain and Northern Ireland have consistently stated that

they are unable to accept reservations to article IX. In their view, these are not the kind of reservations which intending parties to the Convention have the right to make.

Accordingly, the Government of the United Kingdom do not accept the reservations entered by the Government of Singapore and Malaysia to article IX of the Convention."

Territorial Application

<i>Participant</i>	<i>Date of receipt of the notification</i>	<i>Territories</i>
Australia	8 Jul 1949	All Overseas Territories of Australia
United Kingdom of Great Britain and Northern Ireland ^{3,5}	2 Jun 1970	Bahamas, Bermuda, British Virgin Islands, Channel Islands, Dominica, Falkland Islands (Malvinas) and Dependencies, Fiji, Gibraltar, Grenada, Hong Kong, Isle of Man, Pitcairn Island, St. Helena and Dependencies, St. Lucia, Seychelles, St. Vincent and Turks and Caicos Islands
	2 Jun 1970	Tonga

Notes:

¹ Resolution 260 (III), *Official Records of the General Assembly, Third Session*, Part I (A/810), p. 174.

² The former Yugoslavia had signed and ratified the Convention on 11 December 1948 and 29 August 1950, respectively. See also note 1 under "Bosnia and Herzegovina", "Croatia", "former Yugoslavia", "Slovenia", "The Former Yugoslav Republic of Macedonia" and "Yugoslavia" in the "Historical Information" section (click on the tab "Status of Treaties" and then on "Historical Information").

³ On 3 October 1983, the Secretary-General received from the Government of Argentina the following objection:

[The Government of Argentina makes a] formal objection to the declaration of territorial extension issued by the United Kingdom with regard to the Malvinas Islands (and dependencies), which that country is illegally occupying and refers to as the "Falkland Islands". The Argentine Republic rejects and considers null and void the [said declaration] of territorial extension.

With reference to the above-mentioned objection the Secretary-General received, on 28 February 1985, from the Government of the United Kingdom of Great Britain and Northern Ireland the following declaration:

"The Government of the United Kingdom of Great Britain and Northern Ireland have no doubt as to their right, by notification to the Depositary under the relevant provisions of the above-mentioned Convention, to extend the application of the Convention in question to the Falkland Islands or to the Falkland Islands Dependencies, as the case may be.

For this reason alone, the Government of the United Kingdom are unable to regard the Argentine [communication] under reference as having any legal effect."

⁴ The following communication, received by the Secretary-General on 15 June 1993, was transmitted prior to Yugoslavia's admission to membership in the United Nations by General Assembly resolution [A/55/12](#) on 1 November 2000, and its accession to the Convention, deposited with the Secretary-General on 12 March 2001:

"Considering the fact that the replacement of sovereignty on the part of the territory of the Socialist Federal Republic of Yugoslavia previously comprising the Republic of Bosnia and Herzegovina was carried out contrary to the rules of international law, the Government of the Federal Republic of Yugoslavia herewith states that it does not consider the so-called Republic of Bosnia and Herzegovina a party to the Convention on the Prevention and Punishment of the Crime of Genocide, but does consider that the so-called Republic of Bosnia and Herzegovina is bound by the obligation to respect the norms on preventing and punishing the crime of genocide in accordance with general international law irrespective of the Convention on the Prevention and Punishment of the Crime of Genocide.

See also note 2 in this chapter and note 1 under "former Yugoslavia" in the "Historical Information" section (click on the tab "Status of Treaties" and then on "Historical Information").

⁵ On 6 and 10 June 1997, the Secretary-General received communications concerning the status of Hong Kong from the Governments of the United Kingdom and China (see also note 2 under "China" and note 2 under "United Kingdom of Great Britain and Northern Ireland" regarding Hong Kong in the "Historical Information" section (click on the tab "Status of Treaties" and then on "Historical Information")). Upon resuming

the exercise of sovereignty over Hong Kong, China notified the Secretary-General that the Convention with the reservation made by China will also apply to the Hong Kong Special Administrative Region.

⁶ Ratified on behalf of the Republic of China on 19 July 1951. See note 1 under "China" in the "Historical Information" (click on the tab "Status of Treaties" and then on "Historical Information").

⁷ On 16 September 1999, the Government of Portugal informed the Secretary-General that the Convention would apply to Macao. Subsequently, the Secretary-General received communications regarding the status of Macao from Portugal and China (see note 3 under "China" and note 1 under "Portugal" in the "Historical Information" section (click on the tab "Status of Treaties" and then on "Historical Information")). Upon resuming the exercise of sovereignty over Macao, China notified the Secretary-General that the Convention with the reservation made by China will also apply to the Macao Special Administrative Region.

⁸ By a notification received by the Secretary-General on 29 January 1982, the Government of Cuba withdrew the declaration made on its behalf upon ratification of the said Convention with respect to the reservations to articles IX and XII by Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics.

⁹ On 18 May 1998, the Government of Cyprus notified the Secretary-General of the following:

"The Government of the Republic of Cyprus has taken note of the reservations made by a number of countries when acceding to the [Convention] and wishes to state that in its view these are not the kind of reservations which intending parties to the Convention have the right to make.

Accordingly, the Government of the Republic of Cyprus does not accept any reservations entered by any Government with regard to any of the Articles of the Convention."

¹⁰ Czechoslovakia had signed and ratified the Convention on 28 December 1949 and 21 December 1950, respectively, with a reservation. Subsequently, by a notification received on 26 April 1991, the Government of Czechoslovakia notified the Secretary-General of its decision to withdraw the reservation to article IX made upon signature and confirmed upon ratification. For the text of the reservation, see United Nations, *Treaty Series*, vol. 78, p. 303. See also note 1 under "Czech Republic" and note 1 under "Slovakia" in the "Historical Information" section (click on the tab "Status of Treaties" and then on "Historical Information").

¹¹ On 11 January 1990, the Secretary-General received from the Government of the Federal Republic of Germany the following declaration:

"The Government of the Federal Republic of Germany has taken note of the declarations made under the heading "Reservations" by the Government of the United States of America upon ratification of the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations on 9 December 1948.

The Government of the Federal Republic of Germany interprets paragraph (2) of the said declarations as a reference to article V of the Convention and therefore as not in any way affecting the obligations of the United States of America as a State Party to the Convention."

¹² See note 1 under "Germany" regarding Berlin (West) in the "Historical Information" (click on the tab "Status of Treaties" and then on "Historical Information").

¹³ The German Democratic Republic had acceded to the Convention with reservation and declaration on 27 March 1973. For the text of the reservation and the declarations see United Nations, *Treaty Series*, vol. 861, p. 200. See also note 2 under "Germany" in the "Historical Information" section in the front matter of this volume.

¹⁴ See note 1 under "Montenegro" in the "Historical Information" section (click on the tab "Status of Treaties" and then on "Historical Information").

¹⁵ See note 1 under "New Zealand" regarding Tokelau in the "Historical Information" section (click on the tab "Status of Treaties" and then on "Historical Information").

¹⁶ The Secretary-General received communications from the following States on the dates indicated hereinafter regarding the accession of Yugoslavia to the Convention:

Croatia (18 May 2001):

"The Government of the Republic of Croatia objects to the deposition of the instrument of accession of the Federal Republic of Yugoslavia to the Convention on the Prevention and Punishment of the Crime of Genocide, due to the fact that the Federal Republic of Yugoslavia is already bound by the Convention since its emergence as one of the five equal successor states to the former Socialist Federal Republic of Yugoslavia.

This fact was confirmed by the Federal Republic of Yugoslavia in its Declaration of 27 April 1992, as communicated to the Secretary-General (UN doc. [A/46/915](#)). Notwithstanding the political reasoning behind it, in its 1992 Declaration the Federal Republic of Yugoslavia stated that it "shall strictly abide by all the commitments that the former Socialist Federal Republic of Yugoslavia assumed internationally".

In this regard the Republic of Croatia notes in particular the decision of the International Court of Justice in its Judgement of 11 July 1996 that the Federal Republic of Yugoslavia "was bound by provisions of the [Genocide] Convention on the date of the filing of [the Application by Bosnia and Herzegovina], namely on 20 March 1993" (ICJ Reports 1996, p. 595, at para. 17).

The Government of the Republic of Croatia further objects to the reservation made by the Federal Republic of Yugoslavia in respect of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, and considers it to be incompatible with the object and purpose of the Convention. The Government of the Republic of Croatia considers the Convention on the Prevention and Punishment of the Crime of Genocide to be fully in force and applicable between the

Republic of Croatia and the Federal Republic of Yugoslavia, including Article IX.

The Government of the Republic of Croatia deems that neither the purported way of becoming a party to the Genocide Convention *ex nunc* by the Federal Republic of Yugoslavia, nor its purported reservation, have any legal effect regarding the jurisdiction of the International Court of Justice with respect to the pending proceedings initiated before the International Court of Justice by the Republic of Croatia against the Federal Republic of Yugoslavia pursuant to the Genocide Convention."

Bosnia-Herzegovina (27 December 2001):

On 21 March 2001 the Secretary-General of the United Nations confirmed to the Permanent Representative of Yugoslavia to the United Nations the receipt of a 'Notification of Accession to the Convention on the Prevention and Punishment of the Crime of Genocide (1948). The note of the Secretary-General carries reference as: LA 41 TR/221/1(4-1).

The Presidency of Bosnia and Herzegovina objects to the deposition of this instrument of accession.

On 29 June 2001, Bosnia and Herzegovina, the Republic of Croatia, the Republic of Macedonia, the Republic of Slovenia and the Federal Republic of Yugoslavia signed an "Agreement on Succession Issues" in which these States, among other things, declare that they are "in sovereign equality the five successor States to the former Socialist Federal Republic of Yugoslavia". A copy of the Agreement is enclosed. [*Copy not reproduced herein.*] For this reason, there can be no question of "accession", but rather there is an issue of succession. This, in itself, implies that the Federal Republic of Yugoslavia has effectively succeeded the former Socialist Federal Republic of Yugoslavia as of 27 April 1992 (the date of the proclamation of the FRY) as a Party to the Genocide Convention.

Apart from that, the Federal Republic of Yugoslavia upon its proclamation on 27 April 1992 declared - and communicated this to the Secretary-General that it would "strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally"(UN Doc. A/46/915).

For these two reasons it is not possible for the FRY to effectively lay down a reservation with regards to part of the Genocide Convention (i.e. Article IX of the Convention) several years after 27 April 1992, the day on which FRY became bound to the Genocide Convention in its entirety. Bosnia and Herzegovina refers to Articles 2 (1) (d) and 19 of the 1969 Vienna Convention on the Law of Treaties, which explicitly states that a reservation may only be formulated "when signing, ratifying, accepting, approving or acceding to a treaty".

The Presidency of Bosnia and Herzegovina therefore deems the so-called "Notification of Accession to the Convention on the Prevention and Punishment of the Crime of Genocide (1948)" submitted by the Government of the Federal Republic of Yugoslavia to be null and void. Moreover, the International Court of Justice declared in its Judgement of 11 July 1996, "Yugoslavia was bound by the provisions of the Convention" at least at the date of the filing of the Application in the case introduced by Bosnia and Herzegovina on 20 March 1993/ICJ Rep. 1996, p.610, para. 17). The Federal Republic of Yugoslavia continues to be bound under the same conditions, that is without any reservation."

¹⁷ The Secretary-General received on 9 November 1981 from the Government of the Democratic Republic of Kampuchea the following objection with regard to the accession by Viet Nam:

The Government of Democratic Kampuchea, as a party to the Convention on the Prevention and Punishment of the Crime of Genocide, considers that the signing of that Convention by the Government of the Socialist Republic of Viet Nam has no legal force, because it is no more than a cynical, macabre charade intended to camouflage the foul crimes of genocide committed by the 250,000 soldiers of the Vietnamese invasion army in Kampuchea. It is an odious insult to the memory of the more than 2,500,000 Kampucheans who have been massacred by these same Vietnamese armed forces using conventional weapons, chemical weapons and the weapon of famine, created deliberately by them for the purpose of eliminating all national resistance at its source.

It is also a gross insult to hundreds of thousands of Laotians who have been massacred or compelled to take refuge abroad since the occupation of Laos by the Socialist Republic of Viet Nam, to the Hmong national minority in Laos, exterminated by Vietnamese conventional and chemical weapons and, finally, to over a million Vietnamese "boat people" who died at sea or sought refuge abroad in their flight to escape the repression carried out in Viet Nam by the Government of the Socialist Republic of Viet Nam.

This shameless accession by the Socialist Republic of Viet Nam violates and discredits the noble principles and ideals of the United Nations and jeopardizes the prestige and moral authority of our world Organization. It represents an arrogant challenge to the international community, which is well aware of these crimes of genocide committed by the Vietnamese army in Kampuchea, has constantly denounced and condemned them since 25 December 1978, the date on which the Vietnamese invasion of Kampuchea began, and demands that these Vietnamese crimes of genocide be brought to an end by the total withdrawal of the Vietnamese forces from Kampuchea and the restoration of the inalienable right of the people of Kampuchea to decide its own destiny without any foreign interference, as provided in United Nations resolutions 34/22, 35/6 and 36/5.

¹⁸ Accession on behalf of the Republic of Viet-Nam on 11 August 1950 (See [C.N.134.1950](#)). (For the text of objections to some of the reservations made upon the said accession, see publication, *Multilateral Treaties for which the Secretary-General acts as Depositary* (ST/LEG/SER.D/13, p.91). See also note 1 under "Viet Nam" in the "Historical Information" section Accession on behalf of the Republic of Viet-Nam.

¹⁹ The Yemen Arab Republic had acceded to the Convention on 6 April 1989. See also note 1 under "Yemen" in the "Historical Information" section (click on the tab "Status of Treaties" and then on "Historical Information").

²⁰ On 19 July 1999, the Government of Albania informed the Secretary-General that it had decided to withdraw its reservation regarding article IX made upon accession. For the text of the reservation, see United Nations, *Treaty Series*, vol. 210, p. 332.

²¹ On 25 June 1990, the Secretary-General received from the Government of Israel the following objection:

"The Government of the State of Israel has noted that the instrument of accession of Bahrain to the [said] Convention contains a declaration in respect of Israel.

In the view of the Government of the State of Israel, such declaration, which is explicitly of a political character, is incompatible with the purpose and objectives of this Convention and cannot in any way affect whatever obligations are binding upon Bahrain under general International Law or under particular Conventions.

The Government of the State of Israel will, in so far as concerns the substance of the matter, adopt towards Bahrain an attitude of complete reciprocity".

²² In communications received on 8 March, 19 and 20 April 1989, respectively, the Governments of the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic notified the Secretary-General that they had decided to withdraw the reservation relating to article IX. For the texts of the reservations, see United Nations, *Treaty Series*, vol. 190, p. 381, vol.196, p. 345 and vol. 201, p. 368, respectively.

²³ On 24 June 1992, the Government of Bulgaria notified the Secretary-General its decision to withdraw the reservation to article IX of the Convention, made upon accession. For the text of the reservation, see United Nations, *Treaty Series*, vol. 78, p. 318.

²⁴ On 5 January 1998, the Government of Finland notified the Secretary-General that it had decided to withdraw its reservation made upon accession to the Convention. For the text of the reservation, see United Nations, *Treaty Series*, vol. 346, p. 324.

²⁵ In a communication received on 8 December 1989, the Government of Hungary notified the Secretary-General that it had decided to withdraw the reservation relating to article IX made upon accession. For the text of the reservation, see United Nations, *Treaty Series*, vol. 118, p. 306.

²⁶ In this regard, on 14 October 1996, the Secretary-General received from the Government of Norway, the following communication:

"... In [the view of the Government of Norway], reservations in respect of article IX of the Convention are incompatible with the object and purpose of the said Convention. Accordingly, the Government of Norway does not accept the reservations entered by the Governments of Singapore and Malaysia to article IX of the Convention."

²⁷ In a communication received on 19 July 1990, the Government of Mongolia notified the Secretary-General of its decision to withdraw the reservation relating to article IX made upon accession. For the text of the reservation see United Nations, *Treaty Series*, vol. 587, p. 326.

²⁸ On 16 October 1997, the Government of Poland notified the Secretary-General that it had decided to withdraw its reservation with regard to article IX of the Convention made upon accession. For the text of the reservation see United Nations, *Treaty Series*, vol. 78, p. 277.

²⁹ On 2 April 1997, the Government of Romania informed the Secretary-General that it had decided to withdraw its reservation with regard to article IX of the Convention. For the text of the reservation, see United Nations, *Treaty Series*, vol. 78, p. 314.

³⁰ In a communication received on 15 December 2008, the Government of Rwanda notified the Secretary-General that it had decided to withdraw the reservation relating to article IX made upon accession to the Convention. The text of the reservation reads as follows:

The Rwandese Republic does not consider itself as bound by article IX of the Convention.

³¹ With regard to the reservation made by the Government of Yugoslavia upon accession, the Secretary-General received from the following State, a communication on the date indicated hereinafter:

Sweden (2 April 2002):

"The Government of Sweden has taken note of the Secretary-General's circular notification 164.2001.TREATIES-.1 of 15 March 2001, stating the intent of the Federal Republic of Yugoslavia to accede, with a reservation, to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The Government of Sweden regards the Federal Republic of Yugoslavia as one successor state to the Socialist Federal Republic of Yugoslavia and, as such, a Party to the Convention from the date of the entering into force of the Convention for the Socialist Federal Republic of Yugoslavia. The Government of Sweden hereby communicates that it considers the said reservation as having been made too late, according to article 19 of the 1969 Vienna Convention on the Law of Treaties, and thus null and void."

³² On 24 September 2009, the Government of Spain informed the Secretary-General that it had decided to withdraw the reservation in respect of the whole article IX (Jurisdiction of the International Court of Justice) made upon accession to the Convention.

³³ For the Advisory Opinion of the International Court of Justice of 28 May 1951, see *I.C.J., Report 1951*, p. 15.

³⁴ For the resolution adopted on 12 January 1952 by the sixth session of the General Assembly concerning reservations to multilateral conventions, see Resolution 598 (VI); *Official Records of the General Assembly, Sixth Session, Supplement No. 20 (A/2119)*, p. 84.

Annex 3

United Nations Office on Genocide Prevention and the Responsibility to Protect, *Legal Framework. The Genocide Convention: Background*



LEGAL FRAMEWORK

[International Law \(international-law.shtml\)](#) >

[Genocide Convention \(genocide-convention.shtml\)](#) >



The Genocide Convention

Background

The [Convention on the Prevention and Punishment of the Crime of Genocide](https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20Genocide)

(https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20Genocide) is an instrument of international law

that codified for the first time the crime of genocide. The Genocide Convention was the first human rights treaty adopted by the General Assembly of the United Nations on 9 December 1948 and signified the international community's commitment to 'never again' after the atrocities committed during the Second World War. Its adoption marked a crucial step towards the development of international human rights and international criminal law as we know it today.

According to the Genocide Convention, genocide is a crime that can take place both in time of war as well as in time of peace. The definition of the crime of genocide, as set out in the Convention, has been widely adopted at both national and international levels, including in the 1998 Rome Statute of the International Criminal Court (ICC). Learn more about the [definition of the crime of genocide](https://www.un.org/en/genocideprevention/genocide.shtml) (<https://www.un.org/en/genocideprevention/genocide.shtml>).

Importantly, the Convention establishes on State Parties the obligation to take measures to prevent and to punish the crime of genocide, including by enacting relevant legislation and punishing perpetrators, "whether they are constitutionally responsible rulers, public officials or private individuals" (Article IV). That obligation, in addition to the prohibition not to commit genocide, have been considered as norms of international customary law and therefore, binding on all States, whether or not they have ratified the Genocide Convention.



The Genocide Convention: a call for action

Fact-sheet about the Convention

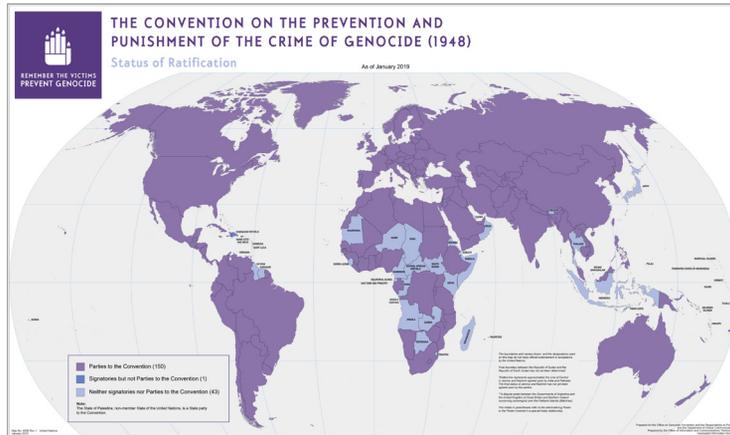
[English \(documents/Genocide Convention-FactSheet-ENG.pdf\)](#) | [French \(documents/Genocide Convention-FactSheet-FR.pdf\)](#) | [Spanish \(documents/Genocide Convention-FactSheet-SP.pdf\)](#)

Basic Facts Genocide Convention	
Signed	9 December 1948
Location	Paris, France
GA resolution	A/RES/3/260 (http://un-documents.net/a3r260.htm)
Effective	12 January 1951
Parties	152 (as of July 2019)
Latest State Party	Mauritius (July 2019)
Depositary	Secretary-General of the United Nations
Inter-State disputes	International Court of Justice
List of countries which have ratified the Genocide Convention (https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en)	

Status of membership

The Genocide Convention has been ratified or acceded to by 152 States (as of July 2019). Other 42 United Nations Member States have yet to do so. From those, 19 are from Africa, 17 from Asia and 6 from America. Check the map below for details.

The Special Advisor on the Prevention of Genocide calls upon all United Nations Member States that are not yet party to the Genocide Convention, to ratify or accede to it as a matter of priority, so that the Genocide Convention becomes an instrument of universal membership.



States' obligations under the Genocide Convention

- Obligation not to commit genocide (Article I as interpreted by the ICJ (<https://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf#page=74>))
- Obligation to prevent genocide (Article I) which, according to the ICJ (<https://www.icj-cij.org/files/case-related/91/091-19960711-JUD-01-00-EN.pdf#page=24>), has an extraterritorial scope;
- Obligation to punish genocide (Article I);
- Obligation to enact the necessary legislation to give effect to the provisions of the Convention (Article V);
- Obligation to ensure that effective penalties are provided for persons found guilty of criminal conduct according to the Convention (Article V);
- Obligation to try persons charged with genocide in a competent tribunal of the State in the territory of which the act was committed, or by an international penal tribunal with accepted jurisdiction (Article VI);
- Obligation to grant extradition when genocide charges are involved, in accordance with laws and treaties in force (Article VII), particularly related to protection granted by international human rights law prohibiting refoulement where there is a real risk of flagrant human rights violations in the receiving State.

International Day

Every year on 9 December, the United Nations marks the adoption of the Genocide Convention, which is also the International Day of Commemoration and Dignity of the Victims of the Crime of Genocide and of the Prevention of this Crime. Watch the [latest event marking the 70th anniversary of the Convention \(http://webtv.un.org/search/2019-international-day-of-victims-of-crime-of-genocide/6114375432001/?term=international%20day%20victims%20genocide&sort=date&page=11\)](http://webtv.un.org/search/2019-international-day-of-victims-of-crime-of-genocide/6114375432001/?term=international%20day%20victims%20genocide&sort=date&page=11).

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Annex 4

UN General Assembly, 55th Plenary Meeting, 96 (I). *The Crime of Genocide*,
UN Doc. A/Res/96(I) (11 December 1946)

Requests the Secretary-General to provide such assistance as the Committee may require for its work.

*Fifty-fifth plenary meeting,
11 December 1946.*

At the same plenary meeting, the General Assembly, on the recommendation of the President, appointed the following States to serve on the Committee:

Argentina, Australia, Brazil, China, Colombia, Egypt, France, India, Netherlands, Panama, Poland, Sweden, Union of Soviet Socialist Republics, United Kingdom, United States of America, Venezuela, Yugoslavia.

95 (I). Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal

The General Assembly,

Recognizes the obligation laid upon it by Article 13, paragraph 1, sub-paragraph a, of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;

Takes note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;

Therefore,

Affirms the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal;

Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946,¹ to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.

*Fifty-fifth plenary meeting,
11 December 1946.*

96 (I). The Crime of Genocide

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the

¹ See page 187.

Invite le Secrétaire général à fournir à la Commission toute l'aide dont elle pourrait avoir besoin pour l'accomplissement de ses travaux.

*Cinquante-cinquième séance plénière,
le 11 décembre 1946.*

A la même séance plénière, l'Assemblée générale, sur la recommandation de son Président, a décidé de nommer membres de cette Commission les Etats suivants:-

Argentine, Australie, Brésil, Chine, Colombie, Egypte, France, Inde, Pays-Bas, Panama, Pologne, Suède, Union des Républiques socialistes soviétiques, Royaume-Uni, Etats-Unis d'Amérique, Venezuela, Yougoslavie.

95 (I). Confirmation des principes de droit international reconnus par le statut de la Cour de Nuremberg

L'Assemblée générale,

Reconnait l'obligation qui lui incombe aux termes de l'Article 13, paragraphe 1, alinéa a, de la Charte, de provoquer des études et de faire des recommandations en vue d'encourager le développement progressif et la codification du droit international;

Prend acte de l'Accord relatif à la création d'une Cour militaire internationale chargée de poursuivre et de châtier les grands criminels de guerre de l'Axe européen, Accord signé à Londres le 8 août 1945, ainsi que du statut joint en annexe; prend acte également du fait que des principes analogues ont été adoptés dans le statut de la Cour militaire internationale chargée de juger les grands criminels de guerre en Extrême-Orient, statut promulgué à Tokyo, le 19 janvier 1946;

En conséquence,

Confirme les principes de droit international reconnus par le statut de la Cour de Nuremberg, et par l'arrêt de cette Cour;

Invite la Commission chargée de la codification du droit international, créée par la résolution de l'Assemblée générale en date du 11 décembre 1946,¹ à considérer comme une question d'importance capitale les projets visant à formuler, dans le cadre d'une codification générale des crimes commis contre la paix et la sécurité de l'humanité ou dans le cadre d'un Code de droit criminel international, les principes reconnus dans le statut de la Cour de Nuremberg et dans l'arrêt de cette Cour.

*Cinquante-cinquième séance plénière,
le 11 décembre 1946.*

96 (I). Le crime de génocide

Le génocide est le refus du droit à l'existence à des groupes humains entiers, de même que l'homicide est le refus du droit à l'existence à un individu; un tel refus bouleverse la conscience hu-

¹ Voir page 187.

conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.

Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.

The punishment of the crime of genocide is a matter of international concern.

The General Assembly, therefore,

Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices — whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds — are punishable;

Invites the Member States to enact the necessary legislation for the prevention and punishment of this crime;

Recommends that international co-operation be organized between States with a view to facilitating the speedy prevention and punishment of the crime of genocide, and, to this end,

Requests the Economic and Social Council to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly.

*Fifty-fifth plenary meeting,
11 December 1946.*

97 (I). Registration and Publication of Treaties and International Agreements: Regulations to give effect to Article 102 of the Charter of the United Nations

The General Assembly,

Considering it desirable to establish rules for the application of Article 102 of the Charter of the United Nations which provides as follows:

"1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

"2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations."

Recognizing, in making provision therefor, the importance of orderly registration and publication of such treaties and international agreements and the maintenance of precise records;

maine, inflige de grandes pertes à l'humanité, qui se trouve ainsi privée des apports culturels ou autres de ces groupes, et est contraire à la loi morale ainsi qu'à l'esprit et aux fins des Nations Unies.

On a vu perpétrer des crimes de génocide qui ont entièrement ou partiellement détruit des groupements raciaux, religieux, politiques ou autres.

La répression du crime de génocide est une affaire d'intérêt international.

L'Assemblée générale, en conséquence,

Affirme que le génocide est un crime de droit des gens que le monde civilisé condamne, et pour lequel les auteurs principaux et leurs complices, qu'ils soient des personnes privées, des fonctionnaires ou des hommes d'Etat, doivent être punis, qu'ils agissent pour des raisons raciales, religieuses, politiques ou pour d'autres motifs;

Invite les Etats Membres à prendre les mesures législatives nécessaires pour prévenir et réprimer ce crime;

Recommande d'organiser la collaboration internationale des Etats en vue de prendre rapidement des mesures préventives contre le crime de génocide et d'en faciliter la répression, et, à cette fin,

Charge le Conseil économique et social d'entreprendre les études nécessaires en vue de rédiger un projet de Convention sur le crime de génocide, qui sera soumis à l'Assemblée générale lors de sa prochaine session ordinaire.

*Cinquante-cinquième séance plénière,
le 11 décembre 1946.*

97 (I). Enregistrement et publication des traités et accords internationaux. Règlement destiné à mettre en application l'Article 102 de la Charte des Nations Unies

L'Assemblée générale,

Estimant opportun de fixer les règles et les méthodes à suivre en vue de l'application de l'Article 102 de la Charte des Nations Unies, ainsi conçu:

"1. Tout traité ou accord international conclu par un Membre des Nations Unies après l'entrée en vigueur de la présente Charte sera, le plus tôt possible, enregistré au Secrétariat et publié par lui.

"2. Aucune partie à un traité ou accord international qui n'aura pas été enregistré conformément aux dispositions du paragraphe 1 du présent article ne pourra invoquer ledit traité ou accord devant un organe de l'Organisation."

Reconnaissant, en prévoyant des dispositions à ce sujet, l'importance qui s'attache à l'enregistrement et à la publication méthodique des traités et accords internationaux, et à ce qu'il soit constamment tenu un état exact de tous faits concernant lesdits traités et accords internationaux;

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)

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FILE NO.:

C.N.25.1956.TREATIES

29 March 1956

CONVENTION OF 9 DECEMBER 1948 ON THE PREVENTION
AND PUNISHMENT OF THE CRIME OF GENOCIDE

RATIFICATION WITH RESERVATIONS BY BURMA

Sir,

I am directed by the Secretary-General to inform you that, on 14 March 1956, the instrument of ratification by the Government of Burma of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948, was deposited with the Secretary-General in accordance with Article XI of the Convention.

This instrument was made subject to the following reservations:

"(1) With reference to Article VI, the Union of Burma makes the reservation that nothing contained in the said Article shall be construed as depriving the Courts and tribunals of the Union of jurisdiction or as giving foreign Courts and tribunals jurisdiction over any cases of genocide or any of the other acts enumerated in Article III committed within the Union territory.

"(2) With reference to Article VIII, the Union of Burma makes the reservation that the said Article shall not apply to the Union".

UNITED NATIONS  NATIONS UNIES

- 2 -

This notification is made in accordance with Article XVII (a) of the said Convention.

By resolution 598 (VI) on Reservations to Multilateral Conventions, adopted on 12 January 1952, the General Assembly recommended to all States that they be guided in regard to the Convention on the Prevention and Punishment of the Crime of Genocide by the advisory opinion of the International Court of Justice of 28 May 1951, and requested the Secretary-General, in relation to reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, to conform his practice to this advisory opinion.

Accept, Sir, the assurances of my highest consideration.



Constantin A. Stavropoulos
Legal Counsel

COPY

COPY

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)

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6 January 1993

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COMMISSION ON HUMAN RIGHTS
Forty-ninth session
Item 22 of the provisional agenda

IMPLEMENTATION OF THE DECLARATION ON THE ELIMINATION OF
ALL FORMS OF INTOLERANCE AND OF DISCRIMINATION BASED ON
RELIGION OR BELIEF

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

1. Sia Geok Hee, 37
2. Leong Soon Yong, 18
3. Gim Kah Hun, 37
4. Ng Lee Fang, 23
5. Lau Lih Yan, 23
6. Chew Keng Leng, 23
7. Teng Mui Fong, 27
8. Teh Lily, 33
9. Tan Sook Kuan, 15
10. Tan Yew Chuan, 34
11. Tan Choon Hun, 36
12. Tan Guat Ling, 31
13. See Seng Teck, 54
14. Lai Ah Lik alias Lai Boey, 52
15. Wong Chok Chang, 42
16. See Yee Al, 23
17. Tan Tian Chiew, 32
18. Lim Kai Tong, 62
19. Chew Kwang Sang, 25
20. Chew Kwang Seok, 22
21. Chew Kwang Sim, 21
22. Ng Lee Ling, 22
23. Ruth Ooi Lee Eng, 22
24. Goh Lai Eng, 50
25. Wong Yau Chee, 57
26. Lim Yew Lee, 57
27. Lee Kaw alias Lee Toong Lam, 43
28. Ng Nyet Chin, 34
29. Leong Ha alias Leong Keong On, 47
30. Ivy Ong"

Myanmar

45. In a communication of 16 October 1992 addressed to the Government of the Union of Myanmar, the following information was transmitted by the Special Rapporteur:

"Persecution of Muslims

According to the information received, 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 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. Muslims are said to make up approximately 4 per cent of the country's population and unofficial estimates place the Muslim population in Rakhine State between 1.4 and 2 million people. Approximately 300,000 Rohingyas are reported to have fled to Bangladesh by the end of April 1992, at the rate of more than 2,000 per day as a result of the repression. The persecution of Rohingyas is said to have intensified in late 1991, forcing them to flee at the rate of 5,000-7,000 per day by March 1992. Several thousand are said to have been killed by border guards while thousands more are reportedly kept in custody. Numerous Muslims born in Burma are said to have been detained for years on charges of illegal immigration. Many of those who have fled allegedly refuse to leave Bangladesh and return to their homes in Myanmar for fear of continuing persecution and some are said to have also fled Bangladesh for this reason. A similar campaign during which more than 200,000 Muslims fled from Myanmar to Bangladesh is said to have been launched by the authorities in 1978. In addition, the State Law and Order Restoration Council (SLORC) is said to have issued a statement according to which Rohingyas are not citizens of Myanmar and therefore cannot return.

The human rights violations against the Rohingyas, which rose sharply in early 1991, are reportedly primarily being committed by the armed forces and are said to have been particularly numerous in the Maungdaw and Buthidaung

townships of Akyab District. In January 1991, 1,500 villagers in Buthidaung township were allegedly ordered to leave their homes. A number of villages are said to have lost up to half of their population as thousands of Muslims fled to seek refuge in neighbouring Bangladesh while others are almost completely empty. The mass exodus is said to have increased dramatically in late 1991 and early 1992.

The human rights violations which have been brought to the attention of the Special Rapporteur may be grouped into the following broad categories: ill-treatment and killing during porter duty, ill-treatment and rape, summary executions and religious persecution, eviction and population transfers.

Ill-treatment during porter duty

Since the mid-1980's, Muslims are said to have been taken for forced porter duty by the military, particularly the light infantry divisions. A village headman would reportedly be coerced by troops into recruiting porters from his village, often in order to avoid an attack. Persons of all ages, including older men and children as well as clerics, are reported to have been taken from their villages and made to carry, without pay, heavy loads of food, bricks or ammunition for troops. Some are said to have literally been abducted from their homes, markets or local roads and many have never returned. They were also forced to work on the building of military camps, the construction and improvement of roads, digging trenches, or were made to act as servants for troops in army camps. They would also be forced frequently to build new villages for non-Muslim settlers which the armed forces had moved into the Rakhine area. Forced labourers were kept in army custody for periods varying from a few days to several months, often on rotation. Some were taken for forced porter duty several times. Since late 1991, there has reportedly been an increase in the number of Muslims taken as porters and the frequency with which they were taken. Citizens of Myanmar belonging to the Hindu faith are also reported to have been conscripted for forced portering.

Muslims on forced porter duty have been reported to be victims of ill-treatment: they were given no food or only a small amount of rice a day and were often tied up at night, which made sleep impossible. Those who became ill or weak from exhaustion or lack of food and could not perform their duties to the satisfaction of the army were verbally abused, kicked with heavy boots, beaten with bamboo sticks, iron rods and rifle butts, burned with cigarettes, slashed with bayonets or killed. If they collapsed and could no longer stand, they were left by the troops on the ground to die. Men who would flee in order to evade porter duty would have female members of their family taken in their place to the military camp and raped, often being held as hostages until the return of the men.

The following specific cases of ill-treatment of forced labourers were brought to the attention of the Special Rapporteur:

Abdul Jalil, 70, from Kiladaung village, Maungdaw township, had served the military at the Kilarbil camp for a decade and was involved in portering heavy loads and canal building. He reported that no one was allowed to stop work and sleep until midnight, when workers had to sleep on the roadside,

justified its intervention by stating that the worshippers had broken the seals placed on the doors of the mosque, encircled it with cannons and fired at the crowd with heavy machine guns. Soldiers are also said to have thrown grenades inside the building.

According to the sources, 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'. Muslims are said to have been virtually prisoners of their provinces since 1964, not being allowed to travel even between villages within a single township. The population transfers are said to have intensified the persecution of Muslims. The following specific cases were brought to the attention of the Special Rapporteur:

Abdul Shokur, 50, a watchmaker, part-time farmer and village teacher of Islam from Kandaung village, Buthidaung township, stated that before May 1990, pressure on Muslims used to be sporadic. Every Muslim had an identity card which designated him or her as a 'foreigner' without Burmese citizenship. No Muslim could travel without a permit, especially to Rangoon. The fee for obtaining a permit was 4,000 to 5,000 Denga (US\$600 to 750), or 10 times the average monthly salary in Akyab District. Muslims were frequently told they were not Burmese but from Bangladesh. The persecution of Muslims is said to have become commonplace after the May 1990 elections. Mosques were at first locked up, and then destroyed throughout the area with forced Muslim labour, and Buddhist temples were reportedly built in their place. Agricultural land was confiscated from Muslims for military use or distributed to non-Muslims in housing projects built with forced Muslim labour. About 150 Muslim homes in Kandaung village were expropriated in favour of non-Muslims and 150 new buildings were built to house the newcomers. Non-Muslim newcomers reportedly received one cow, land, as well as military and agricultural training. The military training of civilians, including the use of arms, increased the level of abuse against the Muslims, as they frequently joined soldiers in beating and looting. Random harassment of Muslims increased as well. Abdul Shokur further reported that one day soldiers discovered him teaching the Koran to children. They ridiculed him, threw the book on the ground and stomped it with their boots. It was at this point that he decided to flee to Bangladesh with his family.

Abdul Salam, 25, from Kandaung village, Buthidaung township, reported that a housing project for urban non-Muslims had been built during 1991 on Muslim land by forced labour in which he had taken part. Soldiers and non-Muslim civilians had also abducted Muslim men to train the newcomers in agricultural activities, in much the same way forced labour crews were collected for road construction. He reported that non-Muslim civilians were provided with military training and weapons, which prompted the random harassment, bullying and beating of Muslims.

Nurul Eslam, 20, a student of Islam from Kuansibaung village, Maungdaw township, reported that in March 1991, all Islamic schools in his village were closed, on orders 'from above', according to the soldiers. Harassment by troops included orders for all Muslims to get out of Burma and 'go back' to Bangladesh.

Mohammad Yonus, 50, from Miumaungkora village, Maungdaw township, reported that the mosque in his village had been destroyed by forced Muslim labour under military orders. All Muslims had been ordered to stop prayers. Mohammad Yonus was reportedly beaten on occasion for praying in a field near his home. Forced Muslim labour was used to build housing for non-Muslims in his village.

Abolhashem, 20, a student of Islam from Singdaung village, Buthidaung township, reported that one day, he and four friends were walking to the market with religious books in hand after class. A group of soldiers and non-Muslim civilians who had recently moved into a new housing project reportedly stopped the youths and began to ask questions about their books. The soldiers and the civilians then pushed the students down the road to their Islamic school. The young men were released, but four teachers were taken in their place. The local mosque had been demolished earlier with forced Muslim labour and a Buddhist temple had been built in its place. A teacher who said something in Bengali at prayer time was immediately beaten. When another teacher started praying in Arabic, the group of soldiers and civilians immediately started beating all four fiercely. They were then ordered to pray aloud to a statue of the Buddha, which they refused, and the beating continued. Finally, the soldiers took the teachers to Buthidaung camp where they were detained until the next day, when the Muslim community had collected enough money to pay a ransom. Abolhashem further reported that shortly after the incident, the school was surrounded by about 30 soldiers when 500 men and boys, aged from 10 to 40, were studying inside. They tied the hands of all those present and made them walk to Fumali camp. They were subsequently forced into portering for days in the mountains, without food, water or rest. Many reportedly died from exhaustion and ill-treatment. Only about one third of the original group survived to reach the Afored Dala camp. Eventually, they were told to walk to Bangladesh, and many died on the way.

The Special Rapporteur has also been informed that Mohamed Ilyas, 60, a Muslim member of parliament from Myothugyi village near Maungdaw, was reportedly beaten to death in military barracks on 19 June 1992 because he refused to go to Bangladesh to try to persuade Muslim refugees from Rakhine State to return home, after an agreement was signed by the SLORC and the Government of Bangladesh on 28 April 1992. Mr. Ilyas is said to have been arrested on 16 June together with four other parliamentarians. The soldiers are said to have returned his dead body to his family on 23 June. The four other deputies, including Fazal Ahmed, were reportedly seriously injured and are detained in a military prison.

Persecution of Christians

According to additional information received by the Special Rapporteur, Christians have also suffered persecution in Myanmar, especially in the area of the Irrawaddy delta. It has been alleged that villages have been bombed, churches raided and that pastors have been killed or have disappeared.

At the beginning of October 1991, a number of pastors from the Bogale, Tee Tant, Ket-Thamaing and Kayin Sabyuzu villages are said to have been imprisoned. Some of them are reported to have been executed. The following pastors are reportedly known to have been executed:

- Rev. James, Tee Tant village
- Elder Po Beh, Deacon of the church, Tee Tant village
- Rev. Daniel Tun, Hti Mulu-Kaimgyi village
- Pastor Thra Raynor, Klo Doh village
- Pastor Thra Ah Play, Klo Po village
- Pastor Thra Silas, Kathamyin village

A number of pastors were also reportedly executed in Ohn Bin Su village. In mid-October, the pastor of Singugyi village, Thra Tse Eh Gay, is reported to have been shot dead when he left the church after the service. The young son of pastor Taw Ler from Kaw Le Lu village was allegedly beaten unconscious and taken to the town of Labutta. There has been no news about him since. On 18 October 1991, numerous pastors were reportedly killed in villages near the town of Ngaputaw. The following pastors are said to have been arrested on that occasion:

- Pastor Johnny Htoo, Hti Mu Lu village
- Pastor Saw Khay, Kaw Kaw Lu village
- Pastor Lah Bah, Thet Po Lu village
- Pastor Htoo Set, Ka Ser Htoo village
- Pastor Bar Tha Aung, Kyauktan village
- Pastor Harry, Kyauktaloue village
- Pastor Harcourt, Hlaingboue village
- Pastor Tsar Eh Gay, Hsingugyi village

Numerous pastors are said to have been killed in November 1991 when the entire Kawlelu village was set on fire by the army. Also in November, troops reportedly entered Eh Eh village in Tavoy District and forcefully raided during worship a protestant church which was full at the time. They arrested the congregation and segregated the men and women. The latter were then ill-treated and raped by the soldiers. The soldiers are reported to have subsequently set fire to a number of houses in the village and killed 24 persons."

46. On 12 November 1992, the Permanent Mission of the Union of Myanmar to the United Nations Office at Geneva transmitted the following information to the Special Rapporteur with regard to the above-mentioned allegation:

"First of all, I should like to say categorically that the allegations to the effect that there is discrimination against people residing in Myanmar based on religion are totally untrue. In Myanmar, the major religions - Buddhism, Islam, Christianity and Hinduism - live side by side, flourishing and living in complete harmony. It is true that a large majority of the Myanmar nationals are Buddhists. Buddhism is a tolerant religion. Myanmar's culture goes back as far as thousands of years. Its culture is known for its gentleness, compassion and tolerance. This deep and rich culture ensures that there is great respect for other religious faiths. One who has been to Yangon (Rangoon), the capital, will notice that right at the centre of the town, there are a Buddhist pagoda, a Christian church, an Islamic mosque and a Hindu temple - all symbols of major religions thriving in Myanmar.

Even in the olden days, the Myanmar kings as devout Buddhists liberally decreed the promotion of other religions by way of the construction of mosques

E/CN.4/1993/62
page 76

and churches with funds from the royal treasury. Royal edicts were issued, allowing the subjects to profess any religion of their choice. The Myanmar king, King Mindon Mingyi, donated and arranged to build a rest-house at Mecca for the benefit of the Myanmar Muslims who went on Haj pilgrimages. Side by side with Buddhist temples, there are mosques and churches all over the country. There are 66 mosques in Yangon alone and some 1,300 in the whole country.

This deep-seated tradition of religious tolerance is well-maintained right up to this day. People of Islamic faith are given facilities to make their Haj pilgrimage to Mecca. Facilities are also extended to the Christians to attend religious conferences of various denominations.

With regard to the allegation that the people of Islamic faith in Myanmar are being persecuted, I should like to refer to the statement made by the General Secretary of All Myanmar Moulvis Headquarters made on 24 July 1992 at the Zafar Shah Mosque in Yangon to the people of the Muslim faith. He categorically stated that the allegations were fabricated by some big countries and certain foreign news agencies. Again, on 25 July 1992, at a ceremony welcoming back the Haj pilgrims, the Myanmar Muslims National Affairs Committee Chairman also stated that there is freedom of religion in Myanmar since the period of the Myanmar kings and called on those who crossed over to Bangladesh to come back to Myanmar with trust in the government.

I should like to stress here that because of the fact a large majority of the Myanmar nationals are Buddhists, the Government is prudent and careful in taking measures so that there is no discrimination against the other religious faiths in Myanmar. For this reason, a separate Ministry for Religious Affairs headed by a Minister of Cabinet rank was established in March 1992. This Ministry is to facilitate the promotion and propagation of the various religious faiths, including Islam, in Myanmar.

Now, I should like to refer to the matter of people who crossed over to Bangladesh. Since the first Anglo-Myanmar war in 1824, Muslims of Bengali stock had entered Rakhine (Arakan) State illegally from across the border. After annexation of Myanmar, the British administration adopted a policy of liberalizing immigration regulations in order to import labour from India to work on the agricultural lands largely devoted to growing paddy. During the course of the years, the number of such immigrants increased culminating in illegal settlement creating problems for the local populace. Recently, the Immigration officials conducted routine checking of the National Registration Cards in the area. Those who did not want to submit themselves to examination of their registration cards fled to the other side of the country. Among those who fled were mostly poor people who were lured by stories that relief food and goods were being distributed on the other side. Some left because they were threatened by terrorist insurgents to burn down their houses. The flow of these people to Bangladesh was essentially an illegal immigration problem. This problem was the cause of the people going over to that country. The same problem was the cause of the outflow of people of Bengali stock back in 1978.

Now about the so-called 'Rohingya people'. 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. The so-called 'Rohingyas' is an invention of insurgent terrorist organizations like the Rohingya Solidarity Organization (RSO) and the Arakan Rohingya Islamic Front (ARIF). Both organizations are alien to Myanmar in form and content and are largely supported and patronized from abroad.

As I have stated earlier, Myanmar saw the illegal entry of people of Bengali stock after the first Anglo-Myanmar war in 1824. At the end of the Second World War, plenty of arms and ammunition came into the hands of the people in that area. When the euphoria generated by the creation of Pakistan spread over Buthidaung and Maungdaw districts in Rakhine State, it gave birth to a political movement known as 'Mujahid Movement' led by one Abdul Kassim from Maungdaw township. Its demand was that Buthidaung and Maungdaw areas (situated in Rakhine State) to be designated as a Muslim State to be amalgamated with East Pakistan, now Bangladesh. The so-called Rohingyas are descendants of this alien terrorist insurgent movement. The said RSO and ARIF are the two main organizations responsible for the terrorist activities inciting the people of Islamic faith to cross over to the other side.

Now about the allegations against the Myanmar Armed Forces (the Tatmadaw).

The Myanmar army is the National Defence Force that in its growth underwent a metamorphosis as a Burmese Independent Army (BIA), the Burma Defence Army (DBA) and the Patriotic Burmese Forces (PBF) which had its beginnings in the early 1940s. In fighting or striving for national independence the Tatmadaw fought hand in hand together with the people, a struggle in which all the indigenous national races participated. The Myanmar army was born out of the national struggle for independence and follows the tradition of serving the people's interest loyally and faithfully. It is a carefully built and organized force that has been nurtured to defend the national interest. The Tatmadaw is a methodically and systematically organized institution made up of highly trained and disciplined personnel. Each member is pledged to conduct oneself in conformity with a prescribed code of ethics and is enjoined to respect the cultural traditions and customs of the local people. This training and tradition is fiercely maintained and observed by every member. Any misbehaviour or misconduct by a member is not tolerated or condoned. In view of these qualities, the grotesque allegations made against the Tatmadaw are totally false.

I feel that I have adequately covered and rebutted the allegations made against the Myanmar armed forces.

With regard to the allegations relating to individuals contained in the Annex attached to your letter, I should like to say that the allegations are based on fabricated and fraudulent evidence and are therefore mendacious."

47. With regard to the very specific allegations which the Special Rapporteur sent to the Government of Myanmar, he has noted that its reply was limited to specifying the principles of religious liberty which are said to be respected in this country and to describing the important role played by the Army of

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)

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COMMISSION ON HUMAN RIGHTS
Forty-ninth session
Agenda item 12

QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS
IN ANY PART OF THE WORLD, WITH PARTICULAR REFERENCE TO COLONIAL
AND OTHER DEPENDENT COUNTRIES AND TERRITORIES

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

CONTENTS

	<u>Paragraphs</u>	<u>Page</u>
Introduction	1 - 6	3
I. Background	7 - 31	3
A. General	7 - 8	3
B. Chronology of events pertinent to the situation	9 - 31	4
II. Activities of the Special Rapporteur	32 - 68	6
III. Allegations	69 - 138	14
A. Right to life	69 - 96	14
B. Torture, cruel, inhuman or degrading punishment	97 - 114	20

CONTENTS (continued)

	<u>Paragraphs</u>	<u>Page</u>
C. Disappearances	115 - 116	23
D. Arbitrary and prolonged detention	117 - 119	24
E. Freedom of expression	120 - 127	24
F. Situation of Myanmar Muslims of Rakhine state . .	128 - 138	25
IV. Legal framework	139 - 199	27
A. International law	140 - 179	28
B. Myanmar law relevant to the question of human rights	180 - 198	36
V. The National Convention for drafting a new Constitution and the transfer of power to a civilian government	199 - 217	40
VI. Conclusions	218 - 241	43
VII. Recommendations	242	48

Introduction

1. On 3 March 1992, at its forty-eighth session, the Commission on Human Rights adopted resolution 1992/58, entitled "Situation of human rights in Myanmar". In that resolution, the Commission noted that, in accordance with the Charter, the United Nations promotes and encourages respect for human rights and fundamental freedoms for all, and that the Universal Declaration of Human Rights states that "the will of the people shall be the basis of the authority of government". It also noted with particular concern in that regard that the electoral process initiated in Myanmar by the general elections of 27 May 1990 had not yet reached its conclusion; that no apparent progress had been made in giving effect to the political will of the people of Myanmar, as expressed in the elections; and that the final results of the elections had not even been officially released; also noted that many political leaders, in particular elected representatives, remained deprived of their liberty and that Daw Aung San Suu Kyi was still under house arrest; and noted with concern the seriousness of the situation of human rights in Myanmar, the existence of important restrictions on the exercise of fundamental freedoms and the imposition of oppressive measures directed, in particular, at minority groups and the continuing exodus of Myanmar refugees to neighbouring countries, including Myanmar Muslim refugees to Bangladesh.

2. By paragraph 3 of resolution 1992/58, the Commission on Human Rights decided to nominate a special rapporteur to establish direct contacts with the Government and with the people of Myanmar with a view to examining the situation of human rights in Myanmar and to report to the General Assembly at its forty-seventh session and to the Commission on Human Rights at its forty-ninth session.

3. After consultation with the Bureau, the Chairman of the Commission appointed, on 10 June 1992, Dr. Yozo Yokota (Japan) as Special Rapporteur on the situation of human rights in Myanmar, pending approval of Commission resolution 1992/58 by the Economic and Social Council.

4. At its substantive session of 1992, the Economic and Social Council adopted decision 1992/235 of 20 July 1992, approving Commission resolution 1992/58.

5. The preliminary report of the Special Rapporteur was submitted to the Secretary-General of the United Nations for dissemination to all States Members of the United Nations at the forty-seventh session of the General Assembly in November 1992 (A/47/651, annex).

6. This comprehensive report is submitted to the Commission on Human Rights at its forty-ninth session for consideration by the Commission.

I. BACKGROUND

A. General

7. The situation of human rights in Myanmar was first considered by the Commission on Human Rights at its forty-sixth session, in 1990, under the procedure established by Economic and Social Council resolution 1503, after

1948, in 1978 when a census was carried out leading to the flight of 200,000 Rakhine to Bangladesh, and again in 1991 which gave rise to the present mass exodus to Bangladesh.

237. In regard to detention of political leaders and other persons attempting to participate freely in the political process, it was impossible for the Special Rapporteur to determine how many persons in this category remain in detention, but it is believed that there remain scores of persons still in detention without any of the judicial safeguards considered as a minimum standard by the international community. Among these is the Nobel Peace Prize recipient, Daw Aung San Suu Kyi, who was detained without trial in 1989 under the 1975 State Protection Act. The Act was then amended in August of 1991 when her term of detention had almost expired, in order to allow for prolongation of her detention.

238. The law was applied in an ex-post facto manner in contradiction to international legal standards. Recent reports stated that she would be released after the National Convention and after the Constitution was drafted and the new government had taken charge. Although over 1,700 persons were released under SLORC Order No. 11/92 in April 1992, the Special Rapporteur has received confirmed reports that new detentions of political leaders have taken place in 1993.

239. The National Convention preparatory to the drafting of the constitution was convened on 9 January 1993. After one and a half days the Convention was postponed reportedly because some elected representatives were preparing to bring up the question of the "leading role of the Tatmadaw (army) in the new government". Several persons were reportedly arrested for having distributed written material.

240. The National Convention was reconvened on 1 February. Discussion on the constitution is taking place under a panel of 45 chairmen elected by the 8 groups represented as delegates. Of these chairmen, only one is a member of the National League for Democracy which won 80 per cent of the vote in the national elections. It has been announced that the universities will reopen on 19 February 1993.

241. On the basis of the visit to Myanmar and the well-documented information received, the Special Rapporteur has assessed that serious repression and an atmosphere of pervasive fear exist in Myanmar. He found that there is a lack of accountability on the part of the Government and an absence of legal and administrative protection and/or recourse available for victims and families of victims of human rights abuses. In the light of these findings, the Special Rapporteur recommends that the Commission on Human Rights continue its close monitoring of the situation of human rights in Myanmar and extend the mandate of the Special Rapporteur to report to the Commission at its fiftieth session.

VII. RECOMMENDATIONS

242. In the light of the above conclusions, the Special Rapporteur submits the following recommendations for the consideration of the Government of Myanmar:

(a) Although the Special Rapporteur believes the Government should give effect to the political will of the people by transferring power to the freely and fairly elected civilian government; nevertheless, he is of the opinion that implementation of the following non-political, human rights recommendations should not be delayed by, nor subordinated to, considerations of political transition.

(b) The Government of Myanmar should fulfil in good faith the obligations it has assumed under Articles 55 and 56 of the Charter of the United Nations "to take joint and separate action in cooperation with the Organization for the achievement of ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion." Other rights under the Charter should not be invoked as limitations on these obligations assumed erga omnes.

(c) The Government of Myanmar should consider accession to: the International Covenants on Human Rights; the Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment and to the two protocols additional to the Geneva Conventions of 1949. In addition, it should immediately withdraw its reservations and understandings to articles 15 on freedom of association and 37 regarding the prohibition of torture of minors, of the Convention on the Rights of the Child.

(d) The system of law, both constitutionally and legislatively, in Myanmar should be regularized to be accessible to those to whom it would be applied, to be clear and unequivocal and to be equitably applied. The ongoing state of emergency should be lifted and martial law in the form of SLORC Orders and other emergency legislation should cease to be the basis of law.

(e) Myanmar law should be brought into line with accepted international standards regarding protection of the physical integrity rights. Among these international standards are the right to life, protection against disappearance, prohibition of torture, cruel, inhuman or degrading treatment, providing humane conditions for all persons under detention and granting the minimum standard of judicial guarantees, as accepted by the international community, in order to further ensure the physical integrity of all persons under all forms of detention. Freedom of expression should be allowed including a free press and media. The Special Rapporteur recommends that constitutional and international legal experts from different regions be invited by the Government of Myanmar to share their expertise with Myanmar in the drafting of the new constitution and other legislation.

(f) The Government should take measures to comply with its obligations under ILO Convention No. 29 by eradicating the practice of forced portering and other forced labour which has provoked systematic torture, cruel inhuman and degrading treatment or punishment, disappearances and mass arbitrary executions. It should also take immediate steps to amend and implement legislation in accordance with ILO Convention No. 87. In compliance with this Convention, it should allow for the existence and practice of free trade unions and free association for the purpose of participation, in the civil and political as well as economic, social and cultural life of the country.

(g) 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. It should be brought in line with the principles embodied in the Convention on the Reduction of Statelessness of 30 August 1961. The Union of Myanmar should consider ratification of both this Convention and the Convention relating to the Status of Refugees of 28 July 1951 and its Additional Protocol of 31 January 1967.

(h) In order to promote repatriation of the Myanmar Muslims and other minorities, the Government should create the necessary conditions of respect for their human rights. The Government should assure, in law and practice, their safe return and resettlement in villages of origin. To this end, it should also promote their complete civil, political, social, economic and cultural participation in Myanmar without restriction or discrimination due to status.

(i) The Special Rapporteur recommends, in the light of the seriousness of the refugee and repatriation problem, and the grave threat this situation poses to the physical integrity of Myanmar ethnic and racial minorities as well as to the peace and security in the region, that an international human rights monitoring team, in conjunction with the mandate of the Special Rapporteur, be allowed access to the border areas. In addition, this team should be allowed access to the sites of repatriation within Myanmar. This team would operate with an integrated human rights/humanitarian approach with consideration for the refugee and repatriation issues. It is suggested that it be composed of independent experts and selected representatives of the specialized agencies with expertise in the relevant areas.

(j) Military and law-enforcement officials should be thoroughly informed and trained as to their responsibilities for the treatment of all persons as set out by international human rights instruments and humanitarian laws, standards which should be incorporated into Myanmar national legislation.

(k) Given the magnitude of the abuses, official condemnation should be made by the Government of all acts by authorities involving human rights violations. Such acts, including all acts of intimidation, threat or reprisal, should not benefit from the present system of complete denial and impunity of the Government.

(l) Daw Aung San Suu Kyi and all other political leaders including the elected political representatives, students, workers, peasants and others arrested or detained under martial law after the 1988 and 1990 demonstrations, or as a result of the National Convention, should be tried by a properly constituted and independent civilian court in an open and internationally accessible judicial process. If found guilty in such judicial proceedings, they should be given a just sentence, alternatively, they should be immediately released, with the responsibility of the Government to refrain from all acts of intimidation, threat or reprisal to them and their families.

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)

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1996

Volume II
Part Two

*Report of the Commission
to the General Assembly
on the work
of its forty-eighth session*

UNITED NATIONS



is understood that the inclusion of certain crimes in the Code does not affect the status of other crimes under international law, and that the adoption of the Code does not in any way preclude the further development of this important area of law.

B. Recommendation of the Commission

47. The Commission considered various forms which the draft Code of Crimes against the Peace and Security of Mankind could take; these included an international convention, whether adopted by a plenipotentiary conference or by the General Assembly; incorporation of the Code in the statute of an international criminal court; or adoption of the Code as a declaration by the General Assembly.

48. The Commission recommends that the General Assembly select the most appropriate form which would ensure the widest possible acceptance of the draft Code.

C. Tribute to the Special Rapporteur, Mr. Doudou Thiam

49. At its 2454th meeting, on 5 July 1996, the Commission, after adopting the text of the articles of the draft Code against the Peace and Security of Mankind on second reading, adopted the following resolution by acclamation:

The International Law Commission,

Having adopted the draft Code of Crimes against the Peace and Security of Mankind,

Expresses to the Special Rapporteur, Mr. Doudou Thiam, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft Code by his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft Code of Crimes against the Peace and Security of Mankind.

D. Articles of the draft Code of Crimes against the Peace and Security of Mankind

50. The text of, and commentaries to, draft articles 1 to 20 as finally adopted by the Commission at its forty-eighth session are reproduced below.

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

PART ONE

GENERAL PROVISIONS

Article 1. Scope and application of the present Code

1. The present Code applies to the crimes against the peace and security of mankind set out in part two.

2. Crimes against the peace and security of mankind are crimes under international law and punish-

able as such, whether or not they are punishable under national law.

Commentary

(1) As the first article in the draft Code of Crimes against the Peace and Security of Mankind, article 1 addresses as a preliminary matter the scope and application of the provisions of the Code.

(2) *Paragraph 1* restricts the scope and application of the Code to those crimes against the peace and security of mankind that are set out in part two. This provision is not intended to suggest that the Code covers exhaustively all crimes against the peace and security of mankind, but rather to indicate that the scope and application of the Code are limited to those crimes dealt with in part two.

(3) The phrase "crimes against the peace and security of mankind" should be understood in this provision of the Code as referring to the crimes listed in part two. The Commission considered adding to the end of paragraph 1 the phrase "hereinafter referred to as crimes against the peace and security of mankind" so as to dispel any possible misunderstanding. It, however, felt that such an addition would make the paragraph unnecessarily cumbersome.

(4) The Commission decided not to propose a general definition of crimes against the peace and security of mankind. It took the view that it should be left to practice to define the exact contours of the concept of crimes against peace, war crimes and crimes against humanity, as identified in article 6 of the Charter of the Nürnberg Tribunal.³³

(5) *Paragraph 2* addresses two fundamental principles relating to individual responsibility for the crimes against the peace and security of mankind under international law.

(6) The opening clause of paragraph 2 indicates that international law provides the basis for the criminal characterization of the types of behaviour which constitute crimes against the peace and security of mankind under part two. Thus, the prohibition of such types of behaviour and their punishability are a direct consequence of international law.

(7) This provision is consistent with the Charter and the Judgment of the Nürnberg Tribunal.³⁴ Article 6 of the Charter authorized the Nürnberg Tribunal to try and punish individuals for three categories of crimes under international law, namely crimes against peace, war crimes and crimes against humanity. In its Judgment, the Nürnberg Tribunal recognized the existence of duties incumbent upon individuals by virtue of international law. "That international law imposes duties and liabilities upon individuals as well as upon States has long been

³³ Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

³⁴ The General Assembly unanimously affirmed the Nürnberg Principles in its resolution 95 (I).

recognized.”³⁵ The Nürnberg Tribunal also recognized that individuals could incur criminal responsibility and be liable to punishment as a consequence of violating their obligations under international law. In this regard, the Nürnberg Tribunal expressly stated “that individuals can be punished for violations of international law.”³⁶

(8) The Commission recognized the general principle of the direct applicability of international law with respect to individual responsibility and punishment for crimes under international law in Principle I of the Nürnberg Principles. Principle I provides that “Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.” As indicated in the commentary to this provision, “The general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law.”³⁷ This principle was also articulated in article 1 of the draft Code of Offences against the Peace and Security of Mankind adopted by the Commission in 1954 (hereinafter referred to as the “1954 draft Code”).³⁸

(9) The concluding clause of paragraph 2 confirms that international law applies to crimes against the peace and security of mankind irrespective of the existence of any corresponding national law. The result is the autonomy of international law in the criminal characterization of the types of behaviour which constitute crimes against the peace and security of mankind under part two.

(10) The said clause states that the characterization, or the absence of characterization, of a particular type of behaviour as criminal under national law has no effect on the characterization of that type of behaviour as criminal under international law. It is conceivable that a particular type of behaviour characterized as a crime against the peace and security of mankind in part two might not be prohibited or might even be imposed by national law. It is also conceivable that such behaviour might be characterized merely as a crime under national law, rather than as a crime against the peace and security of mankind under international law. None of those circumstances could serve as a bar to the characterization of the type of conduct concerned as criminal under international law. The distinction between characterization as a crime under national law and characterization as a crime under international law is significant since the corresponding legal regimes differ. This distinction has important implications with respect to the *non bis in idem* principle addressed in article 12.

(11) This provision is consistent with the Charter and the Judgment of the Nürnberg Tribunal. The Charter of the Nürnberg Tribunal expressly referred to the relationship between international law and national law with respect to the criminal characterization of particular conduct only in relation to crimes against humanity. Article 6,

subparagraph (c) of the Charter characterized as crimes against humanity certain types of conduct “whether or not in violation of the domestic law where perpetrated”. In its Judgment, the Nürnberg Tribunal recognized in general terms what is commonly referred to as the supremacy of international criminal law over national law in the context of the obligations of individuals. In this regard, the Nürnberg Tribunal stated that “the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State”.³⁹

(12) The Commission recognized the general principle of the autonomy of international law over national law with respect to the criminal characterization of conduct constituting crimes under international law in Principle II of the Nürnberg Principles which stated as follows: “The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.”

(13) It must be pointed out that the clause under consideration concerns only the criminal characterization of certain types of conduct as constituting crimes against the peace and security of mankind under part two. It is without prejudice to national competence in relation to other matters of criminal law or procedure, such as the penalties, evidentiary rules, etc., particularly since national courts are expected to play an important role in the implementation of the Code.

Article 2. Individual responsibility

1. A crime against the peace and security of mankind entails individual responsibility.

2. An individual shall be responsible for the crime of aggression in accordance with article 16.

3. An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:

- (a) Intentionally commits such a crime;**
- (b) Orders the commission of such a crime which in fact occurs or is attempted;**
- (c) Fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;**
- (d) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;**
- (e) Directly participates in planning or conspiring to commit such a crime which in fact occurs;**
- (f) Directly and publicly incites another individual to commit such a crime which in fact occurs;**
- (g) Attempts to commit such a crime by taking action commencing the execution of a crime which**

³⁵ *Nazi Conspiracy and Aggression: Opinion and Judgment* (Washington, United States Government Printing Office, 1947), p. 52.

³⁶ *Ibid.*

³⁷ *Yearbook . . . 1950*, vol. II, p. 374, document A/1316, para. 99.

³⁸ See footnote 12 above. Article 1 stated that “Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished”.

³⁹ *Nazi Conspiracy and Aggression . . .* (see footnote 35 above), p. 53.

does not in fact occur because of circumstances independent of his intentions.

Commentary

(1) The principle of individual responsibility for crimes under international law was clearly established at Nürnberg. The Charter of the Nürnberg Tribunal provided for the trial and punishment of persons who committed crimes against peace, war crimes or crimes against humanity.⁴⁰ The Nürnberg Tribunal confirmed the direct applicability of international criminal law with respect to the responsibility and punishment of individuals for violations of this law:

It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals . . . In the opinion of the Tribunal, [this submission] must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized.⁴¹

The Nürnberg Tribunal further concluded that “individuals can be punished for violations of international law”.⁴² The principle of individual responsibility and punishment for crimes under international law recognized at Nürnberg is the cornerstone of international criminal law. This principle is the enduring legacy of the Charter and the Judgment of the Nürnberg Tribunal which gives meaning to the prohibition of crimes under international law by ensuring that the individuals who commit such crimes incur responsibility and are liable to punishment. The principle of individual responsibility and punishment for crimes under international law was reaffirmed in the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991⁴³ (art. 7, para. 1 and art. 23, para. 1) and the statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994⁴⁴ (art. 6, para. 1 and art. 22, para. 1). This principle was also reaffirmed by the Commission in the Nürnberg Principles (Principle 1) and in the 1954 draft Code (art. 1). The punishment of individuals for the crimes covered by the Code is addressed in article 3 (Punishment) and discussed in the commentary thereto.

(2) The principles of individual criminal responsibility which determine whether an individual can be held accountable for a crime against the peace and security of mankind are set forth in articles 2 to 7 of part one. As the first article in this series of articles, article 2 deals with a number of important general principles concerning indi-

vidual criminal responsibility. Paragraph 1 establishes the general principle of individual responsibility for the crimes covered by the Code. Paragraph 2 reaffirms this principle with respect to the crime of aggression as provided in article 16 which deals with the forms of participation. Paragraph 3 addresses the various forms of participation by which an individual incurs responsibility for the other crimes listed in part two of the Code.

(3) *Paragraph 1* reaffirms the principle of individual responsibility for crimes under international law with respect to crimes against the peace and security of mankind. This is clearly indicated by the recognition of the fact that such a crime “entails individual responsibility”. Notwithstanding the scope and application of the Code provided for in article 1, paragraph 1, article 2, paragraph 1, is formulated in general terms to reaffirm the general principle of individual criminal responsibility with respect to all crimes against the peace and security of mankind irrespective of whether such crimes are listed in the Code. The Commission considered that it was important to reaffirm this general principle in relation to all crimes against the peace and security of mankind to avoid any question concerning its application to crimes of such a character that were not listed in part two. The Commission adopted a restrictive approach to the inclusion of crimes in part two while recognizing that there might be other crimes of the same character that were not presently covered by the Code.

(4) Paragraph 1 also indicates that the scope of application of the Code *ratione personae* is limited to “individuals” meaning natural persons. It is true that the act for which an individual is responsible might also be attributable to a State if the individual acted as an “agent of the State”, “on behalf of the State”, “in the name of the State” or as a *de facto* agent, without any legal power. For this reason, article 4 (Responsibility of States) establishes that the criminal responsibility of individuals is “without prejudice to any question of the responsibility of States under international law.”

(5) *Paragraph 2* deals with individual responsibility for the crime of aggression. In relation to the other crimes included in the Code, paragraph 3 indicates the various manners in which the role of the individual in the commission of a crime gives rise to responsibility: he shall be responsible if he committed the act which constitutes the crime; if he attempted to commit the act; if he failed to prevent the commission of the act; if he incited the commission of the act; if he participated in the planning of the act; if he was an accomplice in its commission. In relation to the crime of aggression, it was not necessary to indicate these different forms of participation which entail the responsibility of the individual, because the definition of the crime of aggression in article 16 already provides all the elements necessary to establish the responsibility. According to that article, an individual is responsible for the crime of aggression when, as a leader or organizer, he orders or actively participates in the planning, preparation, initiation or waging of aggression committed by a State. The crime of aggression has particular features which distinguish it from the other offences under the Code. Aggression can be committed only by individuals who are agents of the State and who use their power to give orders and the means it makes available in order to

⁴⁰ Charter of the Nürnberg Tribunal, art. 6.

⁴¹ *Nazi Conspiracy and Aggression* . . . (see footnote 35 above), p. 52.

⁴² *Ibid.*, p. 53.

⁴³ Hereinafter referred to as the “International Tribunal for the Former Yugoslavia”. Reference texts are reproduced in *Basic Documents, 1995* (United Nations publication, Sales No. E/F.95.III.P.1).

⁴⁴ Hereinafter referred to as the “International Tribunal for Rwanda”. Security Council resolution 955 (1994) of 8 November 1994, annex.

Article 17. Crime of genocide

A crime of genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (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.

Commentary

(1) The Charter of the Nürnberg Tribunal recognized in article 6, subparagraph (c), two distinct categories of crimes against humanity. The first category of crimes against humanity relating to inhumane acts is addressed in article 18. The second category of crimes against humanity relating to persecution is addressed in article 17 in the light of the further development of the law concerning such crimes since Nürnberg.

(2) The Charter and the Judgment of the Nürnberg Tribunal defined the second category of crimes against humanity as “persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal”. The Nürnberg Tribunal convicted some of the defendants of crimes against humanity based on this type of conduct and, thus, confirmed the principle of individual responsibility and punishment for such conduct as a crime under international law.¹¹⁴ Shortly after the Judgment of the Nürnberg Tribunal, the General Assembly affirmed that the persecution type of crimes against humanity or “genocide”¹¹⁵ constituted a crime under international law for which individuals were subject to punishment.¹¹⁶ The General Assembly subsequently recognized that genocide had inflicted great losses on humanity throughout history in adopting the Convention on the Prevention and Punishment of the Crime of Genocide to provide a basis for the international cooperation required to liberate mankind from this odious scourge.

(3) The fact that the General Assembly had recognized the extreme gravity of the crime of genocide as early as 1946 and had drafted an international convention on its prevention and punishment as early as 1948 made it essential to include this crime in the Code and also facilitated the Commission’s task. The Convention on the Prevention and Punishment of the Crime of Genocide has been widely accepted by the international community and ratified by the overwhelming majority of States. More-

¹¹⁴ *Nazi Conspiracy and Aggression* . . . (see footnote 35 above), pp. 84, 129-131 and 144-146.

¹¹⁵ The term “genocide” was first coined by Raphael Lemkin. See R. Lemkin, *Axis Rule in Occupied Europe* (Washington, Carnegie Endowment for International Peace, 1944), pp. 79-95.

¹¹⁶ General Assembly resolution 96 (I).

over, the principles underlying the Convention have been recognized by ICJ as binding on States even without any conventional obligation.¹¹⁷ Article II of the Convention contains a definition of the crime of genocide which represents an important further development in the law relating to the persecution category of crimes against humanity recognized in the Charter of the Nürnberg Tribunal. It provides a precise definition of the crime of genocide in terms of the necessary intent and the prohibited acts. The Convention also confirms in article I that genocide is a crime under international law which may be committed in time of peace or in time of war. Thus, the Convention does not include the requirement of a nexus to crimes against peace or war crimes contained in the Charter of the Nürnberg Tribunal which referred to “persecutions . . . in execution of or in connection with any crime within the jurisdiction of the Tribunal”. The definition of genocide contained in article II of the Convention, which is widely accepted and generally recognized as the authoritative definition of this crime, is reproduced in article 17 of the Code. The same provision of the Convention is also reproduced in the statute of the International Tribunal for the Former Yugoslavia and the statute of the International Tribunal for Rwanda. Indeed the tragic events in Rwanda clearly demonstrated that the crime of genocide, even when committed primarily in the territory of a single State, could have serious consequences for international peace and security and, thus, confirmed the appropriateness of including this crime in the Code.

(4) The definition of the crime of genocide set forth in article 17 consists of two important elements, namely the requisite intent (*mens rea*) and the prohibited act (*actus reus*). These two elements are specifically referred to in the initial phrase of article 17 which states that “A crime of genocide means any of the following acts committed with intent to . . .”. Whereas the first element of the definition is addressed in the opening clause of article 17, the second element is addressed in subparagraphs (a) to (e).

(5) As regards the first element, the definition of the crime of genocide requires a specific intent which is the distinguishing characteristic of this particular crime under international law. The prohibited acts enumerated in subparagraphs (a) to (e) are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result. These are not the type of acts that would normally occur by accident or even as a result of mere negligence. However, a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act. As indicated in the opening clause of article 17, an individual incurs responsibility for the crime of genocide only when one of the prohibited acts is “committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such”.

¹¹⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15.

(6) There are several important aspects of the intent required for the crime of genocide. First, the intention must be to destroy a group and not merely one or more individuals who are coincidentally members of a particular group. The prohibited act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group. It is the membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide. The group itself is the ultimate target or intended victim of this type of massive criminal conduct.¹¹⁸ The action taken against the individual members of the group is the means used to achieve the ultimate criminal objective with respect to the group.

(7) Secondly, the intention must be to destroy the group "as such", meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group. In this regard, the General Assembly distinguished between the crimes of genocide and homicide in describing genocide as the "denial of the right of existence of entire human groups" and homicide as the "denial of the right to live of individual human beings" in its resolution 96 (I).

(8) Thirdly, the intention must be to destroy a group "in whole or in part". It is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. None the less the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group.

(9) Fourthly, the intention must be to destroy one of the types of groups covered by the Convention on the Prevention and Punishment of the Crime of Genocide, namely, a national, ethnic, racial or religious group. Political groups were included in the definition of persecution contained in the Charter of the Nürnberg Tribunal, but not in the definition of genocide contained in the Convention because this type of group was not considered to be sufficiently stable for purposes of the latter crime. None the less persecution directed against members of a political group could still constitute a crime against humanity as set forth in article 18, subparagraph (e) of the Code. Racial and religious groups are covered by the Charter of the Nürnberg Tribunal and the Convention. In addition, the Convention also covers national or ethnical groups. Article 17 recognizes the same categories of protected groups as the Convention. The word "ethnical" used in the Convention has been replaced by the word "ethnic" in article 17 to reflect modern English usage without in any way affecting the substance of the provision. Furthermore, the Commission was of the view that the article covered the prohibited acts when committed with the necessary intent against members of a tribal group.

¹¹⁸ "The main characteristic of genocide is its object: the act must be directed toward the destruction of a group. Groups consist of individuals, and therefore destructive action must, in the last analysis, be taken against individuals. However, these individuals are important not *per se* but only as members of the group to which they belong." (N. Robinson, *The Genocide Convention: A Commentary* (New York, Institute of Jewish Affairs, World Jewish Congress, 1960), p. 58.)

(10) As recognized in the commentary to article 5, the crimes covered by the Code are of such magnitude that they often require some type of involvement on the part of high level government officials or military commanders as well as their subordinates. Indeed the Convention on the Prevention and Punishment of the Crime of Genocide explicitly recognizes in article IV that the crime of genocide may be committed by constitutionally responsible rulers, public officials or private individuals. The definition of the crime of genocide would be equally applicable to any individual who committed one of the prohibited acts with the necessary intent. The extent of knowledge of the details of a plan or a policy to carry out the crime of genocide would vary depending on the position of the perpetrator in the governmental hierarchy or the military command structure. This does not mean that a subordinate who actually carries out the plan or policy cannot be held responsible for the crime of genocide simply because he did not possess the same degree of information concerning the overall plan or policy as his superiors. The definition of the crime of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide. A subordinate is presumed to know the intentions of his superiors when he receives orders to commit the prohibited acts against individuals who belong to a particular group. He cannot escape responsibility if he carries out the orders to commit the destructive acts against victims who are selected because of their membership in a particular group by claiming that he was not privy to all aspects of the comprehensive genocidal plan or policy. The law does not permit an individual to shield himself from criminal responsibility by ignoring the obvious. For example, a soldier who is ordered to go from house to house and kill only persons who are members of a particular group cannot be unaware of the irrelevance of the identity of the victims and the significance of their membership in a particular group. He cannot be unaware of the destructive effect of this criminal conduct on the group itself. Thus, the necessary degree of knowledge and intent may be inferred from the nature of the order to commit the prohibited acts of destruction against individuals who belong to a particular group and are therefore singled out as the immediate victims of the massive criminal conduct.

(11) With regard to the second element of the definition of genocide, the article sets forth in subparagraphs (a) to (e) the prohibited acts which are contained in article II of the Convention on the Prevention and Punishment of the Crime of Genocide. Whereas the 1954 draft Code used the word "including" in article 2, paragraph 10, to indicate an illustrative rather than an exhaustive list of acts constituting genocide, the Commission decided to use the wording of article II of the Convention to indicate that the list of prohibited acts contained in article 17 is exhaustive in nature. The Commission decided in favour of that solution having regard to the need to conform with a text widely accepted by the international community.

(12) As clearly shown by the preparatory work for the Convention on the Prevention and Punishment of the Crime of Genocide,¹¹⁹ the destruction in question is the

¹¹⁹ See Report of the Ad Hoc Committee on Genocide, 5 April-10 May 1948 (*Official Records of the Economic and Social Council, Third year, Seventh Session, Supplement No. 6 (E/794)*).

material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word "destruction", which must be taken only in its material sense, its physical or biological sense. It is true that the draft Convention prepared by the Secretary-General at the second session of the General Assembly in 1947¹²⁰ and the draft convention of the prevention and punishment of the crime of genocide, prepared by the Ad Hoc Committee on Genocide, contained provisions on "cultural genocide"¹²¹ covering any deliberate act committed with the intent to destroy the language, religion or culture of a group, such as prohibiting the use of the language of the group in daily intercourse or in schools or the printing and circulation of publications in the language of the group or destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group. However, the text of the Convention, as prepared by the Sixth Committee and adopted by the General Assembly, did not include the concept of "cultural genocide" contained in the two drafts and simply listed acts which come within the category of "physical" or "biological" genocide.¹²² Subparagraphs (a) to (c) of the article list acts of "physical genocide", while subparagraphs (d) and (e) list acts of "biological genocide".

(13) As regards *subparagraph (a)*, the phrase "killing members of the group" was drawn from article II, subparagraph (a) of the Convention on the Prevention and Punishment of the Crime of Genocide.¹²³

(14) With regard to *subparagraph (b)*, the phrase "causing serious bodily or mental harm to members of the group" was drawn from article II, subparagraph (b) of the Convention on the Prevention and Punishment of the Crime of Genocide. This subparagraph covers two types of harm that may be inflicted on an individual, namely, bodily harm which involves some type of physical injury and mental harm which involves some type of impairment of mental faculties. The bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.

(15) Regarding *subparagraph (c)*, the phrase "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" was drawn from article II, subparagraph (c), of the Convention on the Prevention and Punishment of the Crime of Genocide.¹²⁴ It was suggested that deportation should be included in subparagraph (c). The Commission, however,

considered that this subparagraph covered deportation when carried out with the intent to destroy the group in whole or in part.

(16) As regards *subparagraph (d)*, the phrase "imposing measures intended to prevent births within the group" was drawn from article II, subparagraph (d), of the Convention on the Prevention and Punishment of the Crime of Genocide.¹²⁵ The phrase "imposing measures" is used in this subparagraph to indicate the necessity of an element of coercion.¹²⁶ Therefore this provision would not apply to voluntary birth control programmes sponsored by a State as a matter of social policy.

(17) With regard to *subparagraph (e)*, the phrase "forcibly transferring children of the group to another group", was drawn from article II, subparagraph (e) of the Convention on the Prevention and Punishment of the Crime of Genocide. The forcible transfer of children would have particularly serious consequences for the future viability of a group as such. Although the article does not extend to the transfer of adults, this type of conduct in certain circumstances could constitute a crime against humanity under article 18, subparagraph (g) or a war crime under article 20, subparagraph (a) (vii). Moreover, the forcible transfer of members of a group, particularly when it involves the separation of family members, could also constitute genocide under subparagraph (c).

(18) The article clearly indicates that it is not necessary to achieve the final result of the destruction of a group in order for a crime of genocide to have been committed. It is enough to have committed any one of the acts listed in the article with the clear intention of bringing about the total or partial destruction of a protected group as such.

(19) The Commission noted that a court that was called upon to apply the definition of the crime of genocide contained in the article in a particular case might find it necessary to have recourse to other relevant provisions contained in the Convention on the Prevention and Punishment of the Crime of Genocide either as conventional or as customary international law. For example, if a question should arise as to whether the crime of genocide set forth in the article could be committed in time of peace, the court could find the authoritative answer to this question in article I of the Convention which confirmed this possibility.

advance the 'conditions of life' that would come within the prohibition of article II; the intent and probability of the final aim alone can determine in each separate case whether an act of genocide has been committed (or attempted) or not. Instances of genocide that could come under subparagraph (c) are such as placing a group of people on a subsistence diet, reducing required medical services below a minimum, withholding sufficient living accommodations, etc., provided that these restrictions are imposed with intent to destroy the group in whole or in part." (Ibid., pp. 60 and 63-64.)

¹²⁵ "The measure imposed need not be the classic action of sterilization; separation of the sexes, prohibition of marriages and the like are measures equally restrictive and produce the same results." (Ibid., p. 64.)

¹²⁶ The Committee on the Elimination of Discrimination against Women has recognized compulsory sterilization or abortion as a violation of the Convention on the Elimination of all Forms of Discrimination against Women (*Report of the Committee on the Elimination of Discrimination against Women (Official Records of the General Assembly, Forty-seventh Session, Supplement No. 38 (A/47/38)*), chap. 1, para. 22).

¹²⁰ Document E/447.

¹²¹ Article III (footnote 119 above).

¹²² Nonetheless some of the acts referred to in this paragraph could constitute a crime against the peace and security of mankind in certain circumstances, for example, a crime against humanity under article 18, subparagraph (e) or (f) or a war crime under article 20, subparagraph (e) (iv).

¹²³ "The act of 'killing' (subparagraph (a)) is broader than 'murder'; and it was selected to correspond to the French word 'meurtre', which implies more than 'assassinat'; otherwise it is hardly open to various interpretations." (Robinson, op. cit. (see footnote 118 above), p. 63.)

¹²⁴ "The word 'deliberately' was included there to denote a precise intention of the destruction, i.e., the premeditation related to the creation of certain conditions of life . . . It is impossible to enumerate in

(20) The Commission also noted that the fact that the article was drawn from the Convention on the Prevention and Punishment of the Crime of Genocide did not in any way affect the autonomous nature of that legal instrument. Furthermore, the Commission drew attention to article 4 of the Code which expressly provided that it was “without prejudice to any question of the responsibility of States under international law”. This would include any question relating to the responsibility of a State for genocide referred to in article IX of the Convention.

Article 18. Crimes against humanity

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:

- (a) **Murder;**
- (b) **Extermination;**
- (c) **Torture;**
- (d) **Enslavement;**
- (e) **Persecution on political, racial, religious or ethnic grounds;**
- (f) **Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;**
- (g) **Arbitrary deportation or forcible transfer of population;**
- (h) **Arbitrary imprisonment;**
- (i) **Forced disappearance of persons;**
- (j) **Rape, enforced prostitution and other forms of sexual abuse;**
- (k) **Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.**

Commentary

(1) Article 18 recognizes certain inhumane acts as constituting crimes against humanity.

(2) The definition of crimes against humanity contained in article 18 is drawn from the Charter of the Nürnberg Tribunal, as interpreted and applied by the Nürnberg Tribunal, taking into account subsequent developments in international law since Nürnberg.

(3) The opening clause of this definition establishes the two general conditions which must be met for one of the prohibited acts to qualify as a crime against humanity covered by the Code. The first condition requires that the act was “committed in a systematic manner or on a large scale”. This first condition consists of two alternative requirements. The first alternative requires that the inhumane acts be “committed in a systematic manner” meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to exclude a random act

which was not committed as part of a broader plan or policy. The Charter of the Nürnberg Tribunal did not include such a requirement. Nonetheless the Nürnberg Tribunal emphasized that the inhumane acts were committed as part of the policy of terror and were “in many cases . . . organized and systematic”¹²⁷ in considering whether such acts constituted crimes against humanity.

(4) The second alternative requires that the inhumane acts be committed “on a large scale” meaning that the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim. The Charter of the Nürnberg Tribunal did not include this second requirement either. Nonetheless the Nürnberg Tribunal further emphasized that the policy of terror was “certainly carried out on a vast scale”¹²⁸ in its consideration of inhumane acts as possible crimes against humanity. The term “mass scale” was used in the text of the draft Code as adopted on first reading¹²⁹ to indicate the requirement of a multiplicity of victims. This term was replaced by the term “large scale” which is sufficiently broad to cover various situations involving a multiplicity of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude. The first condition is formulated in terms of the two alternative requirements. Consequently, an act could constitute a crime against humanity if either of these conditions is met.

(5) The second condition requires that the act was “instigated or directed by a Government or by any organization or group”. The necessary instigation or direction may come from a Government or from an organization or a group.¹³⁰ This alternative is intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization. This type of isolated criminal conduct on the part of a single individual would not constitute a crime against humanity. It would be extremely difficult for a single individual acting alone to commit the inhumane acts as envisaged in article 18. The instigation or direction of a Government or any organization or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State.¹³¹

¹²⁷ *Nazi Conspiracy and Aggression* . . . (see footnote 35 above), p. 84.

¹²⁸ *Ibid.*

¹²⁹ See footnote 16 above.

¹³⁰ The Nürnberg Tribunal declared the criminal character of several organizations which were established for the purpose of and used in connection with the commission of crimes against peace, war crimes or crimes against humanity. The Charter and the Judgment of the Nürnberg Tribunal recognized the possibility of criminal responsibility based on the membership of an individual in such a criminal organization. (Charter of the Nürnberg Tribunal, articles 9 and 10; and *Nazi Conspiracy and Aggression* . . . (see footnote 35 above), p. 84.) The Code does not provide for any such collective criminal responsibility as indicated by article 2.

¹³¹ Regarding the defendants Streicher and von Schirach, see *Nazi Conspiracy and Aggression* . . . (*ibid.*), pp. 129 and 144.

Annex 9

International Criminal Court, *Rome Statute of the International Criminal Court*,
UN Doc. A/CONF.183/9 (17 July 1998)



**Cour
Pénale
Internationale**

**International
Criminal
Court**

Rome Statute of the International Criminal Court

PART 3.
GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22***Nullum crimen sine lege***

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23***Nulla poena sine lege***

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24***Non-retroactivity ratione personae***

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 25⁸***Individual criminal responsibility***

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

⁸ As amended by resolution RC/Res.6 of 11 June 2010 (adding paragraph 3 *bis*).

Rome Statute of the International Criminal Court

3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26 **Exclusion of jurisdiction over persons under eighteen**

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27 **Irrelevance of official capacity**

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28 **Responsibility of commanders and other superiors**

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29 **Non-applicability of statute of limitations**

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 30 **Mental element**

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;

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
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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF:
INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF
JUSTICE, IMPUNITY

The right to restitution, compensation and rehabilitation for victims of gross
violations of human rights and fundamental freedoms

Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted
in accordance with Commission resolution 1999/33

1. In resolution 1998/43, the Commission on Human Rights requested its Chairman to appoint an independent expert to prepare a revised version of the basic principles and guidelines elaborated by Mr. Theo van Boven with a view to their adoption by the General Assembly.¹ Pursuant to paragraph 2 of resolution 1998/43, the Chairman of the Commission on Human Rights appointed Mr. M. Cherif Bassiouni to carry out this responsibility.
2. The present report is submitted pursuant to Commission resolution 1999/33 in which the Commission requested “the independent expert to complete his work and submit to the Commission at its fifty-sixth session, in accordance with the instructions issued by the Commission in its resolution 1998/43, a revised version of the basic principles and guidelines prepared by Mr. Theo van Boven (E/CN.4/1997/104, annex), taking into account the views and comments of States and of intergovernmental and non-governmental organizations” and decided to continue its consideration of this matter at its fifty-sixth session under the agenda sub-item entitled “Independence of the judiciary, administration of justice, impunity”.

3. The independent expert's initial efforts in preparing a revised version of the draft guidelines and principles included an assessment of the previous drafts of the basic principles and guidelines elaborated by Mr. van Boven and their comparison with other United Nations norms and standards concerning victim redress.² Specifically, the prior drafts were examined in light of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34, annex), pertinent provisions of the Rome Statute of the International Criminal Court (A/CONF.189/9),³ and other relevant United Nations norms and standards. This assessment was submitted to the Commission on Human Rights as the independent expert's first report (E/CN.4/1999/65), pursuant to resolution 1998/43.

4. In preparing the revision of the principles and guidelines, the independent expert benefited from the foundation provided by prior reports as well as by comments made by several Governments on the earlier draft that was the basis of the independent expert's revision. These comments were provided by the Governments of Benin, Chile, Colombia, Croatia, Germany, Japan, Paraguay, the Philippines, Sweden, and Uruguay. Comments were also received from various United Nations bodies, intergovernmental organizations, the International Committee of the Red Cross and non-governmental organizations.⁴

5. The independent expert held two consultative meetings in Geneva for all interested Governments, intergovernmental organizations and non-governmental organizations. These meetings were held on 23 November 1998 and 27 May 1999, respectively and were well attended. The comments made were useful to the independent expert who took them into account in formulating his revision.

6. On the basis of these consultations and prior comments, the independent expert circulated a first draft of his revision of the principles and guidelines on 1 June 1999 to all Governments, intergovernmental organizations and non-governmental organizations for their comments. A second revised draft was then prepared by the independent expert and circulated on 1 November 1999 to Governments, intergovernmental organizations and non-governmental organizations. The independent expert received comments on these drafts from the Governments of Argentina, Burkina Faso, Colombia, Cuba, France, Germany, Japan, the Netherlands, Peru, Singapore, the Syrian Arab Republic, and the United States of America. In addition, comments were received from the International Committee of the Red Cross and several non-governmental organizations and individual experts.⁵ Based on the comments received on these two drafts, the independent expert drafted the principles and guidelines annexed to the present report.

7. The independent expert prepared the principles and guidelines in a manner that is in keeping with existing international law, taking into account all relevant international norms arising from treaties, customary international law, and resolutions of the General Assembly, the Economic and Social Council, the Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights.

8. The expert felt bound by the essential elements of the draft on which his mandate was based. That draft treated jointly the subjects of violations of international human rights law and violations of international humanitarian law. Prior drafts had used the terms "gross violations of

human rights” and “jus cogens violations.” However, a number of Governments and organizations felt that these terms were insufficiently precise, and as a result the independent expert has opted to refer to certain types of violations as “crimes under international law”. Principles 3 to 7, which make reference to “crimes under international law”, represent extant norms of international law. The principles and guidelines use the word “shall” for existing international obligations and the word “should” for emerging norms and existing standards.

9. The principles and guidelines were also drafted with a view to their being applied in light of future developments in international law. For example, the terms “violations”, “human rights law”, and “international humanitarian law” were not defined. Aside from the fact that these are well-understood concepts, their specific content and meaning are likely to evolve over time.

10. The independent expert extends his appreciation to those Governments, organizations and individuals who contributed comments during the drafting process and to the Office of the High Commissioner for Human Rights for its support.

Notes

¹ Pursuant to its resolution 1989/13, the Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted Mr. van Boven with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of human rights and fundamental freedoms (E/CN.4/Sub.2/1993/8), which ultimately resulted in draft basic principles and guidelines (E/CN.4/1997/104, annex). The Commission on Human Rights, in its resolution 1996/35, regarded the proposed draft basic principles elaborated by Mr. van Boven as a useful basis for giving priority to the question of restitution, compensation and rehabilitation.

² Mr. van Boven prepared three versions of the basic principles and guidelines on the right to reparation for victims. The first version is found in document E/CN.4/Sub.2/1993/8 of 2 July 1993, section IX. The second version is found in document E/CN.4/Sub.2/1996/17 of 24 May 1996. The third version is found in document E/CN.4/1997/104 of 16 January 1997. In addition, the independent expert examined the work of Mr. Louis Joinet, who, in his capacity as Special Rapporteur of the Sub-Commission on the question of the impunity of perpetrators of violations of human rights (civil and political), developed basic principles and guidelines on impunity. Two versions of these guidelines (E/CN.4/Sub.2/1997/20 of 26 June 1997 and E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997) were analysed insofar as they related to reparation for victims of human rights violations.

³ See also The Statute of the International Criminal Court: A Documentary History, M. Cherif Bassiouni (ed.), 1999.

⁴ These bodies and organizations were: Catholic Women’s League Australia, European Court of Human Rights, Federación de Mujeres Cubanas, General Arab Women Federation, International Commission of Jurists, International Labour Office, International Police Association, International Rehabilitation Council for Torture Victims, Organization for Economic

E/CN.4/2000/62

page 4

Cooperation and Development, Redress Trust, Transnational Radical Party, United Nations Children's Fund (UNICEF), United Nations Economic Commission for Latin America and the Caribbean, United Nations Office for Drug Control and Crime Prevention, Unión Dominicana de Periodistas Pro la Paz.

⁵ These organizations were: Amnesty International, Parliamentarians for Global Action-International Law and Human Rights Programme, International Centre for Criminal Law Reform, Redress Trust, Group Project for Holocaust Survivors and their Children, International Commission of Jurists and INTERIGHTS.

Annex**BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW**The Commission on Human Rights,

Pursuant to Commission on Human Rights resolution 1999/33 of 26 April 1999, entitled “The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms”, in which the Commission took note with appreciation of the note of the Secretary-General (E/CN.4/1999/53) submitted in compliance with resolution 1998/43 of 17 April 1998 and the report of the independent expert (E/CN.4/1999/65),

Recalling resolution 1989/13 of 31 August 1989 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in which the Sub-Commission decided to entrust Mr. Theo van Boven with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, which was contained in Mr. Van Boven’s final report (E/CN.4/Sub.2/1993/8) and which resulted in draft basic principles and guidelines (E/CN.4/1997/104, annex), and resolution 1994/35 of 4 March 1994 of the Commission on Human Rights in which the Commission regarded the proposed basic principles and guidelines contained in the study of the Special Rapporteur as a useful basis for giving priority to the question of restitution, compensation and rehabilitation,

Recalling the provisions providing a right to a remedy for victims of violations of international human rights and humanitarian law found in numerous international instruments, in particular the Universal Declaration of Human Rights at article 8, the International Covenant on Civil and Political Rights at article 2, the International Convention on the Elimination of All Forms of Racial Discrimination at article 6, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at article 11, and the Convention on the Rights of the Child at article 39,

Recalling the provisions providing a right to a remedy for victims of violations of international human rights found in regional conventions, in particular the African Charter on Human and Peoples’ Rights at article 7, the American Convention on Human Rights at article 25, and the European Convention for the Protection of Human Rights and Fundamental Freedoms at article 13,

Recalling the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power emanating from the deliberations of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and resolution 40/34 of 29 November 1985 by which the General Assembly adopted the text recommended by the Congress,

Reaffirming the principles enunciated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including that victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully

E/CN.4/2000/62

page 6

respected, and that the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged, together with the expeditious development of appropriate rights and remedies for victims,

Recalling resolution 1989/57 of 24 May 1989 of the Economic and Social Council, entitled “Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”, as well as Council resolution 1990/22 of 24 May 1990, entitled “Victims of crime and abuse of power”,

Noting that in resolution 827 (1993) of 25 May 1993 in which it adopted the Statute of the International Criminal Tribunal for the Former Yugoslavia, the Security Council decided that “the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law”,

Noting with satisfaction the adoption of the Rome Statute of the International Criminal Court on 17 July 1998 which obliges the Court to “establish principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation” and obliges the Assembly of States Parties to establish a trust fund for the benefit of victims of crimes within the jurisdiction of the Court and of the families of such victims, and mandates the Court “to protect the safety, physical and psychological well-being, dignity and privacy of victims” and to permit the participation of victims at all “stages of the proceedings determined to be appropriate by the Court”,

Recognizing that, in honouring the victims’ right to benefit from remedies and reparation, the international community keeps faith and human solidarity with victims, survivors and future human generations, and reaffirms the international legal principles of accountability, justice and the rule of law,

Convinced that, in adopting a victim-oriented point of departure, the community, at local, national and international levels, affirms its human solidarity and compassion with victims of violations of international human rights and humanitarian law as well as with humanity at large,

Decides to adopt the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law as follows:

I. OBLIGATION TO RESPECT, ENSURE RESPECT FOR AND ENFORCE INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

1. Every State has the obligation to respect, ensure respect for and enforce international human rights and humanitarian law norms that are, inter alia:

(a) Contained in treaties to which it is a State party;

- (b) Found in customary international law; or
- (c) Incorporated in its domestic law.

2. To that end, if they have not already done so, States shall ensure that domestic law is consistent with international legal obligations by:

- (a) Incorporating norms of international human rights and humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;
- (b) Adopting appropriate and effective judicial and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;
- (c) Making available adequate, effective and prompt reparation as defined below; and
- (d) Ensuring, in the case that there is a difference between national and international norms, that the norm that provides the greatest degree of protection is applied.

II. SCOPE OF THE OBLIGATION

3. The obligation to respect, ensure respect for and enforce international human rights and humanitarian law includes, inter alia, a State's duty to:

- (a) Take appropriate legal and administrative measures to prevent violations;
- (b) Investigate violations and, where appropriate, take action against the violator in accordance with domestic and international law;
- (c) Provide victims with equal and effective access to justice irrespective of who may be the ultimate bearer of responsibility for the violation;
- (d) Afford appropriate remedies to victims; and
- (e) Provide for or facilitate reparation to victims.

III. VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW THAT CONSTITUTE CRIMES UNDER INTERNATIONAL LAW

4. Violations of international human rights and humanitarian law norms that constitute crimes under international law carry the duty to prosecute persons alleged to have committed these violations, to punish perpetrators adjudged to have committed these violations, and to cooperate with and assist States and appropriate international judicial organs in the investigation and prosecution of these violations.

5. To that end, States shall incorporate within their domestic law appropriate provisions providing for universal jurisdiction over crimes under international law and appropriate

legislation to facilitate extradition or surrender of offenders to other States and to international judicial bodies and to provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to and protection of victims and witnesses.

IV. STATUTES OF LIMITATIONS

6. Statutes of limitations shall not apply for prosecuting violations of international human rights and humanitarian law norms that constitute crimes under international law.

7. Statutes of limitations for prosecuting other violations or pursuing civil claims should not unduly restrict the ability of a victim to pursue a claim against the perpetrator, and should not apply with respect to periods during which no effective remedies exist for violations of human rights and international humanitarian law norms.

V. VICTIMS OF VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

8. A person is "a victim" where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights. A "victim" may also be a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental, or economic harm.

9. A person's status as "a victim" should not depend on any relationship that may exist or may have existed between the victim and the perpetrator, or whether the perpetrator of the violation has been identified, apprehended, prosecuted, or convicted.

VI. TREATMENT OF VICTIMS

10. Victims should be treated by the State and, where applicable, by intergovernmental and non-governmental organizations and private enterprises with compassion and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety and privacy as well as that of their families. The State should ensure that its domestic laws, as much as possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her retraumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. VICTIMS' RIGHT TO A REMEDY

11. Remedies for violations of international human rights and humanitarian law include the victim's right to:

- (a) Access justice;

- (b) Reparation for harm suffered; and
- (c) Access the factual information concerning the violations.

VIII. VICTIMS' RIGHT TO ACCESS JUSTICE

12. A victim's right of access to justice includes all available judicial, administrative, or other public processes under existing domestic laws as well as under international law. Obligations arising under international law to secure the individual or collective right to access justice and fair and impartial proceedings should be made available under domestic laws. To that end, States should:

(a) Make known, through public and private mechanisms, all available remedies for violations of international human rights and humanitarian law;

(b) Take measures to minimize the inconvenience to victims, protect their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during, and after judicial, administrative, or other proceedings that affect the interests of victims;

(c) Make available all appropriate diplomatic and legal means to ensure that victims can exercise their rights to a remedy and reparation for violations of international human rights or humanitarian law.

13. In addition to individual access to justice, adequate provisions should also be made to allow groups of victims to present collective claims for reparation and to receive reparation collectively.

14. The right to an adequate, effective and prompt remedy against a violation of international human rights or humanitarian law includes all available international processes in which an individual may have legal standing and should be without prejudice to any other domestic remedies.

IX. VICTIMS' RIGHT TO REPARATION

15. Adequate, effective and prompt reparation shall be intended to promote justice by redressing violations of international human rights or humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered.

16. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for its acts or omissions constituting violations of international human rights and humanitarian law norms.

17. In cases where the violation is not attributable to the State, the party responsible for the violation should provide reparation to the victim or to the State if the State has already provided reparation to the victim.

18. In the event that the party responsible for the violation is unable or unwilling to meet these obligations, the State should endeavour to provide reparation to victims who have sustained bodily injury or impairment of physical or mental health as a result of these violations and to the families, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of the violation. To that end, States should endeavour to establish national funds for reparation to victims and seek other sources of funds wherever necessary to supplement these.

19. A State shall enforce its domestic judgements for reparation against private individuals or entities responsible for the violations. States shall endeavour to enforce valid foreign judgements for reparation against private individuals or entities responsible for the violations.

20. In cases where the State or Government under whose authority the violation occurred is no longer in existence, the State or Government successor in title should provide reparation to the victims.

X. FORMS OF REPARATION

21. In accordance with their domestic law and international obligations, and taking account of individual circumstances, States should provide victims of violations of international human rights and humanitarian law the following forms of reparation: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.

22. Restitution should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes: restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property.

23. Compensation should be provided for any economically assessable damage resulting from violations of international human rights and humanitarian law, such as:

- (a) Physical or mental harm, including pain, suffering and emotional distress;
- (b) Lost opportunities, including education;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Harm to reputation or dignity; and
- (e) Costs required for legal or expert assistance, medicines and medical services, and psychological and social services.

24. Rehabilitation should include medical and psychological care as well as legal and social services.

25. Satisfaction and guarantees of non-repetition should include, where applicable, any or all of the following:

- (a) Cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others;
- (c) The search for the bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities;
- (d) An official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim;
- (e) Apology, including public acknowledgement of the facts and acceptance of responsibility;
- (f) Judicial or administrative sanctions against persons responsible for the violations;
- (g) Commemorations and tributes to the victims;
- (h) Inclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational material at all levels;
- (i) Preventing the recurrence of violations by such means as:
 - (i) Ensuring effective civilian control of military and security forces;
 - (ii) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces;
 - (iii) Strengthening the independence of the judiciary;
 - (iv) Protecting persons in the legal, media and other related professions and human rights defenders;
 - (v) Conducting and strengthening, on a priority and continued basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials;
 - (vi) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as the staff of economic enterprises;
 - (vii) Creating mechanisms for monitoring conflict resolution and preventive intervention.

XI. PUBLIC ACCESS TO INFORMATION

26. States should develop means of informing the general public and in particular victims of violations of international human rights and humanitarian law of the rights and remedies contained within these principles and guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access.

XII. NON-DISCRIMINATION AMONG VICTIMS

27. The application and interpretation of these principles and guidelines must be consistent with internationally recognized human rights law and be without any adverse distinction founded on grounds such as race, colour, gender, sexual orientation, age, language, religion, political or religious belief, national, ethnic or social origin, wealth, birth, family or other status, or disability.

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)

STATE RESPONSIBILITY

[Agenda item 3]

DOCUMENT A/CN.4/507 and Add. 1–4*

Third report on State responsibility, by Mr. James Crawford, Special Rapporteur

[Original: English]

[15 March, 15 June, 10 and 18 July and 4 August 2000]

CONTENTS

	<i>Page</i>
Multilateral instruments cited in the present report.....	6
Works cited in the present report.....	7
	<i>Paragraphs</i>
INTRODUCTION.....	1–11 11
A. Programme for completion of the second reading.....	1–4 11
B. Parts two and three as adopted on first reading: general considerations.....	5–11 12
<i>Chapter</i>	
I. PART TWO. LEGAL CONSEQUENCES OF AN INTERNATIONALLY WRONGFUL ACT OF A STATE.....	12–119 15
A. Chapter I. General principles.....	13–119 15
1. Title and content of chapter I.....	13–16 15
2. The general principle of reparation.....	17–43 15
(a) Current provisions.....	17–22 15
(b) A proposed general principle.....	23–37 17
(c) Article 42, paragraphs 3–4.....	38–43 20
3. Cessation and related issues.....	44–59 21
(a) Current provisions.....	44–48 21
(b) The place of cessation in the draft articles.....	49–50 22
(c) Question of placement and formulation.....	51–52 22
(d) Assurances and guarantees of non-repetition.....	53–59 23
4. Other legal consequences under customary international law.....	60–65 24
5. The injured State.....	66–118 25
(a) Article 40. Meaning of injured State.....	66–81 25
(b) Some preliminary issues.....	82–96 29
(c) Options for the reformulation of article 40.....	97–118 32
6. Conclusions as to part two, chapter I.....	119 38
B. Chapter II. The forms of reparation.....	120–223 39
1. General considerations.....	120–123 39
2. Restitution.....	124–146 40
(a) Existing article 43.....	124–129 40

* Incorporating A/CN.4/507/Add.1/Corr.1, A/CN.4/507/Add.2/Corr.1 and 2 and A/CN.4/507/Add.3/Corr.1.

<i>Chapter</i>	<i>Paragraphs</i>	<i>Page</i>
(b) Cessation, restitution and compensation: questions of classification and priority	130–143	43
(c) Exceptions to restitution	144	45
(d) The formulation of article 43	145–146	46
3. Compensation	147–166	46
(a) Existing article 44	147–153	46
(b) Assessment of compensation: general principle or detailed criteria?	154–160	48
(c) Limitations on compensation	161–164	51
(d) Conclusion	165–166	51
4. Satisfaction	167–194	52
(a) Existing article 45	167–177	52
(b) The character of satisfaction as a remedy	178–181	53
(c) Specific forms of satisfaction	182–192	54
(d) Limitations upon satisfaction: article 45, paragraph 3	193	56
(e) Conclusion on article 45	194	56
5. Interest	195–214	57
(a) The question of interest in the draft articles	195–198	57
(b) The role of interest in relation to reparation	199–212	58
(c) A provision on interest?	213–214	60
6. Mitigation of responsibility	215–222	60
(a) Contributory fault	216–221	61
(b) Mitigation of damage	222	62
7. Summary of conclusions as to part two, chapter II	223	62
II. STRUCTURE OF REMAINING PARTS OF THE DRAFT ARTICLES	224–226	63
III. INVOCATION OF RESPONSIBILITY BY AN INJURED STATE	227–284	63
A. General considerations	227–262	63
1. The right of the injured State to elect the form of reparation	232–233	64
2. Formal requirements for the invocation of responsibility	234–238	64
3. Certain questions as to the admissibility of claims	239–242	65
(a) Exhaustion of local remedies (art. 22)	241	66
(b) Nationality of claims	242	66
4. Limits on the recovery of reparation	243–249	66
(a) The <i>non ultra petita</i> principle	244–247	66
(b) The rule against double recovery	248–249	67
5. Loss of the right to invoke responsibility	250–262	68
(a) Waiver	253–256	68
(b) Delay	257–259	69
(c) Settlement	260–261	70
(d) Termination or suspension of the obligation breached	262	71
B. Cases involving a plurality of injured or responsible States	263–283	72
1. Overview of the legal issues	266–281	72
(a) Plurality of responsible States	267–278	72
(b) Plurality of injured States	279–281	76
2. Proposed provisions	282–283	76
C. Conclusions as to part two bis, chapter I	284	76
D. Countermeasures by an injured State	285–367	77
1. Introduction	286–291	77

<i>Chapter</i>	<i>Paragraphs</i>	<i>Page</i>
2. Review of existing chapter III (arts. 47–50).....	292–319	79
(a) Article 47. Countermeasures by an injured State.....	293–297	79
(b) Article 48. Conditions relating to resort to countermeasures.....	298–305	80
(c) Article 49. Proportionality.....	306–310	82
(d) Article 50. Prohibited countermeasures.....	311–319	83
3. Recasting the provisions on countermeasures by an injured State.....	320–362	86
(a) Definition of countermeasures.....	321–333	86
(b) Obligations not subject to the regime of countermeasures.....	334–343	88
(c) Conditions for taking and maintaining countermeasures.....	344–360	91
(i) Substantive conditions.....	345–354	91
(ii) Procedural conditions.....	355–360	93
(d) Termination of countermeasures.....	361	94
(e) Formulation of article 30.....	362	95
4. Countermeasures and the exception of non-performance.....	363–366	95
5. Conclusions as to countermeasures by an injured State.....	367	96
IV. INVOCATION OF RESPONSIBILITY TO A GROUP OF STATES OR TO THE INTERNATIONAL COMMUNITY.....	368–413	97
A. General considerations.....	369–385	97
1. Right of every State to invoke responsibility for breaches of obligations to the international community.....	373–375	99
2. Limitations on the right to invoke responsibility on behalf of another.....	376–379	99
3. Issues of penalty and process.....	380–385	100
B. Collective countermeasures.....	386–405	101
1. A review of State practice.....	391–394	102
2. An assessment.....	395–400	104
3. Tentative conclusion.....	401–406	105
C. Additional consequences of “gross breaches” of obligations to the international community as a whole.....	407–411	106
1. Additional obligations for other States faced with gross breaches of community obligations?.....	410	107
2. Leaving scope for further developments.....	411	108
D. Summary of conclusions as to part two, chapter III, and part two bis.....	412–413	108
V. PART FOUR. GENERAL PROVISIONS.....	414–429	109
A. Existing articles.....	415–426	109
1. Article 37. <i>Lex specialis</i>	415–421	109
2. Article 39. Relationship to the Charter of the United Nations.....	422–426	110
B. Proposed additions to part four.....	427–428	111
C. Summary of conclusions as to part four.....	429	111

LIST OF TABLES

1. States entitled to invoke responsibility in respect of multilateral obligations.....	107	35
2. Extent to which differently affected States may invoke the legal consequences of the responsibility of a State.....	116	38

2. LEAVING SCOPE FOR FURTHER DEVELOPMENTS

411. It is obvious that issues of the salience and enforcement of community obligations are undergoing rapid development.⁸²⁶ Older structures of bilateral State responsibility are plainly inadequate to deal with gross violations of human rights and humanitarian law, let alone situations threatening the survival of States and peoples. The draft articles cannot hope to anticipate future developments, and it is accordingly necessary to reserve to the future such additional consequences, penal and other, which may attach to internationally wrongful conduct by reason of its classification as a crime, or as a breach of an obligation to the international community as a whole. Such a clause might perhaps be seen as an admission of defeat in the search for adequate and principled alternatives to existing article 19. But in the Special Rapporteur's view, it is rather a realistic acknowledgement of the limits of codification and progressive development, at a time of rapid institutional and political change.

D. Summary of conclusions as to part two, chapter III, and part two bis

412. For these reasons, the Special Rapporteur proposes that the text of part two, chapter III, should read as follows:

“[CHAPTER III

“SERIOUS BREACHES OF OBLIGATIONS TO
THE INTERNATIONAL COMMUNITY
AS A WHOLE

“Article 51. Consequences of serious breaches of obligations to the international community as a whole

“1. This chapter applies to the international responsibility that arises from the serious and manifest breach by a State of an obligation owed to the international community as a whole.

“2. Such a breach entails, for the State responsible for that breach, all the legal consequences of any other internationally wrongful act and, in addition, [punitive damages] [damages reflecting the gravity of the breach].

“3. It also entails, for all other States, the following further obligations:

“(a) Not to recognize as lawful the situation created by the breach;

“(b) Not to render aid or assistance to the State which has committed the breach in maintaining the situation so created;

“(c) To cooperate in the application of measures designed to bring the breach to an end and as far as possible to eliminate its consequences.

⁸²⁶ See paragraphs 372 and 391, and cf. paragraph 382 above.

“4. Paragraphs 2 and 3 are without prejudice to such further penal or other consequences that the breach may entail under international law.]”

Since the proposed chapter III is self-contained, and since article 19 adopted on first reading played no role whatever in part one, if chapter III is adopted article 19 itself can be deleted. The commentary will need to explain in further detail the limited content of the category to which chapter III applies and the non-exclusiveness of the consequences set out in paragraph 3.

413. A number of provisions must also be added to part two bis as already proposed. First of all, article 40 bis as already proposed should make it clear in what respects the broader category of States (referred to in paragraph 2) is entitled to invoke responsibility, in accordance with the recommendations already made.⁸²⁷ The conditions for the invocation of responsibility laid down in part two bis should also apply as far as necessary to such States.⁸²⁸ In addition the following provisions should be added to that part:

“Article 50A.⁸²⁹ Countermeasures on behalf of an injured State

“Any other State entitled to invoke the responsibility of a State under [article 40 bis, paragraph 2] may take countermeasures at the request and on behalf of an injured State, subject to any conditions laid down by that State and to the extent that that State is itself entitled to take those countermeasures.

“Article 50B. Countermeasures in cases of serious breaches of obligations to the international community as a whole

“1. In cases referred to in article 51 where no individual State is injured by the breach, any State

⁸²⁷ See paragraphs 378–379 above.

⁸²⁸ This can be achieved by adding to proposed article 40 bis provisions to the effect that an injured State may invoke all the consequences of an internationally wrongful act in accordance with part two. In addition the following paragraph should be added in relation to the broader category of States presently referred to in article 40 bis, paragraph 2:

“A State referred to in paragraph 2 may seek:

“(a) Cessation of the internationally wrongful act, in accordance with article 36 bis;

“(b) On behalf of and with the consent of the injured State, reparation for that State in accordance with article 37 bis and chapter II;

“(c) Where there is no injured State:

“(i) Restitution in the interests of the injured person or entity, in accordance with article 43; and

“(ii) [Punitive damages] [Damages reflecting the gravity of the breach], in accordance with article 51, paragraph 2, on condition that such damages shall be used for the benefit of the victims of the breach.”

In addition article 46 ter as already proposed (para. 284 above) can apply to any State invoking responsibility, whether or not it is an injured State.

⁸²⁹ These articles would come before article 50 bis (Suspension and termination of countermeasures) as proposed in paragraph 367 above.

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)

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INTERNATIONAL LAW COMMISSION
Fifty-second session
Geneva, 1 May-9 June and 10 July-18 August 2000

State responsibility**Draft articles provisionally adopted by the
Drafting Committee on second reading******PART ONE****THE INTERNATIONALLY WRONGFUL ACT OF A STATE**

CHAPTER I

General principlesArticle 1Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

* Re-issued for technical reasons in English, French and Spanish only.

** Incorporating the reports of the Drafting Committee at its fiftieth and its fifty-first sessions contained in documents A/CN.4/L.569 and A/CN.4/L.574 and Corrs.1 (English only), 2 (French only), 3 and 4 (Spanish only).

PART TWO *bis**
THE IMPLEMENTATION OF STATE RESPONSIBILITY

CHAPTER I

Invocation of the State responsibility of a State

Article 43 [40]

The injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) That State individually; or
- (b) A group of States including that State, or the international community as a whole, and the breach of the obligation:

- (i) Specially affects that State; or
- (ii) Is of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned.

Article 44

Invocation of responsibility by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.
2. The injured State may specify in particular:
 - (a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
 - (b) What form reparation should take.

Article 45 [22]

Admissibility of claims

The responsibility of a State may not be invoked if:

- (a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;
- (b) The claim is one to which the rule of exhaustion of local remedies applies, and any available and effective local remedy has not been exhausted.

* The Commission has set aside Part Three (Settlement of Disputes) of the draft articles adopted on first reading. Hence the gap.

Article 46Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

- (a) The injured State has validly waived the claim in an unequivocal manner;
- (b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 47Invocation of responsibility by several States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 48Invocation of responsibility against several States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.
2. Paragraph 1:
 - (a) Does not permit any injured State to recover, by way of compensation, more than the damage suffered;
 - (b) Is without prejudice to any right of recourse towards the other responsible States.

Article 49Invocation of responsibility by States other than the injured State

1. Subject to paragraph 2, any State other than an injured State is entitled to invoke the responsibility of another State if:
 - (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest;
 - (b) The obligation breached is owed to the international community as a whole.
2. A State entitled to invoke responsibility under paragraph 1 may seek from the responsible State:
 - (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30 [41, 46];
 - (b) Compliance with the obligation of reparation under Chapter II of Part Two, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 44, 45 [22] and 46 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

CHAPTER II

Countermeasures

Article 50 [47]

Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.
2. Countermeasures are limited to the suspension of performance of one or more international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall as far as possible be taken in such a way as not to prevent the resumption of performance of the obligation or obligations in question.

Article 51 [50]

Obligations not subject to countermeasures

1. Countermeasures shall not involve any derogation from:
 - (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
 - (b) Obligations for the protection of fundamental human rights;
 - (c) Obligations of a humanitarian character prohibiting any form of reprisals against persons protected thereby;
 - (d) Other obligations under peremptory norms of general international law;
 - (e) Obligations to respect the inviolability of diplomatic or consular agents, premises, archives and documents.
2. A State taking countermeasures is not relieved from fulfilling its obligations under any applicable dispute settlement procedure in force between it and the responsible State.

Article 52 [49]

Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

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

Document:-
A/CN.4/SR.2671

Summary record of the 2671st meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
2001, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/>)*

stark choice between “a convention or nothing”; it should be given as much room for manoeuvre as possible.

The meeting rose at 1.10 p.m.

2671st MEETING

Wednesday, 2 May 2001, at 10.05 a.m.

Chairman: Mr. Peter KABATSI

later: Mr. Gerhard HAFNER

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. He, Mr. Herdocia Sacasa, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Mr. Yamada.

State responsibility¹ (*continued*) (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,² A/CN.4/517 and Add.1,³ A/CN.4/L.602 and Corr.1 and Rev.1)

[Agenda item 2]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GAJA said that he would confine his remarks to two controversial questions dealt with in chapters II and III of the fourth report (A/CN.4/517 and Add.1). The first point concerned the consequences of serious breaches. Article 42, paragraph 1, referred to damages, which, according to the Special Rapporteur, were not punitive, but “exemplary or expressive”. The distinction was not obvious. As article 42, paragraph 3, made clear, in any case the ordinary consequences of wrongful acts flowed from the breach: those consequences included reparation for the injury. Thus, the gravity of the breach was already reflected in reparation. What further damages did a seri-

ous breach entail? Since the draft articles were not designed to entrust a judicial or arbitral body with a discretionary power if it found that a serious breach had been committed, a better course would be to define the consequences of serious breaches more precisely. Paragraph 1 should give some further indication about when a serious breach entailed exemplary or expressive damages and identify those damages more clearly.

2. Article 42, paragraph 2, subparagraphs (a) and (b), set out the obligation not to recognize as lawful the situation created by a serious breach and the obligation not to render aid or assistance to the responsible State in maintaining the situation so created. Both obligations presupposed the existence of a continuing wrongful act, which had given rise to an unlawful situation, as had been the case with Namibia. As was well known, the two consequences under subparagraphs (a) and (b) were modelled on what ICJ had found in its advisory opinion in the *Namibia* case, namely that the Member States had been under an obligation “to recognize the illegality of South Africa’s presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from ... lending support or assistance to South Africa” [p. 58] with reference to its occupation of Namibia. He proposed that paragraph 2, subparagraphs (a) and (b), should be rephrased to make it clear to which type of serious breach those consequences applied, i.e. only those continuing wrongful acts which had given rise to a wrongful situation.

3. The obligation under subparagraph (c) “to cooperate as far as possible to bring the breach to an end” was more general and applied to all continuing wrongful acts. But it could be made even more general and held to apply to cooperation in the presence of a serious breach in order to obtain not only cessation, but also assurances and guarantees of non-repetition and reparation. As he saw it, the main distinguishing feature between a serious breach and a wrongful act was that, in the first case, States were not only entitled, but required to react, if only by cooperating to obtain cessation, assurances and guarantees of non-repetition and reparation. That could be stated more explicitly in a separate paragraph. In any case, article 42, paragraph 3, on the ordinary consequences of a breach and those that might be entailed under international law, should be retained. For the latter consequences, the current “without prejudice” provision was probably the only practical way of referring to consequences that might vary from one type of serious breach to another and thus did not lend themselves to being expressed in more general terms.

4. His second point concerned injured States and invocation of responsibility by States other than those injured. Article 43 contained a definition of integral obligations that had proved controversial. There was some confusion as to what the term meant. The definition should indeed be more precise, but he did not agree with the substantive change suggested in the footnote at the end of paragraph 38 of the report, namely to say “and” instead of “or” in the last phrase so as to require that both “the enjoyment of the rights” and “the performance of the obligations” were affected before a State could be considered injured. For example, suppose a State party to the Antarctic Treaty dumped nuclear wastes on a large scale in the

¹ For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook . . . 2000*, vol. II (Part Two), chap. IV, annex.

² Reprinted in *Yearbook . . . 2001*, vol. II (Part One).

³ *Ibid.*

Antarctic. That was obviously a breach of the Treaty and it could be said that the rights of all parties to the Treaty were affected, but, arguably, their obligations were not. The example showed that if both rights and obligations had to be affected, a breach of an integral obligation might be very rare. Uncertainty as to the application of the subparagraph would inevitably grow greater, because it would always be necessary to determine whether both elements were present.

5. It was perhaps subversive on his part, but he wanted to ask the more fundamental question whether the category of an integral obligation, theoretically sound as it was, should be retained in article 43. If the rights of States other than the injured State were maintained as currently set out under article 49, then article 43, subparagraph (b) (ii), could probably be dispensed with; that would no doubt simplify the understanding of article 43. For example, no issue of compensation for damage caused to a State party to a treaty imposing integral obligations was likely to occur. As the Special Rapporteur noted in paragraph 38 of the report, the other parties to an integral obligation that had been breached may have no interest in its suspension and should be able to insist, *vis-à-vis* the responsible State, on cessation and restitution. But that was precisely the avenue open to “article 49” States, which were affected by a breach not because there was an integral obligation, but because of a collective interest that was protected by a treaty to which they were a party, or else because of the interest of the international community as a whole.

6. One of the objections to article 49, paragraph 2, that had been raised by several States concerned the proposition that States other than injured States might be entitled to request reparation. It had been argued that that was not in keeping with customary international law and that “article 49” States should only be entitled to request cessation. Yet that would mean that in many instances no State would be entitled to request reparation for the breach of an obligation under treaties established to protect a collective interest or under obligations to the international community as a whole. Take a case of genocide involving only the nationals of the responsible State. If the Commission endorsed the view that “article 49” 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 49, paragraph 2 (b), should be retained. Logically, the fact that in certain circumstances there was also an injured State under article 43 should not affect the right of “article 49” States to request reparation. Why, for instance, should the position of “article 49” States vary in the case of massive pollution of the ocean depending on whether or not a coastal State qualified as specially affected? But as the Special Rapporteur suggested in paragraph 41 of his report, an exception could be provided as a compromise for the case in which there was an injured State.

7. Mr. SIMMA, reacting to a “subversive” point raised by Mr. Gaja suggesting that, in view of article 49, paragraph 1 (a), it was possible to dispense with article 43, paragraph 2, reminded Mr. Gaja that the title of article 49 was “Invocation of responsibility by States other than in-

jured States”. He saw a problem there, because Mr. Gaja’s solution implied that States parties to an integral obligation within the meaning of article 43 would be considered to be States other than injured States. He could not accept that in the case of an integral treaty, such as a disarmament treaty, a serious material breach would not “injure” the other parties within the meaning of article 43.

8. Mr. GAJA said that it was a difficult drafting question the Commission could try to resolve. He agreed that the Commission should not say things that were not theoretically sound, even if the consequences were the same.

9. Mr. SEPÚLVEDA said that he would focus on the draft’s legal form and the possible inclusion of a chapter on dispute settlement, which did not mean that he was disregarding the importance of other subjects or comments and suggestions from Governments. The chapter on countermeasures, and collective countermeasures in particular, and the subject of serious breaches of obligations for the international community as a whole deserved special attention, and much time would need to be spent on them if the draft was to be approved by the end of the current session. The Commission should allow sufficient time to prepare rules on dispute settlement, assuming it decided to recommend a convention.

10. In the informal consultations, he had expressed a preference for recommending the adoption of a draft that would take the form of a convention, for a number of sound reasons.

11. First, most Governments were in favour of a convention. Indeed, it was surprising to hear the claim that there was no support from Governments for an international convention. On the contrary: during the discussions in the Sixth Committee, 19 delegations had been in favour of a convention, whereas only 8 had preferred a declaration. Similarly, of the 14 States that had given their views in the comments and observations received from Governments (A/CN.4/515 and Add.1–3), 10 favoured a convention, with only 4 calling for a non-binding instrument.

12. Secondly, the draft articles in their current version were a normative text that imposed rights and obligations on States. While it was likely that in some matters the Commission had prejudged the decision on form in favour of a declaration, the final result of the work was of an eminently legal nature. As it stood, the draft’s structure differed considerably from that of a straightforward declaration. The setting-up of a normative system began with the definition of an internationally wrongful act, continued with rules on attribution, determination of the existence of a breach of an international obligation, circumstances precluding lawfulness, the legal consequences of an internationally wrongful act and reparation of damage and concluded with a chapter on how to make State responsibility effective. The scope of the rights and obligations referred to in the draft articles far exceeded—in both language and objectives—what usually constituted a General Assembly declaration, in which it was clear from the outset that the legal effects of the instrument could be relatively benign and that the legal commitment was very lax. The draft did not allow for such latitude. It was composed of rules that must be complied with and rights that could be asserted. A simple declaration could

not provide sufficient validity and effectiveness for what was essentially a treaty, an instrument the Commission had been working to produce from the very beginning.

13. In short, the obligations and rights peculiar to international responsibility required a set of rules that could only be envisaged in a binding instrument, in other words, as a convention. A declarative mechanism would abandon the original intention and objectives, which called for a general system of legal rules.

14. Thirdly, normative innovation would gradually be accepted. The ability of States to adapt to new circumstances and needs should not be underestimated. It had been asserted that Governments would not accept norms that represented a progressive development of international law they regarded as too bold. Yet that interpretation was not borne out by the facts. In 1958, some had thought that the three-mile limit for the territorial sea was inviolable. In 1969, a regime for the seabed and ocean floor had been considered absurd. In the beginning, there had been little support for establishing an exclusive economic zone so that coastal States would benefit from the ocean resources within a 200-mile limit. In the early 1960s, *jus cogens* had been a very strange legal concept. Until recently, an international criminal court had seemed impossible. Many other examples could be cited. The Commission should not prejudice whether or not the rules it eventually proposed in the draft were ripe for acceptance by States. That depended on circumstances and decisions that did not fall within the Commission's purview. The Commission must produce the most comprehensive articles possible on what it deemed the law of State responsibility should entail.

15. Special attention should be given to the final text, which, by its very nature, would have legal status and would be generally recognized in international law. As had already happened, the final version of the articles and the commentary would be cited by law courts and arbitral tribunals, would establish criteria for the conduct of States and serve as a source of inspiration for new legal doctrines. It would therefore be a very bad idea to weaken the content of the draft by arguing that the articles set out rules that presupposed a progressive development of international law. Expurgating the text because of imaginary fears of political issues would be prejudicial to the Commission's work.

16. Fourthly, in principle States acted in a responsible manner. It had been repeatedly argued that, if the Commission recommended the adoption of a convention, there would be a serious risk that a preparatory committee and a diplomatic conference would mutilate the work that the Commission had accomplished over so many years. That implied that Governments usually acted against their own interests. Surely, many States were convinced that it was possible to agree on norms on international responsibility, and they were prepared to engage in political negotiations to produce satisfactory results. If that argument was not valid, then neither a declaration nor a convention would be legally operative.

17. It was contended that a diplomatic process for elaborating a convention on State responsibility entailed a risk, but it would be equally dangerous, and might have even

more disastrous consequences, to recommend the adoption of a declaration. There was no guarantee that the text would be maintained as a whole and would follow, article by article, the draft finally adopted by the Commission. In fact, it was likely that Governments, although many of them did not give greater legal validity to declarations, would prefer to water down the text to ensure the adoption of a completely inoffensive resolution that would neutralize obligations and eliminate legal innovations.

18. Nor was it possible at the current time to guarantee that a convention would be a faithful reflection of the Commission's text. If the prime concern was for the integrity of the draft, the two options entailed the same risk, but with a declaration it might be easier to undermine the obligations set out in the draft.

19. It was wrong to assume that the text would automatically be damaged beyond repair if it formed the subject of diplomatic negotiations. One example of responsible conduct among States was the Third United Nations Conference on the Law of the Sea, whose results, despite legal, political and economic complexities and conflicting interests, were far from negligible. It would likewise be difficult to object to the final product of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, namely the Rome Statute of the International Criminal Court.

20. Fifthly, recommending a declaration presupposed the same problems as a convention, but without the advantages. It was not inconceivable that, in recommending the adoption of a declaration on State responsibility, the Commission would open the door to a diplomatic process, with the convening of a conference in the General Assembly to review and approve a politically acceptable text. Nor was it inconceivable that such a text would differ from one that emerged from the Commission. In addition, it would be difficult to accept that such a declaration would need to be approved unanimously or by consensus, and that would give rise to escape clauses so that those States that had voted against the declaration would not feel bound by any political or legal commitment. It should be recalled that the Charter of Economic Rights and Duties of States⁴ had been approved by an overwhelming majority of Governments in the Assembly. The few Governments that had not endorsed the resolution had clearly announced their inability to go along with the majority decision. The same situation might arise with a declaration on State responsibility.

21. That example also served to illustrate the concern expressed at the possibility that a convention might not attract a sufficient number of ratifications and the risk that it might not enter into force in the immediate future. The same risk was inherent in the case of a declaration. However, even without the necessary number of ratifications, the legal value of a convention was infinitely superior to that of a declaration.

22. Sixthly, it had been suggested that adoption in the form of a declaration would constitute a diplomatic effort to confer on the draft articles a political solemnity

⁴ See 2668th meeting, para. 37.

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

Document:-
A/CN.4/SR.2682

Summary record of the 2682nd meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
2001, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/>)*

change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.”

37. The Drafting Committee had amended the title of the article in order to reflect its content more faithfully. It had taken the view that the definition of the injured State, although not expressly defined in the text, was inferred from the content of the article. The new title “Invocation of responsibility by an injured State”, which was that of former article 44, was more fitting for article 43.

38. Bearing in mind the new title of article 43, the Drafting Committee had amended that of article 44 to read: “Notice of claim by an injured State”, which also reflected more closely the content of the provision and would be more in line with article 45 [22] (Admissibility of claims). It had maintained paragraph 1 as it stood, since it had not prompted any objections or proposed amendments by Governments, other than one comment on the meaning of “invocation”, which had already been answered. The Committee had studied the suggestion by a Government that all the remedies available to an injured State should be listed in paragraph 2. It had added the words “in accordance with the provisions of Part Two” at the end of subparagraph (b) to make it quite clear that an injured State had all the remedies provided for in Part Two. The Committee had also considered a proposal to expand paragraph 2 by adding another subparagraph on the nature and characteristics of the claim. Nevertheless, in the light of the view expressed during previous discussions that the article should be as flexible as possible, it had believed that it would be unnecessary to elaborate on the characteristics of the claim in the body of the text, but that that could be done in the commentary.

39. As for article 45 [22], the Drafting Committee had studied a proposal by a Government that the words “by an injured State” should be inserted in the *chapeau* after the words “it may not be invoked”. It had decided not to do so, for those words would be inconsistent with the scope of the article, which applied to both injured States and States other than the injured State which were entitled to invoke responsibility. With regard to subparagraph (a), it had first examined a proposal by a Government to return to the rule on nationality of claims contained in article 22 adopted on first reading. It had also taken note of the fact that the issue of nationality essentially related to the admissibility of claims and had decided that, as the new subparagraph (a) introduced some flexibility, it would not be appropriate to revert to the previous text. It had then considered the comment of one Government that the “nationality of claims” was an unfamiliar concept in French legal terminology and that the expression should be redrafted to refer to an applicable rule relating to nationality in the context of the exercise of diplomatic protection. The Committee had decided to retain the text as it stood, even in the French version. It had recalled that the term “nationality of claims” had been used in 1949 by ICJ in the advisory opinion that it had delivered in French and English in the *Reparation for Injuries* case, with the French text being the official text. The Committee had also noted that the nationality of claims rule did not apply only in the field of diplomatic protection. The Committee had made no amendments to subparagraph (b), since Governments had generally endorsed it.

40. The title of article 46 (Loss of the right to invoke responsibility) had presented problems for some Drafting Committee members who would have preferred the word “renunciation” to the word “loss” (of a right) in English. The Committee had made that change in the French version, but had retained the English title as it stood, since it considered the word “loss” better than the word “renunciation”.

41. With regard to subparagraph (a), the Drafting Committee had examined the proposals by some Governments to exclude the ability to waive a claim arising from a breach of a peremptory norm or an *erga omnes* obligation. It had felt that, in the context of chapter V of Part One (Circumstances precluding wrongfulness), the word “validly” referred to both the procedural and the substantive validity of the waiver of the claim. In that article, the Committee had been unable to settle the question of the circumstances in which a claim relating to a breach of an obligation under a peremptory norm could be waived, for the reasons already explained when introducing article 42, paragraph 2. The Committee had likewise considered a suggestion by one Government that the word “validly” should be deleted, since it was redundant. It had thought it essential to uphold the principle that a claim had been validly renounced, in order to take account of situations in which an injured State might waive its claim under duress or coercion, because such renunciation should not be regarded as a sufficient waiver. The Committee had also studied the proposal from one Government to delete the words “in an unequivocal manner”, which might hamper the application of the article. It had noted that the expression was not strictly necessary and that the adverb “validly” rendered the idea adequately. It had therefore deleted the expression and agreed to explain the point in the commentary. The Committee had maintained subparagraph (b) without any changes, since no Government had submitted any comments on it.

42. Taking its cue from a proposal by the French Government, the Drafting Committee had amended the title of article 47 to read: “Plurality of injured States”, which was, in its opinion, more consistent with the content of the article itself. The article had been generally accepted by Governments. The Committee had wondered whether the article should specify that States could invoke responsibility collectively and separately. It had, however, found that the word “separately” had been expressly included in the text to show that States could invoke responsibility individually and that it went without saying that injured States could act together. In such circumstances, however, each State would be acting in its own right and not on behalf of any group or community. The provision did not deal with the issue of joint actions, which was governed by a separate body of law. That point could be explained in the commentary.

43. The Drafting Committee had amended the title of article 48 to read: “Plurality of responsible States”. In paragraph 1, it had first looked into the question raised by a Government whether the article recognized the principle of joint and several responsibility. It had noted that the general rule in international law was that a State bore responsibility for the wrongful acts it had committed and that article 48 reflected the rule well. The commentary would clearly explain that that provision must not be

construed as recognizing the rule of joint and several responsibility. If States wished to establish such a regime, they could do so. The Committee had further considered a Government's proposal to include the concept of attribution by changing the last part of paragraph 1 to read "the responsibility of each State may only be invoked to the extent that injuries are properly attributable to that State's conduct". It had noted that introducing the notion of attribution would create confusion with Part One and that the words "in relation to that act", which appeared in the text, would achieve the same objective. That point would be explained in the commentary.

44. The Drafting Committee had retained paragraph 2 as it stood, apart from some editorial modifications.

45. The Drafting Committee had noted that only one Government had proposed the deletion of article 49. It had considered a proposal to delete the expression "subject to paragraph 2" from the opening clause of paragraph 1, but had concluded that it would be better to replace it by "in accordance with paragraph 2". The Committee had examined the comment of a Government, which thought it necessary to clarify the concept of collective interest in paragraph 1 (a). It had decided to narrow the provision by adding the words "of the group" after the words "collective interest". That wording did not, however, rule out the possibility of a group of States entering into an obligation in the common interest of a larger community. For example, a group of States with rainforests in their territory might undertake to protect and preserve those forests, not only in their own interest, but also for the benefit of the international community as a whole. In the view of the Committee, that situation was also covered by the subparagraph. The commentary would elaborate on that issue. The Committee had made no changes to paragraph 1 (b) because Governments had found it generally acceptable.

46. In paragraph 2, the Drafting Committee had replaced the words "a State" by "any State" so as to be consistent with paragraph 1. Similarly, in the English version, it had replaced "may seek" by "may claim". The Committee had then examined a suggestion by a Government that a saving clause should be included to indicate that non-State entities might also be entitled to invoke State responsibility, but had considered that it was pointless to do so, since that matter was already dealt with in article 34, paragraph 2. The Committee had then noted that the inclusion of the reference to "assurances and guarantees of non-repetition" in paragraph 2 (a) depended on the decision taken on article 30, subparagraph (b), and had therefore decided to place those words in square brackets in the intervening period. The reference to the cessation of the internationally wrongful act did not give rise to any problems. A number of Governments had queried the substance of paragraph 2 (b). In particular, they had wondered whether the States in question in that article were entitled to ask for more than the cessation of the wrongful act and whether their right to demand reparation was recognized by international law. The Committee had further noted that some Governments were unsure how the invocation of responsibility by several States under that provision could be reconciled with conflicting or divergent demands. The Committee had found that that provision was a clear example of the progressive development of in-

ternational law and its utility should be evaluated from a policy perspective. It had noted that the right of the States referred to in article 49 to adopt countermeasures for the sake of the collective interest in the event of breaches of obligations, which had been embodied in article 54 of the previous draft, was highly controversial. The general view of the Commission had been that that article should be replaced by a saving clause, even if that might have the effect of weakening the protection of the collective interest. Under those circumstances and on balance, the Committee had reached the conclusion that, while that provision represented the progressive development of international law, it established a wise and useful principle worth retaining. It had nevertheless replaced the words "under chapter II of Part Two" by the words "in accordance with the preceding articles" in order to emphasize that the States referred to in article 49 could not demand reparation on behalf of an injured State that had chosen to waive its right to do so in accordance with article 46. The commentary would elaborate on the question of the procedure to be followed in the event of conflicting or divergent demands by the States referred to in article 49. At the beginning of paragraph 2 (b), the Committee had replaced the words "[c]ompliance with" by the words "[p]erformance of" in the English version in order to bring it into line with the French text.

47. Finally, with regard to paragraph 3, the Drafting Committee had discussed the proposal of one Government to add "*mutatis mutandis*" after "under articles 44, 45 [22] and 46 apply", but it had concluded that the intent of the provision was clear and that there was no need to amend its wording. Since the paragraph had been generally deemed acceptable by Governments, the Committee had retained it without any changes.

48. Turning to Part Three, chapter II (Countermeasures), he said that that part of the text had attracted much criticism from Governments and Commission members. Taking into account the compromise reached in the Commission, it had been found undesirable to overload article 23 (Countermeasures in respect of an internationally wrongful act) by incorporating in it most of the articles on countermeasures. Article 23 would therefore remain in chapter V of Part One. The chapter on countermeasures would remain in Part Three, but article 54 of the draft at the previous session, which had been highly controversial, would be deleted and replaced by a saving clause which took account of all the positions on that issue. Article 53 [48] (Conditions relating to resort to countermeasures) of the previous draft would also be reconsidered and the distinction between countermeasures and provisional countermeasures would be removed. That article should also be simplified and brought into line with the decisions of the arbitral tribunal in the *Air Service Agreement* case and the decision of ICJ in the *Gabčíkovo-Nagymaros Project* case. Articles 51 [50] (Obligations not affected by countermeasures) and 52 [49] (Proportionality) should also be reconsidered, as necessary, in the light of the various comments made. On that basis, the Drafting Committee had considered chapter III and article 23 [30] as it was related to that chapter.

49. With regard to article 50 [47] (Object and limits of countermeasures), the Drafting Committee had taken note of the fact that, while Governments had not objected

to it, they had questioned its balance and that was the issue it was trying to resolve.

50. According to paragraph 1, the purpose of countermeasures was to induce the wrongdoing State to comply with its obligations to cease the breach and provide reparation. Countermeasures were not punishment. One Government had suggested that the sole aim should be to bring about the cessation of the wrongful act, but, in the view of the Drafting Committee, reparation was necessary in situations where damage had already been done. That conception of countermeasures was therefore too restrictive and not supported by State practice. The Committee had felt that the restriction implied by the word “only” in the English version applied to both the target of countermeasures, i.e. the responsible State, and the purpose of those countermeasures, which was to persuade the responsible State to comply with its obligations.

51. The Drafting Committee had likewise considered a suggestion that countermeasures to guarantee satisfaction should be ruled out, since satisfaction played only a minor, symbolic and supplementary role in the entire range of forms of reparation and could not alone justify the imposition of countermeasures. It was inconceivable that a State that had met its obligation to cease the wrongful act and had provided compensation could be made the target of countermeasures. The Committee had felt that the notion of proportionality addressed that concern and that it was unnecessary to make arbitrary distinctions in that paragraph.

52. In paragraph 2, the Drafting Committee had considered the use of the expression “suspension of performance of one or more international obligations”, which some considered too close to the language used in the context of treaty obligations and which might convey the impression that the paragraph was confined to that kind of obligation. The words “one or more international obligations” had also been criticized, but the Committee had noted that a countermeasure could well result in the breach of several different obligations coexisting under a variety of arrangements and that the more exact wording “or more” was therefore justified. The Committee had thus done no more than make purely drafting changes to the previous text by replacing the words “suspension of performance of one or more international obligations” by the words “the non-performance for the time being of international obligations” because the term “for the time being” accurately reflected the temporary nature of the countermeasure. Lastly, the Committee had examined the suggestion by a Government that the text did not sufficiently protect third States’ rights, which might be infringed by countermeasures in some situations, but it had considered that, in view of State practice, it was impossible to introduce a provision which would restrict the right of the injured State to adopt countermeasures for that reason.

53. In paragraph 3, the Drafting Committee had turned its attention to a point raised by some Governments concerning the irreversible consequences of countermeasures. In its opinion, it would be impossible to prevent irreversible effects in all cases, but States could at least be required “as far as possible” to take countermeasures with reversible effects. For the sake of greater clarity,

the Committee had made some drafting changes to the paragraph by replacing the words “not to prevent” by the words “to permit” and by deleting the words “obligation or” in order to achieve consistency with paragraph 2, which referred only to “obligations”. The title of the article remained unchanged.

54. As to article 51 [50], although one Government had proposed its deletion on the grounds that it dealt with issues covered by the Charter of the United Nations or by the article on proportionality, whereas others had wished to supplement it, the Drafting Committee had taken the view that it usefully clarified certain issues and had largely reproduced the text of the previous version with a few amendments; for example, it had slightly altered the wording of paragraph 1 by replacing the words “involve any derogation” by the word “affect” in the opening clause because some Governments had rightly been of the opinion that the use of the term “derogation” created confusion with human rights derogation clauses. As far as substance was concerned, in paragraph 1 (c), it had deleted the reference to any form of reprisals against persons protected by obligations because it believed that there was no need to be more specific, since the text relied on *lex specialis*. As at the fifty-second session, it was the understanding of the Committee that paragraph 1 (d) did not qualify the obligations referred to in the previous subparagraphs, especially those in paragraph 1, subparagraphs (b) and (c), which might or might not be peremptory. The subparagraph on diplomatic and consular inviolability had not prompted any criticism by Governments. According to one Government, however, the obligation in question should be considered peremptory. The Committee did not share that viewpoint because a State might waive the inviolability of its own personnel, premises and documents. The purpose of that subparagraph was directly linked with that of paragraph 2, for, in order to settle a dispute successfully, it was essential to keep diplomatic channels open between the States concerned. That was why the Committee had transferred that subparagraph to paragraph 2.

55. When considering paragraph 1, the Drafting Committee had wondered whether it would be useful to keep it general, with no listing of specific obligations. The advantage of such a formula was that the scope of the paragraph would remain within the realm of secondary rules and would avoid the possibility of excluding any of the obligations against which countermeasures might not be taken. On the other hand, the fact of listing some of the “prohibited countermeasures” had the advantage of removing uncertainty, at least about those for which there should be no ambiguity. On balance, the Committee had considered that the second approach was preferable, even though the provision would have to draw on primary rules.

56. Paragraph 2 was a merger of paragraph 2 and paragraph 1 (e) (on diplomatic and consular inviolability) of the article at the previous session. In the context of its consideration of that paragraph, the Drafting Committee had looked into the question of the meaning of the expression “applicable dispute settlement procedure in force” between the injured State and the responsible State and had confirmed its understanding that it was intended to be construed narrowly and to refer only to dispute settlement procedures that were applicable to the dispute in

Annex 15

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)

**Draft articles on
Responsibility of States for Internationally Wrongful Acts,
with commentaries
2001**

Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, as corrected.



that these arise towards or are invoked by a person or entity other than a State. In other words, the provisions of Part Two are without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State, and article 33 makes this clear.

Article 29. Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.

Commentary

(1) Where a State commits a breach of an international obligation, questions as to the restoration and future of the legal relationship thereby affected are central. Apart from the question of reparation, two immediate issues arise, namely, the effect of the responsible State's conduct on the obligation which has been breached, and cessation of the breach if it is continuing. The former question is dealt with by article 29, the latter by article 30.

(2) Article 29 states the general principle that the legal consequences of an internationally wrongful act do not affect the continued duty of the State to perform the obligation it has breached. As a result of the internationally wrongful act, a new set of legal relations is established between the responsible State and the State or States to whom the international obligation is owed. But this does not mean that the pre-existing legal relation established by the primary obligation disappears. Even if the responsible State complies with its obligations under Part Two to cease the wrongful conduct and to make full reparation for the injury caused, it is not relieved thereby of the duty to perform the obligation breached. The continuing obligation to perform an international obligation, notwithstanding a breach, underlies the concept of a continuing wrongful act (see article 14) and the obligation of cessation (see subparagraph (a) of article 30).

(3) It is true that in some situations the ultimate effect of a breach of an obligation may be to put an end to the obligation itself. For example, a State injured by a material breach of a bilateral treaty may elect to terminate the treaty.⁴²⁴ But as the relevant provisions of the 1969 Vienna Convention make clear, the mere fact of a breach and even of a repudiation of a treaty does not terminate the treaty.⁴²⁵ It is a matter for the injured State to react to the breach to the extent permitted by the Convention. The injured State may have no interest in terminating the treaty as distinct from calling for its continued performance. Where a treaty is duly terminated for breach, the termination does not affect legal relationships which have accrued under the treaty prior to its termination, includ-

ing the obligation to make reparation for any breach.⁴²⁶ A breach of an obligation under general international law is even less likely to affect the underlying obligation, and indeed will never do so *as such*. By contrast, the secondary legal relation of State responsibility arises on the occurrence of a breach and without any requirement of invocation by the injured State.

(4) Article 29 does not need to deal with such contingencies. All it provides is that the legal consequences of an internationally wrongful act within the field of State responsibility do not affect any continuing duty to comply with the obligation which has been breached. Whether and to what extent that obligation subsists despite the breach is a matter not regulated by the law of State responsibility but by the rules concerning the relevant primary obligation.

Article 30. Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(a) to cease that act, if it is continuing;

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Commentary

(1) Article 30 deals with two separate but linked issues raised by the breach of an international obligation: the cessation of the wrongful conduct and the offer of assurances and guarantees of non-repetition by the responsible State if circumstances so require. Both are aspects of the restoration and repair of the legal relationship affected by the breach. Cessation is, as it were, the negative aspect of future performance, concerned with securing an end to continuing wrongful conduct, whereas assurances and guarantees serve a preventive function and may be described as a positive reinforcement of future performance. The continuation in force of the underlying obligation is a necessary assumption of both, since if the obligation has ceased following its breach, the question of cessation does not arise and no assurances and guarantees can be relevant.⁴²⁷

(2) Subparagraph (a) of article 30 deals with the obligation of the State responsible for the internationally wrongful act to cease the wrongful conduct. In accordance with article 2, the word "act" covers both acts and omissions. Cessation is thus relevant to all wrongful acts extending in time "regardless of whether the conduct of a State is

⁴²⁴ See footnote 422 above.

⁴²⁵ Indeed, in the *Gabčíkovo-Nagymaros Project* case, ICJ held that continuing material breaches by both parties did not have the effect of terminating the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System (see footnote 27 above), p. 68, para. 114.

⁴²⁶ See, e.g., "*Rainbow Warrior*" (footnote 46 above), p. 266, citing Lord McNair (dissenting) in *Ambatielos, Preliminary Objection, I.C.J. Reports 1952*, p. 28, at p. 63. On that particular point the Court itself agreed, *ibid.*, p. 45. In the *Gabčíkovo-Nagymaros Project* case, Hungary accepted that the legal consequences of its termination of the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System on account of the breach by Czechoslovakia were prospective only, and did not affect the accrued rights of either party (see footnote 27 above), pp. 73–74, paras. 125–127. The Court held that the Treaty was still in force, and therefore did not address the question.

⁴²⁷ 1969 Vienna Convention, art. 70, para. 1.

an action or an omission ... since there may be cessation consisting in abstaining from certain actions".⁴²⁸

(3) The tribunal in the "*Rainbow Warrior*" arbitration stressed "two essential conditions intimately linked" for the requirement of cessation of wrongful conduct to arise, "namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued".⁴²⁹ While the obligation to cease wrongful conduct will arise most commonly in the case of a continuing wrongful act,⁴³⁰ article 30 also encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions. The phrase "if it is continuing" at the end of subparagraph (a) of the article is intended to cover both situations.

(4) Cessation of conduct in breach of an international obligation is the first requirement in eliminating the consequences of wrongful conduct. With reparation, it is one of the two general consequences of an internationally wrongful act. Cessation is often the main focus of the controversy produced by conduct in breach of an international obligation.⁴³¹ It is frequently demanded not only by States but also by the organs of international organizations such as the General Assembly and Security Council in the face of serious breaches of international law. By contrast, reparation, important though it is in many cases, may not be the central issue in a dispute between States as to questions of responsibility.⁴³²

(5) The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law.

(6) There are several reasons for treating cessation as more than simply a function of the duty to comply with the primary obligation. First, the question of cessation only arises in the event of a breach. What must then occur depends not only on the interpretation of the primary obligation but also on the secondary rules relating to rem-

edies, and it is appropriate that they are dealt with, at least in general terms, in articles concerning the consequences of an internationally wrongful act. Secondly, continuing wrongful acts are a common feature of cases involving State responsibility and are specifically dealt with in article 14. There is a need to spell out the consequences of such acts in Part Two.

(7) The question of cessation often arises in close connection with that of reparation, and particularly restitution. The result of cessation may be indistinguishable from restitution, for example in cases involving the freeing of hostages or the return of objects or premises seized. Nonetheless, the two must be distinguished. Unlike restitution, cessation is not subject to limitations relating to proportionality.⁴³³ It may give rise to a continuing obligation, even when literal return to the *status quo ante* is excluded or can only be achieved in an approximate way.

(8) The difficulty of distinguishing between cessation and restitution is illustrated by the "*Rainbow Warrior*" arbitration. New Zealand sought the return of the two agents to detention on the island of Hao. According to New Zealand, France was obliged to return them to and to detain them on the island for the balance of the three years; that obligation had not expired since time spent off the island was not to be counted for that purpose. The tribunal disagreed. In its view, the obligation was for a fixed term which had expired, and there was no question of cessation.⁴³⁴ Evidently, the return of the two agents to the island was of no use to New Zealand if there was no continuing obligation on the part of France to keep them there. Thus, a return to the *status quo ante* may be of little or no value if the obligation breached no longer exists. Conversely, no option may exist for an injured State to renounce restitution if the continued performance of the obligation breached is incumbent upon the responsible State and the former State is not competent to release it from such performance. The distinction between cessation and restitution may have important consequences in terms of the obligations of the States concerned.

(9) Subparagraph (b) of article 30 deals with the obligation of the responsible State to offer appropriate assurances and guarantees of non-repetition, if circumstances so require. Assurances and guarantees are concerned with the restoration of confidence in a continuing relationship, although they involve much more flexibility than cessation and are not required in all cases. They are most commonly sought when the injured State has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily. For example, following repeated demonstrations against the United States Embassy in Moscow from 1964 to 1965, President Johnson stated that:

The U.S. Government must insist that its diplomatic establishments and personnel be given the protection which is required by international law and custom and which is necessary for the conduct of diplomatic relations between states. Expressions of regret and compensation are no substitute for adequate protection.⁴³⁵

⁴²⁸ "*Rainbow Warrior*" (see footnote 46 above), p. 270, para. 113.

⁴²⁹ *Ibid.*, para. 114.

⁴³⁰ For the concept of a continuing wrongful act, see paragraphs (3) to (11) of the commentary to article 14.

⁴³¹ The focus of the WTO dispute settlement mechanism is on cessation rather than reparation: Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), especially article 3, paragraph 7, which provides for compensation "only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement". On the distinction between cessation and reparation for WTO purposes, see, e.g., Report of the Panel, Australia-Subsidies Provided to Producers and Exporters of Automotive Leather (WT/DS126/RW and Corr.1), 21 January 2000, para. 6.49.

⁴³² For cases where ICJ has recognized that this may be so, see, e.g., *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, *Merits, Judgment*, I.C.J. Reports 1974, p. 175, at pp. 201–205, paras. 65–76; and *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 81, para. 153. See also C. D. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), pp. 77–92.

⁴³³ See article 35 (b) and commentary.

⁴³⁴ UNRIIAA, vol. XX, p. 217, at p. 266, para. 105 (1990).

⁴³⁵ Reprinted in ILM, vol. 4, No. 2 (July 1965), p. 698.

Such demands are not always expressed in terms of assurances or guarantees, but they share the characteristics of being future-looking and concerned with other potential breaches. They focus on prevention rather than reparation and they are included in article 30.

(10) The question whether the obligation to offer assurances or guarantees of non-repetition may be a legal consequence of an internationally wrongful act was debated in the *LaGrand* case. This concerned an admitted failure of consular notification contrary to article 36 of the Vienna Convention on Consular Relations. In its fourth submission, Germany sought both general and specific assurances and guarantees as to the means of future compliance with the Convention. The United States argued that to give such assurances or guarantees went beyond the scope of the obligations in the Convention and that ICJ lacked jurisdiction to require them. In any event, formal assurances and guarantees were unprecedented and should not be required. Germany's entitlement to a remedy did not extend beyond an apology, which the United States had given. Alternatively, no assurances or guarantees were appropriate in the light of the extensive action it had taken to ensure that federal and State officials would in future comply with the Convention. On the question of jurisdiction, the Court held:

that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation ... Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.⁴³⁶

On the question of appropriateness, the Court noted that an apology would not be sufficient in any case in which a foreign national had been "subjected to prolonged detention or sentenced to severe penalties" following a failure of consular notification.⁴³⁷ But in the light of information provided by the United States as to the steps taken to comply in future, the Court held:

that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), must be regarded as meeting Germany's request for a general assurance of non-repetition.⁴³⁸

As to the specific assurances sought by Germany, the Court limited itself to stating that:

if the United States, notwithstanding its commitment referred to ... should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.⁴³⁹

⁴³⁶ *LaGrand, Judgment* (see footnote 119 above), p. 485, para. 48, citing *Factory at Chorzów, Jurisdiction* (footnote 34 above).

⁴³⁷ *LaGrand, Judgment* (see footnote 119 above), p. 512, para. 123.

⁴³⁸ *Ibid.*, p. 513, para. 124; see also the operative part, p. 516, para. 128 (6).

⁴³⁹ *Ibid.*, pp. 513–514, para. 125. See also paragraph 127 and the operative part (para. 128 (7)).

The Court thus upheld its jurisdiction on Germany's fourth submission and responded to it in the operative part. It did not, however, discuss the legal basis for assurances of non-repetition.

(11) Assurances or guarantees of non-repetition may be sought by way of satisfaction (e.g. the repeal of the legislation which allowed the breach to occur) and there is thus some overlap between the two in practice.⁴⁴⁰ However, they are better treated as an aspect of the continuation and repair of the legal relationship affected by the breach. Where assurances and guarantees of non-repetition are sought by an injured State, the question is essentially the reinforcement of a continuing legal relationship and the focus is on the future, not the past. In addition, assurances and guarantees of non-repetition may be sought by a State other than an injured State in accordance with article 48.

(12) Assurances are normally given verbally, while guarantees of non-repetition involve something more—for example, preventive measures to be taken by the responsible State designed to avoid repetition of the breach. With regard to the kind of guarantees that may be requested, international practice is not uniform. The injured State usually demands either safeguards against the repetition of the wrongful act without any specification of the form they are to take⁴⁴¹ or, when the wrongful act affects its nationals, assurances of better protection of persons and property.⁴⁴² In the *LaGrand* case, ICJ spelled out with some specificity the obligation that would arise for the United States from a future breach, but added that "[t]his obligation can be carried out in various ways. The choice of means must be left to the United States".⁴⁴³ It noted further that a State may not be in a position to offer a firm guarantee of non-repetition.⁴⁴⁴ Whether it could properly do so would depend on the nature of the obligation in question.

(13) In some cases, the injured State may ask the responsible State to adopt specific measures or to act in a specified way in order to avoid repetition. Sometimes the injured State merely seeks assurances from the responsible State that, in future, it will respect the rights of the injured State.⁴⁴⁵ In other cases, the injured State requires specific instructions to be given,⁴⁴⁶ or other specific conduct to be

⁴⁴⁰ See paragraph (5) of the commentary to article 36.

⁴⁴¹ In the "Dogger Bank" incident in 1904, the United Kingdom sought "security against the recurrence of such intolerable incidents", G. F. de Martens, *Nouveau recueil général de traités*, 2nd series, vol. XXXIII, p. 642. See also the exchange of notes between China and Indonesia following the attack in March 1966 against the Chinese Consulate General in Jakarta, in which the Chinese Deputy Minister for Foreign Affairs sought a guarantee that such incidents would not be repeated in the future, RGDIP, vol. 70 (1966), pp. 1013 et seq.

⁴⁴² Such assurances were given in the *Doane* incident (1886), Moore, *Digest*, vol. VI, pp. 345–346.

⁴⁴³ *LaGrand, Judgment* (see footnote 119 above), p. 513, para. 125.

⁴⁴⁴ *Ibid.*, para. 124.

⁴⁴⁵ See, e.g., the 1901 case in which the Ottoman Empire gave a formal assurance that the British, Austrian and French postal services would henceforth operate freely in its territory, RGDIP, vol. 8 (1901), p. 777, at pp. 788 and 792.

⁴⁴⁶ See, e.g., the incidents involving the "Herzog" and the "Bundestrath", two German ships seized by the British Navy in December 1899 and January 1900, during the Boer war, in which Germany drew the attention of Great Britain to "the necessity for issuing instructions

(3) The primary obligation breached may also play an important role with respect to the form and extent of reparation. In particular, in cases of restitution not involving the return of persons, property or territory of the injured State, the notion of reverting to the *status quo ante* has to be applied having regard to the respective rights and competences of the States concerned. This may be the case, for example, where what is involved is a procedural obligation conditioning the exercise of the substantive powers of a State. Restitution in such cases should not give the injured State more than it would have been entitled to if the obligation had been performed.⁴⁸⁷

(4) The provision of each of the forms of reparation described in article 34 is subject to the conditions laid down in the articles which follow it in chapter II. This limitation is indicated by the phrase “in accordance with the provisions of this chapter”. It may also be affected by any valid election that may be made by the injured State as between different forms of reparation. For example, in most circumstances the injured State is entitled to elect to receive compensation rather than restitution. This element of choice is reflected in article 43.

(5) Concerns have sometimes been expressed that the principle of full reparation may lead to disproportionate and even crippling requirements so far as the responsible State is concerned. The issue is whether the principle of proportionality should be articulated as an aspect of the obligation to make full reparation. In these articles, proportionality is addressed in the context of each form of reparation, taking into account its specific character. Thus, restitution is excluded if it would involve a burden out of all proportion to the benefit gained by the injured State or other party.⁴⁸⁸ Compensation is limited to damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote.⁴⁸⁹ Satisfaction must “not be out of proportion to the injury”.⁴⁹⁰ Thus, each of the forms of reparation takes such considerations into account.

(6) The forms of reparation dealt with in chapter II represent ways of giving effect to the underlying obligation of reparation set out in article 31. There are not, as it were, separate secondary obligations of restitution, compensation and satisfaction. Some flexibility is shown in practice in terms of the appropriateness of requiring one form of reparation rather than another, subject to the requirement of full reparation for the breach in accordance with article 31.⁴⁹¹ To the extent that one form of reparation is dispensed with or is unavailable in the circumstances, others,

especially compensation, will be correspondingly more important.

Article 35. Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Commentary

(1) In accordance with article 34, restitution is the first of the forms of reparation available to a State injured by an internationally wrongful act. Restitution involves the re-establishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act, to the extent that any changes that have occurred in that situation may be traced to that act. In its simplest form, this involves such conduct as the release of persons wrongly detained or the return of property wrongly seized. In other cases, restitution may be a more complex act.

(2) The concept of restitution is not uniformly defined. According to one definition, restitution consists in re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act. Under another definition, restitution is the establishment or re-establishment of the situation that would have existed if the wrongful act had not been committed. The former definition is the narrower one; it does not extend to the compensation which may be due to the injured party for loss suffered, for example for loss of the use of goods wrongfully detained but subsequently returned. The latter definition absorbs into the concept of restitution other elements of full reparation and tends to conflate restitution as a form of reparation and the underlying obligation of reparation itself. Article 35 adopts the narrower definition which has the advantage of focusing on the assessment of a factual situation and of not requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed. Restitution in this narrow sense may of course have to be completed by compensation in order to ensure full reparation for the damage caused, as article 36 makes clear.

(3) Nonetheless, because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. The primacy of restitution was confirmed by PCIJ in the *Factory at Chorzów*

⁴⁸⁷ Thus, in the judgment in the *LaGrand* case (see footnote 119 above), ICJ indicated that a breach of the notification requirement in article 36 of the Vienna Convention on Consular Relations, leading to a severe penalty or prolonged detention, would require reconsideration of the fairness of the conviction “by taking account of the violation of the rights set forth in the Convention” (p. 514, para. 125). This would be a form of restitution which took into account the limited character of the rights in issue.

⁴⁸⁸ See article 35 (b) and commentary.

⁴⁸⁹ See article 31 and commentary.

⁴⁹⁰ See article 37, paragraph 3, and commentary.

⁴⁹¹ For example, the *Mélanie Lachenal* case (UNRIIA, vol. XIII (Sales No. 64.V.3), p. 117, at pp. 130–131 (1954)), where compensation was accepted in lieu of restitution originally decided upon, the Franco-Italian Conciliation Commission having agreed that restitution

would require difficult internal procedures. See also paragraph (4) of the commentary to article 35.

case when it said that the responsible State was under “the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible”. The Court went on to add that “[t]he impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution”.⁴⁹² It can be seen in operation in the cases where tribunals have considered compensation only after concluding that, for one reason or another, restitution could not be effected.⁴⁹³ Despite the difficulties restitution may encounter in practice, States have often insisted upon claiming it in preference to compensation. Indeed, in certain cases, especially those involving the application of peremptory norms, restitution may be required as an aspect of compliance with the primary obligation.

(4) On the other hand, there are often situations where restitution is not available or where its value to the injured State is so reduced that other forms of reparation take priority. Questions of election as between different forms of reparation are dealt with in the context of Part Three.⁴⁹⁴ But quite apart from valid election by the injured State or other entity, the possibility of restitution may be practically excluded, e.g. because the property in question has been destroyed or fundamentally changed in character or the situation cannot be restored to the *status quo ante* for some reason. Indeed, in some cases tribunals have inferred from the terms of the *compromis* or the positions of the parties what amounts to a discretion to award compensation rather than restitution. For example, in the *Walter Fletcher Smith* case, the arbitrator, while maintaining that restitution should be appropriate in principle, interpreted the *compromis* as giving him a discretion to award compensation and did so in “the best interests of the parties, and of the public”.⁴⁹⁵ In the *Aminoil* arbitration, the parties agreed that restoration of the *status quo ante* following the annulment of the concession by the Kuwaiti decree would be impracticable.⁴⁹⁶

(5) Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them. Examples of material restitution include the release of detained individuals, the handing over to a State of an indi-

vidual arrested in its territory,⁴⁹⁷ the restitution of ships⁴⁹⁸ or other types of property,⁴⁹⁹ including documents, works of art, share certificates, etc.⁵⁰⁰ The term “juridical restitution” is sometimes used where restitution requires or involves the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State. Such cases include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law,⁵⁰¹ the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner⁵⁰² or a requirement that steps be taken (to the extent allowed by international law) for the termination of a treaty.⁵⁰³ In some cases, both material and juridical restitution may be involved.⁵⁰⁴ In others, an international court or tribunal can, by determining the legal position with binding force for the parties, award what amounts to restitution under another form.⁵⁰⁵ The term “restitution” in article 35 thus

⁴⁹⁷ Examples of material restitution involving persons include the “*Trent*” (1861) and “*Florida*” (1864) incidents, both involving the arrest of individuals on board ships (Moore, *Digest*, vol. VII, pp. 768 and 1090–1091), and the *United States Diplomatic and Consular Staff in Tehran* case in which ICJ ordered Iran to immediately release every detained United States national (see footnote 59 above), pp. 44–45.

⁴⁹⁸ See, e.g., the “*Giaffarieh*” incident (1886) which originated in the capture in the Red Sea by an Egyptian warship of four merchant ships from Massawa under Italian registry, *Società Italiana per l’Organizzazione Internazionale–Consiglio Nazionale delle Ricerche, La prassi italiana di diritto internazionale*, 1st series (Dobbs Ferry, NY., Oceana, 1970), vol. II, pp. 901–902.

⁴⁹⁹ For example, *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6, at pp. 36–37, where ICJ decided in favour of a Cambodian claim which included restitution of certain objects removed from the area and the temple by Thai authorities. See also the *Hôtel Métropole* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 219 (1950); the *Ottoz* case, *ibid.*, p. 240 (1950); and the *Hénon* case, *ibid.*, p. 248 (1951).

⁵⁰⁰ In the *Buzău-Nehoiși Railway* case, an arbitral tribunal provided for the restitution to a German company of shares in a Romanian railway company, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1839 (1939).

⁵⁰¹ For cases where the existence of a law itself amounts to a breach of an international obligation, see paragraph (12) of the commentary to article 12.

⁵⁰² For example, the *Martini* case, UNRIAA, vol. II (Sales No. 1949.V.1), p. 975 (1930).

⁵⁰³ In the *Bryan-Chamorro Treaty* case (*Costa Rica v. Nicaragua*), the Central American Court of Justice decided that “the Government of Nicaragua, by availing itself of measures possible under the authority of international law, is under the obligation to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics in so far as relates to matters treated in this action” (*Anales de la Corte de Justicia Centroamericana* (San José, Costa Rica), vol. VI, Nos. 16–18 (December 1916–May 1917), p. 7); and AJLL, vol. 11, No. 3 (1917), p. 674, at p. 696; see also page 683.

⁵⁰⁴ Thus, PCIJ held that Czechoslovakia was “bound to restore to the Royal Hungarian Peter Pázmány University of Budapest the immovable property claimed by it, freed from any measure of transfer, compulsory administration, or sequestration, and in the condition in which it was before the application of the measures in question” (*Appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (see footnote 481 above)).

⁵⁰⁵ In the *Legal Status of Eastern Greenland* case, PCIJ decided that “the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this respect by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid” (*Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 22, at p. 75). In the case of the *Free Zones of Upper Savoy and the District of Gex* (see footnote 79 above), the Court decided that France “must withdraw its customs line in accordance with

⁴⁹² *Factory at Chorzów, Merits* (see footnote 34 above), p. 48.

⁴⁹³ See, e.g., *British Claims in the Spanish Zone of Morocco* (footnote 44 above), pp. 621–625 and 651–742; *Religious Property Expropriated by Portugal*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 7 (1920); *Walter Fletcher Smith, ibid.*, vol. II (Sales No. 1949.V.1), p. 913, at p. 918 (1929); and *Heirs of Lebas de Courmont, ibid.*, vol. XIII (Sales No. 64.V.3), p. 761, at p. 764 (1957).

⁴⁹⁴ See articles 43 and 45 and commentaries.

⁴⁹⁵ *Walter Fletcher Smith* (see footnote 493 above). In the *Greek Telephone Company* case, the arbitral tribunal, while ordering restitution, asserted that the responsible State could provide compensation instead for “important State reasons” (see J. G. Wetter and S. M. Schwebel, “Some little known cases on concessions”, BYBIL, 1964, vol. 40, p. 216, at p. 221).

⁴⁹⁶ *Government of Kuwait v. American Independent Oil Company (Aminoil)* ILR, vol. 66, p. 519, at p. 533 (1982).

has a broad meaning, encompassing any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act.

(6) What may be required in terms of restitution will often depend on the content of the primary obligation which has been breached. Restitution, as the first of the forms of reparation, is of particular importance where the obligation breached is of a continuing character, and even more so where it arises under a peremptory norm of general international law. In the case, for example, of unlawful annexation of a State, the withdrawal of the occupying State's forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution.⁵⁰⁶ Even so, ancillary measures (the return of persons or property seized in the course of the invasion) will be required as an aspect either of cessation or restitution.

(7) The obligation to make restitution is not unlimited. In particular, under article 35 restitution is required "provided and to the extent that" it is neither materially impossible nor wholly disproportionate. The phrase "provided and to the extent that" makes it clear that restitution may be only partially excluded, in which case the responsible State will be obliged to make restitution to the extent that this is neither impossible nor disproportionate.

(8) Under article 35, *subparagraph* (a), restitution is not required if it is "materially impossible". This would apply where property to be restored has been permanently lost or destroyed, or has deteriorated to such an extent as to be valueless. On the other hand, restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these. Under article 32 the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation, and the mere fact of political or administrative obstacles to restitution does not amount to impossibility.

(9) Material impossibility is not limited to cases where the object in question has been destroyed, but can cover more complex situations. In the *Forests of Central Rhodopia* case, the claimant was entitled to only a share in the forestry operations and no claims had been brought by the other participants. The forests were not in the same condition as at the time of their wrongful taking, and detailed inquiries would be necessary to determine their condition. Since the taking, third parties had acquired rights to them. For a combination of these reasons, restitution was denied.⁵⁰⁷ The case supports a broad understanding of the impossibility of granting restitution, but it concerned questions of property rights within the legal system of the responsible State.⁵⁰⁸ The position may be different where

the rights and obligations in issue arise directly on the international plane. In that context restitution plays a particularly important role.

(10) In certain cases, the position of third parties may have to be taken into account in considering whether restitution is materially possible. This was true in the *Forests of Central Rhodopia* case. But whether the position of a third party will preclude restitution will depend on the circumstances, including whether the third party at the time of entering into the transaction or assuming the disputed rights was acting in good faith and without notice of the claim to restitution.

(11) A second exception, dealt with in article 35, *subparagraph* (b), involves those cases where the benefit to be gained from restitution is wholly disproportionate to its cost to the responsible State. Specifically, restitution may not be required if it would "involve a burden out of all proportion to the benefit deriving from restitution instead of compensation". This applies only where there is a grave disproportionality between the burden which restitution would impose on the responsible State and the benefit which would be gained, either by the injured State or by any victim of the breach. It is thus based on considerations of equity and reasonableness,⁵⁰⁹ although with a preference for the position of the injured State in any case where the balancing process does not indicate a clear preference for compensation as compared with restitution. The balance will invariably favour the injured State in any case where the failure to provide restitution would jeopardize its political independence or economic stability.

Article 36. Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Commentary

(1) Article 36 deals with compensation for damage caused by an internationally wrongful act, to the extent that such damage is not made good by restitution. The notion of "damage" is defined inclusively in article 31, paragraph 2, as any damage whether material or moral.⁵¹⁰ Article 36, paragraph 2, develops this definition by specifying that compensation shall cover any financially

(Footnote 505 continued.)

the provisions of the said treaties and instruments; and that this régime must continue in force so long as it has not been modified by agreement between the Parties" (p. 172). See also F. A. Mann, "The consequences of an international wrong in international and municipal law", *BYBIL, 1976-1977*, vol. 48, p. 1, at pp. 5-8.

⁵⁰⁶ See above, paragraph (8) of the commentary to article 30.

⁵⁰⁷ *Forests of Central Rhodopia* (see footnote 382 above), p. 1432.

⁵⁰⁸ For questions of restitution in the context of State contract arbitration, see *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic* (1977),

ILR, vol. 53, p. 389, at pp. 507-508, para. 109; *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic*, *ibid.*, p. 297, at p. 354 (1974); and *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic* *ibid.*, vol. 62, p. 141, at p. 200 (1977).

⁵⁰⁹ See, e.g., J. H. W. Verzijl, *International Law in Historical Perspective* (Leiden, Sijthoff, 1973), part VI, p. 744, and the position taken by the Deutsche Gesellschaft für Völkerrecht (German International Law Association) in *Yearbook ... 1969*, vol. II, p. 149.

⁵¹⁰ See paragraphs (5) to (6) and (8) of the commentary to article 31.

*Article 42. Invocation of responsibility
by an injured State*

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) that State individually; or**
- (b) a group of States including that State, or the international community as a whole, and the breach of the obligation:**
 - (i) specially affects that State; or**
 - (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.**

Commentary

(1) Article 42 provides that the implementation of State responsibility is in the first place an entitlement of the “injured State”. It defines this term in a relatively narrow way, drawing a distinction between injury to an individual State or possibly a small number of States and the legal interests of several or all States in certain obligations established in the collective interest. The latter are dealt with in article 48.

(2) This chapter is expressed in terms of the invocation by a State of the responsibility of another State. For this purpose, invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests. For the purpose of these articles, protest as such is not an invocation of responsibility; it has a variety of forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal,⁶⁶⁶ or even the taking of countermeasures. In order to take such steps, i.e. to invoke responsibility in the sense of the articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, e.g. a right of action specifically conferred

⁶⁶⁶ An analogous distinction is drawn by article 27, paragraph 2, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which distinguishes between the bringing of an international claim in the field of diplomatic protection and “informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute”.

by a treaty,⁶⁶⁷ or it must be considered an injured State. The purpose of article 42 is to define this latter category.

(3) A State which is injured in the sense of article 42 is entitled to resort to all means of redress contemplated in the articles. It can invoke the appropriate responsibility pursuant to Part Two. It may also—as is clear from the opening phrase of article 49—resort to countermeasures in accordance with the rules laid down in chapter II of this Part. The situation of an injured State should be distinguished from that of any other State which may be entitled to invoke responsibility, e.g. under article 48 which deals with the entitlement to invoke responsibility in some shared general interest. This distinction is clarified by the opening phrase of article 42, “A State is entitled as an injured State to invoke the responsibility”.

(4) The definition in article 42 is closely modelled on article 60 of the 1969 Vienna Convention, although the scope and purpose of the two provisions are different. Article 42 is concerned with any breach of an international obligation of whatever character, whereas article 60 is concerned with breach of treaties. Moreover, article 60 is concerned exclusively with the right of a State party to a treaty to invoke a material breach of that treaty by another party as grounds for its suspension or termination. It is not concerned with the question of responsibility for breach of the treaty.⁶⁶⁸ This is why article 60 is restricted to “material” breaches of treaties. Only a material breach justifies termination or suspension of the treaty, whereas in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity. Despite these differences, the analogy with article 60 is justified. Article 60 seeks to identify the States parties to a treaty which are entitled to respond individually and in their own right to a material breach by terminating or suspending it. In the case of a bilateral treaty, the right can only be that of the other State party, but in the case of a multilateral treaty article 60, paragraph 2, does not allow every other State to terminate or suspend the treaty for material breach. The other State must be specially affected by the breach, or at least individually affected in that the breach necessarily undermines or destroys the basis for its own further performance of the treaty.

(5) In parallel with the cases envisaged in article 60 of the 1969 Vienna Convention, three cases are identified in article 42. In the first case, in order to invoke the responsibility of another State as an injured State, a State must have an individual right to the performance of an obligation, in the way that a State party to a bilateral treaty has *vis-à-vis* the other State party (subparagraph (a)). Secondly, a State may be specially affected by the breach of an obligation to which it is a party, even though it cannot be said that the obligation is owed to it individually (subparagraph (b) (i)). Thirdly, it may be the case that performance of the obligation by the responsible State is a necessary condition of its performance by all the other States (subparagraph (b) (ii)); this is the so-called “integral” or “inter-

⁶⁶⁷ In relation to article 42, such a treaty right could be considered a *lex specialis*: see article 55 and commentary.

⁶⁶⁸ Cf. the 1969 Vienna Convention, art. 73.

dependent” obligation.⁶⁶⁹ In each of these cases, the possible suspension or termination of the obligation or of its performance by the injured State may be of little value to it as a remedy. Its primary interest may be in the restoration of the legal relationship by cessation and reparation.

(6) Pursuant to *subparagraph* (a) of article 42, a State is “injured” if the obligation breached was owed to it individually. The expression “individually” indicates that in the circumstances, performance of the obligation was owed to that State. This will necessarily be true of an obligation arising under a bilateral treaty between the two States parties to it, but it will also be true in other cases, e.g. of a unilateral commitment made by one State to another. It may be the case under a rule of general international law: thus, for example, rules concerning the non-navigational uses of an international river which may give rise to individual obligations as between one riparian State and another. Or it may be true under a multilateral treaty where particular performance is incumbent under the treaty as between one State party and another. For example, the obligation of the receiving State under article 22 of the Vienna Convention on Diplomatic Relations to protect the premises of a mission is owed to the sending State. Such cases are to be contrasted with situations where performance of the obligation is owed generally to the parties to the treaty at the same time and is not differentiated or individualized. It will be a matter for the interpretation and application of the primary rule to determine into which of the categories an obligation comes. The following discussion is illustrative only.

(7) An obvious example of cases coming within the scope of *subparagraph* (a) is a bilateral treaty relationship. If one State violates an obligation the performance of which is owed specifically to another State, the latter is an “injured State” in the sense of article 42. Other examples include binding unilateral acts by which one State assumes an obligation *vis-à-vis* another State; or the case of a treaty establishing obligations owed to a third State not party to the treaty.⁶⁷⁰ If it is established that the beneficiaries of the promise or the stipulation in favour of a third State were intended to acquire actual rights to performance of the obligation in question, they will be injured by its breach. Another example is a binding judgement of an international court or tribunal imposing obligations on one State party to the litigation for the benefit of the other party.⁶⁷¹

(8) In addition, *subparagraph* (a) is intended to cover cases where the performance of an obligation under a multilateral treaty or customary international law is owed to one particular State. The scope of *subparagraph* (a) in this respect is different from that of article 60, paragraph 1, of the 1969 Vienna Convention, which relies on the formal criterion of bilateral as compared with multilateral

treaties. But although a multilateral treaty will characteristically establish a framework of rules applicable to all the States parties, in certain cases its performance in a given situation involves a relationship of a bilateral character between two parties. Multilateral treaties of this kind have often been referred to as giving rise to “bundles” of bilateral relations”.⁶⁷²

(9) The identification of one particular State as injured by a breach of an obligation under the Vienna Convention on Diplomatic Relations does not exclude that all States parties may have an interest of a general character in compliance with international law and in the continuation of international institutions and arrangements which have been built up over the years. In the *United States Diplomatic and Consular Staff in Tehran* case, after referring to the “fundamentally unlawful character” of the Islamic Republic of Iran’s conduct in participating in the detention of the diplomatic and consular personnel, the Court drew:

the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.⁶⁷³

(10) Although discussion of multilateral obligations has generally focused on those arising under multilateral treaties, similar considerations apply to obligations under rules of customary international law. For example, the rules of general international law governing the diplomatic or consular relations between States establish bilateral relations between particular receiving and sending States, and violations of these obligations by a particular receiving State injure the sending State to which performance was owed in the specific case.

(11) *Subparagraph* (b) deals with injury arising from violations of collective obligations, i.e. obligations that apply between more than two States and whose performance in the given case is not owed to one State individually, but to a group of States or even the international community as a whole. The violation of these obligations only injures any particular State if additional requirements are met. In using the expression “group of States”, article 42, *subparagraph* (b), does not imply that the group has any separate existence or that it has separate legal personality. Rather, the term is intended to refer to a group of States, consisting of all or a considerable number of States in the world or in a given region, which have combined to achieve some collective purpose and which may be

⁶⁶⁹ The notion of “integral” obligations was developed by Fitzmaurice as Special Rapporteur on the Law of Treaties: see *Yearbook ... 1957*, vol. II, p. 54. The term has sometimes given rise to confusion, being used to refer to human rights or environmental obligations which are not owed on an “all or nothing” basis. The term “interdependent obligations” may be more appropriate.

⁶⁷⁰ Cf. the 1969 Vienna Convention, art. 36.

⁶⁷¹ See, e.g., Article 59 of the Statute of ICJ.

⁶⁷² See, e.g., K. Sachariew, “State responsibility for multilateral treaty violations: identifying the ‘injured State’ and its legal status”, *Netherlands International Law Review*, vol. 35, No. 3 (1988), p. 273, at pp. 277–278; B. Simma, “Bilateralism and community interest in the law of State responsibility”, *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Y. Dinstein, ed. (Dordrecht, Martinus Nijhoff, 1989), p. 821, at p. 823; C. Annacker, “The legal régime of *erga omnes* obligations in international law”, *Austrian Journal of Public and International Law*, vol. 46, No. 2 (1994), p. 131, at p. 136; and D. N. Hutchinson, “Solidarity and breaches of multilateral treaties”, *BYBIL*, 1988, vol. 59, p. 151, at pp. 154–155.

⁶⁷³ *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 41–43, paras. 89 and 92.

considered for that purpose as making up a community of States of a functional character.

(12) *Subparagraph (b) (i)* stipulates that a State is injured if it is “specially affected” by the violation of a collective obligation. The term “specially affected” is taken from article 60, paragraph (2) (b), of the 1969 Vienna Convention. Even in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of States bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States. For example a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of the States parties to the Convention in the preservation of the marine environment, those coastal States parties should be considered as injured by the breach. Like article 60, paragraph (2) (b), of the 1969 Vienna Convention, *subparagraph (b) (i)* does not define the nature or extent of the special impact that a State must have sustained in order to be considered “injured”. This will have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.

(13) In contrast, *subparagraph (b) (ii)* deals with a special category of obligations, the breach of which must be considered as affecting *per se* every other State to which the obligation is owed. Article 60, paragraph 2 (c), of the 1969 Vienna Convention recognizes an analogous category of treaties, viz. those “of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations”. Examples include a disarmament treaty,⁶⁷⁴ a nuclear-free zone treaty, or any other treaty where each party’s performance is effectively conditioned upon and requires the performance of each of the others. Under article 60, paragraph 2 (c), any State party to such a treaty may terminate or suspend it in its relations not merely with the responsible State but generally in its relations with all the other parties.

(14) Essentially, the same considerations apply to obligations of this character for the purposes of State responsibility. The other States parties may have no interest in the termination or suspension of such obligations as distinct from continued performance, and they must all be considered as individually entitled to react to a breach. This is so whether or not any one of them is particularly affected; indeed they may all be equally affected, and none may have suffered quantifiable damage for the purposes of article 36. They may nonetheless have a strong interest in cessation and in other aspects of reparation, in particular restitution. For example, if one State party to the Ant-

arctic Treaty claims sovereignty over an unclaimed area of Antarctica contrary to article 4 of that Treaty, the other States parties should be considered as injured thereby and as entitled to seek cessation, restitution (in the form of the annulment of the claim) and assurances of non-repetition in accordance with Part Two.

(15) The articles deal with obligations arising under international law from whatever source and are not confined to treaty obligations. In practice, interdependent obligations covered by *subparagraph (b) (ii)* will usually arise under treaties establishing particular regimes. Even under such treaties it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other States involved, and it is desirable that this *subparagraph* be narrow in its scope. Accordingly, a State is only considered injured under *subparagraph (b) (ii)* if the breach is of such a character as radically to affect the enjoyment of the rights or the performance of the obligations of all the other States to which the obligation is owed.

Article 43. Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

(a) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(b) what form reparation should take in accordance with the provisions of Part Two.

Commentary

(1) Article 43 concerns the modalities to be observed by an injured State in invoking the responsibility of another State. The article applies to the injured State as defined in article 42, but States invoking responsibility under article 48 must also comply with its requirements.⁶⁷⁵

(2) Although State responsibility arises by operation of law on the commission of an internationally wrongful act by a State, in practice it is necessary for an injured State and/or other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation through formal protest, consultations, etc. Moreover, the failure of an injured State which has notice of a breach to respond may have legal consequences, including even the eventual loss of the right to invoke responsibility by waiver or acquiescence: this is dealt with in article 45.

(3) Article 43 requires an injured State which wishes to invoke the responsibility of another State to give notice of its claim to that State. It is analogous to article 65 of the 1969 Vienna Convention. Notice under article 43 need not

⁶⁷⁴ The example given in the commentary of the Commission to what became article 60: *Yearbook ... 1966*, vol. II, p. 255, document A/6309/Rev.1, para. (8).

⁶⁷⁵ See article 48, paragraph (3), and commentary.

**Article 48. Invocation of responsibility
by a State other than an injured State**

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) the obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Commentary

(1) Article 48 complements the rule contained in article 42. It deals with the invocation of responsibility by States other than the injured State acting in the collective interest. A State which is entitled to invoke responsibility under article 48 is acting not in its individual capacity by reason of having suffered injury, but in its capacity as a member of a group of States to which the obligation is owed, or indeed as a member of the international community as a whole. The distinction is underlined by the phrase “[a]ny State other than an injured State” in paragraph 1 of article 48.

(2) Article 48 is based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured in the sense of article 42. Indeed, in respect of obligations to the international community as a whole, ICJ specifically said as much in its judgment in the *Barcelona Traction* case.⁷²¹ Although the Court noted that “all States can be held to have a legal interest in” the fulfilment of these rights, article 48 refrains from qualifying the position of the States identified in article 48, for example by referring to them as “interested States”. The term “legal interest” would not permit a distinction between articles 42 and 48, as injured States in the sense of article 42 also have legal interests.

(3) As to the structure of article 48, paragraph 1 defines the categories of obligations which give rise to the wider

right to invoke responsibility. Paragraph 2 stipulates which forms of responsibility States other than injured States may claim. Paragraph 3 applies the requirements of invocation contained in articles 43, 44 and 45 to cases where responsibility is invoked under article 48, paragraph 1.

(4) *Paragraph 1* refers to “[a]ny State other than an injured State”. In the nature of things, all or many States will be entitled to invoke responsibility under article 48, and the term “[a]ny State” is intended to avoid any implication that these States have to act together or in unison. Moreover, their entitlement will coincide with that of any injured State in relation to the same internationally wrongful act in those cases where a State suffers individual injury from a breach of an obligation to which article 48 applies.

(5) Paragraph 1 defines the categories of obligations, the breach of which may entitle States other than the injured State to invoke State responsibility. A distinction is drawn between obligations owed to a group of States and established to protect a collective interest of the group (paragraph 1 (a)), and obligations owed to the international community as a whole (paragraph 1 (b)).⁷²²

(6) Under *paragraph 1* (a), States other than the injured State may invoke responsibility if two conditions are met: first, the obligation whose breach has given rise to responsibility must have been owed to a group to which the State invoking responsibility belongs; and secondly, the obligation must have been established for the protection of a collective interest. The provision does not distinguish between different sources of international law; obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law. Such obligations have sometimes been referred to as “obligations *erga omnes partes*”.

(7) Obligations coming within the scope of paragraph 1 (a) have to be “collective obligations”, i.e. they must apply between a group of States and have been established in some collective interest.⁷²³ They might concern, for example, the environment or security of a region (e.g. a regional nuclear-free-zone treaty or a regional system for the protection of human rights). They are not limited to arrangements established only in the interest of the member States but would extend to agreements established by a group of States in some wider common interest.⁷²⁴ But in any event the arrangement must transcend the sphere of bilateral relations of the States parties. As to the requirement that the obligation in question protect a collective interest, it is not the function of the articles to provide an enumeration of such interests. If they fall within paragraph 1 (a), their principal purpose will be to foster a common interest, over and above any interests of the States concerned individually. This would include situations in

⁷²² For the extent of responsibility for serious breaches of obligations to the international community as a whole, see Part Two, chap. III and commentary.

⁷²³ See also paragraph (11) of the commentary to article 42.

⁷²⁴ In the *S.S. “Wimbledon”* (see footnote 34 above), the Court noted “[t]he intention of the authors of the Treaty of Versailles to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind” (p. 23).

⁷²¹ *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

which States, attempting to set general standards of protection for a group or people, have assumed obligations protecting non-State entities.⁷²⁵

(8) Under *paragraph 1 (b)*, States other than the injured State may invoke responsibility if the obligation in question was owed “to the international community as a whole”.⁷²⁶ The provision intends to give effect to the statement by ICJ in the *Barcelona Traction* case, where the Court drew “an essential distinction” between obligations owed to particular States and those owed “towards the international community as a whole”.⁷²⁷ With regard to the latter, the Court went on to state that “[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”.

(9) While taking up the essence of this statement, the articles avoid use of the term “obligations *erga omnes*”, which conveys less information than the Court’s reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty. Nor is it the function of the articles to provide a list of those obligations which under existing international law are owed to the international community as a whole. This would go well beyond the task of codifying the secondary rules of State responsibility, and in any event, such a list would be only of limited value, as the scope of the concept will necessarily evolve over time. The Court itself has given useful guidance: in its 1970 judgment it referred, by way of example, to “the outlawing of acts of aggression, and of genocide” and to “the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.⁷²⁸ In its judgment in the *East Timor* case, the Court added the right of self-determination of peoples to this list.⁷²⁹

(10) Each State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations. Whereas the category of collective obligations covered by *paragraph 1 (a)* needs to be further qualified by the insertion of additional criteria, no such qualifications are necessary in the case of *paragraph 1 (b)*. All States are by definition members of the international community as a whole, and the obligations in question are by definition collective obligations protecting interests of the international community as such. Of course, such obligations may at the same time protect the individual interests of States, as the prohibition of acts of aggression protects the survival of each State and the security of its people. Similarly, individual States may be specially affected by the breach of such an

obligation, for example a coastal State specially affected by pollution in breach of an obligation aimed at protection of the marine environment in the collective interest.

(11) *Paragraph 2* specifies the categories of claim which States may make when invoking responsibility under article 48. The list given in the paragraph is exhaustive, and invocation of responsibility under article 48 gives rise to a more limited range of rights as compared to those of injured States under article 42. In particular, the focus of action by a State under article 48—such State not being injured in its own right and therefore not claiming compensation on its own account—is likely to be on the very question whether a State is in breach and on cessation if the breach is a continuing one. For example, in the *S.S. “Wimbledon”* case, Japan, which had no economic interest in the particular voyage, sought only a declaration, whereas France, whose national had to bear the loss, sought and was awarded damages.⁷³⁰ In the *South West Africa* cases, Ethiopia and Liberia sought only declarations of the legal position.⁷³¹ In that case, as the Court itself pointed out in 1971, “the injured entity” was a people, viz. the people of South West Africa.⁷³²

(12) Under *paragraph 2 (a)*, any State referred to in article 48 is entitled to request cessation of the wrongful act and, if the circumstances require, assurances and guarantees of non-repetition under article 30. In addition, *paragraph 2 (b)* allows such a State to claim from the responsible State reparation in accordance with the provisions of chapter II of Part Two. In case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is highly desirable that some State or States be in a position to claim reparation, in particular restitution. In accordance with *paragraph 2 (b)*, such a claim must be made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached. This aspect of article 48, *paragraph 2*, involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake. In this context it may be noted that certain provisions, for example in various human rights treaties, allow invocation of responsibility by any State party. In those cases where they have been resorted to, a clear distinction has been drawn between the capacity of the applicant State to raise the matter and the interests of the beneficiaries of the obligation.⁷³³ Thus, a State invoking responsibility under article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party. Where the injured party is a State, its Government will be able authoritatively to represent that interest. Other cases may present greater difficulties, which the present articles

⁷²⁵ Article 22 of the Covenant of the League of Nations, establishing the Mandate system, was a provision in the general interest in this sense, as were each of the Mandate agreements concluded in accordance with it. Cf., however, the much-criticized decision of ICJ in *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, from which article 48 is a deliberate departure.

⁷²⁶ For the terminology “international community as a whole”, see *paragraph (18)* of the commentary to article 25.

⁷²⁷ *Barcelona Traction* (see footnote 25 above), p. 32, para. 33, and see *paragraphs (2) to (6)* of the commentary to chapter III of Part Two.

⁷²⁸ *Barcelona Traction (ibid.)*, p. 32, para. 34.

⁷²⁹ See footnote 54 above.

⁷³⁰ *S.S. “Wimbledon”* (see footnote 34 above), p. 30.

⁷³¹ *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319; *South West Africa, Second Phase, Judgment* (see footnote 725 above).

⁷³² *Namibia* case (see footnote 176 above), p. 56, para. 127.

⁷³³ See, e.g., the observations of the European Court of Human Rights in *Denmark v. Turkey* (friendly settlement), judgment of 5 April 2000, Reports of Judgments and Decisions 2000-IV, pp. 7, 10 and 11, paras. 20 and 23.

cannot solve.⁷³⁴ Paragraph 2 (b) can do no more than set out the general principle.

(13) Paragraph 2 (b) refers to the State claiming “[p]erformance of the obligation of reparation in accordance with the preceding articles”. This makes it clear that article 48 States may not demand reparation in situations where an injured State could not do so. For example, a demand for cessation presupposes the continuation of the wrongful act; a demand for restitution is excluded if restitution itself has become impossible.

(14) *Paragraph 3* subjects the invocation of State responsibility by States other than the injured State to the conditions that govern invocation by an injured State, specifically article 43 (notice of claim), 44 (admissibility of claims) and 45 (loss of the right to invoke responsibility). These articles are to be read as applicable equally, *mutatis mutandis*, to a State invoking responsibility under article 48.

CHAPTER II

COUNTERMEASURES

Commentary

(1) This chapter deals with the conditions for and limitations on the taking of countermeasures by an injured State. In other words, it deals with measures that would otherwise be contrary to the international obligations of an injured State *vis-à-vis* the responsible State, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation. Countermeasures are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act.

(2) It is recognized both by Governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances.⁷³⁵ This is reflected in article 22 which deals with countermeasures in response to an internationally wrongful act in the context of the circumstances precluding wrongfulness. Like other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States. Chapter II has as its aim to establish an operational system, taking into account the exceptional character of countermeasures as a response

to internationally wrongful conduct. At the same time, it seeks to ensure, by appropriate conditions and limitations, that countermeasures are kept within generally acceptable bounds.

(3) As to terminology, traditionally the term “reprisals” was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach.⁷³⁶ More recently, the term “reprisals” has been limited to action taken in time of international armed conflict; i.e. it has been taken as equivalent to belligerent reprisals. The term “countermeasures” covers that part of the subject of reprisals not associated with armed conflict, and in accordance with modern practice and judicial decisions the term is used in that sense in this chapter.⁷³⁷ Countermeasures are to be contrasted with retorsion, i.e. “unfriendly” conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act. Acts of retorsion may include the prohibition of or limitations upon normal diplomatic relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programmes. Whatever their motivation, so long as such acts are not incompatible with the international obligations of the States taking them towards the target State, they do not involve countermeasures and they fall outside the scope of the present articles. The term “sanction” is also often used as equivalent to action taken against a State by a group of States or mandated by an international organization. But the term is imprecise: Chapter VII of the Charter of the United Nations refers only to “measures”, even though these can encompass a very wide range of acts, including the use of armed force (Articles 39, 41 and 42). Questions concerning the use of force in international relations and of the legality of belligerent reprisals are governed by the relevant primary rules. On the other hand, the articles are concerned with countermeasures as referred to in article 22. They are taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two. They are instrumental in character and are appropriately dealt with in Part Three as an aspect of the implementation of State responsibility.

(4) Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the 1969 Vienna Convention. Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach.⁷³⁸ Countermeasures involve conduct taken in derogation from a subsisting treaty

⁷³⁴ See also paragraphs (3) to (4) of the commentary to article 33.

⁷³⁵ For the substantial literature, see the bibliographies in E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, N.Y., Transnational, 1984), pp. 179–189; O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford, Clarendon Press, 1988), pp. 227–241; L.-A. Siciliano, *Les réactions décentralisées à l’illicite: Des contre-mesures à la légitime défense* (Paris, Librairie générale de droit et de jurisprudence, 1990), pp. 501–525; and D. Alland, *Justice privée et ordre juridique international: Etude théorique des contre-mesures en droit international public* (Paris, Pedone, 1994).

⁷³⁶ See, e.g., E. de Vattel, *The Law of Nations, or the Principles of Natural Law* (footnote 394 above), vol. II, chap. XVIII, p. 342.

⁷³⁷ *Air Service Agreement* (see footnote 28 above), p. 443, para. 80; *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 27, para. 53; *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), at p. 106, para. 201; and *Gabčikovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 82.

⁷³⁸ On the respective scope of the codified law of treaties and the law of State responsibility, see paragraphs (3) to (7) of the introductory commentary to chapter V of Part One.

Annex 16

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)

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Report of the International Law Commission on the work of its fifty-second session (2000)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fifth session prepared by the Secretariat

Contents

	<i>Paragraphs</i>	<i>Page</i>
Introduction	1-4	8
Topical summary	5-383	8
A. State responsibility	5-190	8
1. General remarks	5-24	8
(a) The draft articles provisionally adopted by the Drafting Committee	8-13	9
(i) Scope	11	9
(ii) Definitions	12	9
(iii) Structure	13	9
(b) Primary versus secondary rules	14	10
(c) Codification versus progressive development	15-17	10
(d) Obligations <i>erga omnes</i>	18	10
(e) Dispute settlement	19-21	11
(f) Final form of the draft articles	22-24	11
2. Part One. The internationally wrongful act of a State	25-49	12
Title	26	12



consequences. It was also considered logical for all provisions relating to the conduct of the injured State to be dealt with in a separate section.

51. While the treatment in Part Two of the legal consequences of an internationally wrongful act and the various forms of reparation was considered generally acceptable, questions and serious concerns were raised with regard to some of the provisions relating particularly to the new category of “serious breaches” as departing from existing international law.

Title

52. Different views were expressed concerning the title of Part Two, which was described, on the one hand as correct from the legal viewpoint and faithfully reflecting its contents, and on the other hand as requiring improvement since the part dealt with the nature, effects and implementation of the international responsibility of a State, which was not well expressed by the term “content”.

Chapter I General principles

53. There was support for chapter I of Part Two, which was described as particularly clear, concise, well structured and a fortunate addition, since it created a bridge to Part One and thereby clarified the basic structure of the draft articles.

Article 28 [36] Legal consequences of an internationally wrongful act

Title

54. The title was described as inconsistent with the correct content of article 28, which indicated that international responsibility, and not the internationally wrongful act, entailed consequences.

Article 30 [41, 46] Cessation and non-repetition

55. It was considered appropriate to combine the closely related concepts of cessation and non-repetition in draft article 30. It was noted that assurances of non-repetition were closely and logically related to the obligation to cease the wrongful act and could, in some contexts, offer tangible proof that the State having

committed an internationally wrongful act recognized its unlawful conduct. At the same time, the Drafting Committee’s text was considered preferable to the Special Rapporteur’s proposal because it reflected cessation and non-repetition as two separate concepts.

Subparagraph (b)

56. The view was expressed that the principle of non-repetition still had a limited place in daily diplomatic practice and any effort to distinguish that principle as a political statement or a legal term was more relevant to the Commission’s work on unilateral acts. Assurances and guarantees of non-repetition were considered indispensable under certain circumstances, including cases of wrongful acts involving the use of force, while their exact form could be determined on the basis of international practice. However, it was also remarked that the usefulness of the obsolete requirement that States should give guarantees of non-repetition was doubtful.

57. The obligation to offer appropriate assurances and guarantees of non-repetition was understood to arise as a function of the risk of repetition, the gravity of the wrongful act and the nature of the obligation breached. It was also felt that assurances of non-repetition were required not only where there was a pattern of repetition of the wrongful act, but also where there was a risk of repetition or, alternatively, where the breach was particularly grave, even if the risk of repetition was minimal. The addition of the words “if circumstances so require” was said to clarify the dependence of the concept on the particular context.

58. There was agreement with the Special Rapporteur that this provision touched upon the relationship between municipal and international law, because if the breach stemmed from a domestic law the requirement could be a means of compelling a State to amend or repeal it.

Article 31 [42] Reparation

59. Support was expressed for the obligation to make reparations as one of the general principles governing the international responsibility of States. Support was also expressed for referring to the responsible State’s obligation to provide reparation, and not the injured State’s right in that regard, to obviate the need to determine which State or States had been directly or

indirectly injured. It was suggested that owing to the various special circumstances to be considered by judges in cases involving reparation for injury, it would be best to provide general guidelines in the text and further explanations in the commentary.

Full reparation

60. A number of delegations expressed support for the fundamental principle of full reparation for injury, which was well established in international law and jurisprudence. While noting that history had shown that in some cases insisting on full reparation could do more harm than good, the view was expressed that there was no reason to depart from the principle, which was not defective. It was also remarked that concerns regarding the principle seemed excessive, since international jurisprudence ensured that all circumstances would be taken into account in any specific case. However, attention was drawn to the relationship between this principle and former article 42, paragraph 3, which provided that reparation should not deprive the population of a State of its own means of subsistence. It was suggested that the two approaches were not contradictory and could therefore coexist by limiting the principle of full reparation to ensure the protection of items required for livelihood. The provision was also described as inadequate and requiring further consideration because full reparation was only possible where the damage could be clearly quantified, which would not normally be the case with internationally wrongful acts.

Causation

61. It was remarked that draft articles 31 to 34 satisfactorily stressed the need for a causal link between the wrongful act and the resulting injury. However, the view was also expressed that the issue of "remoteness of damage" had not been resolved in the draft articles and this omission should be remedied, although the relevant primary rules might not exist in most cases.

Mode of the breach

62. The view was expressed that article 31 should take into account the mode of the breach since the responsibility of a State, and thus the obligation to provide reparation, would differ depending on whether the wrongful act had been committed intentionally or through negligence. While noting that a cause-and-

effect relationship between a breach of international law and the presence of damage was enough to make the State committing the breach responsible for the damage, it was considered possible that a minor violation, through a combination of exceptional circumstances, might lead to considerable damage which the responsible State had been unable to anticipate. Referring to the distinction drawn in draft article 40 between contributing to damage by a wilful or a negligent action or omission, it was suggested that the same distinction should be drawn with regard to the State responsible for the breach of international law by providing for a limited and mitigated form of responsibility in cases where there was no intention of causing harm or where it was impossible to anticipate the damage at the time the internationally wrongful act was committed.

Paragraph 1

63. The view was expressed that paragraph 1 was generally acceptable but should be rephrased for consistency with draft article 30, as follows: "The State responsible for the internationally wrongful act is under an obligation to make full reparation for the injury caused by that act."

Paragraph 2

64. The view was expressed that the concept of damage was satisfactorily defined in draft articles 31 to 34. In particular, support was expressed for the possibility of claiming reparation for moral as well as material injury, as recognized in article 31, paragraph 2. However, the following concerns and suggestions were also expressed regarding moral damage: it was questionable whether the same concept of moral damage was applicable to all forms of reparation, namely, restitution, compensation and satisfaction; such a general clause without a concise definition would not provide clarification for tribunals which were cautious in respect of non-material damage; article 31, paragraph 2, article 37 and article 38, paragraph 1, required further consideration to avoid being interpreted as permitting compensation for moral damage since there was no material reparation for moral damage suffered by States, merely satisfaction; article 31 should be amended, if necessary, by a reference to the provisions of the draft dealing with claims brought by directly or indirectly injured States to avoid claims for compensation for moral damage,

for which reparation was to take the form of satisfaction only.

**Article 32 [42]
Irrelevance of internal law**

65. It was remarked that article 32 was of great importance not only for the determination of responsibility but also with respect to other aspects of the law on State responsibility, including the origin of such responsibility.

66. It was also suggested that the provision meant that domestic law could not be relied upon in order to avoid an international obligation and therefore should be included in Part Four.

**Article 33 [38]
Other consequences of an internationally wrongful act**

67. Support was expressed for the new wording of article 33, which made reference to applicable rules of international law other than the draft articles. However, it was suggested that article 33, which covered the same question as article 56 and allowed for reference to other rules of international law applicable to a specific situation, should be included in Part Four. In that connection, reference could be made to article 60 of the Vienna Convention on the Law of Treaties or to other multilateral international conventions providing for self-contained regimes.

**Article 34
Scope of international obligations covered by this Part**

Paragraph 1

68. Support was expressed for including in paragraph 1 a general provision introducing obligations *erga omnes* as a general principle. However, it was also suggested that paragraph 1 should end after the words "circumstances of the breach", since the reference to beneficiaries other than a State was questionable and required at least further consideration and the inclusion of the concept in articles 49 and 54.

Paragraph 2

69. Support was expressed for paragraph 2. In contrast, the paragraph was considered unclear as to the relationship between the law on State responsibility

and claims for reparation based on private law brought before the national courts of the responsible State. While the right of individuals to invoke international law on State responsibility was considered acceptable, it was felt that such an approach might go beyond State practice.

**Chapter II
The forms of reparation**

70. Chapter II was described as particularly clear, concise and well structured. It was felt that the Commission had achieved a good balance between the forms of reparation for an injury caused by an internationally wrongful act, stressing the requirement of full reparation but incorporating sufficient flexibility so that the obligation did not become unduly burdensome. While supporting the reformulation of the articles on the forms of reparation to strengthen the obligation of the responsible State, caution was advised since in certain cases moderation was necessary.

Priority of forms of reparation

71. There was support for establishing a priority among the forms of reparation, with restitution being described as the primary, the preferred and the best means of reparation. It was felt that compensation should be a secondary form of reparation if restitution were impractical or involved a burden out of all proportion to the benefit. Monetary compensation was considered important, particularly since it was often politically difficult for States to return expropriated property, which was often the subject of disputes. Satisfaction was described as a last resort when restitution or compensation was impossible. The succession of forms of reparation was considered sufficiently expressed in the draft articles.

**Article 36 [43]
Restitution**

72. The view was expressed that restitution should be understood as restitution in full in the general sense, rather than as a requirement to restore the exact situation which existed before the breach. It was noted that there might be occasions where restitution alone could not provide full reparation. It was also suggested that article 36 should be amended to refer to re-establishing the situation which would have existed if the wrongful act had not been committed, which did

Annex 17

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
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COMMISSION ON HUMAN RIGHTS
Sixty-first session
Item 11 of the provisional agenda

CIVIL AND POLITICAL RIGHTS**The right to a remedy and reparation for victims of violations
of international human rights and humanitarian law****Note by the High Commissioner for Human Rights**

In its resolution 2004/34, the Commission on Human Rights requested the High Commissioner for Human Rights to hold, with the cooperation of interested Governments, a third consultative meeting for all interested Member States, intergovernmental organizations and non-governmental organizations in consultative status with the Economic and Social Council, using available resources, with a view to finalizing the “Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law” and, if appropriate, to consider all options for the adoption of these principles and guidelines.

In paragraph 6 of that resolution, the Commission also requested the High Commissioner to transmit to the Commission at its sixty-first session the outcome of the consultative process, for its consideration.

Accordingly, the High Commissioner has the honour to transmit to the Commission on Human Rights the report of the Chairperson-Rapporteur, Mr. Alejandro Salinas (Chile), on the third consultative meeting.

Introduction

1. From 29 September to 1 October 2004, the Office of the High Commissioner for Human Rights (OHCHR) convened the third consultative meeting with a view to finalizing the “Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law” (hereinafter “Principles and Guidelines”) and, if appropriate, to consider options for the adoption of these Principles and Guidelines. The third consultative meeting, convened pursuant to Commission on Human Rights resolution 2004/34, was chaired by Mr. Alejandro Salinas (Chile), and benefited from the expert guidance of Mr. Theo van Boven, one of the mandated authors of the Principles and Guidelines. Representatives of 51 Member States, two international organizations and nine non-governmental organizations participated in the consultation. (The list of participants is contained in annex III.)

2. The consultative meeting had, as one of the bases for its work, the revised version of the Principles and Guidelines of 5 August 2004, which had been prepared pursuant to resolution 2004/34 by the Chairperson-Rapporteur in consultation with the independent experts, Mr. Theo van Boven and Mr. M. Cherif Bassiouni. In the preparation of the revised text, all comments, questions and suggestions raised to date by Member States, international organizations and non-governmental organizations (NGOs) were taken into account.

3. The meeting was opened by the Chief of the Research and Right to Development Branch of OHCHR. Following the election of the Chairperson-Rapporteur, the meeting adopted its agenda (annex II). The meeting proceeded with general comments and two readings of the revised text, principle-by-principle.

4. Oral and written comments received from participants during the meeting were taken into account in preparing the revised draft Principles and Guidelines of 1 October 2004. The Chairperson and experts also held informal consultations with several delegations in order to achieve consensus. Subsequently, the Chairperson and the various participants discussed the follow-up to the consultative meeting.

5. The present report to the Commission on Human Rights on the final outcome of the meeting includes (a) the Chairperson’s observations; (b) the Chairperson’s recommendations for follow-up to the third consultative meeting; and (c) the revised version of the Principles and Guidelines, dated 1 October 2004 (annex I).

I. OBSERVATIONS OF THE CHAIRPERSON-RAPPORTEUR

6. The Chairperson made several observations based on the discussions during the consultative meeting. These observations are not intended to be either comprehensive or exclusive, but merely serve as a summary of the main issues addressed during the meeting.

A. General observations

7. The draft Principles and Guidelines had benefited greatly from more than 15 years of work and the broad consultative process facilitated by the three consultative meetings. The revised text had been significantly improved by the useful input from Governments, international organizations and NGOs, as well as the ongoing revision efforts and assistance of the experts.
8. Several delegations expressed their general support for the revised text. They expressed their hope to comply with the mandate provided by the Commission on Human Rights and that the Principles and Guidelines would be adopted at the sixty-first session of the Commission.
9. The Principles and Guidelines had been drafted to reflect a victim-based perspective, and had been systematized according to the needs and rights of the victims. Delegations recalled that the document would serve as a useful working tool for both States and victims.
10. The revised Principles and Guidelines did not introduce new principles of international law, but rather consolidated and clarified already existing obligations. The document reflected minimum standards of international law. It was emphasized that the Principles and Guidelines should in no way fall below the requirements of existing international legal standards.
11. The text of the document had been drafted to reflect this reality, and, accordingly, mandatory language had been used only where a particular international obligation existed.
12. Pursuant to the compromise found during the second consultative meeting, the document referred to “gross violations” of international human rights law and “serious violations” of international humanitarian law. Both terms constituted a term of art and it should be ensured that they were correctly translated in the final draft.

B. Observations on the preamble

13. The inclusion in the first preambular paragraph of a reference to articles 68 and 74 of the Rome Statute of the International Criminal Court was suggested.
14. It was suggested that the quotes from international instruments in the fourth and fifth preambular paragraphs should be more accurate.
15. The sixth preambular paragraph was considered important as it set out the scope of the document. The listing of specific rights in the paragraph, however, appeared to create some form of hierarchy and, accordingly, the following amendment was proposed: “*Affirming* that the Principles and Guidelines are directed at gross violations of human rights and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity.”

16. Some delegations reiterated their concern regarding the use of “shall” as binding treaty language in certain areas of the text and suggested that some common understanding be included in the seventh preambular paragraph to emphasize that the document was not legally binding. However, as current legal thinking considered soft law documents non-binding, it was felt that this proposal would change the understanding of future soft law documents. To avoid such potential problems, delegations were encouraged to find another formulation for the seventh preambular paragraph.

17. The reference to “classes of persons” in the ninth preambular paragraph was questioned and the following amendment was proposed: “*Noting further* that contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively.”

C. Observations on the specific principles

Principles 1 and 2

18. To avoid any difficulties with the use of the word “enforce” in principle 1, the word “implement” could be used. Concerns were raised regarding the reference to “domestic law” in principle 1 (c). A suggestion was made to refer to the domestic law of “each State”.

19. The use of “shall” in principle 2 could be revisited and less categorical wording, such as “should”, could be used in order to remove any ambiguity that the Principles and Guidelines were non-binding. On the other hand, the practice of using “shall” in non-binding legal instruments was noted. A suggestion was made to use the wording “States shall, as required under international law, ...”.

20. Additional amendments to principle 2 were considered. The wording “to that end” should be removed. A reference in principle 2 to the obligation to “incorporate” international law into national law could benefit from further clarification. The word “norms” should be retained as it provided for rights and obligations. Principle 2 (d) should be reworded so as to state “Ensuring that their domestic law provides at least the same level of protection for victims as required by their international obligations.”

Principle 3

21. The use of the qualifying word “applicable” with regard to the reference to international human rights law and international humanitarian law would ensure consistency with principle 1. On the other hand, it was noted that insertion of the word “applicable” was inconsistent with agreements made on the text last year. Subsequently, the wording “The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law ...” was suggested for both principles 1 and 3.

22. The use of “alleged perpetrator” in principle 3 (b) was questioned as its translation into Spanish limited its scope.

Annex 18

United Nations International Commission of Inquiry on Darfur, *Report to the United Nations Secretary General* (25 January 2005)

**Report of the International Commission of Inquiry on Darfur
to the United Nations Secretary-General**

Pursuant to Security Council Resolution 1564 of 18 September 2004

Geneva, 25 January 2005

502. *Proof of genocidal intent.* Whenever direct evidence of genocidal intent is lacking, as is mostly the case, this intent can be inferred from many acts and manifestations or factual circumstances.¹⁸⁵ In *Jelisić* the Appeals Chamber noted that “as to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts” (§ 47).

503. Courts and other bodies charged with establishing whether genocide has occurred must however be very careful in the determination of the subjective intent. As the ICTY Appeals Chamber rightly put it in *Krstić (Appeal)*, “Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirements of specific intent. Convictions for genocide can be entered only where intent has been unequivocally established”(Judgment of 19 April 2004, at § 134). On this ground the Appeals Chamber, finding that the Trial Chamber had erred in demonstrating that the accused possessed the genocidal intent, reversed the Trial Chamber’s conviction of genocide and sentenced Krstić for complicity in genocide.

504. Similarly, States have shown caution when defining genocidal intent with regard to particular events, as is shown, for instance, by the position the Canadian authorities took in 1999 with regard to the question of mass killing of Kosovar Albanians by the armed forces of the central authorities of the Federal Republic of Yugoslavia (FRY) in the internal armed conflict between Kosovo and the Government of the FRY.¹⁸⁶

505. *Is genocide graver than other international crimes?* It has widely been held that genocide is the most serious international crime. In *Kambanda* (§ 16) and *Serushago* (§15) the ICTR defined it as “the crime of crimes” (but see below). In *Krstić* the ICTY Appeals Chamber stated that “Among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium. The crime is horrific in its scope; its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all

¹⁸⁵ See *Jelisić* (Appeals Chamber), at § 47; *Rutaganda* (Appeals Chamber), at § 528; *Krstić* (Appeals Chamber), at § 34. A number of factors from which intent may be inferred were mentioned in *Akayesu* (§§523-4: “the general context of the perpetration of other culpable acts systematically directed against that same group, whether . . . committed by the same offender or by others”; “the scale of atrocities committed”; the “general nature” of the atrocities committed “in a region or a country”; “the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups”; “the general political doctrine which gave rise to the acts”; “the repetition of destructive and discriminatory acts” or “the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group—acts which are not in themselves covered by the list . . . but which are committed as part of the same pattern of conduct.”), in *Musema* (§ 166) as well as *Kayishema and Ruzindana* (§§ 93 and 527: “the number of group members affected”; “the physical targeting of the group or their property”; “the use of derogatory language toward members of the targeted group”; “the weapons employed and the extent of bodily injury”; “the methodical way of planning”; “the systematic manner of killing” and “the relative proportionate scale of the actual or attempted destruction of a group.”).

¹⁸⁶ In a Memorandum of 30 March 1999, the Legal Bureau of the Canadian Department of Foreign Affairs pointed out first that in the case of the Kosovar Albanians one element of genocide was present (“targeting a group on the basis of ethnicity”). Then, after noting that so-called ethnic cleansing has been expressly excluded from the Genocide Convention in the 1948 negotiations, it pointed that that such notion (namely the forcible expulsion of person from their homes in order to escape the threat of subsequent ill-treatment), showed an intent different from the “intent to destroy”. It went on note that “Ethnic Albanians are being killed and injured *in order to drive them from their homes*, not in order to *destroy them as a group, in whole or in part*” (in *37 Canadian Yearbook of International Law* 1999, at 328; emphasis in the original).

humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.” (§36).

506. It is indisputable that genocide bears a special stigma, for it is aimed at the *physical obliteration* of human groups. However, one should not be blind to the fact that some categories of crimes against humanity may be similarly heinous and carry a similarly grave stigma. In fact, the Appeals Chamber of the ICTR reversed the view that genocide was the “crime of crimes”. In *Kayishema and Ruyindana*, the accused alleged “that the Trial Chamber erred in finding that genocide is the “crime of crimes” because there is no such hierarchical gradation of crimes”. The Appeals Chamber agreed: “The Appeals Chamber remarks that there is no hierarchy of crimes under the Statute, and that all of the crimes specified therein are “serious violations of international humanitarian law”, capable of attracting the same sentence.” (§ 367).¹⁸⁷

II. DO THE CRIMES PERPETRATED IN DARFUR CONSTITUTE ACTS OF GENOCIDE?

507. *General.* There is no doubt that some of the objective elements of genocide materialized in Darfur. As discussed above, the Commission has collected substantial and reliable material which tends to show the occurrence of systematic killing of civilians belonging to particular tribes, of large-scale causing of serious bodily or mental harm to members of the population belonging to certain tribes, and of massive and deliberate infliction on those tribes of conditions of life bringing about their physical destruction in whole or in part (for example by systematically destroying their villages and crops, by expelling them from their homes, and by looting their cattle). However, two other constitutive elements of genocide require a more in depth analysis, namely whether (a) the target groups amount to one of the group protected by international law, and if so (b) whether the crimes were committed with a genocidal intent. These elements are considered separately below.

508. *Do members of the tribes victims of attacks and killing make up objectively a protected group?* The various tribes that have been the object of attacks and killings (chiefly the Fur, Massalit and Zaghawa tribes) do not appear to make up ethnic groups distinct from the ethnic group to which persons or militias that attack them belong. They speak the same language (Arabic) and embrace the same religion (Muslim).¹⁸⁸ In addition, also due to the high measure of intermarriage, they can hardly be distinguished in their outward physical appearance from the members of tribes that allegedly attacked them. Furthermore, inter-marriage and coexistence in both social and economic terms, have over the years tended to blur the distinction between the groups. Apparently, the sedentary and nomadic character of the groups constitutes one of the main distinctions between them. It is also notable that members of the African tribes speak their own dialect in addition to Arabic, while members of Arab tribes only speak Arabic.

509. *If not, may one hold that they subjectively make up distinct groups?* If objectively the two sets of persons at issue do not make up two distinct protected groups, the question arises as to whether they may nevertheless be regarded as such subjectively, in that they perceive each other and themselves as constituting distinct groups.

¹⁸⁷ Note however that the Appeals Chamber concluded that the Trial Chamber had made no reversible error: “The Appeals Chamber finds that the Trial Chamber’s description of genocide as the “crime of crimes” was at the level of general appreciation, and did not impact on the sentence it imposed.” (§ 367). See also *Semanya*, ICTR Trial Chamber, § 555.

¹⁸⁸ See section above, ‘Historical and social background ...’

Annex 19

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)



OFFICE OF THE HIGH COMMISSIONER FOR
HUMAN RIGHTS



**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**

Human Rights Resolution 2005/35

The Commission on Human Rights,

Recalling *the report of the independent expert appointed by the Commission, M. Cherif Bassiouni, and, in particular, the draft of the “basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law” annexed to his report (E/CN.4/2000/62), and the note by the secretariat (E/CN.4/2002/70),*

Recalling *all its previous resolutions on the matter, particularly resolution 2004/34 of 19 April 2004,*

Thanking the independent experts, M. Cherif Bassiouni and Theo van Boven, for their most valuable contributions to the finalization of the draft basic principles and guidelines,

Welcoming with appreciation the report of Alejandro Salinas, Chairperson-Rapporteur of the third consultative meeting on the “basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law” (E/CN.4/2005/59), and in particular his assessment that the mandate provided in resolution 2004/34 - to finalize the draft basic principles and guidelines - has been fulfilled as the document reflects three rounds of consultative meetings and some fifteen years of work on the text,

1. *Adopts* 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 annexed to the present resolution;
2. *Recommends* that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of Government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general;
3. *Recommends* the following draft resolution to the Economic and Social

Council for adoption:

“The Economic and Social Council,

“Taking note of Commission on Human Rights resolution 2005/35

of 19 April 2005, in which the Commission adopted the text of 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,

“1. Expresses its appreciation to the Commission for the adoption of 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;

“2. Adopts the Basic Principles and Guidelines as contained in the annex to Commission resolution 2005/35;

“3. Recommends to the General Assembly that it adopt the Basic Principles and Guidelines.”

56th meeting

19 April 2005

[Adopted by a recorded vote of 40 votes to none,
with 13 abstentions. See chap. XI, E/CN.4/2005/L.10/Add.11]

Annex

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

Preamble

Recalling the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular the Universal Declaration of Human Rights at article 8, the International Covenant on Civil and Political Rights at article 2, the International Convention on the Elimination of All Forms of Racial Discrimination at article 6, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at article 14, the Convention on the Rights of the Child at article 39, and of international humanitarian law as found in article 3 of the Hague Convention of 18 October 1907 concerning the Laws and Customs of War and Land (Convention No. IV of 1907), article 91 of Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts

(Protocol I), and articles 68 and 75 of the Rome Statute of the International Criminal Court,

Recalling the provisions providing a right to a remedy for victims of violations of international human rights found in regional conventions, in particular the African Charter on Human and Peoples' Rights at article 7, the American Convention on Human Rights at article 25, and the European Convention for the Protection of Human Rights and Fundamental Freedoms at article 13,

Recalling the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power emanating from the deliberations of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and resolution 40/34 of 29 November 1985 by which the General Assembly adopted the text recommended by the Congress,

Reaffirming the principles enunciated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including that victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected, and that the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged, together with the expeditious development of appropriate rights and remedies for victims,

Noting that the Rome Statute of the International Criminal Court requires the establishment of "principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation" and requires the Assembly of States Parties to establish a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, and mandates the Court "to protect the safety, physical and psychological well-being, dignity and privacy of victims" and to permit the participation of victims at all "stages of the proceedings determined to be appropriate by the Court",

Affirming that the Principles and Guidelines contained herein are directed at gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity,

Emphasizing that the Principles and Guidelines do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms,

Recalling that international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with international obligations of States and the requirements of national law or as provided for in the applicable statutes of international

judicial organs, and that the duty to prosecute reinforces the international legal obligations to be carried out in accordance with national legal requirements and procedures and supports the concept of complementarity,

Noting further that contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively,

Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations, and reaffirms the international legal principles of accountability, justice and the rule of law,

Convinced that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity at large, in accordance with the following Basic Principles and Guidelines.

I. OBLIGATION TO RESPECT, ENSURE RESPECT FOR AND IMPLEMENT INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW

1. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from:

- (a) Treaties to which a State is a party;
- (b) Customary international law;
- (c) The domestic law of each State.

2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:

(a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;

(b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;

(c) Making available adequate, effective, prompt, and appropriate remedies, including reparation, as defined below; and

(d) Ensuring that their domestic law provides at least the same level of protection for victims as required by their international obligations.

II. SCOPE OF THE OBLIGATION

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;

(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;

(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and

(d) Provide effective remedies to victims, including reparation, as described below.

III. GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW THAT CONSTITUTE CRIMES UNDER INTERNATIONAL LAW

4. In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

5. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

IV. STATUTES OF LIMITATIONS

6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

V. VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

8. For purposes of this document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or

substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

VI. TREATMENT OF VICTIMS

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. VICTIMS' RIGHT TO REMEDIES

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered; and
- (c) Access to relevant information concerning violations and reparation

mechanisms.

VIII. ACCESS TO JUSTICE

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in

domestic laws. To that end, States should:

(a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;

(b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;

(c) Provide proper assistance to victims seeking access to justice;

(d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.

14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

IX. Reparation for harm suffered

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. 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. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the party liable for the harm suffered is unable or unwilling to meet their obligations.

17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

19. Restitution should, whenever possible, restore the victim to the original situation 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.

20. Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services,

and psychological and social services.

21. Rehabilitation should include medical and psychological care as well as legal and social services.

22. Satisfaction should include, where applicable, any or all of the following:

- (a) Effective measures aimed at the cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent

that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim

or prevent the occurrence of further violations;

(c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;

(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;

(e) Public apology, including acknowledgement of the facts and acceptance of responsibility;

(f) Judicial and administrative sanctions against persons liable for the violations;

(g) Commemorations and tributes to the victims;

(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

23. Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:

(a) Ensuring effective civilian control of military and security forces;

(b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;

(c) Strengthening the independence of the judiciary;

(d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;

(e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;

(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;

(g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;

(h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

X. ACCESS TO RELEVANT INFORMATION CONCERNING VIOLATIONS AND REPARATION MECHANISMS

24. States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

XI. NON-DISCRIMINATION

25. The application and interpretation of these Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or ground, without exception.

XII. NON-DEROGATION

26. Nothing in these Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. It is further understood that these Principles and Guidelines are without prejudice to special rules of international law.

XIII. RIGHTS OF OTHERS

27. Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process.

Annex 20

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)

United Nations

A/60/221

**General Assembly**Distr.: General
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Sixtieth session

Item 73 (c) of the provisional agenda*

**Human rights questions: human rights situations and reports
of special rapporteurs and representatives****Situation of human rights in Myanmar****Note by the Secretary-General**

The Secretary-General has the honour to transmit to the members of the General Assembly the interim report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar, Paulo Sérgio Pinheiro, submitted in accordance with Commission resolution 2005/10 and Economic and Social Council decision 2005/257 of 25 July 2005.

* A/60/150.

Interim report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar

Summary

The mandate of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar was established by the Commission in its resolution 1992/58 and extended most recently in resolution 2005/10. In that resolution, the Commission requested the Special Rapporteur to report to the General Assembly at its sixtieth session and to the Commission at its sixty-second session. The present report is submitted further to that request and is based on information received by the Special Rapporteur up to 22 July 2005. It is to be read in conjunction with his last report to the Commission (E/CN.4/2005/36).

The Special Rapporteur has not been permitted to conduct a fact-finding mission to Myanmar since November 2003. While he has not been granted access to the country during the period covered by the present report, he has continued to fulfil his mandate to the best of his ability based on information collected from a variety of independent and reliable sources.

The National Convention was reconvened from 17 February to 31 March 2005 without the involvement of a number of political parties, including the National League for Democracy (NLD). The invited delegates were selected from the same eight categories as for the previous Convention: political parties, representatives-elect, national races, peasants, workers, intellectuals and intelligentsia, State service personnel and ceasefire groups. According to the National Convention Convening Commission, 1,073 out of the 1,081 delegates invited attended the meeting.

The exclusion of important and representative political actors from the process, the restrictions placed on their involvement, the intolerance of critical voices and the intimidation and detention of pro-democracy activists render any notion of a democratic process devoid of meaning. Freedom of movement, assembly and association must be guaranteed, as they are basic requirements for national reconciliation and democratization.

The Special Rapporteur firmly believes that if the inherent procedural restrictions are not amended and the representatives of the democratic opposition are not involved in the National Convention, any constitution that emerges will lack credibility. Placing the procedural arrangements that govern the National Convention on a sound democratic footing would allow for the full inclusion and involvement of all political parties and true progress to be made in the democratization process. The Government can and should take immediate steps to salvage the National Convention and its credibility both at home and internationally.

The question of defining who will draft the constitution is one of the most relevant issues in the current political process. Furthermore, there is at present no clear indication of the rules for the adoption of the constitution through a national referendum.

The Special Rapporteur regrets to note that the information received demonstrates that the situation regarding the exercise of fundamental rights and

freedoms has not substantially changed during the reporting period. He constantly receives reports of restrictions and violations of basic rights and freedoms.

There reportedly remain over 1,100 political prisoners in Myanmar. The release of 249 political prisoners on 6 July 2005 was tempered by the continuation of the arrests, detention and harsh sentences meted out to civilians and democracy advocates for peaceful political activities. The Special Rapporteur remains very concerned at the practice of administrative detention. It is deeply regrettable that NLD General-Secretary Daw Aung San Suu Kyi celebrated her sixtieth birthday under house arrest. Her virtual solitary confinement and lack of access to NLD colleagues run counter to the spirit of national reconciliation.

The Special Rapporteur is encouraged that HIV/AIDS prevention and treatment activities have increased, but remains very concerned that HIV/AIDS has become a generalized epidemic in Myanmar. While the Government continues to work on a national plan of action for children, it has yet to ratify the two Optional Protocols on the Convention on the Rights of the Child.

Serious human rights violations continue to be perpetrated against Myanmar's ethnic minority communities. Widespread reports of forced labour, rape and other sexual violence, extortion and expropriation by Government forces continue to be received. Victims of violations rarely have recourse to redress.

The transition to a full, participatory and democratic system in Myanmar can no longer be postponed. Political and constitutional dialogue must begin without delay. By instituting values of democracy and human rights, the Government will send a clear signal to the people of Myanmar and the international community that it is actively committed to facilitating the creation of a stable and democratic future for the country.

The United Nations and the international community stand ready to work in partnership with the Government, the political parties and civil society organizations, to effectively facilitate national reconciliation and the transition to democracy. By strengthening its cooperation with international organizations, the Government can be assured of support for conflict resolution, political and economic reform, institution- and capacity-building, humanitarian assistance and human development.

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1–2	5
II. Activities of the Special Rapporteur	3–11	5
III. National Convention	12–39	6
A. Recent developments	20–24	8
B. Participation of political parties, ethnic nationality parties and ceasefire groups	25–31	8
C. Proceedings	32–39	10
IV. Civil and political rights	40–56	11
V. Economic, social and cultural rights	57–64	14
VI. Human rights situation in ethnic minority areas	65–80	15
VII. Humanitarian situation	81–90	18
VIII. Concluding observations	91–100	19
IX. Recommendations	101–118	21

he understands that technical ministries have participated in a number of regional forums, including the Regional Consultation on Violence against Children. Furthermore, at the national level, a juvenile justice inter-agency working group has been created to promote action on juvenile justice areas. The United Nations Children's Fund (UNICEF) has reported increased recognition of some child protection issues in Myanmar, including the situation of children deprived of parental care, street and working children, and children in conflict with the law.

63. Approximately 55 per cent of schoolchildren in Myanmar complete the five years of primary school, with most of the remainder dropping out of school to work. It is reported that the costs of education are largely borne by parents, in the form of "donations" which are expected to be paid towards teachers' salaries, supplies and the maintenance of schools. While these problems are endemic in the country, they are particularly acute in border areas, which have suffered from decades of armed conflict.

64. The Special Rapporteur welcomes the steady and remarkable reduction in opium poppy cultivation. Supply control will bring more stability to the region, whose already significant problems are exacerbated by narco-trafficking. It is vital that alternative income-generating sources be generated to stave off relocations and the creation of internally displaced persons, and to ensure the success and sustainability of the opium reduction programme. To this end, he calls on the Government to ensure that, in the interim, the basic needs of former opium farmers are met and sufficient resources allocated to those whose livelihoods depended upon opium-generated income.

VI. Human rights situation in ethnic minority areas

65. The Special Rapporteur is very concerned to learn that serious human rights violations continue to be perpetrated against Myanmar's ethnic minority communities, which constitute approximately 35 per cent of the country's population. Widespread reports of forced labour, rape and other sexual violence, extortion and expropriation by Government forces continue to be received. While those in areas where counter-insurgency operations are taking place are particularly badly affected, there are also reports of violations in ceasefire areas, where large contingents of Government forces continue to be present. Numerous violations of humanitarian law by these forces are still being reported. Allegations of human rights abuses by members of non-State armed groups have also been received. A widespread culture of impunity persists, in which victims of violations rarely have recourse to redress.

66. The Special Rapporteur is seriously concerned at ongoing allegations of forced labour throughout Myanmar, and particularly in ethnic minority states. The Government issued two orders prohibiting the practice of forced civilian labour by military and civilian authorities in 1999 and 2000, stating that it was a punishable offence. This notwithstanding, it is reported that men, women and children are forcibly made to perform duties such as road repair and construction, portering for the military, sentry duty, transport of military supplies, forced rice and tea cultivation, rock-breaking, digging, gathering of firewood, construction, bush and scrub clearance, fencing of military barracks and compounds and digging of military

bunkers and trenches. Civilian vehicles and their owners are frequently requisitioned to transport military supplies.

67. In many instances, those who are not in a position to undertake forced labour duties are allegedly obliged to pay a sum to cover the hire of another to go in their place. Fees such as a “porter” or “self-reliance development” fee for road construction are regularly extorted by Government forces in lieu of forced labour.

68. Civilians living in counter-insurgency areas who are unable to carry out their forced labour duties are particularly vulnerable to reprisals and collective punishment. Cases of severe punishment of those who are unable, unwilling or too weak to carry out orders continue to be received. Several cases have been brought to the attention of the Special Rapporteur of persons who have been conscripted as porters and have become too weak to carry their loads or keep up with the military column (owing to a lack of food, water or medical care) often being beaten and, in some instances, summarily executed.

69. The Special Rapporteur is particularly concerned at the assertion made by the Government at a recent press conference that anyone making what it deemed to be false allegations of forced labour, or found to be reporting such allegations to the International Labour Organization (ILO), would face prosecution. He is also disturbed to note the increased restrictions placed on the ILO liaison officer and calls by Government-affiliated organizations for the Government to consider withdrawing from ILO.

70. The Special Rapporteur is concerned to note that ceasefire groups have also allegedly insisted upon forced labour by the civilian population for tasks including clearing tracts through the jungle and preparing land for crop cultivation.

71. The Special Rapporteur continued to receive reliable reports of forcible recruitment and training of children for the Government armed forces and non-State armed groups. Lamentably, because of his lack of access to the country, he was not in a position to assess the extent of these alleged practices. He is aware that the dialogue between the Government and UNICEF on issues such as child soldiers has been limited owing to changes in ministerial leadership, with whom a new dialogue has had to begin. While there has been discussion on the need to further develop and operationalize the national plan of action to prevent the recruitment of child soldiers, cooperation on this issue has yet to be seen.

72. The Special Rapporteur is distressed that sexual violence committed by Government personnel against women and children allegedly continues. Civilians in ethnic minority areas such as Shan, Kayin, Kayah and Mon states have allegedly been particularly vulnerable to such violations. Documented reports of rape, sexual slavery and forced marriage continue to be received. Such incidents have resulted in the restricted movement of women, who allegedly are often fearful of working in the fields or travelling unaccompanied. It is reported that prosecution of the alleged perpetrators rarely takes place.

73. The imposition of arbitrary taxes is reportedly commonplace. Random and temporary checkpoints are understood to be periodically erected and “taxes” demanded of the civilian population. Reports have been received that many farmers have been prohibited from selling their rice and bran to anyone other than the military. They are allegedly forcibly obliged to sell produce at a price fixed by the

authorities that is many times lower than the market price. Others were compelled to make a payment to the authorities before they could harvest their crops.

74. The Special Rapporteur is concerned about ongoing reports of the self-sufficiency policy for the military, which continues to result in Government forces confiscating land, livestock, fish-catches and harvested crops from the civilian population and randomly shooting the cattle of civilians for their own consumption. It is reported that civilians refusing to acquiesce to the demands of the Government forces are subjected to fines and physical punishment.

75. The requisitioning of possessions, forcible evictions, house destruction and the burning of civilian dwellings are more prevalent in counter-insurgency areas. A large number of villages in ethnic minority areas have reportedly been burnt down and the villagers forced to relocate as a result of military offensives against armed opposition groups.

76. The Special Rapporteur is concerned about continued reports that the freedom of movement of civilians is unnecessarily restricted. In this regard, he notes reports that members of the Rohingya Muslim minority are prevented from travelling outside their villages without official permission. Others who are particularly affected are the Shan in the south-eastern part of Shan state and the Mon in southern Ye township in Mon state. It is understood that in several instances, civilians have been required to obtain passes, at a fee, in order to farm their own land and have had limits imposed on the length of time they may travel outside their village.

77. The Special Rapporteur is very concerned to hear that the use of landmines by Government forces and some non-State armed groups continues, affecting nine out of 14 states and divisions. He is disturbed by reports of the ongoing practice of “atrocious demining” whereby civilians are forced to act as human mine-sweepers by the military, resulting in severe mutilation and sometimes death. It is believed that Myanmar continues to produce landmines, with devastating effects. The lack of provision of adequate care and assistance for victims affected by landmines is to be very much regretted. The continued practice of laying landmines in fields and forests, and the lack of mine clearance, has had a negative impact upon the freedom of movement of civilians and their economic right to earn a living. Livestock are understood regularly to be maimed or killed in landmine incidents.

78. The Special Rapporteur is pleased to note that some progress has been made by the Government in tackling the issue of human trafficking. He welcomes news that anti-trafficking legislation is currently being drafted and that some progress has been made in prosecuting those involved in trafficking for forced labour purposes. The recent establishment of a police anti-trafficking unit is to be welcomed, as is the training of the anti-trafficking unit within the Ministry of Home Affairs in the investigation of trafficking cases. He remains concerned, however, that men, women and children continue to be trafficked for forced labour and sexual exploitation.

79. The Special Rapporteur has taken note of allegations of ongoing incidents of religious persecution. In Chin state, the reported destruction of a Christian cross by Government troops and the coercion of Chin Christians to contribute money and labour for the construction of a Buddhist monastery are to be regretted. He remains very concerned about reports of ongoing discrimination against the Rohingya ethnic minority in northern Rakhine state, including the destruction of mosques by

Government forces and the forced labour practice of ordering civilians to construct “model villages” to resettle Buddhists onto Muslim land.

80. He is concerned that the 1982 Citizenship Law, which recognizes the right to nationality for those defined as indigenous, excludes the Rohingya minority from citizenship, leaving them de facto stateless.

VII. Humanitarian situation

81. As long as there is conflict in Myanmar, livelihood prospects within the country will remain poor, and as long as the Government fails to protect human rights, there will be those who feel compelled to seek a better life elsewhere. Neighbouring countries will continue to bear the burden of those who have left Myanmar in search of safety, sustenance and freedom.

82. The ongoing armed conflict between Government forces and non-State armed groups of the various ethnic minority communities, combined with the perpetration of systematic and grave human rights violations have resulted in significant numbers of people fleeing their homes and becoming internally displaced persons and refugees. Many flee to the forests and remote areas, where there is inadequate food security and health care and no education for the children. Several thousand civilians have reportedly been displaced since the beginning of the year, particularly as a result of the counter-insurgency operations of the Government forces and/or their proxies.

83. It has been reported that as of the end of 2004, there were at least 526,000 internally displaced persons in eastern Myanmar alone, in Mon, Kayin, Kayah, southern Shan states and Tanintharyi and eastern Bago divisions. The Special Rapporteur is concerned about reports that allege that 365,000 people are in temporary settlements in ceasefire areas controlled by ethnic minority groups; 84,000 civilians are reportedly in hiding or temporary settlements, having been forcibly evicted from their homes; and a further 77,000 are understood to have been moved to relocation sites by Government troops. It is believed that at least 1 million people are internally displaced countrywide.

84. Reports state that relocation sites are in most cases empty tracts of land, where those who have been displaced are expected to provide their own shelter. Internally displaced persons face severe food shortages and inadequate access to safe drinking water, health and education services. Infant and maternal mortality rates are reportedly higher among the displaced. The lack of access for humanitarian agencies to border areas is believed to be exacerbating the problem.

85. Following the renunciation by the Shan State National Army of its ceasefire agreement in April 2005, there has been increased military activity and increased deployment of Government forces to restrict contact with the Shan State Army (South). As a result, it is understood that over 10,000 civilians have been displaced by conflict in southern Shan state between March and June 2005. During this period several villages were forcibly relocated, burnt or abandoned, allegedly as a result of the military strategy of Government forces and its adverse impact upon the civilian population.

86. In 2003 and 2004, the Special Rapporteur welcomed the fact that the flow of United Nations development assistance, especially in the area of health, had

significantly increased, access for international organizations had improved and agreement had been reached on activities under the Global Fund for HIV/AIDS, Tuberculosis and Malaria. However, since October 2004, the situation has reverted to a more constrained operating environment for United Nations agencies. International agencies working inside Myanmar do not have sufficient access to the zones of ongoing armed conflict or instability in the eastern part of the country, where protection and other humanitarian vulnerabilities are particularly acute. United Nations agencies are coming under increased scrutiny, with many of their operations subjected to increased governmental restrictions. In addition, in spite of concerns about deepening poverty and social vulnerability, restricted mandates of some United Nations agencies continue to affect their capacity to support Government programmes and capacity-building projects.

87. The Special Rapporteur regrets that international non-governmental organizations are reportedly also experiencing difficulties in carrying out their activities.

88. ICRC has continued to monitor the situation of the civilian population in conflict areas along the Thailand-Myanmar border. Its work in this region is of great benefit to all sides. However, the Special Rapporteur regrets to note that the access of ICRC has also been seriously curtailed in the eastern border areas.

89. While certain non-governmental organizations have some access to conflict areas, coverage is limited and will remain so until ceasefires in these areas are consolidated. There has been significant concern recently about reports of the forced return to Myanmar of refugees in Thailand to conflict areas.

90. The south coast of Myanmar was hit by the tsunami of 26 December 2004. The humanitarian community, led by the International Red Cross and Red Crescent Movement, assessed the affected areas and was able to confirm Government estimates of about 90 people killed and 10,000 to 15,000 people affected. The worst-hit areas were the coastal portions of the Ayeyarwady Delta as well as Tanintharyi division and Rakhine state. The overall assessment was that the country had fortunately been spared a large-scale disaster. The Government of Myanmar responded to the situation by providing support to affected populations and sharing available information on the impact of the tsunami with the relief community. The United Nations agencies rapidly coordinated their response and provided emergency support for immediate needs.

VIII. Concluding observations

91. The Special Rapporteur believes that the Government can and should take steps to salvage the National Convention and the credibility of the Government both at home and internationally. Freedom of movement, assembly and association must be guaranteed, as they are basic requirements for national reconciliation and the path to democratization. The National Convention will continue to have its credibility questioned as long as it fails to adequately represent the people of Myanmar. Democratic principles should govern all constitutional discussion and the entire political process.

92. One of the most relevant issues continues to be the definition of those who will draft the constitution, the third step of the road map. According to Government

declaration 1/90 of 27 July 1990, “the representatives elected by the people are those who have the responsibility to draw up the constitution of the future democratic State”, while, more recently, there have been reports that a group of “experts” from the Government or appointed by the National Convention would draft the constitution. For the time being, there are also no clear indications about the rules for the adoption of the constitution through a national referendum.

93. The transition to a full, participatory and democratic system can no longer be postponed. Political and constitutional dialogue must begin without delay. By instituting values of democracy and human rights, the Government will send a clear signal to the people of Myanmar and the international community that it is actively committed to facilitating the creation of a stable and democratic future for the country.

94. While the release of a large number of common-law prisoners and some political prisoners is to be welcomed, the constant arrests, detention and maltreatment of civilians and democracy advocates continues. The Special Rapporteur deplores the sentencing of five pro-democracy activists to life imprisonment on 13 June 2005, which contradicts the expressed commitment of the Government to implement the road map in good faith.

95. It is deeply regrettable that the General-Secretary of NLD, Daw Aung San Suu Kyi, celebrated her sixtieth birthday under house arrest. Her virtual solitary confinement and lack of access to her NLD colleagues run counter to the spirit of national reconciliation. Furthermore, ICRC has not been allowed to independently monitor her living conditions for the past two years.

96. The misuse of the machinery of law, order and justice by the Government of Myanmar to instigate systematic political repression rather than protect basic human rights and fundamental freedoms is to be regretted. The Special Rapporteur believes that judicial procedures must undergo serious and immediate reform to bring them into line with international standards and the rule of law. The lack of due process, particularly in political trials, and the abuse of the justice system to silence peaceful political dissent are of serious concern to the Special Rapporteur.

97. Throughout the country, civilians are unable to make complaints or obtain redress for human rights violations by State agents. It is deeply regrettable that when victims of human rights violations attempt to complain, they invariably find no avenue of redress available. Furthermore, they are frequently subjected to threats and reprisals.

98. The Special Rapporteur is dismayed that no action has yet been brought against the perpetrators of the fatal attacks on NLD supporters in a car convoy at Depayin in May 2003, or an investigation launched into the alleged systematic rape of Shan, Karen and other ethnic minority women by Government forces.

99. The Special Rapporteur deeply regrets to note the deaths of at least 11 people and the wounding of many others following the bomb attacks in Yangon on 7 May 2005.

100. The Special Rapporteur strongly believes that the United Nations and the international community are ready to work in partnership with the Government, the political parties and civil society organizations to effectively facilitate national reconciliation and the transition to democracy. By improving its human rights record

and governance policies and strengthening its cooperation with international organizations, the Government can be assured of support for conflict resolution, political and economic reform, institution- and capacity-building, humanitarian assistance and human development.

IX. Recommendations

101. **The Special Rapporteur believes that the Government of Myanmar needs to explicitly reaffirm and demonstrate its commitment to implement political and constitutional reform by guaranteeing the full and effective participation of all political actors, including NLD, political parties and ethnic leaders, in a meaningful and substantive dialogue.**

102. **The Government needs to clearly state the procedural steps it plans to take in drafting the constitution and in conducting the referendum and genuinely free and fair elections.**

103. **The Special Rapporteur calls on the Government to ensure the full and effective participation of all those political actors who are trying to build a free, open and just society throughout the political transition process. The constitution should prescribe a model of government that reflects and involves the diverse ethnic and political communities that make up the country.**

104. **The Special Rapporteur reiterates that the General-Secretary of NLD, Daw Aung San Suu Kyi, the Vice-Chairman of NLD, U Tin Oo, ethnic leaders such as Khun Htun Oo, Chairperson of SNLD, and elderly prisoners such as the poet and journalist U Win Tin, should be released. The immediate release of all 1,100 political prisoners would send a powerful signal to the people of Myanmar and the international community that the Government is seriously committed to a genuine process of reconciliation and to constituting a participatory democracy in Myanmar.**

105. **It would be most desirable to have an independent assessment of the conditions of detention of all persons detained, including Daw Aung San Suu Kyi, and all those under house arrest, by a neutral body such as ICRC.**

106. **The Special Rapporteur reiterates the pressing need for State institutions to receive and fully investigate all complaints of human rights abuses and to prosecute, where necessary, in accordance with international standards. The State must assume the responsibility to protect and promote the well-being of its people.**

107. **The Special Rapporteur calls on the Government of Myanmar to guarantee that all civil and political rights are protected and promoted. In particular, he reiterates the need for an environment to be created where freedom of expression, opinion and assembly are upheld, so as to enable meaningful progress to be made on the process of national reconciliation and the transition to democracy. In this connection, the arbitrary arrests, detention and imprisonment of civilians for engaging in peaceful political activity must end, as a matter of priority.**

108. **Laws that excessively restrict the peaceful exercise of civil and political rights should be immediately reviewed, amended or repealed. The 1962**

Annex 21

UN General Assembly, 60th Session, 64th Plenary Meeting, *Reports of the Third Committee*,
UN Doc. A/60/PV.64 (16 December 2005)

United Nations

A/60/PV.64



General Assembly

Sixtieth session

Official Records

64th plenary meeting

Friday, 16 December 2005, 3 p.m.
New York

President: Mr. Eliasson (Sweden)

The meeting was called to order at 3.15 p.m.

Reports of the Third Committee

The President: The General Assembly will consider the reports of the Third Committee on agenda items 39, 61 to 65, 67 to 71, 106, 107 and 116.

I request Mr. Pedro Cardoso of Brazil, Rapporteur of the Third Committee, to introduce, in one intervention, the reports of the Third Committee.

Mr. Cardoso (Brazil), Rapporteur of the Third Committee: I have the honour to introduce, for the consideration of the General Assembly, the reports of the Third Committee on the agenda items allocated to it by the Assembly.

Under agenda item 39, entitled “Report of the United Nations High Commissioner for Refugees, questions relating to refugees, returnees and displaced persons and humanitarian questions”, the Third Committee recommends, in paragraph 17 of document A/60/499, the adoption of three draft resolutions; and, in paragraph 18 of the same report, the adoption of one draft decision.

Under agenda item 61, entitled “Implementation of the outcome of the World Summit for Social Development and of the twenty-fourth special session of the General Assembly”, the Third Committee recommends, in paragraph 12 of document A/60/500, the adoption of one draft resolution.

Under agenda item 62, entitled “Social development, including questions relating to the world social situation and to youth, ageing, disabled persons and the family”, the Third Committee recommends, in paragraph 27 of document A/60/501, the adoption of four draft resolutions; and, in paragraph 28 of the same report, the adoption of one draft decision.

Under agenda item 63, entitled “Follow-up to the International Year of Older Persons: Second World Assembly on Ageing”, the Third Committee recommends, in paragraph 9 of document A/60/502, the adoption of one draft resolution.

Under agenda item 64, entitled “Advancement of women”, the Third Committee recommends, in paragraph 48 of document A/60/503, the adoption of six draft resolutions; and, in paragraph 49 of the same report, the adoption of one draft decision.

Under agenda item 65, entitled “Implementation of the outcome of the Fourth World Conference on Women and of the twenty-third special session of the General Assembly, entitled ‘Women 2000: gender equality, development and peace for the twenty-first century’”, the Third Committee recommends, in paragraph 10 of document A/60/504, the adoption one draft resolution.

Under agenda item 67, entitled “Promotion and protection of the rights of children”, the Third Committee recommends, in paragraph 46 of document A/60/505, the adoption of two draft resolutions.

This record contains the text of speeches delivered in English and of the interpretation of speeches delivered in the other languages. Corrections should be submitted to the original languages only. They should be incorporated in a copy of the record and sent under the signature of a member of the delegation concerned to the Chief of the Verbatim Reporting Service, room C-154A. Corrections will be issued after the end of the session in a consolidated corrigendum.

05-64817 (E)

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Agenda item 71 (continued)**Human rights questions****Report of the Third Committee (A/60/509)**

The President: The Assembly has before it a draft decision recommended by the Third Committee in paragraph 5 of its report.

We will now take action on the draft decision.

The draft decision, entitled “Reports considered by the General Assembly in connection with the question of human rights”, was adopted by the Third Committee. May I take it that the Assembly wishes to do the same?

The draft decision was adopted.

The President: The General Assembly has thus concluded this stage of its consideration of agenda item 71.

(a) Implementation of human rights instruments**Report of the Third Committee (A/60/509/Add.1)**

The President: The Assembly has before it three draft resolutions recommended by the Third Committee in paragraph 23 of its report.

We will now take decisions on draft resolutions I to III.

Draft resolution I is 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”. The Third Committee adopted draft resolution I without a vote. May I take it that the Assembly wishes to do the same?

Draft resolution I was adopted (resolution 60/147).

The President: Draft resolution II is entitled “Torture and other cruel, inhuman or degrading treatment or punishment”. The Third Committee adopted draft resolution II without a vote. May I take it that the Assembly wishes to do likewise?

Draft resolution II was adopted (resolution 60/148).

The President: Draft resolution III is entitled “International Covenants on Human Rights”. The Third Committee adopted draft resolution III without a vote. May I take it that the Assembly wishes to do the same?

Draft resolution III was adopted (resolution 60/149).

The President: May I take it that it is the wish of the General Assembly to conclude its consideration of sub-item (a) of agenda item 71?

It was so decided.

(b) Human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms**Report of the Third Committee (A/60/509/Add.2 (Parts I and II))**

The President: The Assembly has before it a draft resolution recommended by the Third Committee in paragraph 21 of part I of its report and 20 draft resolutions recommended by the Third Committee in paragraph 102 of part II of its report.

Before proceeding further, I should like to inform members that action on the draft resolution entitled “Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities”, contained in part I of the report, is postponed to a later date to allow time for the review of its programme budget implications by the Fifth Committee. The Assembly will take action on the draft resolution as soon as the report of the Fifth Committee on its programme budget implications is available.

I now call on the representative of the United States of America, who wishes to speak in explanation of vote before the voting.

Mr. Godard (United States of America): With regard to draft resolution X under this item, entitled “Human rights in the administration of justice”, the United States would like to bring to the attention of the General Assembly the amendments to operative paragraphs 1 and 2 submitted by our delegation during consideration of the draft resolution by the Third Committee.

While we are not going to re-submit these now, we would like to reaffirm our position. In particular, we have strong concerns with the reference in paragraph 1 to implementing “all United Nations standards on human rights”, which include a variety of non-binding norms and recommendations.

The United States takes seriously our commitment to fully implement human rights obligations we have undertaken, and we believe that that more limited and accurate language should be used when addressing this topic in future resolutions of this nature.

The President: We will now take decisions, one by one, on the 20 draft resolutions recommended in paragraph 102 of part II of the report. After all the decisions have been taken, representatives will again have the opportunity to explain their votes.

We first turn to draft resolution I, entitled “Combating defamation of religions”.

A recorded vote has been requested.

A recorded vote was taken.

In favour:

Afghanistan, Algeria, Angola, Antigua and Barbuda, Argentina, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Benin, Bhutan, Bolivia, Brazil, Brunei Darussalam, Burkina Faso, Cambodia, Cameroon, Chile, China, Colombia, Comoros, Costa Rica, Côte d’Ivoire, Cuba, Democratic People’s Republic of Korea, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Eritrea, Ethiopia, Fiji, Gabon, Gambia, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Indonesia, Iran (Islamic Republic of), Iraq, Jamaica, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lao People’s Democratic Republic, Lebanon, Lesotho, Libyan Arab Jamahiriya, Malaysia, Maldives, Mali, Mauritius, Mexico, Morocco, Mozambique, Myanmar, Nicaragua, Niger, Oman, Pakistan, Paraguay, Peru, Philippines, Qatar, Russian Federation, Rwanda, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Singapore, Somalia, South Africa, Sudan, Suriname, Syrian Arab Republic, Tajikistan, Thailand, Timor-Leste, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates,

Uruguay, Uzbekistan, Venezuela (Bolivarian Republic of), Viet Nam, Yemen, Zimbabwe.

Against:

Albania, Andorra, Australia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Marshall Islands, Mauritania, Micronesia (Federated States of), Monaco, Netherlands, New Zealand, Norway, Palau, Poland, Portugal, Republic of Moldova, Romania, Samoa, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America.

Abstaining:

Armenia, Botswana, Cape Verde, Democratic Republic of the Congo, Ghana, Honduras, India, Kenya, Madagascar, Malawi, Namibia, Nepal, Nigeria, Panama, Papua New Guinea, Republic of Korea, Solomon Islands, Sri Lanka, United Republic of Tanzania, Zambia.

Draft resolution I was adopted by 101 to 53, with 20 abstentions (resolution 60/150).

The President: Draft resolution II is entitled “Subregional Centre for Human Rights and Democracy in Central Africa”. The Third Committee adopted draft resolution II without a vote. May I take it that the Assembly wishes to do likewise?

Draft resolution II was adopted (resolution 60/151).

The President: Draft resolution III is entitled “Globalization and its impact on the full enjoyment of all human rights”.

A recorded vote has been requested.

A recorded vote was taken.

In favour:

Afghanistan, Algeria, Angola, Antigua and Barbuda, Argentina, Armenia, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Benin, Bhutan, Bolivia, Botswana, Brunei Darussalam, Burkina Faso,

Annex 22

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)



General Assembly

Distr.: General
21 March 2006

Sixtieth session
Agenda item 71 (a)

Resolution adopted by the General Assembly on 16 December 2005

[on the report of the Third Committee (A/60/509/Add.1)]

60/147. 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

The General Assembly,

Guided by the Charter of the United Nations, the Universal Declaration of Human Rights,¹ the International Covenants on Human Rights,² other relevant human rights instruments and the Vienna Declaration and Programme of Action,³

Affirming the importance of addressing the question of remedies and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law in a systematic and thorough way at the national and international levels,

Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms international law in the field,

Recalling the adoption of 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 by the Commission on Human Rights in its resolution 2005/35 of 19 April 2005⁴ and by the Economic and Social Council in its resolution 2005/30 of 25 July 2005, in which the Council recommended to the General Assembly that it adopt the Basic Principles and Guidelines,

1. *Adopts* 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 annexed to the present resolution;

¹ Resolution 217 A (III).

² Resolution 2200 A (XXI), annex.

³ A/CONF.157/24 (Part I), chap. III.

⁴ See *Official Records of the Economic and Social Council, 2005, Supplement No. 3* and corrigendum (E/2005/23 and Corr.1), chap. II, sect. A.

2. *Recommends* that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general;

3. *Requests* the Secretary-General to take steps to ensure the widest possible dissemination of the Basic Principles and Guidelines in all the official languages of the United Nations, including by transmitting them to Governments and intergovernmental and non-governmental organizations and by including the Basic Principles and Guidelines in the United Nations publication entitled *Human Rights: A Compilation of International Instruments*.

64th plenary meeting
16 December 2005

Annex

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

Preamble

The General Assembly,

Recalling the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular article 8 of the Universal Declaration of Human Rights,¹ article 2 of the International Covenant on Civil and Political Rights,² article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination,⁵ article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁶ and article 39 of the Convention on the Rights of the Child,⁷ and of international humanitarian law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV),⁸ article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977,⁹ and articles 68 and 75 of the Rome Statute of the International Criminal Court,¹⁰

⁵ Resolution 2106 A (XX), annex.

⁶ United Nations, *Treaty Series*, vol. 1465, No. 24841.

⁷ *Ibid.*, vol. 1577, No. 27531.

⁸ See Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915).

⁹ United Nations, *Treaty Series*, vol. 1125, No. 17512.

¹⁰ *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998*, vol. I: *Final documents* (United Nations publication, Sales No. E.02.I.5), sect. A.

Recalling the provisions providing a right to a remedy for victims of violations of international human rights found in regional conventions, in particular article 7 of the African Charter on Human and Peoples' Rights,¹¹ article 25 of the American Convention on Human Rights,¹² and article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms,¹³

Recalling the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power emanating from the deliberations of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and General Assembly resolution 40/34 of 29 November 1985 by which the Assembly adopted the text recommended by the Congress,

Reaffirming the principles enunciated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including that victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected, and that the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged, together with the expeditious development of appropriate rights and remedies for victims,

Noting that the Rome Statute of the International Criminal Court requires the establishment of "principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation", requires the Assembly of States Parties to establish a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, and mandates the Court "to protect the safety, physical and psychological well-being, dignity and privacy of victims" and to permit the participation of victims at all "stages of the proceedings determined to be appropriate by the Court",

Affirming that the Basic Principles and Guidelines contained herein are directed at gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity,

Emphasizing that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms,

Recalling that international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with international obligations of States and the requirements of national law or as provided for in the applicable statutes of international judicial organs, and that the duty to prosecute reinforces the international legal obligations to be carried out in accordance with national legal requirements and procedures and supports the concept of complementarity,

¹¹ United Nations, *Treaty Series*, vol. 1520, No. 26363.

¹² *Ibid.*, vol. 1144, No. 17955.

¹³ *Ibid.*, vol. 213, No. 2889.

Noting that contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively,

Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law,

Convinced that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity at large, in accordance with the following Basic Principles and Guidelines,

Adopts the following Basic Principles and Guidelines:

I. Obligation to respect, ensure respect for and implement international human rights law and international humanitarian law

1. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from:

- (a) Treaties to which a State is a party;
- (b) Customary international law;
- (c) The domestic law of each State.

2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:

(a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;

(b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;

(c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below;

(d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.

II. Scope of the obligation

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;

(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;

(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and

(d) Provide effective remedies to victims, including reparation, as described below.

III. Gross violations of international human rights law and serious violations of international humanitarian law that constitute crimes under international law

4. In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

5. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

IV. Statutes of limitations

6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

V. Victims of gross violations of international human rights law and serious violations of international humanitarian law

8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

VI. Treatment of victims

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. Victims' right to remedies

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.

VIII. Access to justice

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

(a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;

(b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;

(c) Provide proper assistance to victims seeking access to justice;

(d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.

14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

IX. Reparation for harm suffered

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. 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. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.

17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

19. *Restitution* should, whenever possible, restore the victim to the original situation 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.

20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;

(e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

21. *Rehabilitation* should include medical and psychological care as well as legal and social services.

22. *Satisfaction* should include, where applicable, any or all of the following:

(a) Effective measures aimed at the cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;

(c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;

(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;

(e) Public apology, including acknowledgement of the facts and acceptance of responsibility;

(f) Judicial and administrative sanctions against persons liable for the violations;

(g) Commemorations and tributes to the victims;

(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

23. *Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention:

(a) Ensuring effective civilian control of military and security forces;

(b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;

(c) Strengthening the independence of the judiciary;

(d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;

(e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;

(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;

(g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;

(h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

X. Access to relevant information concerning violations and reparation mechanisms

24. States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

XI. Non-discrimination

25. The application and interpretation of these Basic Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception.

XII. Non-derogation

26. Nothing in these Basic Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it is understood that the present Basic Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. It is further understood that these Basic Principles and Guidelines are without prejudice to special rules of international law.

XIII. Rights of others

27. Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process.

Annex 23

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)



General Assembly

Distr.: General
10 March 2010

Original: English

Human Rights Council

Thirteenth session

Agenda item 4

Human rights situations that require the Council's attention

Progress report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana*

Summary

The present report, submitted pursuant to Human Rights Council resolution 10/27, covers human rights developments in Myanmar since the Special Rapporteur's second report to the Human Rights Council (A/HRC/10/19) and the submission of his report to the General Assembly (A/64/318) in October 2009.

The Special Rapporteur has travelled to Myanmar three times. He conducted his third country visit from 15 to 19 February 2010 at the invitation of the Government, which had postponed planned visits several times.

The present report elaborates on the issues related to the protection of human rights. The Security Council, the Secretary-General, the Human Rights Council, Government representatives from many nations, Nobel laureates and other respected leaders have all called for the release of Aung San Suu Kyi and the more than 2,100 prisoners of conscience. However, the Government of Myanmar has not yet met this important step in its preparations for transition to democracy in the lead-up to the 2010 election. Likewise, the international community has urged the Government of Myanmar to announce an election date and an electoral framework that adheres to international standards for a free, fair, participatory and transparent election process. The basic rights to food, shelter, health and education, which are not only human rights in and of themselves, but are also essential for the exercise of other human rights, are denied to far too many of the people of Myanmar. At the same time, conflicts along the border areas continue to abet serious human rights abuses against civilian populations, including the ongoing recruitment of child soldiers. The Special Rapporteur is deeply concerned about the systematic and endemic discrimination faced by the Muslim community in Northern Rakhine State. This discrimination, which is framed as an immigration problem, leads to basic and fundamental human rights being denied to this population. Measures taken against this population

* The present report was submitted after the deadline in order to include the most recent information gathered during the Special Rapporteur's mission to Myanmar from 15 to 19 February 2010.

include the restriction of movement, limitations on permission to marry, and forced labour.

As the Special Rapporteur stated in previous reports, there is a pattern of gross and systematic violation of human rights which has been in place for many years and still continues. Given the extent and persistence of the problem, and the lack of accountability, there is an indication that those human rights violations are the result of a State policy, originating from decisions by authorities in the executive, military and judiciary at all levels. The Government of Myanmar needs to take prompt and effective measures to investigate these facts.

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1–6	4
II. Methodology and activities of the special rapporteur	7–12	4
III. Human rights issues	13–117	5
A. Situation of prisoners of conscience and conditions of detention	15–34	6
B. Due process of law.....	35–42	9
C. Freedom of expression, assembly and association in the light of the 2010 elections.....	43–56	10
D. The Constitution and transition to democracy	57–60	12
E. Protection of civilians	61–82	13
F. Discrimination	83–94	16
G. Living conditions, sustenance, humanitarian assistance	95–113	17
H. Developing cooperation in the context of human rights	114–117	20
IV. Conclusions and recommendations	118–123	20

I. Introduction

1. The mandate of the Special Rapporteur on the situation of human rights in Myanmar was established pursuant to resolution 1992/58 of the Commission on Human Rights, and most recently extended by Human Rights Council resolution 7/32. The current Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana (Argentina), officially assumed the function on 1 May 2008.

2. The present report is submitted pursuant to Human Rights Council resolution 10/27 and covers human rights developments in Myanmar since the Special Rapporteur's second report to the Human Rights Council (A/HRC/10/19) and the submission of his report to the General Assembly (A/64/318) in October 2009.

3. Engagement with Myanmar by the international community has improved with some notable shifts from long-standing policies of isolating the Government of Myanmar. With the launch of the new human rights mechanism of the Association of Southeast Asian Nations (ASEAN), namely, the ASEAN Intergovernmental Commission on Human Rights, the Government of Myanmar is presented with another forum to address human rights concerns. The Special Rapporteur hopes that engagement, at all levels, will bring the improvement of human rights in Myanmar.

4. The Government of Myanmar has reiterated that national elections, planned for 2010 as part of the seven-step road map to democracy to which the Myanmar authorities have committed, will go ahead. As of 5 March 2010, neither the election date nor the election law had been announced, and restrictions to freedoms of expression, assembly and association had not been lifted. The Special Rapporteur regrets that during his mission in February 2010 no further information was provided on the election date or the electoral framework. This election is an important opportunity for the Government to show its commitment to international human rights standards and democratic values, however, the ongoing delay offers serious doubts about the possibility to provide adequate time for examination of the electoral framework and preparation by all parties to fairly contest the elections.

5. The Security Council, the Secretary-General, the Human Rights Council, representatives of many States, Nobel laureates and other respected leaders have all called for the release of Aung San Suu Kyi and the more than 2,100 prisoners of conscience, particularly in the light of the expected upcoming elections. However, the Government of Myanmar has not yet met this important step in its preparations for transition to democracy.

6. The Special Rapporteur would like to thank the Office of the United Nations High Commissioner for Human Rights (OHCHR), in particular at Headquarters, in Bangkok and in New York, for assisting him in discharging his mandate. These thanks are also extended to the United Nations Country Team in Myanmar.

II. Methodology and activities of the special rapporteur

7. Since taking up the mandate in May 2008, the Special Rapporteur has adopted an open and clear approach to working towards the promotion and protection of human rights in Myanmar, including working in a cooperative manner with the Government to assist in the realization of those rights. He explained the approach in his first report to the Human Rights Council in June 2008 (A/HRC/8/12) and reiterated it in his statements to the Human Rights Council (A/HRC/10/19) and the General Assembly (A/64/318). The Special Rapporteur intends to continue with this approach.

8. The Special Rapporteur conducted his third country visit from 15 to 19 February 2010 at the invitation of the Government, which had postponed planned visits several times. His previous two missions were carried out from 3 to 7 August 2008 and from 14 to 19 February 2009.

9. As in the past, the Special Rapporteur was provided with his mission programme on a daily basis. The length of the mission agreed by the Government was only five days, during which time the Special Rapporteur visited Rakhine State, including the Sittwe and Buthidaung prisons, and met with state authorities, members of the Nasaka (Myanmar's border and immigration forces) and Muslim community leaders. In Nay Pyi Taw, he met with the Ministers of Home Affairs and Labour, the Chief Justice and Attorney General, the Chief of Police and the governmental human rights body. In Yangon he visited Insein Prison and met with political party and ethnic nationality leaders, and the judges and lawyers involved in the most recent trial of Daw Aung San Suu Kyi.

10. With a view to gathering all relevant information on the country and maintaining an impartial and balanced approach, in addition to meeting with the authorities of Myanmar during missions, the Special Rapporteur keeps in contact with all those working on Myanmar – individuals, non-governmental organizations (NGOs) and diplomatic missions. He consults with countries in the region, especially ASEAN members given the important role they play in relation to Myanmar.

11. The Special Rapporteur met with the Secretary-General in October 2009, and is in regular contact with the office of his Special Adviser on Myanmar. In New York, the Special Rapporteur also met with the Special Adviser for the Responsibility to Protect, and representatives of the Office of the Special Representative of the Secretary-General for Children and Armed Conflict and the Office of the Special Adviser on the Prevention of Genocide.

12. Between 1 August 2009 and 13 January 2010, the Special Rapporteur sent five communications to the Government of Myanmar regarding particular cases of alleged human rights violations. He sent those letters of allegation and urgent appeals jointly with other special procedures mandate holders, and he has received replies to two of those communications.

III. Human rights issues

13. The human rights issues confronting Myanmar are many, complex and interdependent. At the centre of the daunting challenges to the full realization of human rights in the country is the pattern of widespread and systematic violations which has existed for many years and still persists. The prevailing culture of impunity, in fact, is a necessary consequence of the lack of accountability for grave human rights violations when they do occur. The lack of independence of the judiciary and weak rule of law are also preconditions for this pattern. The large number of prisoners of conscience in Myanmar demonstrates the abrogation of the fundamental rights to freedom of expression, assembly and association. The plight of ethnic minorities and civilians along the country's border areas who are subject to discrimination and grave human rights abuses has continued for too long, due to the prevailing culture of impunity.

14. Recommendations made by the international community, including the four core human rights elements proposed by the Special Rapporteur, remain largely outstanding. Substantive action by the Government on the four core human rights elements would be necessary for the democratic transition to which Myanmar has committed. The four core human rights elements are: the release of all prisoners of conscience; review and reform of specific national legislation, in compliance with international human rights standards;

reform of the judiciary to assure independence and impartiality; and specific measures by the military and police including respecting international human rights and humanitarian law and establishing a permanent and meaningful training programme on human rights.

A. Situation of prisoners of conscience and conditions of detention

15. The Special Rapporteur has repeatedly expressed grave concerns about the house arrest of Daw Aung San Suu Kyi and the high number of prisoners of conscience and has called for the release of all prisoners of conscience without delay and without conditions. He recalls that one of the four core human rights elements that he proposed to the authorities is the progressive release of prisoners of conscience before the announced 2010 elections. Nevertheless, during his recent mission, the Special Rapporteur did not receive any indication that the Government is willing to release all prisoners of conscience. The Government of Myanmar does not accept that there are any prisoners of conscience in Myanmar. While there was a release of 131 prisoners of conscience in September 2009 and 29 prisoners in February 2009, these figures lack proportionality to the more than 2,100 prisoners of conscience who remain detained. In fact, the number of prisoners of conscience has nearly doubled in the past two years. These prisoners come from all walks of life, and include monks, students, teachers, lawyers, journalists and political activists. Some have spent many years in prison and continue to suffer under long sentences.

16. In order to move forward concretely and urgently on the release of prisoners of conscience, the Special Rapporteur reiterates the proposal he put forward to the authorities to begin with certain categories of prisoners such as the elderly, those with health limitations, long-serving prisoners and women who have children. The Special Rapporteur wishes to underline the utmost urgency of the release of those prisoners whose lives are at risk if proper medical attention is not received, including those who have endured torture and ill-treatment during years in detention in harsh conditions. There are reportedly 130 prisoners of conscience in poor health, 19 of them requiring urgent medical treatment.

17. Over 260 sentenced prisoners have been transferred to prisons far from their hometowns, in isolated areas around the country, making it difficult for their families to ensure regular visits. At least 47 of them — including Htay Kywe, Min Ko Naing, Su Su Nway and Zarganar — have been transferred to prisons over 1,000 km away from their families. The impossibility to see each other on a regular basis can have a psychological impact on both the prisoners and their families. A number of prisoners have been transferred to other prisons without their families being notified, such that the families lose track of the prisoner's whereabouts. There are serious concerns for the health and well-being of prisoners of conscience who are unable to receive family visits as they do not receive important supplementary food or medicines.

18. The Special Rapporteur has noted previously the importance of financial support that the International Committee of the Red Cross provides families so they can visit their detained relatives. He again invites the authorities to re-engage with the International Committee in order for it to conduct prison visits, in accordance with its established mandate, which have been suspended since December 2005.

19. On his latest mission, the Special Rapporteur was allowed to visit three prisons — Sittwe, Buthidaung and Insein — where he met with 14 prisoners of conscience and one former child soldier. While serious concerns on prison conditions remain, such as inadequate water and food rations and extortion by prison staff, the Special Rapporteur understands that the conditions in both Buthidaung and Insein had improved over the past few months. The Special Rapporteur would like to encourage the authorities to continue these efforts throughout the prison system. He invites the authorities to address effectively

the requests of prisoners who staged hunger strikes in Insein and in Buthidaung in February 2010 for better food and health care as well as for reading and writing material.

20. There are 44 prisons in Myanmar and at least 50 labour camps. Some do not have a prison hospital, and at least 12 of the prisons do not even have a prison doctor.

21. In this regard the Special Rapporteur would like to draw attention to the Standard Minimum Rules for the Treatment of Prisoners, which provide for, among other things: the services of a qualified medical officer within prisons or detention facilities; the transfer of prisoners and detainees who require specialist treatment to specialized institutions or to civil hospitals; and the provision of sufficiently nutritious food for prisoners.

22. These provisions are still not being met in Myanmar as some of the prison facilities do not have a prison doctor, and prisoners in many cases have to purchase their own medicines beyond basic pain relief pills or pay for outside treatments. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment also provides that “medical care and treatment shall be provided whenever necessary” (art. 24).

23. On 16 October 2009 the Special Rapporteur on the situation of human rights in Myanmar along with the Special Rapporteurs on torture and other cruel, inhuman or degrading treatment or punishment, on the promotion and protection of the right to freedom of opinion and expression, on the situation of human rights defenders and on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and the Chairperson of the Working Group on Arbitrary Detention, wrote to the Government regarding the case of Hla Myo Naung, who has been at serious risk of total blindness unless he receives specialist medical treatment. He had already been the subject of a joint urgent appeal addressed on 5 November 2008. Hla Myo Naung had participated in demonstrations against the fuel price hike in August 2007 and was the main spokesperson for the 88 Generation Students. He was arrested on 10 October 2007, sentenced to a prison term of 65 years and 6 months in November 2008, and transferred to the remote Myitkyina prison shortly afterwards. An unsuccessful eye surgery was conducted while he was in detention and led to the loss of vision in one eye. He later began to experience the same symptoms in his functional eye that had led to blindness in the other eye. He is known to be suffering from keratitis and corneal opacity. No reply has been provided by the Government of Myanmar.

24. The Special Rapporteur continues to receive reports on the alarmingly high number of deaths in prison. While official statistics have not been made available, it appears that both prisoners of conscience and regular prisoners are subject to conditions that lead to death.

25. Reports suggest that 143 prisoners of conscience have died in prison since 1988. Reports suggest that some prisoners died in prison from internal injuries that they sustained in interrogation camps and police stations where they were subject to brutal torture-like beating and kicking. Often, the bodies of the prisoners of conscience are cremated before the family can view them.

26. It is reported that in Sittwe Prison authorities register deaths of prisoners in prison as having taken place on the way to Sittwe General Hospital during the transfer process. In November 2009, four prisoners died in Sittwe Prison: Myo Kyaw, Daw Aung Tha Paing, U Sate Taung and Abu Ahlong.

27. Deprivation of food and water as punishment are reported to continue in Myanmar’s prisons. The State has the responsibility to ensure the protection and proper treatment of those put in detention, including providing adequate food and medical care in accordance

with universally accepted standards and the principles contained in international human rights instruments.

28. According to media reports six prisoners died in Insein Prison in Yangon during the week of 28 October – 4 November 2009. According to reliable sources they are: U Win Aung, former Foreign Minister U Win Aung, Ma Thida Soe from Pazuntaung, Mayanthee from Mingaladon, Ko Phyo, Myint Wei and Pho Si.

29. The Special Rapporteur wishes to remind the Government of Myanmar that the State has the responsibility to ensure adequate budget allocation to prisons to ensure proper health facilities and conditions.

30. On 23 December 2009 Tin Tin Htwe Ma Pae, aged 38, died in Insein Prison from a burst aneurysm. She was sentenced along with 14 other political activists because of their involvement in the 2007 demonstrations on 24 November 2007, under sections 332 (hindering a public servant from carrying out their duty) and 294 (covering obscene acts and songs in public), to three years and three months with hard labour. She is the third prisoner of conscience to die in prison in 2009.

31. International standards require that an inquiry into the cause of death be held by a judicial or other authority and that the findings of such inquiry be made available upon request. The authorities must ensure that each death in detention is fully investigated, that causes for deaths identified, that families are informed in timely fashion, that lessons are learned and that accountability is clearly established. The Special Rapporteur urges the Government to investigate all deaths of those in detention.

32. On 29 September 2009, the Special Rapporteur on the human rights situation in Myanmar, along with the Special Rapporteur on the question of torture and the Chairperson of the Working Group on Arbitrary Detention, wrote to the Government regarding the case of Kyaw Zaw Lwin (a.k.a. Nyi Nyi Aung). On 3 September, Kyaw Zaw Lwin was arrested and taken to Insein Prison in Yangon. During his interrogation, he was subject to ill-treatment. On 16 December, the same group sent a follow-up letter to the Government. He was originally accused of entering the country with the intention to prompt unrest in the nation. The Government of Myanmar replied on 8 February 2010 that Kyaw Zaw Lwin was found guilty of forging a national identity card, failing to declare currency at customs, and failing to renounce his Myanmar citizenship, and he was sentenced to five years in prison.

33. Of serious concern to the Special Rapporteur are reports that prisoners of conscience are subject to torture during the interrogation period and in detention. According to testimonies from prisoners of conscience who were released, there are systematic patterns of abuse and torture of detainees. Various forms of physical, psychological and sexual abuse by officials have been detailed in reports. Deliberately poor prison conditions combined with purposeful medical negligence cause extreme suffering of prisoners.

34. The Special Rapporteur would like to stress the importance of the need for human rights training for the military and prison staff to ensure their awareness of and compliance with international standards and rules for the treatment of prisoners. This is part of one of the four core human rights elements. During his meeting with the Chief of Police, the Special Rapporteur was told that the Government has started a training programme on human rights for new recruits at the township level. The Special Rapporteur did not receive substantive details about the training programmes and would welcome more information from the authorities.

B. Due process of law

35. Another core human rights element recommended to the Government by the Special Rapporteur is the establishment of an independent and impartial judiciary. Without such a judiciary, Myanmar does not have functioning rule of law. The current system of administration of justice is seriously flawed.

36. The Special Rapporteur notes that the Constitution of Myanmar (2008), in chapter 1, paragraph 19, establishes important judicial principles: (a) to administer justice independently according to the law; (b) to dispense justice in open court unless otherwise prohibited by the law; (c) to guarantee in all cases the right of defence and the right of appeal under the law. However, in reality, many trials are conducted behind closed doors within prison compounds, without legal representation, without the presence or knowledge of their family members, without proof of evidence or with defective evidence, and pursuant to arbitrary decisions of the judges.

37. The Special Rapporteur draws the attention of the Myanmar authorities to the existence of a body of internationally accepted standards and principles in the area of human rights in the administration of justice, including the treatment of prisoners, role of lawyers, role of prosecutors, independence of the judiciary and conduct of law enforcement officials, which must guide the authorities to ensure fair trials and due process of law. The Special Rapporteur underlines the necessity of legal reform through review of legislation and procedures to ensure conformity with human rights standards and respect for the basic principles of the presumption of innocence, due process of the law and independence of the judiciary.

38. Defence lawyers face great difficulties ranging from not being informed of the dates and venues of the trials, to not being allowed to meet the detainees in private in advance of the trials. The right to defence through proper legal representation has to be ensured in law as well as in practice. Lawyers must be allowed to defend clients without harassment and without the threat of charges for the contempt of court. However, the Special Rapporteur has continued to receive disturbing information on the conviction of defence lawyers for contempt of court. The Contempt of Court Act (1926) contains such brief and broad formulations that it is open for any arbitrary interpretations. Some 11 lawyers are currently imprisoned. In this regard, the Special Rapporteur would like to flag to the Government the Basic Principles on the Role of Lawyers.

39. The Special Rapporteur repeats his call for the termination of the detention of Daw Aung San Suu Kyi under house arrest, which is in contravention to international and domestic law. He regrets the decision of the Supreme Court to reject her appeal against her house arrest on 26 February 2010. He regrets also that the Government did not grant his special request to meet with Daw Aung San Suu Kyi on his third mission.

40. While the Special Rapporteur again commends the Government for the effective moratorium on the use of death penalty, he regrets that lower courts continue to hand down death sentences. During his last mission, the Special Rapporteur raised this issue with the Attorney General and Chief Justice as a step backwards for Myanmar.

41. The Special Rapporteur is also deeply concerned about reports that Aung Ko Htay, a child soldier, now aged 16, has been sentenced to death for involvement in the killing of a soldier during a fight. He was recruited into the army when he was 14 years old. The Convention on the Rights of the Child, to which Myanmar is a State party, prohibits the execution of people for offences committed under the age of 18. According to the country's Child Law (1993), chapter XVIII, article 71, a child should not be punished by death or imprisonment exceeding 10 years.

42. During the Special Rapporteur's second mission to Myanmar, the Chief Justice accepted his recommendation to engage with the Special Rapporteur on the independence of judges and lawyers. However, when the latter sent a visit request in March 2009, the Government replied in April that it had other commitments. The Special Rapporteur on the situation of human rights in Myanmar again raised this recommendation on his third mission. The Chief Justice again said that the Government of Myanmar would welcome the Special Rapporteur on the independence of judges and lawyers. Such a mission would be an indication of seriousness in addressing the problem of judicial independence and impartiality.

C. Freedom of expression, assembly and association in the light of the 2010 elections

43. The freedom of opinion and expression, as well as, freedom of assembly and association are fundamental rights enshrined in the UDHR and are guaranteed by international human rights treaties including those to which Myanmar is a State party, namely, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention concerning Freedom of Association and Protection of the Right to Organize, 1948 (No. 87) of the International Labour Organization (ILO). These freedoms are essential for the functioning of a democratic society, critical for the organization of meaningful and credible elections, and necessary for reflecting the diversity of a multi-ethnic society. They are exercised through the existence of an independent media, vibrant civil society and independent trade unions.

44. As 2010 is the year announced for holding national elections, freedom of opinion and expression, as well as assembly and association, are more necessary than ever. The elections cannot be free, fair, transparent and inclusive, in accordance with international standards, without those freedoms. At present essential conditions allowing for the exercise of these rights do not exist in Myanmar. Dissenting voices are not allowed, and all publications are subject to censorship by the Press Scrutiny and Registration Board of the Ministry of Information. Other censorship boards exercise control in the field of arts and culture. Journalists exercise a high level of self-censorship in order to survive or otherwise risk seeing their licences revoked as has happened to many journals and magazines.

45. There are currently at least 12 journalists and many more bloggers in prison. In effect, many of the other prisoners of conscience are incarcerated for offences that are linked to a denial of this freedom, or sometimes charged for completely unrelated offences.

46. In its resolution 64/238, the General Assembly strongly calls upon the Government of Myanmar to lift restrictions on the freedom of assembly, association, movement and freedom of expression, including for free and independent media, including through the openly available and accessible use of Internet and mobile telephone services, and ending the use of censorship. In his previous report, the Special Rapporteur indicated several domestic laws that restrict the principles of freedom of association and assembly: most importantly, the Unlawful Association Act (1908), the State Protection Act (1975), as well as sections 143, 145, 152, 505, 505 (b) and 295 (A) of the Penal Code.

47. These laws continue to be used to restrict freedom of expression and association. With regard to freedom of opinion and expression, the Television and Video Law (1985), the Motion Picture Law (1996), the Computer Science Development Law (1996), Electronic Transactions Law (2004) and the Printers and Publishers Registration Act (1962) are being used to censor the media.

48. It is important to note that these laws are in contravention of international law, *inter alia* articles 19 and 20 of the Universal Declaration of Human Rights, articles 13 and 15 of

the Convention on the Rights of the Child, as well as ILO Convention 87, to which Myanmar is a State party, and which explicitly calls upon Governments to ensure the full enjoyment of freedom of expression and association. As a State party to these conventions and a Member State of the United Nations, the Government of Myanmar should ensure compliance of domestic laws with its international obligations.

49. A review of national laws to ensure they are in compliance with international standards is one of the Special Rapporteur's four core human rights elements. According to the Attorney General, the Government has been reviewing national legislation and has found that half are not in line with the new Constitution, and 50 laws will be deleted. Some laws remain to be reviewed, but that should be completed before the end of the year. No details were provided on the specific laws mentioned above, which the Special Rapporteur enquired about during his third mission.

50. The Special Rapporteur has received information that several journalists have been convicted under the Electronic Transactions Law and the Television and Video Law. He remains concerned about restrictions on the media, including censorship of newspapers, the Internet and other sources of information, and the threatening of journalists with heavy prison sentences under the above-mentioned laws. Win Zaw Naing, 24, has been held since December 2009 by police in the Yangon district of Kyauktada, where he has not been allowed to see a lawyer. He was arrested under article 33 (a) of the Electronic Transactions Law, which provides for sentences of up to 15 years in prison. He was arrested for posting photos of the September 2007 protests, including of Buddhist monks, on his blog. According to reports, freelance reporter Hla Hla Win, age 25, was arrested in September 2009 after visiting a Buddhist monastery in the northern town of Pakokku. She was sentenced to 20 years in prison on 31 December 2009 for an alleged violation of the Electronics Transactions Law. A man accompanying her was sentenced to 26 years in jail.

51. In Sittwe prison, the Special Rapporteur met Aung Tun Myint, age 33, a video journalist, who was arrested in 2008 for filming outside a polling station during the referendum on the new Constitution. Although the polling station was in Yangon, which is not near any border, he was sentenced to three years in prison under charges related to the immigration act. His three video cameras and mobile phone were confiscated, and he lost his work including interviews from the Cyclone Nargis aftermath.

52. The Special Rapporteur has continued to receive information about ongoing restrictions on the right to form trade unions. Several individuals have been detained, convicted and sentenced to long terms in prison for their association with trade unions, including the banned Federation of Trade Unions of Burma.

53. In Buthidaung Prison, the Special Rapporteur met Kyaw Min, age 23, who received a 28-year sentence for his activities related to organizing workers. He noted that everything he and his colleagues did was within the bounds of the law.

54. The Special Rapporteur was informed by the Minister of Labour of discussions between the Government and ILO about assistance in drafting a trade union act. The Special Rapporteur welcomes this initiative and hopes that the law will conform to international standards.

55. The continuous building of democracy, which is the aim of the seven-step road map as declared by the Government, requires the active participation of civil society including independent NGOs. Organized groups such as associations of monks, students and human rights defenders have been harshly suppressed. Currently some 500 monks and students remain imprisoned. The well known 88 Generation Students group has been punished most severely for advocating peaceful democratic changes. Many of its prominent members have been arrested and sentenced to lengthy prison terms. During his last mission, the Special Rapporteur met two of its leaders, Htay Kywe in Buthidaung and Than Tin in Sittwe,

serving 65-year sentences far from their homes. Prisoners of conscience like these who believe in peaceful national reconciliation and democratic changes must be released to play a legitimate and important role in the upcoming elections.

56. On 3 August 2009, the Special Rapporteur, along with the Special Rapporteur on the situation of human rights defenders and the Chairperson for the Working Group on Arbitrary Detention, wrote an urgent appeal regarding the arrest and detention of 27 members of the National League for Democracy. Three other members of the League were arrested around the same time, but later released. The Government responded on 29 November that these members were attempting to create unrest and were questioned by the police and released on the same day. In section 151 of the Code of Criminal Procedure, it is provided that a police officer has the right to arrest any person who intends to commit a crime without an order and warrant issued by a criminal judge if it appears to the police officer that there is no other way to prevent the crime.

D. The Constitution and transition to democracy

57. The Special Rapporteur has previously noted the problem of impunity in Myanmar, and he has called for prompt measures to establish accountability and responsibility with regard to widespread and systematic human rights abuses. The Constitution contains one article in chapter XIV on transitory provisions which could be seen to enshrine impunity through permanent amnesties for crimes committed by military leaders and civilian personnel and requires clarification. Article 445 states that “no proceeding shall be instituted against the said Councils [State Law and Order Restoration Council and the State Peace and Development Council] or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties”.

58. Article 352 states that “the Union shall, upon specified qualifications being fulfilled, in appointing or assigning duties to civil service personnel, not discriminate for or against any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, and sex. However, nothing in this Section shall prevent appointment of men to the positions that are suitable for men only”. The Committee on the Elimination of Discrimination against Women in reviewing the periodic report submitted by Myanmar in November 2008 expressed concern that this and other provisions in the new Constitution may be incompatible with the Convention.

59. The provisions in the Constitution are currently confined to citizens, and the very restricted requirement of having both parents as nationals of the country for citizenship will render some people stateless. It is estimated that there are over 723,000 people without citizenship in Myanmar.

60. The Special Rapporteur notes that it is important to recognize that under international human rights law, some fundamental rights are non-derogable and that the derogation of certain rights in case of declared emergencies is clearly defined. In addition, he wishes to reiterate the principles he has outlined with regard to restrictions on the enjoyment of human rights. They shall (a) be defined by law, (b) be imposed for one or more specific legitimate purposes, and (c) be necessary for one or more of these purposes in a democratic society, including proportionality. Any limitation which does not follow these requirements and jeopardizes the essence of the right with vague, broad and/or sweeping formulas, would contravene the principles of legality and international human rights law.

E. Protection of civilians

61. The Special Rapporteur remains deeply concerned about ongoing conflict in border areas, particularly in eastern Myanmar. Since 1996, up to 1 million people in Myanmar, half of them in the eastern part of the country, have been displaced. Entire communities have been forced to relocate and their houses and food supplies burned to prevent their return. Those who refuse forced relocations and choose to hide risk military attacks. While the number of conflict-affected areas has been reduced with ceasefire agreements, armed clashes affecting civilians caught in the middle continue to be reported.

62. It is estimated that there are over 184,000 refugees originating from Myanmar. An estimated 2 million migrants from Myanmar are currently found in Thailand. Thousands of ethnic Chin have crossed the border to the State of Mizoram in India, where some 75,000–100,000 undocumented Chin from Myanmar live. Muslim residents from Northern Rakhine State of Myanmar continue to seek asylum in neighbouring countries and beyond. Approximately 28,000 are residing in two refugee camps in Bangladesh and have been there since 1991 in addition to about 100,000–200,000¹ residing in Bangladesh with no legal status. There are also some 40,000 individuals of concern from Myanmar in Malaysia.

63. The presence and conduct of the military are central to the plight of these civilians. Military operations have placed a particularly heavy burden on rural populations, affecting their ability to sustain livelihoods. There have been numerous and frequent reports of civilians being forced to serve as porters and guides for the military, to build and maintain roads, to construct military camps and to labour for infrastructure projects. Cases of rape and sexual violence, many of them against young girls and adolescents, have been reported by human rights organizations over the past years as committed by military personnel. As with all allegations of serious human rights violations, proper investigations must be conducted and justice provided to the victims.

64. While civilians living in conflict affected areas live in fear of being suspected as sympathizers of armed rebel groups, they are also vulnerable to abuses by some rebel groups.

65. The Special Rapporteur is alarmed by the dire human rights situation in Shan State. Since 27 July 2009, it is reported that the military have burned down over 500 houses and scores of granaries, and forcibly relocated almost 40 villages, mostly in the Laikha township. According to reports, over 100 villagers, both men and women, have been arrested and tortured. At least three villagers have been killed. This would be the largest forced relocation since 1996–1998, when over 300,000 villagers in southern and central Shan State were displaced.

66. Battles between Government forces and ethnic groups in Shan State in August 2009 and along the Thai border region in June 2009 have raised serious concerns about security both inside Myanmar and its spillover effects in neighbouring countries. As many as 37,000 people may have fled into Nansan County in China to flee fighting between Myanmar Government troops and Kokang fighters. Despite Government control of the Kokang territory following these battles, the situation in north-eastern Myanmar remains tense according to reports received by the Special Rapporteur.

67. The Special Rapporteur is seriously concerned about the continuing armed conflict in Kayin State, which severely affects the civilian population. It has been reported that in Hsaw Law Kho village, three villagers were killed and over a dozen more tortured by

¹ According to estimates of the Government of Bangladesh.

Infantry Battalion No. 48, in the Than Tha Bin Township in the Pegu Division on 5 November 2009.

68. The Special Rapporteur reminds the Government of its obligations to fully implement Legislative Order No. 1/1999 on the Eradication of Forced Labour. The Special Rapporteur has received specific reports about human rights abuses in relation to extractive industry projects.

69. The Special Rapporteur urges the Government and all armed groups to ensure the protection of civilians, in particular children and women, during armed conflict. In this regard, recruitment of child soldiers, displacement of villagers, the use of anti-personnel landmines and the forced labour of civilians should stop without any delay.

70. He calls upon the Government to abide by international humanitarian law, especially the four Geneva Conventions to which Myanmar is a party. In particular, article 3 of the Geneva Conventions provides for the protection of civilians from inhumane treatment and violence to life and person.

71. Since 2000, the Security Council has passed four resolutions finding that the growing use of violence against women in situations of armed conflict threatens international peace and security. Resolutions 1325, 1820, 1888 and 1889 require that specific measures be taken to ensure women's right to equality and justice both during and after conflict.

72. The Committee on the Elimination of Discrimination against Women has expressed deep concern at the high prevalence of sexual and other forms of violence, including rape, perpetrated against rural women from the Shan, Mon, Karen, Palaung and Chin ethnic groups by members of armed forces. The Committee also expressed concern at the apparent impunity of the perpetrators of such violence, although a few cases have been prosecuted, and at reports of threats against and intimidation and punishment of the victims.

73. The use of anti-personnel mines along Myanmar's border areas, particularly in the east, endangers villagers. Both the military and non-State armed groups use anti-personnel mines. It is reported that from May until June 2009 and again since September the Democratic Karen Buddhist Army has increased the number of landmines it has placed in civilian areas throughout the Bu Tho and Dweh Loh townships. According to the information, villagers are not being notified of the location of the new landmines, which are on busy paths used by villagers, in farm field huts, around paddy fields and along the banks of canals.

74. Of grave concern are reports that civilians are forced by the military to clear brush in suspected mined areas or to serve as porters for the military in areas where there is a mine hazard. According to sources, civilians have been ordered to remove mines without training or protective equipment or to repair fences of mined areas, which have caused serious casualties. The Special Rapporteur calls for a moratorium on the use of landmines and for Myanmar to accede to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997), which some 156 states have already ratified, acceded to, accepted or approved. He encourages the authorities to seek effective international cooperation and support in order to begin demining efforts and to provide support to victims of landmines.

75. The Special Rapporteur commends the efforts of the Committee on the Prevention of Military Recruitment of Underage Children, which include: the education of officers, military personnel and communities on the law regarding recruitment of underage children and the purpose and activities of the Committee; training on adhering to the law; discharging soldiers who were found to be underage; and investigating complaints received from ILO on forced military recruitment. Nevertheless, reports from numerous reliable

sources of ongoing recruitment and the estimates of upwards of thousands of underage soldiers call for increased measures against recruiting officers and generals.

76. Despite measures by the Government of Myanmar to prevent and halt the recruitment and use of child soldiers, these practices still persist in the military and by non-State actors. Children from vulnerable poor families are particularly at risk of being lured into the military with promises of jobs and food. There have been reports of threats of arrests to children who refuse to join the military.

77. In 2009, ILO received 78 complaints concerning underage recruitment, of which 34 led to releases that year; an additional 10 complaints received in 2008 led to discharges in 2009. According to information received by the Special Rapporteur, the Government has released 278 child soldiers.

78. The Working Group on Children and Armed Conflict released its conclusions on Myanmar on 28 October 2009 (S/AC.51/2009/4) which included strong condemnation of all recruitment and use of children in violation of national and international law as well as deep concern about continued lack of humanitarian access particularly in contested and ceasefire areas.²

79. Non-State armed groups have recruited and used children, including through forced recruitment. Although the situation has been well documented by several NGOs, due to the restrictions in access to the border areas the United Nations has been unable to monitor and verify the presence of children in these groups. A United Nations country task force has been established as a monitoring and reporting mechanism, but the effective functioning of such a mechanism requires strengthened capacity, unhindered access, freedom of movement and witness protection guarantees. The ILO complaint mechanism on forced labour encompasses recruitment of child soldiers and should be given the conditions and means to operate effectively, including strengthened capacity of the office.

80. Recruitment of child soldiers is a crime for which perpetrators must be held accountable in accordance with the law. Only legal prosecution of those involved will contribute to ending this practice. The Working Group on Children and Armed Conflict urged the Myanmar Government to prosecute as a matter of priority persons responsible for crimes committed against children.³ Punitive measures taken to punish those involved in the recruitment of child soldiers have been disproportionately light and largely ineffective.

81. The Special Rapporteur also encourages the Government to apply the principle that child recruits cannot be found guilty of desertion and to adjust its policies to ensure that children are not charged with desertion in the first place, and are not subject to any criminal charges, imprisonment or any other form of harassment. There appears to be a practice of arresting former child soldiers for desertion some years after the fact.

82. The Special Rapporteur raised the case of Myo Win with the Minister of Labour. Myo Win was arrested in September 2009 for desertion and sentenced to seven years in a military court without a lawyer. He had been forcibly recruited into the military in 1996 while still in school but escaped back home after spending four and a half months in training and a week in his regiment.

² Para. 6 (b) and (c).

³ S/AC.51/2009/4, para. 7 (c) (iii).

F. Discrimination

83. Non-discrimination is a well-established fundamental human rights principle, explicitly referred to in the Universal Declaration of Human Rights (art. 2), as well as in the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women. Article 4, paragraph 1 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992 Declaration on Minorities) spells out the responsibility of the State to ensure that persons belonging to minorities exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.

84. The Special Rapporteur calls upon the Government to ensure that ethnic minorities are granted fundamental rights. The ethnic minorities in Myanmar should have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination, in accordance with the 1992 Declaration on Minorities. Policies that prevent teaching in ethnic languages in ethnic populated areas need to be changed. Ensuring the enjoyment of culture rights for ethnic minorities would contribute to the richness of Myanmar as a diverse and multi-ethnic country and would contribute to its political and social stability.

85. In the light of the 2008 Constitution, especially articles 34 (freedom of religion), 347 (equal rights of all persons before the law), and 348 (prohibition of discrimination based on race, birth, religion, official position, status, culture, sex and wealth), the Special Rapporteur urges the Government to undertake the amendment of domestic laws to ensure the full enjoyment of human rights without discrimination for all people in Myanmar.

86. During his last mission, the Special Rapporteur visited Northern Rakhine State. He is deeply concerned about the systematic and endemic discrimination faced by the Muslim community, known as the Rohingya, in this State. This discrimination, which is framed as an immigration problem, leads to basic and fundamental human rights being denied to this population. Measures taken against this population include restriction of movement, limitations on permission to marry, and forced labour.

87. The Special Rapporteur urges the Government to end the unacceptable discrimination, human rights abuses and resulting severe economic deprivation they face. This ethnic minority continues to be denied citizenship, under the 1982 Citizenship Act, which contravenes generally accepted international norms to ensure that there is no State-sanctioned discrimination on the basis of religion and ethnicity. The right of children to nationality and registration at birth are guaranteed by the Convention on the Rights of the Child.

88. Since 1994 the Myanmar authorities have refused to issue birth certificates to many Muslim children. As a consequence of their statelessness, these children face discrimination with regard to education, health care and employment.

89. Unlike other people of Myanmar, this Muslim community must apply for papers from Nasaka, the border and immigration forces in Northern Rakhine State, which checks for citizenship and age of majority, in order to get married. 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. As a consequence, many Muslims are arrested and sentenced up to five years in prison for offenses relating to these requirements. The majority of the prison population of Buthidaung were Muslim, most of them for charges related to immigration or marriage offenses. However, the Supreme Court in 2009 overturned two convictions for illegal marriage. The Special Rapporteur urges the Government to consider these rulings and to

release all those prisoners currently serving sentences for illegal marriage, a topic he raised with the Chief Justice during his last mission.

90. The Special Rapporteur notes that the Government should comply with the conclusions of the Committee on the Rights of the Child, which recommended that the Citizenship Act be repealed⁴ and that in the light of articles 2 (non-discrimination) and 3 (best interests of the child) of the Convention, “abolish the categorization of citizens, as well as the mention on the national identity card of the religion and the ethnic origin of citizens, including children. In the view of the Committee, all possibility of stigmatization and denial of the rights recognized by the Convention should be avoided.”⁵

91. Also of concern are the extreme restrictions on movement placed on this Muslim population due to their lack of citizenship, which limits their employment opportunities. The situation of poverty appears to be exacerbated by the frequent imposition of arbitrary taxes and forced labour, which has been on the rise since November 2008, as a consequence of military expansion in the area, as well as by the construction of a barbed wire fence along the border in March 2009 to prevent Muslims from travelling back and forth.

92. The impact of these policies of discrimination is felt through family and social breakdowns in the community. The situation has resulted in the exodus of many from the community. In 2009 hundreds attempted the dangerous journeys by boat, risking their lives at sea. Some were pushed back to the sea. Others remain in detention facilities in the countries where they landed. The risk of another mass exodus of people remains unless the economic and social conditions for the community are adequately addressed with respect for their fundamental human rights.

93. In Rakhine State, it is said that only 13 per cent of households are able to meet their food needs for the entire year, and 26 per cent of the population suffers from malnutrition. Between 70 and 90 per cent of a household’s income is allocated to food purchase. Only 30 per cent of the population is said to receive public health care. A third of the population has no access to clean water. Prevalent causes of mortality are malaria, diarrhoea, respiratory and skin infections, intestinal parasites and cholera. The maternal mortality rate is much higher than in the rest of Myanmar (380 women per 100,000 births). There are three doctors per 430,000 people in Maungdaw, and two per 280,000 in Buthidaung.

94. The Special Rapporteur commends the Government on its agreement to extend and strengthen the presence of the Office of the United Nations High Commissioner for Refugees in Northern Rakhine State, and its identification of key social and economic areas for cooperation, which will be facilitated by the support announced by some donors. The Special Rapporteur hopes that all members of the United Nations Country Team could contribute to this cooperation in the identified areas.

G. Living conditions, sustenance, humanitarian assistance

95. The enjoyment of economic, social and cultural rights is seriously impeded by the social, economic and development conditions in the country, affecting the most vulnerable populations, including those in remote states and those recovering from Cyclone Nargis. This vulnerability is the result of the Government’s policies, and is further exacerbated by the impact of the global economic crisis, food insecurity and climate change.

⁴ CRC/C/15/Add.69, para. 28.

⁵ *Ibid.*, para. 34.

96. The Special Rapporteur recalls that it is the duty of the Government of Myanmar to expend available resources to address the realization of basic economic, social and cultural rights. The denial of economic, social and cultural rights has had devastating effects in Myanmar, affecting an immense proportion of the population. Serious investment in the public service sector is urgently needed in order to make available affordable and accessible health care, education, and social security coverage.

97. Infant mortality remains high, with an estimated 1 in 10 births resulting in the death of the infant. More than 25 per cent of the population lacks access to safe drinking water. Approximately half of the malaria deaths in South-East Asia occur in Myanmar. More than 30 per cent of Myanmar's children are chronically malnourished. The national prevalence of underweight and stunting among children under 5 years is 32 per cent.

98. The Government of Myanmar spends 0.5 per cent of the gross domestic product (GDP) on health, and 0.9 per cent of GDP on education, while the military and State-owned enterprises together account for 80 per cent of total State spending.

99. Regional disparities in poverty remain alarming. While the figure for people below the official food poverty line is 10 per cent countrywide, it is 40 per cent in Chin, 21 per cent in northern Shan State, and 20 per cent in eastern Shan State, according to estimates.

100. In Chin State, the evolving food crisis remains of great concern. According to information received, up to 100,000 people in more than 200 villages are in need of food aid, most urgently in the southern townships of Matupi and Paletwa.

101. Scarcity of food is also reported in Northern Rakhine State, Kayin State, North and East Shan State, and the cyclone-affected areas. According to reliable sources, nearly 5 million people are in need of food aid.

102. Myanmar's earnings from natural gas are recorded at the official exchange rate for the kyat, which overvalues the currency by 150 to 200 times its market value. According to reliable sources, it is estimated that in 2009 the Government of Myanmar earned almost \$3 billion in revenues from sales of oil and natural gas. Since 2000, \$4.8 billion of \$4.83 billion of the Government's revenues on the Yadana Project appears not to have been included in the national budget.

103. Nobel laureate Joseph Stiglitz, during his participation in a forum in Yangon in December 2009 sponsored by the Government and the Economic and Social Commission for Asia and the Pacific, noted that revenues from oil and gas provided an opportunity for the Government to "open up a new era if used well". In fact, the Government of Myanmar is obligated by international treaties to which it is a State party to expend these available resources to the furtherance of the economic, social and cultural rights of the people of Myanmar. The Government's compliance with the obligation to take appropriate measures is assessed in the light of available resources. Article 4 of the Convention on the Rights of the Child states: "With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation."

104. With regard to the health sector, the Special Rapporteur notes that the right to health remains an obligation of the Government of Myanmar. Vulnerable groups, including widows and orphans, need special attention and protection as laid down in the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women.

105. An estimated 240,000 people are thought to be living with HIV/AIDS in Myanmar. Among them, 76,000 are in urgent need of antiretroviral treatment, yet less than 20 per cent of them currently have access to it. In 2008, about 25,000 people died of AIDS-related illnesses.

106. The Special Rapporteur welcomes the return of The Global Fund to Fight AIDS, Tuberculosis and Malaria to Myanmar in November 2009. The Global Fund has agreed to provide Myanmar with \$110 million to fight HIV/AIDS, malaria and tuberculosis, after pulling out of the country in 2005.

107. Although it is over a year and a half since Cyclone Nargis ripped through the Irrawaddy Delta, killing 140,000 and leaving 2.4 million destitute, the situation remains fragile. The Special Rapporteur welcomes the achievements of the Tripartite Core Group, established in May 2008 by the Government of Myanmar, ASEAN and the United Nations, in its relief efforts. The Post-Nargis and Regional Partnership Conference, held on 25 November 2009 in Bangkok, reported that shelter was the most important need identified for now. There was still an overall gap of 178,000 households that required urgent shelter assistance and that had been waiting for support from the humanitarian community for over a year.

108. Myanmar receives one of the lowest levels of overseas development assistance. Donors cite the human rights situation as a key obstacle, along with issues of access and other restrictions on the delivery of aid. However, the social development indicators of the country call for concerted action and support. Urgent measures are required to ensure the most basic human rights of the most vulnerable people, especially those ethnic communities residing in remote border areas. According to the *Human Development Report 2009*, Myanmar is still one of the least developed countries, ranking 138th of 182 nations on the human development index, despite its rich natural resources.

109. Commitments by the authorities in addressing barriers to development assistance would be the fundamental step in encouraging stronger international support, such as lifting administrative restrictions that threaten to limit the work of NGOs and aid workers, and the release of those who have been imprisoned for involvement in post-Nargis relief efforts.

110. Access to international agencies and organizations would help facilitate not only humanitarian work but would also help verify information coming out of border areas and other restricted zones which, in complaints, the Government has characterized as inaccurate and resulting from malicious reports deliberately made by opposing forces.

111. The Special Rapporteur is aware of reports of human rights abuses associated with large-scale development projects in Myanmar, in relation to oil and gas industries, mining and the building of large-scale dams. The alarming depletion of resources in Myanmar is of concern, as is the relationship between the extractive industries and a vast array of human rights violations. In Myanmar the mining of gold, gemstones, copper and other plentiful mineral resources has been linked to land confiscation, forced labour, and violations of the right to a healthy environment and the right to water.

112. It has been reported that extraction activities have directly resulted in an increase in human rights and environmental abuses committed by the military against the people living along the PTT Exploration and Production Public Company Limited's Yadana and Yetagun gas pipeline projects in the Tenasserim region of Myanmar. Reports highlight the close relationship between the extraction companies and the armed forces. The companies rely on the Myanmar military to provide security for their projects. Similar negative impact is caused in the context of the Kanbawk to Myaing Kalay gas pipeline project, operated by the Myanmar Oil and Gas Enterprise, and the Shwe gas pipeline project, the majority stakeholder of which is Daewoo International. According to reports, there is rampant use of forced labour in the areas.

113. The Special Representative on the issue of human rights and transnational corporations and other business enterprises has defined the policy framework in regard to this issue (see A/HRC/8/5). The framework rests on three complementary pillars: the State duty to protect against human rights abuses by third parties, including business, through

appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non-judicial. The Special Rapporteur hopes that this policy framework is incorporated and applied in Myanmar by all parties concerned.

H. Developing cooperation in the context of human rights

114. The Special Rapporteur welcomes the cooperation between the United Nations Country Team and the Governmental human rights body. In this context, the Special Rapporteur encourages the Member States of the United Nations and the donor community to provide adequate resources and the necessary environment to the United Nations and financial institutions to assist the Government of Myanmar in achieving the Millennium Development Goals. Children, women and all people of Myanmar should be given the same opportunity as those in any other Member State to achieve their economic, social and cultural rights. At the same time, the Special Rapporteur calls upon the Government of Myanmar to cooperate with international organizations by facilitating necessary visas and allowing access for effective delivery of aid.

115. Myanmar is party only to the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. However, as a Member State of the United Nations, it is still bound by the Universal Declaration of Human Rights proclaimed on 10 December 1948 and subsequent Declarations adopted by the General Assembly.

116. The Committee on the Elimination of Discrimination against Women considered in November 2008 the second and third reports of Myanmar covering the period 2000–2006. The Government should take heed of the Committee's requests that the State party provide, within one year, written information on the steps undertaken to implement the recommendations contained in paragraph 29 regarding the pursuance of sustained policies aimed at the promotion of women's full and equal participation in decision-making in all areas of public, political and professional life, and paragraph 43, regarding violence and discrimination against women in Northern Rakhine State, of its concluding observations (CEDAW/C/MMR/CO/3). The Committee also requested the State party to consider seeking technical cooperation and assistance, including advisory services, if necessary and, when appropriate, for implementation of the above recommendations.

117. The Special Rapporteur welcomes the extension of the Supplementary Understanding between the Government of the Union of Myanmar and the International Labour Office for one year from 26 February 2010. ILO operates, in agreement with the Government of Myanmar, a forced labour complaints mechanism which covers complaints of underage recruitment into the military and the inappropriate use of prison labour. Nevertheless, the Special Rapporteur remains disturbed by the situation of four farmers associated with forced labour complaints to ILO who, following the release of 10 farmers on 17 February 2010, are currently in prison on charges which clearly breach the spirit and letter of the protections provided in the Supplementary Understanding. He is also concerned about the situation of a facilitator and a lawyer who had assisted the farmers, who remain in prison on allegedly unrelated charges.

IV. Conclusions and Recommendations

118. **The Special Rapporteur would like to thank the Government of Myanmar for its increased cooperation in facilitating his brief but very intensive third mission.**

119. The recommendations that the Special Rapporteur has made to the Government since his first report to the General Assembly in September 2008 (A/63/341), including the four core human rights elements, still apply in the context of the announced intention to hold elections this year.

120. As the Special Rapporteur stated in previous reports, there is a pattern of gross and systematic violation of human rights which has been in place for many years and still continues. The human rights that are part of this pattern are broad-ranging and include the rights to life, to liberty, to personal integrity, to freedom of expression, assembly and religion, to judicial remedy and due process of law, to nationality, to protection of civilians and internally displaced communities and to prohibition against discrimination, among others.

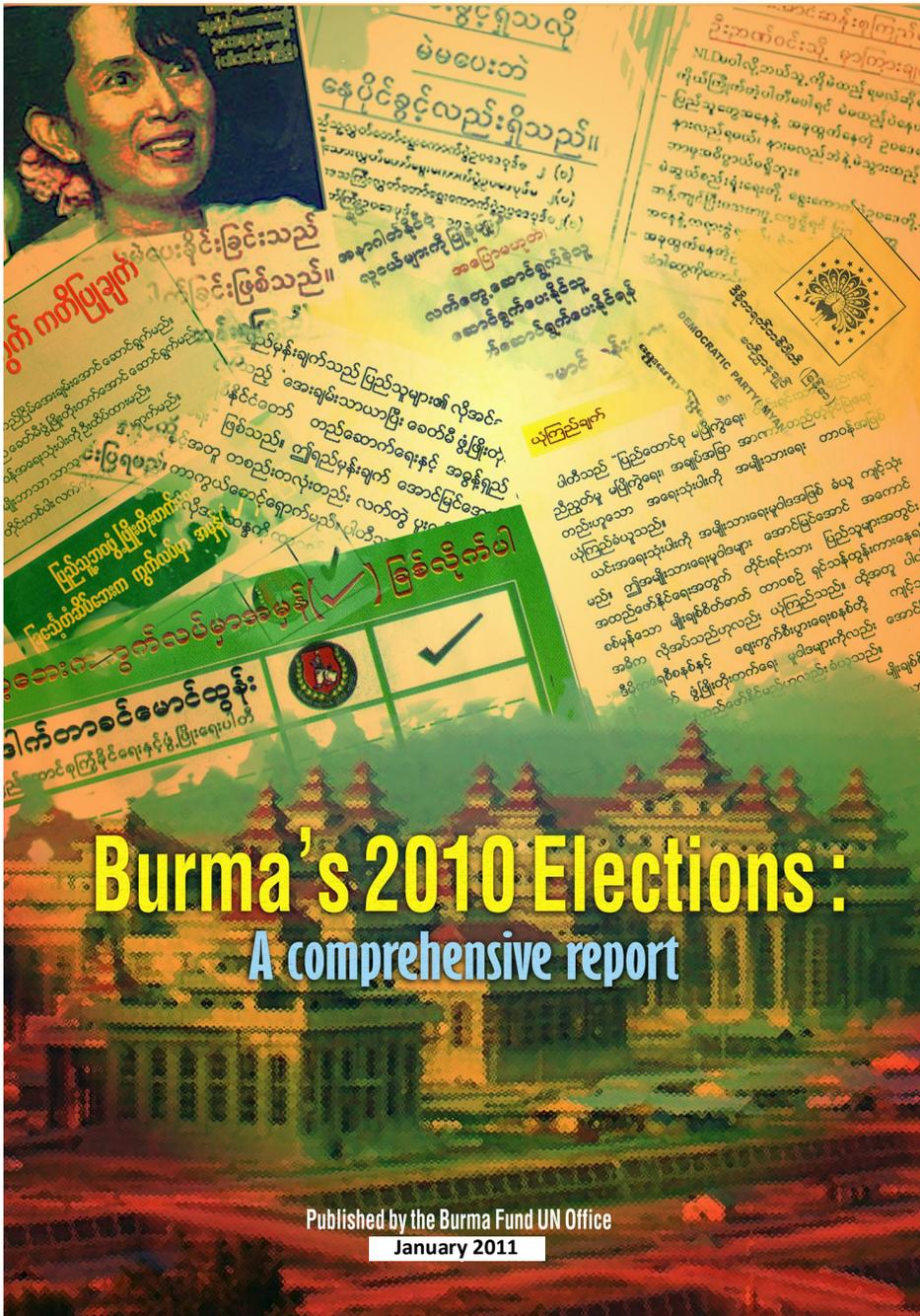
121. Given the gross and systematic nature of human rights violations in Myanmar over a period of many years, and the lack of accountability, there is an indication that those human rights violations are the result of a State policy that involves authorities in the executive, military and judiciary at all levels. According to consistent reports, the possibility exists that some of these human rights violations may entail categories of crimes against humanity or war crimes under the terms of the Rome Statute of the International Criminal Court.

122. The mere existence of this possibility obliges the Government of Myanmar to take prompt and effective measures to investigate these facts. There have clearly been cases where it has been necessary to establish responsibility, but this has not been done. Given this lack of accountability, United Nations institutions may consider the possibility to establish a commission of inquiry with a specific fact-finding mandate to address the question of international crimes. At this particular stage in the history of Myanmar, the State faces this critical assignment which must be addressed by this Government and by a newly elected Government as well.

123. With plans for the first national elections in 20 years, Myanmar faces an opportunity for positive change. Respect for human rights is a fundamental condition for that change to be positive. Nevertheless, during his last mission, the Special Rapporteur received no indication that all prisoners of conscience would be released, that freedom of opinion and association would be guaranteed in the context of these elections, and that ethnic communities would be able to fully participate. The Special Rapporteur hopes that the Government seriously considers and ultimately implements the necessary steps for ensuring credible elections and substantive changes to the human rights situation in Myanmar.

Annex 24

The Burma Fund UN Office, *Burma's 2010 Elections: A Comprehensive Report* (January 2011)



Burma's 2010 Elections :

A comprehensive report

Published by the Burma Fund UN Office
 January 2011

Burma's 2010 Elections: a comprehensive report

Published by the Burma Fund UN Office

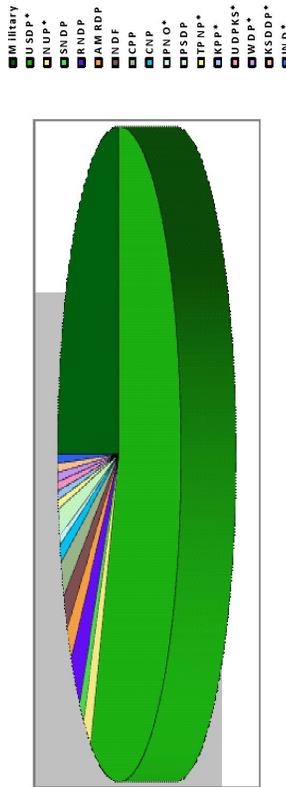
January 31, 2011

**The Burma Fund-UN Office, 777 UN Plaza, 6th Floor, New York, NY 10017, USA
Tel: +1-212-338-0048, Email: burma1un@igc.org**

Table 1: Members of Parliament (National Parliament) by State and Division

State&Division	Composition of the National Parliament																Total	
	USDP	SNDP	PNO	TNP	WDP	NUP	UDPKS	CPP	CNP	RNDP	PSDP	KPP	AMRDP	KSDD	NDF	Independent		Military Quota
Shan	7	2	1	1	1											1	4	16
Kachin	6	1				3	1										4	16
Chin	6						4	2									4	16
Arakan	5							7									4	16
Karenni	12																4	16
Karen	6										3	1	1	1			4	16
Mon	8					1							3				4	16
Tennasserim	12																4	16
Pegu	12																4	16
Rangoon	8														4		4	16
Irrawaddy	12														4		4	16
Mandalay	12																4	16
Sagaing	11																4	16
Magwe	12																4	16
Total:	129	3	1	1	1	5	1	4	2	7	3	1	4	1	4	1	56	224

Figure 3: Composition of the National Parliament



- INHERIT
- USDP*
- NUP*
- SNDP
- RNDP
- AMRDP
- NDF
- CPP
- CNP
- PNO*
- PSDP
- TNP*
- KPP*
- UDPKS*
- WDP*
- KSDDP*
- IN D*

Table 2: Members of Parliament (People's Parliament) by State and Division

State&Division	Composition of the People's Parliament																Total	
	USDP	SNDP	PNO	TNP	WDP	INDP	NUP	UDPKS	CPP	CNP	RNDP	PSDP	KPP	AMRDP	NDF	Independent		Military Quota
Shan	23	17	3	1	2	1	2									1		50
Kachin	14	1					2	1										18
Chin	5								2	2								9
Arakan	8										9							17
Karenni	7																	7
Karen	4											2	1					7
Mon	6						1							3				10
Tenasserim	10																	10
Pegu	26						2											28
Rangoon	37																	45
Irrawaddy	25						1								8			26
Mandalay	36																	36
Sagaing	34						3											37
Magwe	24						1											25
Total:	259	18	3	1	2	1	12	1	2	2	9	2	1	3	8	1	110	435

Figure 4: Composition of the People's Parliament

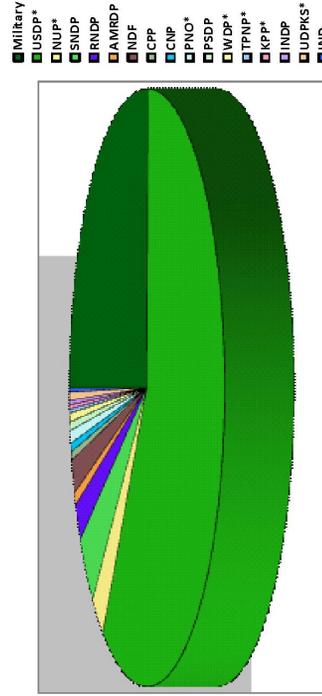
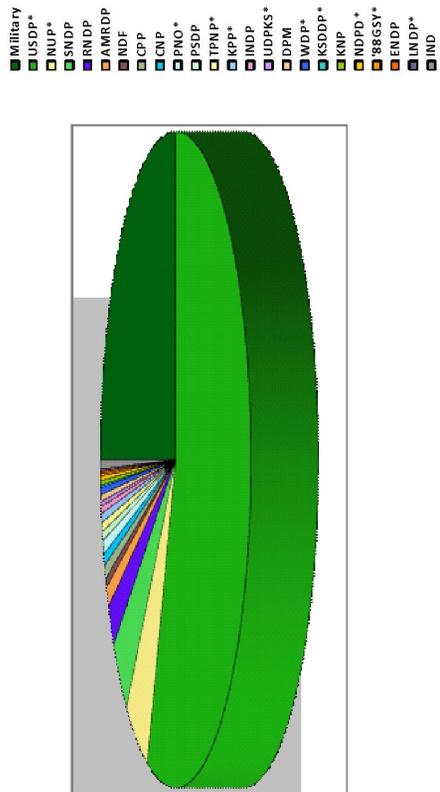


Table 3: Members of Parliament (Regional and State Parliament) by State and Division

State and Division	Composition of the Regional and State Parliament																	Total							
	USDP	SNDP	PNO	TNP	WDP	INDP	KNP	NUP	LNDP	UDP KS	CPP	CNP	ENDP	RNDP	NDPD	PSDP	KPP		AMRDP	KSDD	NDF	DP (M)	88 Gen	Independent	Military
Shan	54	31	6	4	3	3	2	1	1	2													2		107
Kachin	20	4						11															1		38
Chin	7										5	5	1												18
Arakan	14						1						18	2											35
Karenni	15																								15
Karen	7																2	2	1				1		17
Mon	14																	7							23
Tennasserim	20						1	1																	21
Pegu	51						5										1								57
Rangoon	75						8							1			1								92
Irrawaddy	48						6														4	2	1		54
Mandalay	56	1																							58
Sagaing	66						8			1															75
Magwe	47						4																		51
Total:	494	36	6	4	3	3	2	47	1	2	6	5	1	19	2	4	4	9	1	4	3	1	4	222	661

Figure 5: Composition of the Regional and State Parliament



Annex 25

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)



General Assembly

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2 April 2014

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Human Rights Council

Twenty-fifth session

Agenda item 4

Human rights situations that require the Council's attention

Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana*

Summary

In the present report, the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, looks at the current situation of human rights in Myanmar and reflects on the extent of the progress made during the course of his six years as the mandate holder.

* Late submission.

GE.14-12994



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Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1–3	3
II. Human rights situation	4–65	3
A. Prisoners of conscience	4–7	3
B. Conditions of detention and treatment of prisoners	8–11	4
C. Freedom of opinion and expression	12–21	5
D. Freedom of peaceful assembly and association	22–26	7
E. Human rights concerns in the context of development	27–32	8
F. Situation in ethnic border areas	33–41	9
G. Situation in Rakhine State	42–51	11
H. Democratic transition and establishing the rule of law	52–63	14
I. Truth, justice and accountability	64–65	16
III. Conclusions	66–72	17
IV. Recommendations	73–86	17

I. Introduction

1. The mandate of the Special Rapporteur on the situation of human rights in Myanmar was established pursuant to Commission on Human Rights resolution 1992/58 and was recently extended by the Human Rights Council in its resolution 22/14. The present report, submitted pursuant to Council resolution 22/14 and General Assembly resolution 68/242, covers human rights developments in Myanmar since the reports of the Special Rapporteur to the Council in March 2013 (A/HRC/22/58) and to the Assembly in October 2013 (A/68/397). The present report to the Council is the last by the current mandate holder before the end of his six-year term in May 2014.

2. From 14 to 19 February 2014, the Special Rapporteur conducted his ninth mission to Myanmar. He expresses his thanks to the Government for its cooperation during the visit. He visited Thailand from 10 to 13 February 2014 and also expresses his thanks to the Government of Thailand for its cooperation.¹

3. He continued to engage with the Government of Myanmar through its Permanent Representatives in Geneva and New York. He sent nine joint communications between 1 June and 30 November 2013 and, by 31 January 2014, the Government had replied to eight of those communications.²

II. Human rights situation

A. Prisoners of conscience

4. The Special Rapporteur highlights the release of prisoners of conscience as one of the most significant achievements of the Government of Myanmar. Since May 2011, there have been 15 presidential amnesties, resulting in the release of over 1,100 prisoners of conscience. The most recent amnesty, announced by the President on 30 December 2013, was aimed at fulfilling his pledge in July 2013 to release all political prisoners by the end of the year. The Special Rapporteur highlights that about 33 prisoners of conscience remain in detention, including Tun Aung, Kyaw Hla Aung and three international non-governmental organization (NGO) workers in Rakhine State. In Sittwe prison, he met with a Rohingya prisoner of conscience, Than Shwe, who had been detained because he had reportedly tried to meet with the Special Rapporteur during his visit to Buthidaung in August 2013. Furthermore, people are still being arrested and imprisoned for their peaceful political activities in Myanmar.

5. The Special Rapporteur notes that the presidential pardon of 30 December 2013 included those convicted and being prosecuted under the Peaceful Assembly and Peaceful Procession Act, the Unlawful Associations Act, articles 122, 124 (a) and 505 of the Penal Code, the Law to Safeguard the State from the Danger of Subversive Elements and the Emergency Provisions Act of 1950. However, the Special Rapporteur highlights that those

¹ For details of the ninth mission, see: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14263&LangID=E.

² Links to the communications referred to herein are contained in the communications reports of special procedures mandate holders submitted to the Human Rights Council at its twenty-fourth (A/HRC/24/21) and twenty-fifth (A/HRC/25/74) sessions.

laws remain on the books and new prosecutions are taking place under them, and urges the Government to expedite their abolition/amendment.

6. The Special Rapporteur commends the work of the prisoner review committee set up in February 2013 to identify remaining prisoners of conscience. He recommends that the Government continue to convene meetings of that committee and, furthermore, upgrade the status of the committee to enable it to investigate suspected cases of prisoners of conscience, including in Rakhine State, which entails access to prisons and the authority to question relevant state officials.

7. Referring to 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, the Special Rapporteur highlights the obligations of the State to former prisoners of conscience, which include equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms. Reparations involve restitution, including restoration of the enjoyment of human rights and of employment; compensation, including for economically assessable damage; rehabilitation, including medical and psychological care as well as legal and social services; satisfaction, including public disclosure of the truth, the restoration of the dignity, reputation and rights of the victim and a public apology; and guarantees of non-repetition, including ensuring effective civilian control of military and security forces and strengthening the independence of the judiciary. The Special Rapporteur is concerned that former prisoners of conscience are required to declare criminal records when applying for jobs, education or vocational training. This has a detrimental effect on their right to work and their access to education. Other difficulties faced on release included access to passports.

B. Conditions of detention and treatment of prisoners

8. The Special Rapporteur remains concerned about the ongoing practice of torture in places of detention in Myanmar and the absence of accountability. He recently wrote to the Government regarding the emblematic cases of Myo Myint Swe and Than Htun; the Government has provided formal replies.³ During his latest visit, the Special Rapporteur met with the family of Than Htun. Despite the extensive evidence to support the allegation that the police tortured Than Htun to death while he was in police custody, township and district level courts have refused to let the family file a criminal case against the police. The Special Rapporteur has also continued to receive allegations from Kachin State and northern Shan State that the military are arbitrarily detaining and torturing, during interrogation, young men suspected of belonging to ethnic armed groups.

9. Currently, prompt, effective and impartial investigations into allegations of torture against police and military personnel do not take place in Myanmar. For instance, no action has been taken on the Special Rapporteur's previous recommendation (A/68/397, para. 91 (i)) for an investigation into allegations of torture in Buthidaung prison. Furthermore, military and police personnel who are found to be responsible for committing acts of torture are not being transparently held to account through the criminal justice system and punished in a manner commensurate with the gravity of the offence. In the case of Myo Myint Swe, the responsible police personnel were subjected only to internal disciplinary measures, involving transfers, dismissals and reduction of police service.

³ See A/HRC/23/51, p. 10, and A/HRC/25/74, p. 46.

10. During his latest visit, the Special Rapporteur noted some positive steps towards tackling the practice of torture, including, as reported by the Minister of Home Affairs, the use of closed-circuit television (CCTV) cameras in all city police stations. He was informed by the Chief Justice that district and high court judges were now utilizing their powers under the new Judiciary Act to conduct prison inspections and sending recommendations to the Cabinet. He also notes the Government's continuing good cooperation with the International Committee of the Red Cross following the resumption of prison visits in January 2013.

11. On 2 January 2014, the President issued an order which commuted all death sentences to life imprisonment. The Special Rapporteur commends this move and recommends the abolition of the death penalty in Myanmar.

C. Freedom of opinion and expression

12. The Special Rapporteur notes the remarks made in December 2013 by the President, Thein Sein, that Myanmar would have an open and free society only if the ongoing political reforms continued.⁴ Since 2011, Myanmar has enjoyed a significant opening of space for people to exercise their right to freedom of opinion and expression. This has been seen in particular with the development of greater press freedom, which constitutes one of the cornerstones of a democratic society.

13. However, the Special Rapporteur highlights that there is a long way to go before Myanmar has a free, uncensored and unhindered press. During his latest visit, journalists described the prevailing climate of uncertainty, intimidation and fear of arrest, particularly if reporting dealt with issues too close to the interests of the military or other powerful elites. The Special Rapporteur underlines that this uncertainty is linked to the absence of the rule of law in Myanmar, in particular in the sense that the law is not accessible, intelligible, clear or predictable; the laws of the land do not apply equally to all; and the laws do not afford adequate protection to fundamental human rights, including freedom of opinion and expression.

14. On 17 December 2013, *Daily Eleven* reporter Ma Khaing, who was pursuing a story on corruption, was sentenced to three months in prison by a court in the Kayah State capital Loikaw (three months for trespassing, one month for defamation and one month for abusive language, to be served concurrently). In February 2014, an ethnic Rohingya Member of Parliament, Shwe Maung, was questioned over comments he reportedly made to the Democratic Voice of Burma news agency alleging police involvement in a fire that occurred in Maungdaw. Also in February, four journalists and the Chief Executive Officer of the *Unity* newspaper were arrested in connection with a report dated 25 January alleging the existence of a government chemical weapons factory in Magway Region and charged under article 3 (1) (a) of the 1923 State Secrets Act.

15. The Special Rapporteur highlights that extreme care must be taken by States to ensure that laws relating to national security are applied in a manner that conforms to international human rights standards. For instance, laws should not be invoked to suppress or withhold information of legitimate public interest that does not harm national security, or be used to prosecute journalists or others for having disseminated such information. Furthermore, when a State invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of

⁴ See www.myanmargeneva.org/pressrelease/radio%20speech%201%20dec.pdf.

the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.

16. The Special Rapporteur highlights that the value of uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain. Imprisonment for defamation is disproportionate to the offence and is never an appropriate penalty.

17. To help avoid resorting to criminal sanctions against journalists, the Special Rapporteur encourages the Ministry of Information to make greater use of the Interim Press Council to resolve disputes while ensuring that the right to freedom of opinion and expression is fully upheld. He also encourages reference to general comment No. 34 (2011) of the Human Rights Committee, which provides guidance on the implementation of the right to freedom of opinion and expression that is particularly relevant to Myanmar at this point in its democratic transition.

18. The Media Bill, drafted by the Interim Press Council, and the Printing and Publishing Enterprise Bill, drafted by the Ministry of Information, have both been passed by the lower and upper houses of the parliament and are now with the Union Assembly. The Special Rapporteur received assurances from the Minister of Information that the Ministry's bill had been amended to remove the power of a registration official, situated in the Ministry of Information, to grant and revoke publishing licences, and that the registration procedure with criminal penalties for violations had been replaced with a voluntary acknowledgement procedure which would play more of an enabling role for publishers, for example, in helping to resolve copyright disputes. While encouraged by those assurances, the Special Rapporteur is unclear on the details of the revisions and is still concerned about the remaining government licensing powers and content regulation in the draft law. He urges the Union Assembly to take into consideration his previous concerns regarding that bill (A/68/397, para. 16) when considering final amendments prior to adoption.

19. Laws that have previously been used to violate the right to freedom of opinion and expression remain on the books, including the 2004 Electronic Transactions Act and the 1950 Emergency Provisions Act. The Special Rapporteur was assured by the Minister of Information that those laws were currently being reviewed by respective departments and the parliament to ensure they were "in conformity with the current situation". The Special Rapporteur has yet to see the final outcome of the review of the laws or the passing of new laws relevant to media freedom, including a new broadcast media bill. He calls for continued monitoring and engagement in the process by national and international actors to help ensure those laws meet international human rights standards.

20. The Special Rapporteur reiterates the importance of developing a culture of ethical and responsible journalism. He is encouraged by the countrywide consultative process that the Interim Press Council, in collaboration with International Media Support, is currently engaged in to establish a code of ethics for journalists, which he hopes will include elements to counter hate speech. He was encouraged to learn from the Minister of Information of the work being done to promote professionalism in journalism, which includes the planned opening in July 2014 of a journalism school offering one-year diploma courses, as well as the development of other journalism courses for students and practitioners across the country. He highlights the importance of also training government departments' newly appointed spokespersons in ethical engagement with the media.

21. The relationship between the proscription of hate speech and the flourishing of freedom of expression should be seen as complementary. The Special Rapporteur is concerned that the Government is not fulfilling its international human rights obligation to

tackle incitement to violence based on national, racial or religious hatred. Community-based, political and religious groups have been conducting, with impunity, well-organized and coordinated campaigns of incitement to discrimination, hostility and violence against Rohingya and other Muslim minorities. The Government has a duty, under international human rights law, to investigate the nature and extent of the harm caused to persons and groups as a result of hostility and violence incited on the basis of racial or religious hatred, and to hold the perpetrators to account with proportionate punishments. For further guidance on tackling hate speech in accordance with international human rights standards, the Special Rapporteur highlights general recommendation No. 35 (2013) of the Committee on the Elimination of Racial Discrimination.

D. Freedom of peaceful assembly and association

22. On 30 November 2013, President Thein Sein spoke of the need to restore the “long-weakened trust” between the Government and the people and of the Government’s intention to intensify its cooperation with civil society organizations. While acknowledging the important progress Myanmar has made since 2011 in upholding the rights of people to freedom of peaceful assembly and of association, the Special Rapporteur remains concerned that important legislative changes have not yet taken place to allow the President’s vision of further progress to be realized.

23. The presidential pardon of 30 December resulted in the pardoning of hundreds of people prosecuted for participating in peaceful assemblies. However, the problematic laws remain on the books and continue to be used; in January 2014, 10 people were charged under article 18 of the Peaceful Assembly and Peaceful Procession Act. People involved in protests concerning business and development projects, including land confiscation, remain particularly vulnerable to arrest. In Kachin State, the Special Rapporteur met with Bauk Ja, who had recently been released from detention following spurious charges the Special Rapporteur believes stem from her outspoken campaign against land confiscations in Hukaung Valley, Kachin State. Furthermore, the law is being applied in an arbitrary way, with other demonstrations that appear to align with Government interests being allowed to take place.

24. In February, the Chair of the Bill Committee of the upper house informed the Special Rapporteur that an amendment of article 18 of the Peaceful Assembly and Peaceful Procession Act was currently being discussed in the lower house and would later go to the upper house for consideration. The Special Rapporteur urges the parliament to ensure the amendment of article 18, including through the replacement of the permit system and criminal sanctions with a voluntary notification procedure (see A/68/397, para. 23).

25. The Attorney General informed the Special Rapporteur that discussions on repealing the Unlawful Associations Act and amending articles 143, 145, 152 and 505 of the Penal Code were ongoing in the parliament. The Special Rapporteur has been advocating for the amendment of those laws since the beginning of his mandate in 2008 and calls on the parliament to expedite their amendment.

26. The Special Rapporteur notes that a new associations law, to replace the 1988 Act relating to the Formation of Organizations, is still before the parliament. He welcomes the process of consultation with civil society and international organizations by the lower house’s Public Affairs Management Committee and Bills Committee on the bill and is, moreover, encouraged that the consultation led to significant improvements in the draft law which addressed some of the concerns raised in his previous report (A/68/397, para. 25). Most notably, criminal penalties (imprisonment for up to six months) for joining an unregistered organization and the compulsory registration requirement were reportedly

removed. However, the Special Rapporteur is concerned by updates received just prior to publication of the present report that some parliamentarians were trying to reinsert those provisions, and urges the parliament to ensure that the law meets international standards.

E. Human rights concerns in the context of development

27. The Special Rapporteur reiterates the importance of establishing a system of individual titling and tenure rights for smallholders to protect people against land appropriation and forced evictions, as the process of economic development proceeds. He met with residents of a village in northern Yangon who had recently been forcibly evicted and their homes demolished after being told they were living in a military zone. Forced evictions constitute a gross violation of a range of human rights related to housing, health, education, livelihoods and security of person. Furthermore, a collective or communal tenure system for land, fisheries and forests should be put in place to protect the access of local communities to common goods and ensure that the land can be converted to new uses only with their free, prior and informed consent. Amendments to the Farmland Law and the Vacant, Fallow and Virgin Land Law are also required (see A/68/397, para. 29). The Special Rapporteur stresses that issues relating to land rights will be one of the primary challenges for the Government over the years to come, which can only be addressed by respecting human rights standards and principles.

28. The Special Rapporteur is concerned that, due to the absence of an independent judiciary and the rule of law, people are currently not able to challenge decisions on evictions or claim their rights to just compensation in a court of law. Furthermore, those trying to claim their rights by peacefully protesting forced evictions and land confiscations are being subjected to excessive use of force by the police, arbitrary arrest and detention and criminal prosecution. For example, in August 2013, 10 protestors were reportedly arrested by police while peacefully protesting with about 50 local villagers against the Letpadaung copper mine project in Monywa, and subsequently charged under article 18 of the Peaceful Assembly and Peaceful Procession Act. Nine of the protestors were reportedly released after having signed a declaration that they would not protest again. The remaining protestor, Naw Ohn Hla, was convicted by Monywa Court on 29 August 2013 under article 505 (b) of the Penal Code and sentenced to two years of imprisonment. She was subsequently released on 25 November 2013 following the 15 November presidential amnesty.

29. During the Special Rapporteur's visit to the copper mines of Monywa in the Sagaing Region, he met with local residents and listened to their grievances over the Letpadaung copper mine, including with regard to forced relocation, loss of livelihoods (in particular farmers who had lost the land they had worked for generations) and health problems related to the proximity of the project. He also met with two monks who had been left badly scarred following the use of incendiary devices by police in their attempt to clear a protest site in November 2012. He is concerned that many of the recommendations from the parliamentary commission set up to help address local grievances have not been implemented, and urges the Government to address that.

30. In Monywa, he met with youths from a local school in Kangone village, who described the detrimental effect on their health that they believed the sulphuric acid plant in nearby Mogyoe had caused. To help address those concerns, he urges the publication of the environmental and social impact assessment of the Letpadaung copper mine and prompt follow-up to the recommendations. Furthermore, he urges the Government to make environmental and social impact assessments a legal requirement for all large-scale development projects in Myanmar.

31. The Special Rapporteur also met, in Monywa, with representatives from Wanbao, the Chinese company active in developing the copper mine at Letpadaung, who expressed their commitment to addressing the concerns of the local community. The Special Rapporteur highlights the responsibility of all investors and businesses to abide by the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (A/HRC/17/31, annex). He recommends that human rights impact assessments be incorporated into the environmental and social impact assessments undertaken by large-scale development projects, which requires meaningful consultations with potentially affected groups before the start of the project. He also highlights the guiding principles on human rights impact assessments of trade and investment agreements (see A/HRC/19/59/Add.5) as providing pertinent guidance on how Myanmar can ensure that the trade and investment agreements it concludes are consistent with its international human rights obligations.

32. The Special Rapporteur is encouraged by the good progress Myanmar has made in recent months in preparing for Extractive Industries Transparency Initiative candidature. Membership will help to improve openness and the accountable management of revenues from natural resources. With the full disclosure of taxes and other payments made by oil, gas and mining companies, the public will be able to see how much the Government is receiving from the country’s natural resources.

F. Situation in ethnic border areas

33. Ceasefire agreements have now been signed between the Government and 14 ethnic armed groups, which is a major achievement. The Kachin Independence Army and the Ta’ang (Palaung) National Liberation Army are the two major ethnic armed groups not to have signed. During his meeting with the Minister of the President’s Office, U Aung Min, the Special Rapporteur learned of the efforts to secure a national ceasefire accord by April and the plans for subsequent political dialogue.

34. Fighting continues in Kachin State and northern Shan State, with military operations ongoing against the Kachin Independence Army, the Shan State Army-North and the Ta’ang (Palaung) National Liberation Army. During his drive from Myitkyina to Laiza, a non-Government controlled town in Kachin State, the Special Rapporteur witnessed the physical destruction the fighting had brought to villages since fighting restarted in June 2011 following the breakdown of a 17-year ceasefire. Clashes in October and November 2013 displaced more than 2,400 people in Mansi, southern Kachin State, including 1,600 people from Nam Lim Pa who were displaced for the second time to internally displaced persons’ (IDP) camps bordering Chin State and northern Shan State. In total, some 100,000 people remain displaced in Kachin and northern Shan State. While in Laiza, the Special Rapporteur visited the Je Yang IDP camp to speak with people who had been violently displaced during military advances into their villages in August 2011, and listened to allegations of human rights violations suffered by their families and community members. This included more recent allegations of sexual violence against Kachin women and the arbitrary detention and torture, during interrogation, of young Kachin men. Since his previous report, the Special Rapporteur has continued to receive allegations of serious human rights violations accompanying military offensives. This includes allegations that more than 100 women and girls had been raped by army soldiers since 2010, and reports of 47 cases of gang rape and 28 women dying as a result of their injuries. Most of the cases are linked to the military offensives in Kachin State and northern Shan State since 2011.

35. Throughout his mandate, the Special Rapporteur has highlighted the widespread and systematic human rights violations that have accompanied the armed conflict in the ethnic

border areas and the absence of accountability. In advance of a national ceasefire accord that is implemented by all sides, he reiterates his call for military and non-State actors to abide by humanitarian and human rights law. Furthermore, he hopes to see included in the eventual nationwide ceasefire accord specific references to respect for human rights and humanitarian law, which could be incorporated into a code of conduct for the military and ethnic armed groups.

36. The ethnic armed groups the Special Rapporteur met during his latest visit retain high levels of mistrust towards the Government and the military. That is partly due to the poor implementation of ceasefire agreements. Establishing a comprehensive system of monitoring will need to form an integral part of the next stage of negotiations. Monitoring groups should be given freedom of movement and include representation from civil society and community-based groups. During his meeting with Aung Min, the Special Rapporteur welcomed the news that progress is being made with the establishment of local monitoring groups, and was encouraged by his openness to future international participation in such monitoring. The United Nationalities Federal Council in Chiang Mai, Thailand informed the Special Rapporteur that international participation in monitoring would play an important role in reassuring the ethnic armed groups that agreements were being implemented and, subsequently, help to build trust.

37. The Government has made clear that political dialogue will follow the signing of a national ceasefire agreement. However, in the Special Rapporteur's meetings with ethnic armed groups, there was deep-seated mistrust that this would happen, which finds its source in a long history of ceasefires which have not led to political dialogue on underlying grievances. The Government will therefore need to set a clear time frame for prompt progress towards political talks following the signing of a national ceasefire accord, and stick firmly to that timetable.

38. In October's monthly radio address (2013), the President acknowledged that ceasefire agreements alone would not lead to lasting peace and that the root causes of the problems would have to be resolved through political means. He also stated that the peace process would only be successful if it was fully inclusive, which the Special Rapporteur welcomes. The Special Rapporteur emphasizes the importance of political dialogue abiding by the human rights principles of participation, transparency, accountability, equality and non-discrimination. This will require greater participation and representation of local communities and women. Ceasefire talks have so far been limited mostly to male leaders on both sides. Addressing those flaws in the process will help to ensure that political talks forge agreements which address the underlying grievances of the ethnic minority groups, including their full range of human rights concerns.

39. The Special Rapporteur notes that, since his visit in August 2013, humanitarian access has improved to the over 50,000 IDPs in non-government controlled areas in Kachin State and northern Shan State. However, access is still granted on an ad hoc basis and he urges the state and national governments to ensure regular, systematic access for humanitarian organizations, including the United Nations.

40. About 400,000 people remain internally displaced in the south-east of Myanmar, with a further 120,000 refugees living in temporary sites along the Thai-Myanmar border. Some of the refugees have been residing in the Thai-Myanmar border camps for more than 25 years. During his latest visit, the Special Rapporteur heard from refugees about their feelings of insecurity when contemplating a return to Myanmar, which included uncertainty about access to land and livelihoods and concerns about how secure their land would be from confiscation by the military or the ethnic armed groups. The Special Rapporteur highlights the relevance of the Guiding Principles on Internal Displacement and the Principles on Housing and Property Restitution for Refugees and Displaced Persons. He

recommends that clauses which protect and promote the land rights of existing, displaced and returning ethnic populations be incorporated into ceasefire and political agreements, and that they include the restitution and recognition of land titles and tenure rights of villagers.

41. The Special Rapporteur welcomes the continuing implementation of the joint action plan to end the recruitment and use of child soldiers signed by the Government and the United Nations in June 2012. On 18 January 2014, 96 children and young persons were released from the Myanmar Armed Forces. This follows earlier releases of 68 children and young people on 7 August 2013, 42 in July 2013, 24 in February 2013 and 42 in September 2012. He encourages the Government to accelerate the identification and release of all children in the national armed forces and border guard forces, including by providing unimpeded access to its military sites by the country task force. The Special Rapporteur commends the recent commitment of the Government of Myanmar to ratify International Labour Organization Convention No. 182 (1999) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour. He urges the Government to ratify the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict in order to further bolster those positive steps. To prevent future underage recruitment, he recommends the strengthening of recruitment procedures, age verification mechanisms and oversight of all recruitment sites in the country, as well as the bringing to justice of those responsible for child recruitment or use, including those with command responsibility and civilian brokers who assist in the unlawful recruitment of children. Furthermore, he highlights the need for child protection mechanisms to be fully incorporated into peace and ceasefire agreements, and calls for joint action plans to also be drawn up with non-State armed groups.

G. Situation in Rakhine State

42. During his latest visit to Rakhine State, the Special Rapporteur saw no improvements in the human rights situation. Instead, as time passes without clear action at the state and national level to address the widespread discrimination and human rights violations occurring there, the situation continues to worsen from an already dire state.

43. The Government has stated that Buddhist and Muslim communities are separated to maintain stability and protect the lives of the populations from both communities, and has publicly announced its intention to reintegrate communities once trust is rebuilt. In this regard, the Government is working with interfaith groups and is sending messages from the President's Office which promote mutual understanding and peaceful coexistence.

44. The practice of separating communities continues to have a severe impact on the Muslim populations in Rakhine State, and in particular the Rohingya community. Discriminatory and stringent restrictions on freedom of movement for Muslim populations remain in place, which continue to affect a range of other human rights, including the right to life. In February, the Special Rapporteur again visited Aung Mingalar, the only remaining Muslim neighbourhood in Sittwe, which he described as a ghetto. In Aung Mingalar ward, he heard from residents that the population had fallen by around 1,600 compared to his August visit. Many had left to risk their lives on rickety boats to reach neighbouring countries, where those who survived the journey were subjected to further human rights violations, including human trafficking. 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. A limited number of teachers are entering the

ward to provide education for the children. About 700 university students have been unable to gain access to education since May 2012. Working-age residents, many of whom are traders, remain unable to access their livelihoods. The Special Rapporteur also visited the Khoung Dote Khar Rohingya IDP camp in Sittwe. The violations of the rights to freedom of movement, access to health care, education, livelihoods and places of worship he saw in the IDP camp and Aung Mingalar represent a microcosm of the violations suffered by the 140,000 people still in IDP camps and the 36,000 people living in crisis-affected villages across Rakhine State, the vast majority of whom are Rohingya. Of the six hospitals in Rakhine State, only two are currently accepting Muslim patients (with a limited number of beds provided).

45. Ordinary Rakhine Buddhists have a genuine and legitimate desire to have their economic, social and cultural rights respected, promoted and protected after years of neglect. The grievances of the Rakhine Buddhist community must be heard, including with regard to the regulation and management of borders and to immigration policy. Local communities under the poverty line and without electricity have voiced their grievances about not receiving the benefits from projects such as the Kyaukpyu–Kunming dual oil and gas pipeline in Rakhine State, and they need to be listened to. However, the Special Rapporteur is concerned that influential community, political and religious groups are propagating an agenda to rid Rakhine State of the estimated one million Rohingyas who live there. The organizers of hate campaigns (see para. 21 above) and the instigators of violence continue to act with impunity. The United Nations and international NGO actors, who are providing life-saving humanitarian assistance to all communities in Rakhine State, continue to be harassed and threatened by those groups, with some forced to terminate their operations. Local and central authorities are not intervening to fulfil their obligations under international human rights law.

46. Since the violence broke out in June 2012, the Special Rapporteur has highlighted the obligation of the State to hold those responsible for human rights violations to account. Yet up to this point, no credible investigation has taken place to uncover the human rights violations that have occurred there. The Government has prosecuted people from both communities accused of being involved in the violence. However, no State officials have been held to account and, in the absence of an independent and credible investigation, it remains unclear whether the main perpetrators have been prosecuted.

47. During his latest visit, the Special Rapporteur met with the chief of Rakhine State police. He informed the Special Rapporteur that in Du Chee Yar Tan village (in Maungdaw township) on 13 and 14 January 2014, the police conducted a large security operation involving over 100 police officers armed with live ammunition to search for a police officer who was taken by the villagers and reportedly killed. He stated that homes had been searched in the village and surrounding areas, but that no warrant had been secured to do that. He said that journalists and NGOs had been denied access to the village, but that the United Nations and diplomatic community had been on accompanied visits. He denied that there had been any incident that had compromised the physical integrity or property of the villagers. However, the Special Rapporteur has continued to receive allegations of serious human rights violations being committed during that police operation, which also involved Rakhine mobs, including allegations of the brutal killing of men, women and children, sexual violence against women and the looting and burning of properties.

48. The Special Rapporteur is concerned that domestic investigations have so far failed to satisfactorily address these serious allegations. He recognizes that the Government has shown a willingness to engage with the international community on key issues such as forced labour, economic development and even training in international human rights standards for the police and military. He urges that cooperation to extend to one of the most

important challenges that Myanmar is facing, which is to address its long history of impunity. He therefore recommends that the Human Rights Council work with the Government on this latest incident to establish a credible investigation to uncover the truth of what happened in Du Chee Yar Tan and to hold anyone responsible for human rights violations to account. The Special Rapporteur believes that investigations conducted with the involvement and support of the international community, including in relation to technical assistance, represent an opportunity to turn the tide of impunity in Rakhine State.

49. In addition to tackling impunity, the other underlying issue that the Government is failing to address is the systematic discrimination against and marginalization of the Rohingya community. To tackle this requires key legislative changes. For more than 20 years, holders of the special procedures mandate on the situation of human rights in Myanmar have been advocating reform of the 1982 Citizenship Act. Particularly problematic under international human rights law is the provision referring to certain “national” and “ethnic” groups as Myanmar citizens, specified by authorities in a list of 8 “national” and 135 “ethnic” groups. The majority of Myanmar citizens have automatically acquired citizenship under this provision by virtue of belonging to one of those groups. In practice, that has led to “nationals” and “ethnic groups” not contained in those listings being discriminated against on the basis of race and ethnicity in their access to citizenship, including the Rohingya Muslims, as well as persons of Indian, Chinese and Nepali descent, which is in contravention of international human rights law. To bring the Citizenship Act into line with international standards, race and ethnicity cannot be determining factors in the granting of citizenship. Instead, the law needs to provide for objective criteria that comply with the principle of non-discrimination, such as birth in the territory and descent (with citizenship being passed through a parent who is a citizen).

50. The Government has stated that, “it is crucial for non-Rakhine community [sic] to accept the population verification process” that is being proposed as “an initial step for resettlement and access to livelihoods, freedom of movement and citizenship among others”.⁵ The Special Rapporteur acknowledges that if that exercise is conducted in accordance with international human rights standards, including with regard to consultation with affected communities and enabling ethnic groups to self-identify, it could be an important initiative to help address the issue of citizenship in Rakhine State.

51. Taking into consideration the information and allegations the Special Rapporteur has received throughout the course of his six years on this mandate,⁶ including during his five visits to Rakhine State, and in particular since the June 2012 violence and its aftermath, he concludes that the pattern of widespread and systematic human rights violations in Rakhine State may constitute crimes against humanity as defined under the Rome Statute of the International Criminal Court. He believes that extrajudicial killing, rape and other forms of sexual violence, arbitrary detention, torture and ill-treatment in detention, denial of due process and fair trial rights, and the forcible transfer and severe deprivation of liberty of populations has taken place on a large scale and has been directed against the Rohingya Muslim population in Rakhine State. He believes that the deprivation of health care is deliberately targeting the Rohingya population, and that the increasingly permanent segregation of that population is taking place. Furthermore, he believes that those human rights violations are connected to discriminatory and persecutory policies against the

⁵ See <http://myanmedelhi.com/ministry-of-foreign-affairs-responds-to-mr-tomas-ojea-quintanas-statement-made-on-19-2-2014/>.

⁶ See A/63/341, paras. 61–62; A/64/318, paras. 70–80; A/HRC/13/48, paras. 86–94; A/65/368, para. 73; A/HRC/16/59, para. 46; A/66/365, para. 29; A/67/383, paras. 56–67; A/HRC/22/58, paras. 46–60; A/68/397, paras. 46–57.

Rohingya Muslim population, which also include ongoing official and unofficial practices from both local and central authorities restricting rights to nationality, movement, marriage, family, health and privacy. In the country's ongoing process of democratic transition and national reconciliation, the human rights situation in Rakhine State will be a critical challenge for the Government of Myanmar and the international community to address.

H. Democratic transition and establishing the rule of law

52. In assessing the reforms that have been initiated so far, the Special Rapporteur stresses that they can only be viewed as the start of a long process of reform that will be required to address the deep-seated human rights issues in Myanmar, which includes developing an independent judiciary and tackling impunity for human rights violations. In that regard, he notes President Thein Sein's comment during his nationwide address on 1 December 2013 that the level of achievement so far is "comparable to a sprout that has just come out of a seed".⁷ The Special Rapporteur believes that looking back at the four core human rights elements that he specified at the start of his mandate in 2008 will help to objectively put into perspective how far reforms have progressed and how much further they need to go.

53. The judiciary was the Special Rapporteur's fourth core human rights element. An independent, impartial and effective judiciary is essential for the transition to democracy to uphold the rule of law, ensure checks and balances on the executive and legislative branches of government, and to safeguard human rights and fundamental freedoms in Myanmar. The Special Rapporteur welcomes the President's acknowledgement in September 2013 that the Government needed to work hard to strengthen an independent judiciary so that the rule of law could prevail in the country.

54. However, there has been little progress in introducing fundamental reforms to the judiciary, and the gist of the Special Rapporteur's recommended measures under the fourth core element remain pertinent: establish a judiciary that is impartial and independent, including from the direct control of the Government and the military; guarantee due process of law; refrain from charging individuals for alleged infringement of national laws that are in contravention of the international human rights obligations of Myanmar; establish mechanisms to investigate allegations of human rights violations; and seek international technical assistance with a view to establishing an independent and impartial judiciary that is consistent with international standards and principles. Most progress has been seen with this final recommended measure; during the Special Rapporteur's latest visit, the Attorney General and the Chief Justice outlined to him a range of trainings, seminars and technical assistance programmes that were taking place with the international community.

55. The required fundamental reforms to the judiciary will need to be initiated by the Government. The Special Rapporteur urges the Government to muster the political will to instigate reforms which fulfil international standards, including the Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers, the Guidelines on the Role of Prosecutors, the Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary and the Beijing Statement of Principles of the Independence of the Judiciary. He also encourages the Government to invite the Special Rapporteur on the independence of judges and lawyers to conduct a country visit to Myanmar in the near future to assist with the development of a programme of reform.

⁷ See www.myanmargeneva.org/pressrelease/radio%20speech%201%20dec.pdf.

56. The Special Rapporteur reiterates the role of lawyers in establishing the rule of law in Myanmar, including in upholding fair trial rights and in helping to ensure that laws are applied in line with international human rights standards. He remains concerned about the lack of protection of lawyers against reprisals, including violence, threats and discrimination, particularly for those involved in cases considered to be politically sensitive. He urges the parliament to amend the Bar Council Act to transform the Bar Council into a self-governing professional association to defend the integrity and independence of the profession and maintain professional standards in accordance with the Basic Principles on the Role of Lawyers and other international standards. He highlights the responsibility of all branches of government to ensure the protection of lawyers against reprisals and, furthermore, recommends that the parliament reform the contempt of court laws to ensure that lawyers cannot be subjected to sanctions because of their association with politically sensitive cases.

57. While the Myanmar National Human Rights Commission, established by Presidential decree in September 2011, has undertaken some good initiatives, the Special Rapporteur highlights that it is not an independent institution. Noting that the international community has provided technical advice on a new draft enabling law, he stresses the importance of the parliament passing a law which establishes a Commission in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles), including with regard to the selection of commissioners.

58. Regarding the review of national legislation referred to in the first core human rights element, the Special Rapporteur observes that, of the 16 laws and sections of the Penal Code originally identified as in need of reform (A/63/341, para. 93), only one has been repealed (the Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the Successful Performance of the Functions of the National Convention against Disturbance and Oppositions); the rest are under consideration by the parliament or the relevant ministries (A/68/397, para. 67).

59. Furthermore, for national reconciliation and the democratic transition to proceed, important changes to the Constitution are also needed. The 109-member joint committee for reviewing the 2008 Constitution, set up by the parliament on 25 July 2013, reported at the end of 2013 that it had received 28,247 letters of suggested reforms from the executive, legislative and judicial branches of Government. The Special Rapporteur welcomes the President's remarks in January 2014 that a healthy constitution must be amended from time to time to address the national, economic and social needs of Myanmar society, to strengthen democratic attitudes and values and to facilitate national reconciliation and the peace process.

60. Reforms to the Constitution will be needed to embrace the aspirations of ethnic communities to have their human rights respected, to have a say in Government decisions and to benefit from the resources held within their lands. Furthermore, to ensure the accountability of all State institutions under the rule of law, it is necessary to bring the military under civilian control and oversight, which requires amendment of article 20 (b), which currently gives the military "the right to independently administer and adjudicate all affairs of the armed forces", as well as of article 445, which currently states that "no proceeding shall be instituted against the said [previous] Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties". The following constitutional provisions require amendment for the overall transition to a democratic system of civilian governance to proceed: provisions which allow for military appointees to occupy 25 per cent of seats in the parliament (arts. 74, 109 (b) and 141 (b)), thereby also providing them with an effective veto on constitutional changes; article 232 (b), which requires the President to appoint the ministers of Defence, Home Affairs and Border Affairs from lists of

nominees (who can include serving military officers) provided by the Commander-in-Chief; and article 40 (c), which authorizes the Commander-in-Chief to assume State sovereign power under a broad set of vague conditions related to a state of emergency. To allow the people of Myanmar to freely choose their Government, the constitutional provisions that currently disqualify persons from standing for election as President or Vice-President, including on grounds of the nationality and birthplace of their parents (art. 59 (b)), the length of time that they have resided in Myanmar before the election (art. 59 (e)) and the nationality of their spouse, their children and the spouses of their children (art. 59 (f)), also require amendment. Furthermore, the Constitution needs to affirm that the fundamental human rights of all people living in Myanmar need to be respected, and not just those of the citizens of Myanmar.

61. The third core human rights element concerns the armed forces. Important progress has been made in tackling the recruitment of child soldiers (see para. 41 above) and forced labour (A/67/383, para. 32), and engagement with the international community has begun on training programmes on human rights for members of the armed forces, as well as police and prison personnel (although the Special Rapporteur expresses his disappointment that the Commander-in-Chief did not agree to meet with him once during his entire six years on the mandate, and stresses the need for the military to engage with the international community on human rights). The use of landmines has decreased significantly, although there has been limited progress in mine surveying and clearance, marking or fencing, with an estimated 5.2 million people continuing to live in areas contaminated by landmines, and Myanmar has not ratified the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction. Furthermore, violations of international human rights and humanitarian law continue where military operations are ongoing (see para. 34 above), and there is no progress in tackling the impunity under which the military forces currently operate.

62. Most progress has been made with the second core human rights element: the progressive release of political prisoners (see para. 4 above). However, the releases have not been without conditions, with article 401, paragraphs 1, 3 and 4, of the Code of Criminal Procedure allowing the application of penalties, such as the imposition of the remaining sentence, if a condition of release is judged by the President to have been broken.

63. Reflecting on progress with the four core elements in mind reminds us how far the reforms still need to go. The Special Rapporteur believes that, in pursuing those reforms in line with international human rights standards, the Government would benefit greatly from the presence of an Office of the United Nations High Commissioner for Human Rights (OHCHR) country office with a full toolbox. He is therefore concerned that progress towards its establishment continues to be slow, nearly a year and a half since the invitation was made by the Government, and encourages more speedy progress.

I. Truth, justice and accountability

64. The Special Rapporteur emphasizes that a truthful account of past human rights violations is needed to inform the ongoing process of democratic reform and national reconciliation. He continues to encourage the parliament to take forward the initiative to establish a truth commission as a step towards ensuring truth, justice and accountability. He also encourages other initiatives, some of which have already begun, such as commemorations, memorials and documentation of the past.

65. The Special Rapporteur underlines that fulfilling the rights to truth, justice and reparation is an important step towards addressing impunity for human rights violations in Myanmar. Furthermore, justice contributes to lasting reconciliation.

III. Conclusions

66. Throughout his six years on the mandate, the Special Rapporteur has seen significant changes in Myanmar that have brought important improvements to the human rights situation, including the release of over 1,100 prisoners of conscience, the opening up of space for freedom of expression, the development of political freedoms and the holding of free and fair by-elections, and important progress in securing an end to fighting in the ethnic border areas. He believes that there is limited space for backtracking, although the democratic transition is still in its early stages and remains fragile.

67. For the time being, the military retains a prevailing role in the life and institutions of Myanmar. State institutions in general remain unaccountable and the judiciary is not yet functioning as an independent branch of the State. Moreover, the rule of law cannot yet be said to exist in Myanmar. In that regard, tackling the impunity and systematic discrimination in Rakhine State represents a particular challenge which, if left unaddressed, could jeopardize the entire reform process.

68. A change of mindset still needs to take place within all levels of Government to allow civil society, political parties and a free media to flourish beyond the limited freedoms that have currently been granted. The energy and enthusiasm of the younger generation and of women needs to be allowed to come through, which will, in turn, reinvigorate the reform process and ensure that Myanmar secures a successful transition. As part of the transition, addressing the past will also become increasingly important.

69. A critical step will be to secure ceasefire and political agreements with ethnic minority groups, so that Myanmar can finally transform itself into a peaceful multi-ethnic and multi-religious society.

70. The transition in Myanmar requires systematic support from the international community, including in the form of technical assistance and capacity development. It will also be essential for Myanmar to build on its progress of engagement on human rights, which should include the establishment of an OHCHR country office with a full mandate.

71. The Special Rapporteur hopes that his time on this mandate has helped to improve the human rights situation of the people of Myanmar. After nine visits to the country, he is aware of the value that the people place on this mandate, and highlights the importance of it continuing to help keep human rights near the top of the reform agenda of Myanmar.

72. The Special Rapporteur praises the cooperation extended by the Government of Myanmar to this mandate. He believes that this cooperation represents a good example of how States can progress on human rights through engagement with the international community as envisioned in the Charter of the United Nations.

IV. Recommendations

73. Regarding prisoners of conscience, the Government should:

(a) Continue to convene meetings of the prisoner review committee and upgrade the status of the committee to enable it to investigate suspected cases of prisoners of conscience, including in Rakhine State, which entails access to prisons and the authority to question relevant state officials;

(b) Remove all conditions attached to released prisoners of conscience and fulfil its human rights obligations towards former prisoners of conscience, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

74. The parliament should prioritize the amendment of laws that continue to be used to detain prisoners of conscience, including article 18 of the Peaceful Assembly and Peaceful Procession Act, the Unlawful Associations Act, the Emergency Provisions Act and article 505 (b) of the Penal Code. In the meantime, the relevant authorities, including the police and the courts, should cease to use those or other laws to arbitrarily detain and convict people.

75. To tackle the continuing practice of torture in places of detention, the Government should:

(a) Prioritize the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol thereto;

(b) Ensure that police and military officers alleged to have committed acts of torture and ill-treatment are held accountable through the criminal justice system;

(c) Expedite the passing of a new prisons law that meets international standards;

(d) Abolish the death penalty.

76. In relation to the right to freedom of opinion and expression, the Government should:

(a) Ensure that the Printing and Publishing Enterprise Bill and the Broadcast Media Bill meet international human rights standards, including with regard to government licensing powers and content regulation;

(b) Expedite the passing of the media law drafted by the Interim Press Council;

(c) Expedite the abolition or review of the Electronic Transactions Act (2004), the Motion Picture Act (1996), the Computer Science Development Act (1996), the Television and Video Act (1985), the Printers and Publishers Registration Act (1962), the Wireless Telegraphy Act (1933), the Emergency Provisions Act (1950) and the State Protection Act (1975) to bring them into line with international human rights standards;

(d) Remove provisions in defamation laws which provide for prison sentences;

(e) Make greater use of the Interim Press Council to help resolve disputes.

77. To tackle the problem of hate speech, the Government should investigate the nature and extent of the harm caused to persons and groups as a result of the hostility and violence incited by certain individuals and groups on the basis of racial or religious hatred, and hold the perpetrators to account.

78. To address shortcomings in upholding the rights to peaceful assembly and association, the Government should:

(a) Amend the Peaceful Assembly and Peaceful Procession Act, including article 18, to replace the permit system with a notification system that is not subject to criminal sanctions;

(b) Ensure that the draft association law is amended to remove criminal sanctions and replace the registration procedure with a voluntary notification procedure, and ensure the concomitant review/abolition of the Act relating to the Formation of Organizations and the Unlawful Associations Act;

(c) Invite the Special Rapporteur on the rights to freedom of peaceful assembly and of association to visit the country, and ratify the International Covenant on Civil and Political Rights.

79. In relation to human rights concerns in the context of development, the Government should:

(a) Establish a system of individual titling and tenure rights for smallholders to protect people against land appropriation and forced evictions;

(b) Put in place a collective or communal tenure system for land, fisheries and forests to protect the access of local communities to common goods and ensure that the land can be converted to new uses only with their free, prior and informed consent;

(c) Abide by the basic principles and guidelines on development-based evictions and displacement (A/HRC/4/18, annex I);

(d) Ensure that people peacefully protesting forced evictions and land confiscations are not subjected to excessive use of force by the police or arbitrary detention and criminal prosecution;

(e) Ensure that the recommendations from the Letpadaung parliamentary commission and the environmental and social impact assessment are fully implemented;

(f) Make environmental and social impact assessments a legal requirement for all large-scale development projects in Myanmar and ensure that human rights impact assessments are incorporated;

(g) Abide by the guiding principles on human rights impact assessments of trade and investment agreements (see A/HRC/19/59/Add.5);

(h) Continue the good progress in preparing for Extractive Industries Transparency Initiative candidature.

80. The Special Rapporteur also calls on all investors and businesses to abide by the Guiding Principles on Business and Human Rights.

81. Regarding the situation in ethnic border areas, the Government and, where applicable, the ethnic armed groups should:

(a) Abide by humanitarian and human rights law in areas where armed conflict continues;

(b) Establish a comprehensive system for monitoring the implementation of ceasefire and political agreements, which includes representation from civil society, community-based groups and the international community, and guarantee the freedom of movement of monitors;

(c) Set a clear time frame for prompt progress towards political talks following the signing of a national ceasefire accord, and stick firmly to that timetable;

(d) Ensure that political negotiations abide by the principles of participation, transparency, accountability, equality and non-discrimination, and

subsequently provide for greater participation and representation of local communities and women;

(e) Ensure regular systematic access to non-government controlled areas in Kachin State for humanitarian organizations, including the United Nations;

(f) Abide by the Guiding Principles on Internal Displacement and the Principles on Housing and Property Restitution for Refugees and Displaced Persons;

(g) Ensure that any return of refugees, asylum seekers and internally displaced persons is carried out voluntarily, in safety and with dignity;

(h) Incorporate into ceasefire and political agreements clauses which protect and promote the land rights of existing, displaced and returning ethnic populations, including the restitution and recognition of land titles and tenure rights of villagers;

(i) Ratify the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction and begin to undertake mine survey, clearance, marking and fencing activities in ethnic border areas;

(j) Accelerate the identification and release of all children in the national Armed Forces and border guard forces, including by providing unimpeded access to its military sites by the country task force;

(k) Ratify the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

82. The Special Rapporteur calls for joint plans of action on child soldiers to also be drawn up with non-State armed groups.

83. Regarding Rakhine State, the Special Rapporteur recommends that the Government:

(a) Ease the disproportionate and discriminatory restrictions on the freedom of movement of Muslim populations;

(b) Ensure safe access to humanitarian organizations providing life-saving assistance, including health care, for the IDP camps and isolated villages in Rakhine State;

(c) Reverse the increasingly permanent policy of separation and segregation of communities by taking positive steps to rebuild integrated communities, which includes upholding the right of people to return to their land and property;

(d) Release, immediately and without conditions, Tun Aung, Kyaw Hla Aung and Than Shwe, and the three international NGO workers, who have been arbitrarily detained;

(e) Ensure that the due process and fair trial rights of all defendants in Rakhine State are upheld;

(f) Bring the Citizenship Act into line with international standards, by providing for objective criteria in the granting of citizenship that comply with the principle of non-discrimination, such as birth in the territory and descent (with citizenship being passed through a parent who is a citizen);

(g) Ensure that all children who are born in Myanmar and who do not have a right to the nationality of another State are able to acquire Myanmar citizenship,

regardless of the status of their parents, and provide for naturalization under a revised citizenship law.

84. In view of the failure of the Government to conduct a credible and independent investigation into the allegations of widespread and systematic human rights violations in Rakhine State which may constitute crimes against humanity, particularly since the outbreak of the violence of June 2012, and as a measure to help turn the tide of impunity in Rakhine State, the Special Rapporteur calls on the Human Rights Council to work with the Government to establish a credible investigation to uncover the truth of what happened in Du Chee Yar Tan on 13 and 14 January 2014 and to hold anyone responsible for human rights violations to account.

85. Regarding the transition to democracy and establishing the rule of law, the Special Rapporteur recommends that the Government:

- (a) Initiate fundamental reforms to establish a judiciary that is impartial and independent, including from the direct control of the Government and the military;
- (b) Guarantee due process of law;
- (c) Refrain from charging individuals for alleged infringement of national laws that are in contravention of the international human rights obligations of Myanmar;
- (d) Establish mechanisms to investigate allegations of human rights violations;
- (e) Continue to seek international technical assistance with a view to establishing an independent and impartial judiciary that is consistent with international standards and principles, including by inviting the Special Rapporteur on the independence of judges and lawyers to conduct a country visit;
- (f) Increase salaries and pensions for judges to decrease incentives for corruption, and establish a mechanism to conduct prompt and effective investigations into allegations of corruption in the judiciary;
- (g) Expedite the establishment of an OHCHR country office with a full mandate to assist with these and other reforms.

86. The Special Rapporteur urges the parliament to:

- (a) Amend the Bar Council Act to transform the Bar Council into a self-governing professional association to defend the integrity and independence of the profession and maintain professional standards;
- (b) Reform the contempt of court laws to ensure that lawyers cannot be subjected to sanctions because of their association with politically sensitive cases;
- (c) Expedite the abolition or review of the laws referred to in paragraphs 74, 76 (c) and 78 (b) of the present report, articles 143, 145, 152, 505, 505 (b) and 295A of the Penal Code, the Code of Criminal Procedure and the Official Secrets Act, to ensure their compliance with international human rights standards;
- (d) Ensure that new legislation combats and does not increase discrimination against women, racial, ethnic and religious minorities, the lesbian, gay, bisexual, transgender and intersex community, persons with disabilities or other groups and is in full compliance with the obligations of Myanmar under the Convention on the Elimination of All Forms of Discrimination against Women, the

Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities;

(e) Adopt a law that brings the Myanmar National Human Rights Commission into line with the Paris Principles, including with regard to the selection process for its members;

(f) Initiate a process of consultation with all relevant stakeholders on the feasibility and desirability of establishing a truth commission;

(g) Amend the Constitution to bring the armed forces under civilian control, including articles 20 (b), 445, 343 (b), 74, 109 (b), 141 (b), 232 (b) and 40 (c);

(h) Amend the Constitution, including article 59 (b), (e) and (f), to allow the people of Myanmar to freely choose their Government. Furthermore, the Special Rapporteur recommends that amendments be adopted to ensure that the Constitution affirms the fundamental human rights of all people in Myanmar and not just its citizens.

Annex 26

UN OHCHR, *Myanmar: UN Rights Experts Express Alarm at Adoption of First of Four 'Protection of Race and Religion' Bills* (27 May 2015)

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Myanmar: UN rights experts express alarm at adoption of first of four 'protection of race and religion' bills

GENEVA (27 May 2015) – A group of United Nations human rights experts today expressed alarm at the enactment of the Population Control Healthcare Bill in Myanmar, the first of four in a package of bills that seek to 'protect race and religion'. The bills are highly discriminatory against ethnic and religious minorities as well as against women.

"These bills risk deepening discrimination against minorities and setting back women's rights in Myanmar," said the UN Special Rapporteur on the situation of human rights in Myanmar, Yanghee Lee. "At a time when thousands of Rohingya are already fleeing the country by boat, this sends precisely the wrong signal to these communities."

On Saturday, State media reported that the President of Myanmar had signed the Population Control Healthcare Bill. While the stated objectives of the Bill are to improve living standards, alleviate poverty, ensure quality healthcare and develop maternal and child health, its provisions are extremely vague and lack any protection against discrimination, the independent experts noted. Under the newly adopted law, certain areas can be designated for special health care measures, including birth spacing.

"Any coercive requirement for birth spacing with the aim to 'organise' family planning would constitute a disproportionate interference in the sexual and reproductive health and rights of women and could amount to a violation of women's human rights," said the UN Special Rapporteur on the right to health, Dainius Pūras, noting that the Bill allows township groups to 'organise' married couples to practice 36-month birth spacing between pregnancies. "Women should be able to choose freely and responsibly the number and spacing of their children."

The experts underlined that inclusive policies and approaches that focus on a voluntary regulation of population can act as effective safeguards to ensure respect for women's human rights, and sustainable economic and social development. Such policies should provide women with access to health services, including family planning and free contraception; nutrition; education, including sex education; and employment.

"Evidence shows that attempts to impose strategies aimed at 'controlling population growth' often disproportionately target marginalized and minority groups and can have discriminatory, coercive and punitive effects that go against basic rights and freedoms, particularly those of women," the experts added.

The rights experts also expressed serious concern about the other three bills currently being considered by Parliament: the Religious Conversion Bill, the Myanmar Buddhist Women's Special Marriage Bill and the Monogamy Bill.

The Special Rapporteur on minority issues, Rita Izsák, cautioned that “these bills particularly discriminate against ethnic and religious minorities and have the potential to fuel existing tensions in the country.”

The Religious Conversion Bill establishes a State-regulated system for religious conversion, involving justification, registration, interview, study and approval. “The right to conversion has the status of unconditional protection under international human rights law,” the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, said. “States must respect everyone’s right to conversion as an essential component within freedom of religion or belief by removing administrative obstacles.”

The Myanmar Buddhist Women’s Special Marriage Bill seeks to protect Buddhist women marrying non-Buddhist men. “The Bill discriminates against women by restricting the right to marry for Buddhist women and placing restrictions only on Buddhist women who wish to marry outside their faith,” said Emna Aouij, who currently heads the Working Group on discrimination against women.

In practice, the Bill discourages interfaith marriages between Buddhist women and men of other faiths by imposing disproportionate penalties on non-Buddhist men. Moreover, under the Bill, a cohabiting couple where the female partner is Buddhist and the male is not, is *de facto* deemed ‘married’. If one or both parties do not wish to marry, they may be forced into marriage by a Court, which interferes greatly with the right to enter into marriage only with free and full consent.

The Monogamy Bill criminalizes polygamy and prohibits extramarital affairs. The Bill is redundant since the Penal Code already prohibits polygamy. While the ban on polygamy is in accordance with international human rights requirements, the Bill adopts a restrictive and discriminatory approach to regulate marriage. It makes specific references to ‘non-Buddhist persons’ and omits other forms of marriage discriminatory to women, including early and forced marriages.

“Enforcement of laws criminalizing adultery often leads to discrimination and violence against women. Experience shows that, in practice, adultery legislation imposes disproportional criminal liability on women,” Ms. Aouij added.

The independent experts called on the Government of Myanmar to discard all four laws, which will violate Myanmar’s obligations under international human rights standards. The experts reiterated their availability to provide assistance and technical advice on legislation and other measures affecting basic rights and freedoms in Myanmar.

“In this election year, Myanmar must ensure that its laws comply with fundamental human rights provisions and help rather than hinder progress towards a more tolerant, pluralistic and inclusive society,” the Special Rapporteur on Myanmar concluded.

The UN human rights experts are part of what is known as the Special Procedures of the Human Rights Council. Special Procedures, the largest body of independent experts in the UN Human Rights, is the general name of the independent fact-finding and monitoring mechanisms of the Human Rights Council that address either specific country situations or thematic issues in all parts of the world. Special Procedures’ experts work on a voluntary basis; they are not UN staff and do not receive a salary for their work. They are independent from any government or organization and serve in their individual capacity. For more information, log on to:

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UN Human Rights, country page – Myanmar:

<http://www.ohchr.org/EN/countries/AsiaRegion/Pages/MMIndex.aspx>

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Annex 27

UN General Assembly, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. A/70/412 (6 October 2015)

United Nations

A/70/412

**General Assembly**Distr.: General
6 October 2015

Original: English

Seventieth session

Agenda item 72 (c)

**Promotion and protection of human rights:
human rights situations and reports
of special rapporteurs and representatives****Situation of human rights in Myanmar****Note by the Secretary-General****Summary*

The Secretary-General has the honour to present to the members of the General Assembly the report on the situation of human rights in Myanmar submitted by the Special Rapporteur on the situation of human rights in Myanmar, Yanghee Lee, in accordance with General Assembly resolution 69/248. The present report provides an overview of the main human rights developments in Myanmar since the Special Rapporteur's report to the Human Rights Council in March 2015. It sets out key issues and priorities that need to be addressed to further the reforms in the area of human rights prior to the November elections and beyond.

* Late submission due to country mission to Myanmar from 2 to 7 August 2015.



“midnight inspections”, these visits are used to intimidate or harass civil society activists. The Special Rapporteur calls on the Government to halt all forms of surveillance and harassment against human rights defenders and members of civil society and ensure respect for their rights to freedoms of expression, peaceful assembly and association.

C. Incitement

30. The protection of the right to freedom of expression must be accompanied by efforts to combat intolerance, discrimination and incitement to hatred. While welcoming President Thein Sein’s statements against hate speech, the Special Rapporteur continues to observe calls, often made by religious leaders or members of political parties, to incitement and hatred against minorities. They involve negative stereotyping and discrimination and largely target Muslim communities, especially the Rohingya. She is also concerned by the increasing influence of Buddhist ultra-nationalist movements in fuelling discriminatory sentiments and advocating support of discriminatory policies or legislation. She also notes reports of intimidation and harassment of civil society actors, political figures and journalists who seek to protect the rights of minorities. Greater efforts must be made to publicly condemn, prevent and combat acts of incitement to discrimination, hostility and violence. It is vital that deep-seated divisions and tension are not manipulated for political purposes or used to fuel violence ahead of the elections.

31. During her visit, the Special Rapporteur expressed concern about a video on the Internet¹² of a public rally where the Chair of the Peace and Diversity Party called for the killing of the Rohingya. Referring to the Rohingya, the Chair stated: “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.” The crowd can be heard repeating these statements. To the knowledge of the Special Rapporteur, the Government has not publicly condemned these statements and no legal action has been initiated against their author. She also raised the case of Htin Lin Oo who was sentenced to two years in prison with hard labour in June 2015 under section 295 (a) of the Penal Code for “insulting” religion or religious belief. Htin Lin Oo was convicted for a speech discouraging the use of Buddhism as a tool for nationalist extremism. The Special Rapporteur notes with concern the stark difference in treatment between these two cases.

32. According to the Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression (see [A/67/357](#), paras. 45 and 46) and on minority issues (see [A/HRC/28/64](#), paras. 48 and 58), several elements should be considered when identifying which expressions constitute incitement: the context of the expression; the official position and level of authority of the speaker; the intent to incite discrimination, hostility or violence; the content of the expression; the extent and means of dissemination; the danger of violence resulting from the expression. Serious and extreme instances of incitement to hatred, which cross this threshold, should be criminalized. For other cases, the Government should adopt civil laws which can provide for diverse procedural and substantive remedies (see

¹² <https://www.youtube.com/watch?v=O59n9M6jB28>.

[A/67/357](#), para. 48). However, such measures should not impose additional restrictions on the rights to freedom of expression, assembly and association.

33. Communal tension and hatred cannot be eliminated by legal provisions alone. Root causes should be addressed, including through the deconstruction of discriminatory and negative stereotypes and the promotion of greater tolerance. Preventative measures should be prioritized, including through education, information campaigns, training for judges and law enforcement officers, and social dialogue. The Special Rapporteur therefore welcomes President Thein Sein's instructions in 2014 calling on local authorities to establish interfaith organizations to improve dialogue and understanding between communities. Such organizations should be established widely and reinvigorated wherever inactive. The Special Rapporteur also welcomes various interfaith activities led by religious leaders or civil society actors aimed at promoting intercommunal harmony and building a more tolerant and inclusive society.

D. Rakhine State

34. The Special Rapporteur regrets that her request to visit Rakhine State was denied by the Government, well before the start of her mission. While she firmly believes in making assessments based on the realities observed on the ground, she welcomed the opportunity to engage constructively with the Chief Minister, members of the Emergency Coordination Centre, as well as some of the Rakhine Elders. She is aware, however, that they were brought to Yangon despite dealing with a natural disaster.

35. Rakhine State, declared one of four disaster zones, was among the hardest hit by the floods. The Special Rapporteur urges that continued assistance and support be provided as a priority. The floods will likely exacerbate the long-standing social and economic development challenges in Rakhine State, one of the poorest States in Myanmar.

36. One priority area the Special Rapporteur would like to stress is improving education opportunities and access to higher education for all communities in Rakhine State. According to the United Nations Committee on Economic, Social and Cultural Rights, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty.¹³ Thus, efforts can be made to increase the number of primary and secondary schools Statewide, which currently are overcrowded and underresourced, and to provide greater access to non-formal education and vocational training. Access to education (particularly at the middle and secondary levels), for displaced youth and children in camps should be improved. Lifting travel restrictions, which have prevented Rohingya students from attending any form of university education, is also necessary.

37. Three years after the first outbreak of communal violence in Rakhine State, some 140,000 displaced persons remain in camps¹⁴ where conditions remain abysmal and access to adequate basic services severely limited. Acute malnutrition

¹³ See [E/C.12/1999/10](#), general comment No. 13: the right to education, para. 1.

¹⁴ http://reliefweb.int/sites/reliefweb.int/files/resources/Affected_Map_IDP_Sites_Rakhine_OCHA_Aug2015_A4.pdf

Annex 28

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)

United Nations

A/HRC/32/18



General Assembly

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Human Rights Council

Thirty-second session

Agenda item 2

**Annual report of the United Nations High Commissioner
for Human Rights and reports of the Office of the
High Commissioner and the Secretary-General**

Situation of human rights of Rohingya Muslims and other minorities in Myanmar*

Report of the United Nations High Commissioner for Human Rights

Summary

In the present report, submitted to the Human Rights Council pursuant to its resolution 29/21, the United Nations High Commissioner for Human Rights examines the situation of human rights of Rohingya Muslims and other minorities in Myanmar, analyses patterns of human rights violations and abuses, particularly discrimination, and concludes with recommendations on measures to be taken by the relevant authorities to improve the situation of minorities in Myanmar.

* The present report was submitted after the deadline in order to reflect the most recent developments.

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I. Introduction

1. The present report is submitted to the Human Rights Council pursuant to its resolution 29/21, in which it requested the United High Commissioner for Human Rights to report on the human rights violations and abuses against Rohingya Muslims and other minorities in Myanmar, particularly the recent incidents of trafficking and forced displacement of Rohingya Muslims. The report is based on information received by the Office of the High Commissioner (OHCHR) from various sources, including the Government of Myanmar, United Nations entities, the Myanmar National Human Rights Commission and civil society entities. The reports that successive Special Rapporteurs on the situation of human rights in Myanmar have submitted since 1992 were also considered, as were the written and oral comments received from the Government of Myanmar.

II. Context

2. Myanmar is one of the most ethnically diverse countries in Asia. The Citizenship Law of 1982 recognizes eight major “national ethnic groups”: Bamar (approximately two thirds of the population), Chin, Kachin, Kayah, Kayin, Mon, Rakhine and Shan. According to lists published in various government documents, the eight groups have been broken down further into 135 recognized “national ethnic groups”. An estimated 90 per cent of the population are Buddhists, 4 per cent Muslims, 4 per cent Christians and under 2 per cent Hindus. Most Christians belong to ethnic minorities, including the Chin, the Kachin and the Kayin. Among the Muslim population, the Kaman are a community belonging to one of the 135 recognized ethnic groups, as are Bamar Muslims. Other Muslim groups include “Chinese Muslims” and “Indian Muslims”.

3. Rohingya Muslims represent the largest percentage of Muslims in Myanmar, with the majority living in Rakhine State. They self-identify as a distinct ethnic group with their own language and culture, and claim a long-standing connection to Rakhine State. Successive Governments have rejected these claims, and the Rohingya were not included in the list of recognized ethnic groups. Most Rohingya are stateless.

4. In 2014, in the first census conducted by the Government of Myanmar in 30 years, a directive prohibited Rohingya from identifying as such, which led to their de facto exclusion from official figures.¹ Although the data on ethnicity and religion have yet to be released, the publication of census data disaggregated by religion is one priority included in the 100-day plan of the Ministry of Labour, Immigration and Population. The lack of data combined with lack of access to parts of the country pose significant challenges to the analysis of the situation of minorities in Myanmar.

5. Ethnic and religious minorities in Myanmar have a complex and contested history. Even though the agreement adopted at the Panglong Conference in 1947 envisaged the creation of a federal union based on voluntary association and political equality, Burma (then the official name of Myanmar), upon its independence in 1948, became a quasi-federal union largely dominated by the Bamar ethnic group. Subsequent claims by ethnic minorities for self-determination, greater autonomy and the equitable sharing of power and resources have driven non-international armed conflicts, varying in scope and intensity. After the military seized power in 1962, ethnic minorities were increasingly excluded from

¹ See *The 2014 Myanmar Population and Housing Census: The Union Report, Census Report Volume 2*, May 2015, p. 8.

positions of authority, facing restrictions in, inter alia, education, the use of minority languages and religious freedom.

6. Myanmar is undergoing significant transformation. In 2011, after decades of military control, the Government embarked on wide-ranging reforms, including the opening up of democratic space. The reforms culminated in historic elections on 8 November 2015, and the transfer of power to a civilian Government on 31 March 2016. Nonetheless, the military retains 25 per cent of seats in Parliament, giving it a de facto veto on any constitutional amendment. Moreover, the Commander-in-Chief appoints the Ministers to the key portfolios of Home Affairs, Border Affairs and Defence.

7. In May 2015, 700,000 individuals from minority communities were disenfranchised (see paras. 46-47 below). Muslim candidates were disqualified from standing for election, and the Parliament currently has no Muslim members.

8. On 15 October 2015, the Government and eight of the more than 20 ethnic armed groups in Myanmar signed a nationwide ceasefire agreement. Nonetheless, armed conflict persists in Kachin and northern Shan States, while sporadic skirmishes have broken out in Chin, Kayin and Rakhine States. The new Government – the most ethnically diverse Government in decades – has proposed a “twenty-first-century Panglong Conference” to advance the peace process.

9. Rakhine State is one of the poorest states in Myanmar, with limited access to basic services and livelihood opportunities for the entire population. There are long-standing grievances between Rohingya Muslims (population of just over 1 million) and Rakhine Buddhists (the “Rakhine”) (around 2 million); and between each community on the one hand and the Bamar-majority-led central Government on the other. Many Rakhine contest the claims of the Rohingya to a distinct ethnic heritage and historic links to Rakhine State, viewing the Rohingya as “Bengali” (“illegal immigrants”), with no cultural, religious or social ties to Myanmar. Some Rakhine also hold the perception that international assistance has focused on the Rohingya, to their detriment. The Rakhine have been subject to long-standing discrimination by past military Governments. Although officially recognized as an ethnic group, the Kaman Muslims in Rakhine State also face entrenched discrimination and other human rights violations (see A/HRC/28/72, para. 41). Since 2012, incidents of religious intolerance and incitement to hatred by extremist and ultra-nationalist Buddhist groups have increased across the country. The Rohingya and other Muslims are often portrayed as a “threat to race and religion”.

10. Against this backdrop, tensions have occasionally erupted into violence. The most recent major outbreak in June and October 2012 led to hundreds of cases of injury and death, the destruction of property and the displacement of 140,000 people (see A/67/383, paras. 56–58, and A/HRC/22/58, paras. 47–48). Around 120,000 individuals remain in camps for internally displaced persons in central Rakhine State, with ongoing segregation between Rakhine and Rohingya communities.

11. Systemic human rights violations and lack of opportunities have triggered irregular migration flows of Rohingya from Rakhine State to Thailand and Malaysia, in the same boats as irregular migrants from Bangladesh. Trafficking and smuggling networks have facilitated these flows.² More than 94,000 Rohingya and Bangladeshis are believed to have departed since early 2014, with a peak of 31,000 in the first half of 2015.³ In May 2015, Thailand and Malaysia cracked down on international smuggling networks, which led to the

² United Nations Office on Drugs and Crime, *Protecting peace and prosperity in Southeast Asia: synchronizing economic and security agendas*, February 2016, pp. 37-41.

³ See UNHCR, *Mixed Maritime Movements in South-East Asia*, 2015.

abandonment of 5,000 irregular migrants at sea.⁴ Malaysia and Indonesia ultimately offered temporary shelter to migrants affected by the Andaman Sea crisis provided that the international community grant resettlement and repatriation within a year. Many of those rescued at sea remain detained in shelters, camps or immigration detention facilities, and face an uncertain future. The policies and practices of discrimination against the Rohingya, a root cause of irregular migration from Rakhine State, remain to be addressed as part of broader reforms to protect all minorities in Myanmar.

12. Access to justice for victims of human rights violations and abuses has, in the meantime, been sorely lacking. The military and other security forces have generally enjoyed impunity. Endemic corruption and limited capacity and will to conduct effective investigations and prosecutions add to a general lack of public trust in the administration of justice. Structural issues affecting the independence of the judiciary and legal professionals remain. Judicial independence has been further undermined by the undue influence of the executive branch and its interference in politically sensitive cases. Social and cultural stigma deters victims of sexual and gender-based violence from reporting. Minorities face other obstacles that limit further their access to justice, including language, geography and fear of reprisal.

13. In his inaugural address, President U Htin Kyaw described four priorities for the new Government: national reconciliation, peace, a Constitution leading to the establishment of a democratic federal union, and improved quality of life. In April 2016, State Counsellor Daw Aung San Suu Kyi reiterated the importance of national reconciliation and the rule of law for all citizens. Recent steps taken by the Government include the establishment of the Ministry for Ethnic Affairs and the transformation of the Myanmar Peace Centre into the National Reconciliation and Peace Centre. The new Government informed OHCHR that addressing the situation in Rakhine State had been “one of the highest priorities on its agenda”, and called for “more time to find durable solutions” (see A/HRC/32/G/9). On 30 May 2016, the Government established the Central Committee on the Implementation of Peace, Stability and Development of Rakhine State, with the State Counsellor as its Chair. According to the Government, the objectives of the Committee are to “bring peace, stability and development to all people in Rakhine State”.

14. One key to Myanmar’s transformation is addressing past and ongoing human rights violations, which may otherwise undermine the transition. Patterns of entrenched discrimination against minorities, and measures to address them, are described below. This is a challenging process that will require resolve, resources and time. Specific constraints include the continued influence exercised by the military in critical areas of governance. In Rakhine State, the situation is compounded by the highly politicized and polarized environment, including tensions between political parties and continued activity by armed groups. The new Government has nevertheless a unique opportunity to create positive momentum by taking crucial steps to halt discrimination against minorities in law and in practice.

III. Legal framework

15. The human rights obligations of the State are grounded in both treaty and customary law. Myanmar is a party to the Convention on the Rights of the Child and the Optional Protocol thereto on the sale of children, child prostitution and child pornography, the Convention on the Elimination of All Forms of Discrimination against Women, the

⁴ The Government of Myanmar rescued two boats on 22 and 29 May 2015.

Convention on the Rights of Persons with Disabilities and other key international treaties.⁵ It is a signatory to the International Covenant on Economic, Social and Cultural Rights, which therefore requires the authorities to refrain from actions contrary to the object or purpose of the Covenant. The obligations under these treaties are complemented by customary international law, which includes a number of the rights described in the Universal Declaration of Human Rights.

16. Non-discrimination is central to the promotion and protection of the rights of minorities. According to article 2 of the Universal Declaration of Human Rights, States are required to protect and respect the human rights of all, without distinction such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶ Article 30 of the Convention on the Rights of the Child describes the right of children belonging to minorities to enjoy their own culture, profess and practise their own religion, and to use their own language. Article 4 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities requires States to take positive measures to protect the rights and identity of minorities.

17. Considering the context of past and current armed conflict in Myanmar, it is also important to note the relevant provisions of international humanitarian law governing the conduct of parties to an armed conflict, such as the Geneva Conventions (ratified by Myanmar in 1992). International criminal law applies to situations in which individuals may be held individually criminally responsible under international law, such as for crimes against humanity and war crimes.⁷ States have the primary obligation to ensure accountability for such crimes.⁸ They must investigate and prosecute gross violations of international human rights law and serious violations of international humanitarian law.⁹

18. The Constitution of Myanmar of 2008 offers some protection to recognized “national races”, requiring the Government to assist in developing their language, literature and culture; to promote solidarity and respect among them; and to promote their socioeconomic development. Chapter VIII of the Constitution protects the rights to equality and non-discrimination, education and health care, and prohibits forced labour and arbitrary detention. Many rights are, however, reserved for “citizens”, whereas international human rights law generally requires the State to respect, protect and fulfil the human rights of all individuals within its jurisdiction or control.¹⁰ Moreover, the Constitution imposes limitations on several fundamental rights,¹¹ or permits their suspension on vague or impermissible grounds.¹²

⁵ Including the Convention on the Prevention and Punishment of the Crime of Genocide, the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, and the International Labour Organization (ILO) Forced Labour Convention, 1930 (No. 29) and Worst Forms of Child Labour Convention, 1999 (No. 182).

⁶ See also the Charter of the United Nations, Art. 1(3).

⁷ For example, Rome Statute of the International Criminal Court, arts. 7-8.

⁸ See the updated set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), principles 20 and 21.

⁹ Convention on the Elimination of All Forms of Discrimination against Women, art. 2; Convention on the Prevention and Punishment of the Crime of Genocide, art. 1.

¹⁰ See Convention on the Rights of the Child, art. 2. See also OHCHR, *The Rights of Non-citizens*, Geneva (Sales No E.07.XIV.2), 2006, p. 15.

¹¹ For example, s. 353 states that “Nothing shall, except in accord with existing laws, be detrimental to the life and personal freedom of any person”.

¹² For example, the President may, in declaring a state of emergency, “... restrict or suspend as required one or more fundamental rights of the citizens residing in the areas where the state of emergency is in

19. The right to nationality is a fundamental human right.¹³ The Citizenship Law of 1982, which provides for three types of citizenship, contravenes the principle of non-discrimination, as the acquisition of nationality is based primarily on ethnicity rather than on objective criteria.¹⁴ “Full” citizenship may be obtained through four different mechanisms. Automatic acquisition of “full” citizenship is reserved for “nationals such as the Kachin, Kayah, Karen (Kayin), Chin, Burman (Bamar), Mon, Arakan (Rakhine) or Shan and ethnic groups who settled in Myanmar before 1823”.¹⁵ The list of 135 recognized “national ethnic groups” whose members may acquire citizenship automatically does not include the Rohingya or people of Chinese, Indian or Nepali descent. “Associate” citizenship applies to those whose application for citizenship under the Citizenship Law of 1948 was pending when the law of 1982 came into force. “Naturalized” citizenship may be granted to persons who provide “conclusive evidence” of entry and residence in Myanmar before 1948, and their children born in Myanmar. It may also be granted under certain circumstances by marriage or descent. In addition, applications for “naturalized” citizenship must be at least 18 years of age, have a command of one of the national languages, be of “good character” and of “sound mind”. “Associate” and “naturalized” citizens have fewer rights than “full” citizens; for example, their citizenship may be revoked on broad-ranging grounds.

20. In 2015, the Parliament adopted a package of laws seeking to “protect race and religion”. The laws discriminate against ethnic and religious minorities and women, in violation of the State’s international obligations. The Religious Conversion Law established a State-regulated system for changing religion, which contravenes the right to freedom of religion or belief.¹⁶ The Population Control Health-Care Law adopts a selective and coercive approach to population control, including a potential requirement of 36 months between births, which would violate a woman’s right to choose the number and spacing of her children.¹⁷ The law could be used to target areas with significant minority communities. The Buddhist Women’s Special Marriage Law seeks to “protect” Buddhist women marrying non-Buddhist men, in contravention of a woman’s right to choose freely her spouse.¹⁸

IV. Patterns of human rights violations and abuses

A. Incitement to hatred and religious intolerance

21. The Constitution of Myanmar prohibits the abuse of religion for political purposes and acts intended or likely to promote hatred, enmity or discord between racial or religious communities. In accordance with international law, the State is required to uphold the right of all persons in its territory to freedom of religion and the principle of non-discrimination.¹⁹

operation”.

¹³ Universal Declaration of Human Rights, art. 15; Convention on the Rights of the Child, Art. 7; Convention on the Elimination of All Forms of Discrimination against Women, art. 9.

¹⁴ Universal Declaration of Human Rights, art. 2.

¹⁵ Citizenship Law, sect. 3.

¹⁶ Universal Declaration of Human Rights, art. 18.

¹⁷ *Ibid.*, arts. 12, 16; Convention on the Elimination of All Forms of Discrimination against Women, art. 16; Convention on the Rights of Persons with Disabilities, art. 23.

¹⁸ Convention on the Elimination of All Forms of Discrimination against Women art. 16.

¹⁹ Universal Declaration of Human Rights, arts. 2, 7 and 18.

22. Since the 1990s, however, extremist or ultra-nationalist Buddhist organizations have actively promoted messages of hatred and intolerance against Muslims and other religious minorities. Groups including the Organization for the Protection of Race and Religion (known as MaBaTha) spread messages based on fear and hatred, compare Muslims to animals, use derogatory language and present Muslims as a threat to the “Buddhist State”.²⁰ During a public rally in Yangon in May 2015, a politician encouraged the crowd to “kill and bury” all Rohingya; the crowd cheered and repeated his statements (A/HRC/31/79, p. 37). Such rhetoric fuels enmity and discord. Recently, ultra-nationalist Buddhist organizations also targeted moderate Buddhists, interfaith activists, women’s rights activists and the Special Rapporteur.²¹

23. Efforts must be made to prevent and counter acts of incitement to discrimination, violence and hatred, including through the development of a comprehensive strategy based on international human rights standards. The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (A/HRC/22/17/Add.4, appendix) provides useful guidance. The Parliament has recently taken steps to revive discussions on the “Maintenance of Religious Harmony” bill. These should be based on broad consultations with civil society and take into account the Rabat Plan of Action.

24. Underlying root causes should also be addressed, including through preventive education and awareness-raising. Programmes conducted by interfaith and civil society actors to build a more tolerant, diverse and inclusive society should be supported and promoted.

B. Violations and abuses against Rohingya in Rakhine State

25. Patterns of human rights violations against the Rohingya have been documented by successive Special Rapporteurs since 1992. Many result from national, State or local laws, policies and practices targeting the Rohingya owing to their ethnicity, race or religion, either directly or through selective, discriminatory implementation. The tightening of restrictions after the outbreak of violence in 2012 has also had a severe impact on the Kaman community, increasing their vulnerability to human rights violations and abuses.

1. Arbitrary deprivation of nationality

26. A State’s prerogative to grant or remove nationality is constrained under international law.²² The Citizenship Law of 1982 is discriminatory, and contravenes the prohibition of arbitrary deprivation of nationality. It violates the right of every child to acquire nationality,²³ as it fails to protect the acquisition of citizenship for children born in Myanmar with no “genuine link” to another State (see CRC/C/MMR/CO/3-4, paras. 41-42). It also gives overly broad power to the Government to revoke citizenship without due protection. It has led and continues to lead to statelessness. Myanmar has one of the largest stateless populations in the world: some 1,090,000 stateless persons, predominately

²⁰ See C4ADS, *Sticks and Stones: Hate Speech Narratives and Facilitators in Myanmar*, 2016.

²¹ See OHCHR, “Comment by UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein on the abuse of the Special Rapporteur on human rights in Myanmar, Yanghee Lee”, 21 January 2015.

²² See General Assembly resolution 50/152, Universal Declaration of Human Rights, art. 15(2); Convention on the Rights of the Child, arts. 7, 8; Convention on the Elimination of All Forms of Discrimination against Women, art. 9; Convention on the Rights of Persons with Disabilities, art. 18.

²³ Convention on the Rights of the Child, art. 7.

Rohingya in Rakhine State. The lack of citizenship of the Rohingya community heightens their vulnerability to a range of human rights violations.

27. In June 2014, the Government initiated a citizenship verification process, piloted in Myebon (Rakhine State). Members of the Rohingya community refusing to identify as “Bengali” were arbitrarily excluded from the verification process. The process was reportedly suspended in 2015. Although those granted citizenship in Myebon were allowed to vote in 2015, their freedom of movement and access to basic services and livelihoods after receiving citizenship has not improved. On 7 June 2016, a citizenship verification process – conducted within the framework of the Citizenship Law of 1982 – was relaunched in Kyaukpyu, Myebon and Ponnagyun.

2. Restrictions to freedom of movement

28. The Rohingya and the Kaman face severe restrictions on their freedom of movement. Although in place in northern Rakhine State for decades, restrictions were tightened after 2012 and differ in severity between townships. Even though their stated purpose is to ensure security, their application is disproportionate and discriminatory, given that they target Muslims exclusively. The majority of Rohingya live in northern Rakhine State, where they require official authorization to move between, and often within, townships (in northern Rakhine State, for example, a village departure certificate is required to stay overnight in another village.). The procedures to secure travel are onerous and time-consuming. Failure to comply with requirements can result in arrest and prosecution. Restrictions routinely lead to extortion and harassment by law enforcement and public officials.

29. Since the outbreak of violence in June 2012, town administrators have imposed a curfew in northern Rakhine State, allegedly to “protect the safety of both communities”. The curfew, regularly extended since 2012, is reportedly based on section 144(1) of the Myanmar Code of Criminal Procedure, which permits temporary orders in urgent cases and requires a magistrate or delegate to issue a curfew order. OHCHR received credible allegations that the procedure prescribed by section 144(1) has not been followed. The curfew affords broad discretionary powers to the authorities, including with regard to limitations on assembly and prohibiting movement between dusk and dawn. The curfew constrains the ability of Muslims to worship and practice religion freely by limiting gatherings of more than five people. Reportedly, it is only enforced against the Rohingya. While a separate presidential state of emergency was lifted in March 2016 in northern Rakhine State, the curfew remains in place.

30. Most of those displaced during the violence in 2012 reside in central Rakhine State, in approximately 39 camps for internally displaced persons. Restrictions on movement in camps are severe, and many are subject to extreme security measures. In certain locations, there is strict control of access and exits through security checkpoints. Given the nature, extent and duration of confinement, many camps could be considered places of deprivation of liberty under international law (see CCPR/C/GC/35, paras. 3 and 5).²⁴

31. The blanket restrictions on freedom of movement for Muslim communities clearly violate international human rights law, which requires any limitations to be necessary and proportionate (see CCPR/C/21/Rev.1/Add.9, para. 14).²⁵ The restrictions discriminately target the Muslim population and severely constrain their access to livelihood, food, health

²⁴ See Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2, annex), Principle 12: 1-2.

²⁵ Universal Declaration of Human Rights, arts. 13 and 29(2).

care and education. Lifting these restrictions is essential in order to address other human rights and humanitarian concerns in Rakhine State.

3. Threats to life, liberty and security

32. Successive Special Rapporteurs have reported patterns of serious human rights violations of the rights to life, liberty and security of the Rohingya by State security forces and other officials. Violations include summary executions, enforced disappearance, arbitrary arrest and detention, torture and ill-treatment, and forced labour (see A/67/383, para. 64 and A/HRC/28/72, para. 38).²⁶ Following the outbreak of violence in 2012, OHCHR received credible reports of the arbitrary arrest and detention of hundreds of Rohingya, including women and children, and consistent allegations of torture and ill-treatment, including cases of severe beating, burning by cigarettes, burning of beards, forced labour, sexual humiliation and abuse, the denial of medical treatment, degrading conditions of detention and deaths in custody. The indiscriminate nature and scale of arrest and detention without due process and the subsequent treatment in detention has raised concerns of collective punishment.

33. In northern Rakhine State, the arbitrary arrest and detention of Rohingya remains widespread. Their statelessness leaves them particularly vulnerable and a target for extortion. Arrests are often made without grounds for arrest, formal processing or the laying of charges, until release is secured by the payment of a bribe. OHCHR received reports of violence, forced entrance and search of homes, confiscation of property, extortion and excessive use of force related to arrest. Inability to pay onerous bribes can lead to violence, detention or retributive action against the victim's relatives. For those formally charged, fair trial guarantees are often not respected.

34. Arbitrary arrest and detention often lay the ground for other violations, such as torture and extrajudicial killings. OHCHR received credible reports of torture and death in custody of individuals arrested and detained on charges related to arson or alleged links to terrorist groups. The lack of regular and independent monitoring of detention heightens the vulnerability of detainees to torture and ill-treatment.

35. Excessive use of force in the context of demonstrations and law enforcement activities has also been reported, including during patrols and the enforcement of restrictions on movement. Deaths resulting from excessive, unnecessary or disproportionate use of force by law enforcement officials constitute an arbitrary deprivation of the right to life.

4. Sexual and gender-based violence

36. Sexual and gender-based violence perpetrated by security forces against the Rohingya in Rakhine State has been reported for decades. Its prevalence has, however, most likely been underreported owing to lack of access to justice, cultural barriers, stigma and fear of reprisal. OHCHR received reports of sexual violence, including rape, against women who had been arrested or detained, or in the course of law enforcement operations, such as house searches or at checkpoints. OHCHR has no information that such allegations have been investigated or that perpetrators have been held accountable.

37. Domestic violence has been reported within the Rohingya community. Protracted displacement, overcrowding in camps, the lack of livelihoods and constraints on all aspects of life exacerbate tensions and the risk of domestic violence. The lack of available and accessible health and other support services remains a concern. The Government has an

²⁶ In violation of Universal Declaration of Human Rights, arts. 3, 4, 5 and 9.

obligation to protect all individuals from all forms of violence and to address sexual and gender-based violence within the private and public spheres.²⁷

5. Denial of the right to health

38. The availability, accessibility, affordability and quality of health facilities, goods and services are extremely poor across Rakhine State. The consequences of limited access to health facilities include delays in treatment, reliance on alternative health care, the escalation of preventable diseases and poor overall health outcomes.

39. Rohingya and Kaman communities face a disproportionate burden owing to discriminatory barriers, including restrictions on freedom of movement, which have a severe impact on the right to health, in particular with regard to access to emergency and life-saving care. OHCHR received credible reports of death caused by lack of access to health facilities or of timely treatment, often where there was a township hospital in close proximity.²⁸ In townships surrounding Sittwe, including Pauktaw and Myebon, Muslims have no free access to township hospitals; emergency cases must be referred to Sittwe General Hospital through an onerous and time-consuming referral process, which entails boat travel and police escorts. Muslim patients are confined to a segregated ward, where allegations and rumours of discriminatory treatment persist. The situation leads to a general reluctance to seek care at the facility. In northern Rakhine State, patients have access to township hospitals but are required to obtain costly and time-consuming travel authorizations, pass through checkpoints and face additional limitations imposed by the curfew, which in some cases may lead to serious and life-threatening delays in an emergency situation. Delays in seeking or receiving emergency obstetric treatment can have particularly devastating consequences and are a major cause of death of babies and for women experiencing complications during pregnancy and childbirth.

40. Restrictions placed on Muslim communities in their access to public health facilities constitute a violation of the right to health;²⁹ if they lead to death, they may also amount to a violation of the right to life. Equal and non-discriminatory access to medical treatment, facilities and care should be ensured for all people in Myanmar, irrespective of religion, ethnicity or citizenship status.

6. Denial of the right to education

41. Rakhine State has one of the lowest rates of literacy in the country, while the lack of education opportunities and access to adequate education affects all its inhabitants. Muslim communities face additional barriers owing to protracted displacement, restrictions on freedom of movement and discrimination (see CRC/C/MMR/CO/3-4, paras. 96–97, A/70/412, para. 36 and A/HRC/28/72, para. 55).³⁰ Non-citizens, including Rohingya, are excluded from studying a number of “liberal professions”, such as medicine, economics and engineering (for example, the university admission guide for 2013 required university applicants to be “citizens of Myanmar”). Since the outbreak of violence in 2012, they are also excluded from tertiary education at the only university in Rakhine State, in Sittwe, on “security grounds”.

²⁷ Convention on the Elimination of All Forms of Discrimination against Women, art. 2.

²⁸ In the cases reported, OHCHR is unable to determine whether patients would have survived had emergency treatment been given.

²⁹ Convention on the Rights of the Child, art. 24; Convention on the Elimination of All Forms of Discrimination against Women, art. 12; Convention on the Rights of Persons with Disabilities, art. 25.

³⁰ In violation of Convention on the Rights of the Child, arts. 2 and 28.

42. Approximately 30,000 Muslim children in camps for internally displaced persons depend on temporary learning spaces supported by humanitarian organizations. The quality of education is a matter of concern, given the lack of qualified teachers, textbooks, teaching materials and teaching time. The consequences of lost years of education are devastating for future livelihood opportunities and the ability of young members of the Rohingya and Kaman communities to contribute to the development of Myanmar. Preventing co-education of Rohingya and Rakhine is discriminatory and a violation of the right to equal access to education. It also restricts opportunities for interaction and reconciliation between communities.

7. Other restrictions based on local orders

43. In northern Rakhine State, a number of local orders targeting the Rohingya are discriminatory in intent and effect. Many have no legal basis, but are policies and directives issued by government authorities or law enforcement bodies ostensibly to prevent illegal immigration and to control movement and population growth. Although the degree to which the orders are enforced is unclear, their impact remains pervasive. Under one local order, couples are required to follow costly and arduous administrative procedures to secure a marriage permit, which itself includes restrictions on the number of children and a requirement to use contraception. Non-compliance is a criminal offence, punishable by up to 10 years of imprisonment. OHCHR received reports of women and girls resorting to unsafe abortions out of fear of contravening the orders.

44. It is estimated that 5,000 children born in contravention of local orders are excluded from official household lists and placed on a separate list (the “black list”). Moreover, birth certificates have not been issued for Rohingya children since the 1990s. The lack of official documentation and effective legal identity has serious consequences for all stages of life, further restricting their freedom of movement and access to health care and education. It also heightens their vulnerability to human rights violations, such as arbitrary arrest and detention, and extortion.

45. The local orders constitute a violation of fundamental rights, including the principle of non-discrimination, freedom of movement, the rights to privacy, to marry and to found a family, and the rights of the child.³¹

8. Limitation on political rights and documentation

46. In February 2015, the previous Government announced the expiry of “temporary identity certificates” held by some 700,000 stateless people across the country, including the Rohingya, the Chinese and other minority groups. The certificate was the primary document held by stateless persons in Rakhine to confirm their legal residence in Myanmar. In June 2015, a new “identity card for nationality verification” was announced; however, it was widely viewed with suspicion, and acceptance has been extremely low. Consequently, hundreds of thousands of stateless persons in Rakhine have no valid individual identity document confirming their legal residence.

47. During the elections in 2010, holders of temporary identity certificates were granted the right to form and join political parties, and to vote. Before the elections held in November 2015, however, steps were taken to prevent certificate holders from participating in political life.³² In September 2014, the Parliament amended the Political Parties

³¹ See the Convention on the Elimination of All Forms of Discrimination against Women, arts. 1 and 16, the Convention on the Rights of Persons with Disabilities, arts. 18, 22 and 23, and the Convention on the Rights of the Child, arts. 2, 7 and 16.

³² Universal Declaration of Human Rights, art. 21.

Registration Law, introducing a requirement for party leaders to be “full” citizens, and for party members to be “full” or “naturalized” citizens. In May 2015, the right of temporary identity certificate-holders to vote in the general election was revoked.

9. Forced labour

48. Myanmar has taken significant steps to eliminate forced labour, including by establishing a complaints mechanism and a joint action plan with the International Labour Organization (ILO). Nonetheless, credible reports indicate that, while the use of forced labour has generally declined, it persists in parts of the country where it particularly affects minority groups.

49. Reports that forced labour involving Rohingya in northern Rakhine State continue to be received. Tasks include sentry duty, building and maintenance work, and provisions of materials for such work. Victims state that they cannot refuse work out of fear of repercussions, which may include violence, arrest or detention, fines or other forms of coercion, punishment and intimidation. Forced labour has severe consequences for the mental and physical health of victims and a long-term impact on livelihoods and food security. OHCHR also received reports of forced labour imposed on Rakhine communities, including recently in the context of the conflict between the Tatmadaw and the Arakan Army. It is likely that forced labour practices are underreported in Rakhine State owing to lack of access for independent observers, lack of awareness of the ILO complaints mechanism, and fear of reprisal.

10. Trafficking in persons and migrant smuggling

50. In May 2015, the Andaman Sea crisis highlighted a pattern of human rights violations and abuses linked to irregular regional migration flows facilitated by trafficking and smuggling networks. This included unlawful confinement on boats and at land-based transit points, sexual and gender-based violence, and ill-treatment. It is estimated that some 2,000 Rohingya and Bangladeshi died at sea between 2012 and 2015.

51. Myanmar is a party to the Association of Southeast Asian Nations Convention against Trafficking in Persons, Especially Women and Children of 2015. It has also signed the Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime of 2016, in which the signatories pledged to tackle human trafficking in part by improving the conditions that force people to flee, including “full respect for human rights ... and measures to prevent and reduce statelessness”. The second half of 2015 saw a 96 per cent reduction in boat departures from Rakhine State and Bangladesh compared with the same period in 2014. The decrease in boat departures since June 2015 can be explained by various factors, including the greater scrutiny of irregular migration by Governments in the region and the higher prices demanded by smugglers. In order to fully address irregular maritime movement originating from Rakhine State, concrete and meaningful efforts are required to address the push factors and coercive circumstances highlighted in the present report.

11. Protracted displacement and denial of an adequate standard of living

52. Four years after the outbreak of violence in 2012, almost 120,000 people, mainly Rohingya and Kaman, remain internally displaced in Rakhine State. Protracted displacement in deteriorating shelters, limited access to basic services and the inability to move freely make for particularly oppressive living conditions for those in the camps. Besides violating the right to freedom of movement, the conditions also affect the

enjoyment of several economic and social rights, including the rights to education, to the highest attainable standard of health and to an adequate standard of living.³³ A significant number of internally displaced persons are not officially recognized or do not receive adequate assistance owing to issues in clarifying and defining who is an internally displaced person. The violence and related restrictions have also severely affected those in Rakhine State who are not among the internally displaced, including those located in remote or isolated communities, who do not receive adequate assistance.

53. It is estimated that 25,000 internally displaced persons returned or were integrated at the site of displacement in 2015 through the Rakhine State Government Resettlement Plan. There is, however, an urgent need to find durable solutions for all those who remain displaced. The process should be informed, transparent, voluntary and rights-based. Furthermore, internally displaced persons should have access to an effective mechanism that ensures or restores housing, land and property, or that provides adequate compensation where return is not feasible. Sufficient guarantees should be given to ensure that housing, land and tenure issues do not lead to further human rights concerns.

54. The segregation of communities in Rakhine poses a significant challenge to the identification of durable solutions. This is particularly the case in Sittwe town, where no plans have been made to address the situation of more than 90,000 internally displaced persons in camps, who often reside only a few kilometres from their place of origin. This enforced segregation of communities requires urgent attention. Targeted measures of peacebuilding, interfaith initiatives and the gradual restoration of social and economic bonds are vital.

12. Assessment

55. The situation described above reflects a pattern of gross human rights violations that affect fundamental civil, political, economic, social and cultural rights of the Rohingya. Widespread discriminatory policies and/or practices targeting them on the basis of their ethnic and/or religious identity have led to an acute deprivation of fundamental rights. Many of the acts described would suggest a widespread or systematic attack against the Rohingya, in turn suggesting the possible commission of crimes against humanity, if established by a court of law (see also A/HRC/25/64, para. 51).

C. Violations and abuses against other minorities

56. Decades of armed conflicts, varying in scope and intensity, have taken place against a complex backdrop of long-standing grievances against the Bamar-dominated central Government and military. Successive Special Rapporteurs have consistently reported allegations of violations of international humanitarian law and human rights law in the context of these conflicts. The absence of adequate accountability mechanisms has resulted in impunity, thereby eroding further the rule of law and undermining sustainable peace and reconciliation. While the signing of a nationwide ceasefire agreement is a significant step, it is only a starting point. Inclusive political talks – with the full participation of ethnic minority communities, including women representatives – are critical to address the root causes of conflict and long-standing grievances of ethnic communities. The new Government's proposal for a national peace conference is welcome.

³³ Universal Declaration of Human Rights, arts. 25 and 26; International Covenant on Economic, Social and Cultural Rights, arts. 11-13.

57. In the context of armed conflict, allegations of violations of international humanitarian law and human rights law involving the military have included the deliberate targeting of and indiscriminate attacks against civilians, the use of child soldiers, forced displacement, the summary execution of civilians and captured fighters, forced labour, arbitrary arrest and detention, torture and ill-treatment, and sexual violence. Credible reports detail practices that include military personnel ordering civilians to walk before them as “human mine sweepers”; a policy of categorizing certain zones as “black areas”, giving the military free rein to target anyone in that area, including civilians, contrary to the principle of distinction; and the “live off the land” policy, resulting in the confiscation by the military of land, livestock or harvested crops from civilians.

58. In Kachin and Northern Shan States, where fighting has intensified, there are ongoing reports of violations by all parties to the conflicts (see A/70/412, para. 50 and A/HRC/31/71, para. 52). In June 2011, the breakdown of a 17-year ceasefire in Kachin State caused significant displacement; 96,000 people remain internally displaced. Fighting in 2015 caused the displacement of an additional 100,000 people, including 80,000 from the Kokang Self-Administered Zone. Credible reports of violations of international humanitarian law by the military include a lack of distinction between civilians and fighters and indiscriminate firing.

59. The reported abuses by ethnic armed groups against civilians include the forced recruitment and use of children in hostilities, forced displacement of the population, torture, ill-treatment and the summary execution of captured Tatmadaw personnel and ongoing reports of harassment, arbitrary detention, and extortion by some of these groups (A/HRC/31/71 para. 52). There are also ongoing reports of the use by both the military and ethnic armed groups of civilians as porters, sentries, guides and human shields, and also the use of anti-personnel mines in civilian areas (A/HRC/28/72, para. 31).

60. Cases of sexual and gender-based violence against women of ethnic minority communities perpetrated by Myanmar security forces have been documented for many years. Such violence continues to be reported, and is particularly prevalent in conflict-affected areas, such as Kachin and Shan States, with credible reports of rape, sexual slavery, and forced and servile marriages. According to reports, victims include women and men, girls and boys, including children as young as 7 years of age (S/2014/181, paras. 37-39). The risk of sexual violence appears to be greater during home invasions, movements of populations and forced portering. Some reports by civil society sources allege that rape and sexual torture are committed on military bases and in prisons. Reports of sexual violence increase for communities living in close proximity to areas with a large military presence.

61. The confiscation of land by the military for barracks and military camps, crop confiscation, the production of food for soldiers, and designation of forbidden “high security areas” have consistently been reported in areas where ethnic communities reside (A/66/365, para. 64). Violations of housing, land and property rights, including through development-induced displacement, have also been increasingly documented since 2012. Private local commercial interests, often with strong links to the military, have allegedly engaged in land grabbing and forced evictions. Years of continuing conflict and military campaigns in ethnic areas have resulted in extensive displacement in eastern Myanmar and along the border with Thailand. Many of the long-term displaced, including more than 100,000 refugees in Thailand, are reportedly reluctant to return out of fear for their safety owing to the outbreak of sporadic skirmishes, the continued military presence, and the presence of landmines and unexploded ordnance.

62. A significant disparity in access to education persists. In ethnic minority areas, especially conflict-affected areas, many schools are either not operational or inaccessible. Under the policy of previous military Governments, the use and teaching of minority languages in schools was prohibited, and informal community schools providing learning in

minority languages were banned in some areas. Recent national education legislation (such as the National Education Law) has opened up space for the use of ethnic languages in classrooms, while State and regional governments are empowered to develop and implement language policy at the regional and State levels.

63. For many years, Christian communities in Myanmar have faced restrictions in their freedom of religion or belief, especially in Chin, Kachin, Kayin and Kayah States. Special procedure mandate holders have reported allegations of human rights violations targeting Chin Christians, including of forced labour for the construction of monasteries and pagodas, the forcible confiscation of land, induced or coerced conversions to Buddhism, the closure of churches and “house” churches, and the destruction of crosses (A/HRC/22/67, p. 127). Allegations of arbitrary arrest, detention and torture of religious leaders, missionaries, church workers and others have also been reported (A/HRC/25/74, p. 105). Like Muslim communities, Christian groups report difficulties in obtaining permission to renovate, extend or construct religious buildings (see A/69/398, para. 40).

Assessment

64. The information received by OHCHR suggests that minority groups have suffered a wide range of human rights violations and abuses. Moreover, in the context of armed conflicts, reports over many decades have documented violations of international humanitarian law allegedly committed by the military and armed groups. If established in a court of law, some of these violations could amount to war crimes.

V. Conclusions

65. **The human rights situation of the Rohingya and other minorities in Myanmar is a cause of utmost concern. The scope and patterns of violations and abuses reported cannot be ignored; systematic and systemic discrimination and policies of exclusion and marginalization are all too often at the root of future conflicts. On 25 March 2013, the Special Adviser of the Secretary-General on the Prevention of Genocide warned that failing to address the immediate consequences and root causes of violence between Rakhine Buddhists and Rohingya Muslim could have “serious consequences which the international community has solemnly promised to prevent”.**

66. Conversely, addressing the violations and abuses identified by the High Commissioner in the present report may help to provide a safe and peaceful environment for all in Myanmar, planting the seeds for growth, prosperity and harmony.

67. The new Government has the responsibility and the opportunity to halt these violations and abuses. It must seize the momentum by stopping discriminatory policies and practices and repealing discriminatory laws.

68. Measures are needed to break the cycle of impunity and to promote accountability in the interests of justice, reconciliation and the protection of the human rights of all people in Myanmar. In accordance with the State’s obligations under international norms and standards, the authorities of Myanmar should ensure that all past and ongoing allegations of human rights violations and abuses are investigated promptly, thoroughly, impartially and independently. This will ensure accountability and the access of victims to an effective remedy, including adequate reparation and respect for their right to know the truth about violations.

69. Such efforts should be made in close collaboration with civil society and with the support of the international community. They will be essential to lay solid and

sustainable foundations for the rule of law, based on full and equal respect for human rights, including the rights of persons belonging to minorities and to consolidate the democratic transformation of Myanmar.

70. The Government should also take comprehensive legal and policy measures that address the root causes of all human rights violations and abuses, and prevent their recurrence. Victim and community perspectives should be central to such a process, including through broad and inclusive consultations and participation throughout the design and implementation of any measures aimed at addressing the past.

71. Progress should also be made in reforming the legal framework, including the Constitution of 2008 and the Citizenship Law of 1982, so that it is fully consistent with the State's international human rights obligations. The report of the Special Rapporteur submitted to the Human Rights Council at its thirty-first session (A/HRC/31/71) is a useful tool in this regard. The establishment of mechanisms to ensure that any new legislation is fully compliant with the State's international human rights obligations is also of critical importance.

72. With strengthened independence and an enhanced protection mandate, the Myanmar National Human Rights Commission could play a critical role in upholding and protecting the human rights of all people in Myanmar. Its powers to inquire into violations committed by law enforcement officials, to demand accountability from the Government, to denounce discrimination and incitement to hatred or violence and to visit places of detention could be utilized to strengthen protection of minorities.

73. While some of the measures necessary to address concerns raised in the present report should be taken promptly, the High Commissioner acknowledges that others will require a staged, longer-term approach in the context of the political transition.

74. OHCHR stands ready to provide the Government with support in its efforts to protect and promote the human rights of all people in Myanmar, and to strengthen effective rule of law. The focus on discrimination that underpins the Sustainable Development Goals provides an important framework to ensure that no minority is left behind in the State's accelerated development. The collective and collaborative effort of the United Nations in the country will also be crucial to addressing critical human rights issues.

VI. Recommendations

A. Policies and practices

75. The High Commissioner recommends that the relevant authorities in Myanmar:

(a) Abolish all discriminatory local orders in Rakhine State, including those restricting movement and the rights to marriage and family life; immediately remove arbitrary requirements for travel; facilitate movement within and between townships; and promptly and clearly communicate these decisions to all relevant authorities;

(b) Establish a road map and a time frame for lifting all restrictions on freedom of movement in Rakhine State, and where security considerations remain, ensure that restrictions are necessary, proportional and not discriminatory;

(c) Promptly lift the curfew order in northern Rakhine State, remove arbitrary limitations on the right to freedom of assembly, and guarantee freedom of worship;

(d) Remove all discriminatory and restrictive bureaucratic requirements for emergency medical referrals, and ensure unhindered access for all communities to government hospitals in all townships in Rakhine State;

(e) Ensure the replacement or issuance of identity documentation for all individuals residing in Myanmar, regardless of their citizenship status; and ensure that all children are registered at birth, without discrimination, and implement promptly a process to register all unregistered children, including all Rohingya children;

(f) Find durable solutions for all internally displaced persons in Rakhine State and conflict areas in accordance with the Guiding Principles on Internal Displacement.

B. Legislation

76. The High Commissioner recommends that the relevant authorities in Myanmar:

(a) Take progressive steps towards the removal of all discriminatory legal provisions, including in the Constitution, the Citizenship Law of 1982 and the four “race and religion laws”;

(b) Prevent and sanction incitement to discrimination, hatred and violence, including through the development of a comprehensive strategy based on international human rights standards, and ensure that the Parliament takes into account the Rabat Plan of Action when discussing the “Maintenance of Religious Harmony” bill.

C. Accountability

77. The High Commissioner recommends that the relevant authorities in Myanmar:

(a) Undertake a comprehensive inquiry into the situation of minorities in Rakhine State and other areas in Myanmar, in consultation with all stakeholders and in accordance with international human rights law and standards with a view to recommending measures of accountability, and address the root causes of discrimination, foster reconciliation between communities and prevent recurrence of violations;

(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;

(c) Ensure national laws on arrest and detention and their application are consistent with international human rights standards; and that law enforcement action is conducted in accordance with human rights standards, including the principles of legality, necessity, proportionality and non-discrimination;

(d) Ensure that independent civilian and parliamentary oversight mechanisms over security sector actors and robust complaints mechanisms are established and operational;

(e) Ensure investigations into allegations of forced labour, and the prosecution of those responsible.

D. Prevention of further violations and abuses

78. The High Commissioner recommends that the relevant authorities in Myanmar:

(a) Ensure that persons belonging to minorities can enjoy all their human rights and fundamental freedoms without discrimination and with full equality before the law;

(b) Issue clear instructions on the prohibition of forced labour to the police, border guard police and the General Administration Department;

(c) Issue clear instructions on the prohibition of trafficking of persons to law enforcement agencies, and ensure that victims are protected and treated in accordance with international human rights standards;

(d) Ensure that measures aimed at addressing irregular migration and combating transnational organized crime, including trafficking of persons and smuggling of migrants, do not adversely affect the human rights and dignity of migrants and refugees.

E. Peace process

79. The High Commissioner recommends that the relevant authorities in Myanmar:

(a) Ensure broad consultations with and the full participation of all local and affected communities in the peace process, including ethnic minorities, civil society and women;

(b) Ensure that human rights protection is placed at the centre of the work of the National Reconciliation and Peace Centre and ceasefire monitoring mechanisms.

F. Institutions

80. The High Commissioner recommends that the relevant authorities in Myanmar:

(a) Undertake institutional reforms to ensure respect for the rule of law;

(b) Improve access to justice before independent and impartial courts through fair procedures, and ensure that the administration of justice complies fully with international human rights norms and standards, including the principles of independence and impartiality of the judiciary;

(c) Strengthen the mandate of the Myanmar National Human Rights Commission so that it is able to perform its functions independently and in full compliance with the Paris Principles, including monitoring of all places of detention;

(d) **Increase sustained engagement and cooperation with OHCHR to enhance the promotion and protection of human rights in Myanmar.**

G. Implementation

81. **The High Commissioner recommends that the Human Rights Council follow closely the implementation of the above-mentioned recommendations, and encourage the Government to make meaningful progress in this regard.**

Annex 29

UN High Commissioner for Refugees, *Study on Community Perceptions of Citizenship, Documentation and Rights in Rakhine State* (August 2016)



Study on Community Perceptions of Citizenship, Documentation and Rights in Rakhine State

August 2016
UNHCR Myanmar

EXECUTIVE SUMMARY

The citizenship verification process in Rakhine State commenced in July 2014 with the pilot in Taung Pyo IDP camp in Myebon Township. It was then rolled out as of 1 January 2015 across Rakhine State and nationwide, but with a very low level of participation. The verification exercise recommenced in 2016 under the newly formed Government led by the National League for Democracy. The pilot process in Myebon has resulted in around 2,000 people (including children) receiving a form of citizenship documentation (full or naturalized citizenship). However, there have been no tangible changes in the overall situation of those who have acquired citizenship through the pilot; their constraints on freedom of movement persist as well as their access to basic services including education, health and livelihoods. In northern townships of Rakhine State where the majority of the stateless population reside, participation in the verification continues to be low.

Since the commencement of the pilot project in Myebon in 2014, UNHCR has monitored the implementation of the exercise consistently through gauging community perceptions of the processes and outcomes. To complement this sustained monitoring, and in order to strengthen its advocacy on the citizenship verification process, UNHCR conducted a survey of the stateless population and other minorities' perceptions of citizenship, documentation and related processes. Over the period from March to early June 2016, 1,293 community members from eight townships and various villages and communities in Rakhine State were interviewed.

The key findings that have arisen from this study include:

- **Further improvements to the current implementation measures are needed in order to encourage participation in the citizenship verification process.** It has become clear from the implementation of the citizenship verification process in 2016 that the ICNV ("Identity Card for Nationality Verification") is not accepted by the community, despite key changes made by the Government to the application process and to the card itself. In 2015 the key concerns regarding the ICNV included the requirement to self-identify as "Bengali", and the expiration of the document within two years. Although the Government demonstrated some flexibility on these issues, the stateless population still sees the ICNV as compelling them to participate in a citizenship verification process that remains non-transparent with no clarity on the rights attached to the ICNV.
- **The recognition of ethnicity on citizenship documentation is described as being important by the community members surveyed, in order for "Rohingya" to be recognized as a minority group like other ethnic groups in the country.** It is also widely considered that the recognition of ethnicity on the documentation will facilitate equal treatment with other Myanmar citizens. Some community members, though a minority among those interviewed for this study, highlighted that it was acceptable that ethnicity was not included on documentation.
- **Information gaps on citizenship, documentation and rights are widespread and significant, undermining the stateless population's ability to make informed decision during the citizenship verification process.** Most stateless community members who participated in the survey are unclear about the various kinds of documentation and the rights and obligations attached to these.
- **Communities feel entitlement to "full" citizenship.** Most Rohingya community members surveyed feel that "full" citizenship should be granted to their community given that they can prove that they were born in Myanmar and that their families have lived in Myanmar for generations. For some this is also tied to the desire that their community be recognized as a distinct and recognized ethnic group in Myanmar.
- **The concept of being a citizen in Myanmar is intimately linked to the perception that citizens have rights.** The rights attached to being a citizen or having any form of documentation is perceived by the community include freedom of movement, access to livelihoods, equal treatment, access to healthcare and education and freedom from discrimination. The community's key asks from the new Government echo the themes of rights that are associated with being a citizen.

- **The Rohingya highlight freedom of movement as a core right that they do not currently enjoy due to their stateless status.** Freedom of movement is highlighted as being a key right enabled by documentation and core when explaining how stateless communities perceive citizenship. It was identified as being the main right that would significantly change their lives. Freedom of movement is one of the main hopes for change with the new Government. Women and youth also highlight the importance of this right in their everyday life.
- **Young stateless people have a very limited awareness of what citizenship means.** Both young women and men found it extremely difficult to explain any perception on citizenship, with little understanding of documentation and related processes. Young people do however express that documentation to confirm their citizenship would grant important rights such as freedom of movement, access to livelihoods and access to education.
- **Women do not have access to information on the substantive elements of documentation or hold their own documentation.** The low literacy rate in Rakhine State among the Rohingya women and lack of access to participation in discussions concerning documentation was highlighted as key challenges in their ability to understand the procedures and contents of the documentation that they received. In some instances, women were found not to be the custodians of their own documentation.
- **Women often share that if they received a citizenship card there would be peace in Rakhine State.** Women's perception of peace is explained as freedom of movement, livelihood opportunities, being able to marry freely without marriage permissions, being able to register their children to household lists and for their children to have access to education.
- **The Maramagyi confirm that having a CSC card has enabled access to rights, diminished discriminatory treatment by the authorities and made them feel "secure".** Before receiving the CSC the Maramagyi had no identity card and report having felt discriminated by the authorities. The Maramagyi communities report that their lives changed significantly with the CSC and their situation both in terms of access to documentation and rights that they can enjoy as a result.
- **The Kaman perceive that they face restrictions in accessing documentation and rights due to religious discrimination.** Despite being a recognized minority group the community highlights that they are discriminated because of their Muslim faith. The community hopes for equal access to rights as other citizens, the granting of the CSC for all and freedom from discrimination.
- **Some Hindu perceive the Naturalized Citizenship Scrutiny Card to be a temporary card providing them with an insecure status and with which they cannot access full rights.** Particularly in northern Rakhine some are concerned that if the law changes they might be sent to India.
- **The Rakhine highlight the importance of a citizenship card to ensure freedom of movement, freedom from discrimination and access to services.** The Rakhine consider the citizenship card to be very important, believing that not having the card would directly affect their freedom of movement, their children's access to education and civil documentation. Women perceive that they may be discriminated without the card.
- **All groups included in the study experience limited access to reliable information on documentation, rights, obligations and entitlements.** Similar to the stateless community there is a lack of access to information and little dialogue between the authorities and communities to dispel rumours and ensure clear and transparent messages. This results in communities not being fully informed or empowered to make informed decisions.

Recommendations

The findings in this report identify significant information gaps on citizenship, documentation and rights. Such information gaps undermine the stateless population's ability to make informed choices during the citizenship verification process and hinder government attempts to make substantial progress. Women and youth are those with the least access, perpetuating their inability to participate and make decisions. In light of these, key recommendations for improving the current citizenship verification process, include the following:

- **Improving access and providing information:** Information on the procedures of the citizenship verification exercise should be delivered directly by authorities in a language that is understood to ensure that all members of the community, including women and youth, are able to access the procedure and be informed of the requirements to apply. A consistent dialogue between authorities and the communities on the process and status of the citizenship verification exercise would ensure transparency and confidence in the procedure and dispel rumours. Consideration should also be given to outreach within communities to ensure that information and the application procedure is accessible.
- **Resolving the terminology issue:** The terminology issue has not been resolved and is likely to continue to be an impediment to implementation. A low level of participation will be expected if this issue is not resolved in a manner that is acceptable to all communities.
- **Enhanced consultations with affected communities:** It is evident that communities either do not know about the citizenship verification, or do not understand the process and its ramifications. Active steps to consult with both the stateless and Rakhine communities on how a citizenship verification process will be implemented under the current legal framework will be essential.
- **Simplified application forms:** The application procedure may be expedited by the use of simplified application forms and the implementation of a low threshold for submitting supporting documentation. Township archives could be referenced, particularly when applicants do not have complete family records.
- **Timely decision-making:** Decisions should be issued in a timely manner and information should be provided on mechanisms to follow up pending cases, or to pursue review or appeals for rejected decisions.
- **Flexible approach:** Given the low level of literacy among the community, a low threshold for establishing knowledge of a national language would ensure that a greater number of applicants benefit from the exercise, particularly women and youth. Waiving the multiple fees which applicants cannot afford would also increase participation. Members of the community who may be living with disabilities or the elderly should likewise not be excluded from the exercise and measures to ensure they are able to participate should be implemented.
- **Tangible changes:** The absence of tangible changes that has followed the exercise to date has resulted in a lack of confidence in the procedure throughout stateless communities. Progressive tangible changes must be seen for those who are confirmed as citizens.

TABLE OF CONTENTS

1. INTRODUCTION	6
2. GLOSSARY	8
3. THE ROHINGYA COMMUNITY	9
(A). COMMUNITY PERCEPTIONS ON DOCUMENTATION	9
(I). HOUSEHOLD LISTS	9
(II). TEMPORARY IDENTITY CERTIFICATE “SLIP”	10
(III). IDENTITY CARD FOR NATIONALITY VERIFICATION (ICNV)	10
(IV). CITIZENSHIP SCRUTINY CARDS (CSCs, “PINK CARDS”)	11
(B). COMMUNITY PERCEPTIONS ON RIGHTS	13
(C). COMMUNITY PERCEPTIONS ON CITIZENSHIP	14
(D). COMMUNITY PERCEPTION ON ETHNICITY AND CITIZENSHIP	16
(E). COMMUNITY PERCEPTIONS OF THE CITIZENSHIP VERIFICATION EXERCISE (PRE-JUNE 2016)	16
(F). COMMUNITY PERCEPTIONS AND HOPES TOWARDS THE NEW GOVERNMENT	18
4. OTHER ETHNIC GROUPS IN RAKHINE STATE	20
(A). THE MARAMAGYI COMMUNITY	20
(B). THE KAMAN COMMUNITY	20
(C). THE HINDU COMMUNITY	21
(D). THE RAKHINE COMMUNITY	22
(E). THE MRO, DINET AND RAKHINE ARRIVALS FROM BANGLADESH	23
5. CONCLUSIONS	24
6. RECOMMENDATIONS	25

1. INTRODUCTION

Citizenship in Myanmar is currently governed by the *1982 Citizenship Law* and its 1983 Procedures, which replaced the 1948 Union Citizenship Act and its 1949 Regulations. The *1982 Citizenship Law* introduced three different tiers of citizenship where previously there had been only one: these are citizens, associate citizens and naturalized citizens which are afforded different entitlements.

In 1989, a nationwide citizenship scrutiny exercise was carried out during which the *1982 Citizenship Law* and its 1983 Procedures were applied. For those who were “scrutinized” and found to fulfil the requirements of the new citizenship law, the Citizenship Scrutiny Card (CSC) replaced their National Registration Card (NRC). Individuals whose mother and father were considered as belonging to the 135 recognized “national ethnic groups” under the law retained their citizenship status without difficulty. Others, in particular the Rohingya, a proportion of whom had been issued with NRCs like other citizens prior to 1989, did not have their NRCs replaced with CSCs.

Following the introduction of CSCs in 1989, the Rohingya population that applied for a CSC never received a decision regarding their status. Furthermore, persons who were not granted CSCs but retained the NRCs that they had previously been issued are no longer considered Myanmar citizens by the relevant competent authorities. Consequently, 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. The members of this group did not hold citizenship of another country and they therefore became stateless. This appears inconsistent with the general principle of international law that arbitrary deprivation of nationality is prohibited, particularly where it results in statelessness.¹

UNHCR estimates that more than one million Rohingya habitual residents of predominantly northern Rakhine State, including 120,000 internally displaced in central Rakhine State, are stateless because of the discriminatory *1982 Citizenship Law* and its application.

In an attempt to address the issue of citizenship for the stateless population in Rakhine, the citizenship verification process was launched by the Government in 2014 with the pilot in Taung Pyo IDP camp, Myebon. However, few applications were made when the process was rolled out in Rakhine in 2015. While the then incumbent Government under President Thein Sein attempted to enlist more to participate in the verification, it annulled the Temporary Identity Certificate (or Temporary Registration Card (TRC), TIC, “white card”) held by at least 390,000 Rohingya through a Presidential Degree as of May 2015. The identity documents offered to replace the TIC, the receipt slips and the newly created Identity Card for Nationality Verification (ICNV, NVC, “turquoise card”), did not specify a clear legal framework that would allow for fundamental rights to be realized. The Government outreach when commencing the verification process as well as the exchange of the TIC was *ad hoc* and poorly implemented, and the process of citizenship verification as well as the impact of its outcome was never made clear to the affected community. Furthermore, the requirement to self-identify as “Bengali” in the verification process was almost universally rejected by communities. The vast majority of the Rohingya communities did not trust the citizenship verification process and rejected the alternative documents to the TIC. This may have been interpreted by the Government at the time as an indication of lack of interest by the target population in obtaining citizenship. However, routine field monitoring by UNHCR revealed that some members of the target population were keen to acquire citizenship.

In 2016, the new Government resumed its attempt to implement a citizenship verification process by reviving the distribution of ICNV as an initial step in the verification process. This study was conducted from March to May 2016 (i.e. before the Government commenced the ICNV distribution). Given that the modalities employed by the Government remain largely unchanged, however, the key issues highlighted in this community perceptions study remain unchanged.

For developing this paper UNHCR used a participatory approach to strengthen its understanding of community perceptions on citizenship, documentation and priorities of rights, and as such presents a snapshot of the prevailing narrative within the Rohingya community in Rakhine State since the inception of the citizenship verification process. For this study UNHCR conducted a survey of the

¹ Protection Sector Myanmar, *Protection Context Analysis – Rakhine State 2014-15*, p.11

stateless population and other minorities' current understanding of citizenship, documentation and related processes such as verification procedures. A total of 85 Focus Group Discussions (FGD) were held covering 1,293 men, women and youth in Rakhine State mainly focusing on the Rohingya stateless community but also including various ethnicities such as Kaman, Maramagi, Hindu, and the Rakhine. These other groups were included in this study to draw parallels on perceptions and concerns on citizenship verification, documentation and rights.

The analysis presented in this paper aims to identify knowledge gaps, misconceptions and rumours surrounding documentation and citizenship, mainly focusing on the stateless communities and their key priorities on these matters in order to inform subsequent actions. The study also serves to reinforce UNHCR's understanding of wishes, perceptions and sentiments concerning citizenship and rights which will guide and strengthen advocacy on these matters.

Transparent and widespread information dissemination will serve to strengthen local community voices and empower people to make informed choices. Information sharing and dialogue should become an ongoing process and continuously include information on rights, obligations and entitlements. The empowerment of communities will encourage people to more effectively engage in citizenship processes and lead to community involvement in helping themselves on these issues.

Figure 1: Focus Group Discussion data broken down by township, age and gender

Township	# FGD	# Individuals	# Women	# Men	# Youth
Buthidaung	24	366	185	181	135
Kyauktaw	6	116	46	70	20
Maungdaw	26	408	186	222	166
Minbya	3	55	20	35	-
Mrauk U	2	38	18	20	-
Pauktaw	7	102	31	71	37
Rathedaung	3	53	-	53	15
Sittwe	14	155	62	93	-
Total	85	1293	548	745	373*

**youth are also included in the breakdown by gender*

3. THE ROHINGYA COMMUNITY

(a). Community perceptions on Documentation

Communities confirm that all of the stateless community members who previously held a Temporary Identity Certificate/white card (TIC) and handed this over to Immigration and National Registration Department (INRD) in 2015 received a TIC slip or receipt. Those who previously did not hold a TIC, or where the TIC was lost, destroyed or damaged, continue to hold no document as TIC slips were only given to those who were able to surrender them. Communities estimate that the majority of those who had held a TIC now hold a slip as well as a household list, while they also remark that there are many who have never held any personal identity document.² All stateless communities report that they have no access to new documentation. Some women are not aware which card they currently hold or if they hold any card at all. This was observed mostly in the more rural areas in central Rakhine State. In northern Rakhine, women are usually aware of the TIC and the TIC slip. This difference in awareness is linked to the specific context and the differences in restrictions of freedom of movement in these areas. In rural central Rakhine women can move discreetly without obtaining travel authorization that is needed in northern Rakhine, where freedom of movement falls under the Local Order regime³ and Village Departure Certificates are required for all movement. Furthermore, the freedom of movement restrictions in central Rakhine are relatively recent, enforced since the 2012 violence, while restrictions in northern Rakhine under the Local Orders, have been in place since the 1990s.

(i). Household Lists

The household list is the main form of documentation for stateless families in Rakhine State. Registration in the household list is a pre-requisite for the issuing of identity documents, enrolment in Governmental schools, issuing of authorization to travel within townships and obtaining permission to marry.⁴

Whether the household list update takes place or not varies significantly between northern Rakhine State and central Rakhine State, as well as between the IDP camp and village setting. In the camps in central Rakhine, IDPs and Rohingya host communities have not had their household list updated since the 2012 conflict, but may have been within the last five years. Depending on place of origin, some communities report that they have not been able to update their household list for a much longer time. Communities in remote areas have difficulties in accessing the INRD services for the updating.⁵ The result is a large number of children in all camps and host families who are not on any household list.

In contrast in northern Rakhine State, where people are not in camps but where the Local Orders restrict peoples' everyday lives, household lists are updated annually by MaKaPa⁶ and all communities confirm the 2016 update having already taken place. Commencing 2016 a new process of registering newborn children in the household list was introduced where the stateless parents have to submit an application for each child. All communities report that the new process is unclear, complicated and burdensome.⁷ Families are concerned as they are still waiting for the results of their applications. In addition, there are challenges to have all family members on added to a household list due to the requirement to obtain marriage permission.⁸ In addition, given that new household lists are

² Particularly youth who never received a TIC.

³ For more information on Local Orders see Protection Sector – Context Analysis Rakhine State p.9

⁴ Permission to marry is required under the Local Orders in northern Rakhine State.

⁵ People living in Sittwe could, previous to 2012, update lists by paying a fee directly at the INRD office while those who lived in more remote areas were dependent on the INRD visits for any update. Such visits did not take place regularly in all places.

⁶ Committee for the Prevention of Illegal Immigration of Foreigners (MaKaPa). For more information see Protection Sector – Context Analysis Rakhine State p.9

⁷ In 2016 a new application process was introduced for registering children to household lists. This requires a large amount of recommendations the parents should submit to the local MaKaPa team: 2 copies of (a) application form, together with a birth notification letter from the Village Administrator (VA), a birth recommendation letter from the health staff, the marriage permission by the VA, a copy of the household list; (b) recommendations of 2 close relatives and by the VA; (c) statements of 2 witnesses of the parents, and of local BGP personnel. See *UNHCR advocacy note Birth Registration in northern Rakhine State*.

⁸ On 28 April 2016, Border Guard Police (BGP) from Sector 10 in Taung Bazar, Buthidaung, issued an instruction regarding new marriage permission procedures. The revised procedures referred to marriage related matters of "Bengali races" by the Village Administrators under the commanding Sector. Accordingly, the following documents were requested prior to marriage permission would be approved: a recommendation letter from the District/Township Immigration or Ma Ka Pa from respective Sectors for completing the eligible age of marriage; a recommendation letter from the respective Sector/Station Commanders to ensure that the soon-to-be-married couple is free from criminal offences/not outlawed; a recommendation letter from the health

not issued to Rohingya families, these lists become increasingly lengthy and the checking process requires all members to be present during the update.

Perceptions on the importance of being on the household lists are consistent and highlights the risk that stateless children and youth can be completely undocumented. Due to children not being on household lists all communities report significant concerns over their children's future freedom of movement, lack of access to education⁹ and ability to marry.¹⁰ In addition there are concerns that children will as a consequence have limited access to livelihoods. 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.

(ii). Temporary Identity Certificate “slip” (receipt given upon surrendering TIC)

Communities perceive the introduction of the TIC slip as a deterioration to their documentation status. Most people in both central and northern Rakhine report that their freedom of movement deteriorated since holding the TIC slip and that travel was easier with the TIC.¹¹ In northern Rakhine State it was also reported that the introduction of the slip caused an increase of unofficial fees requested at checkpoints. Communities therefore consider the slip as having little or no value, as one of the main purposes of an identity document in the current context is that it allows for freedom of movement. The community is concerned that they will have no proof of residence or any individual identity document if the TIC slip becomes invalid.

Rohingya women shared that they often don't know what is written on identity cards as most of them are illiterate. In a rural area UNHCR visited the women had never seen or heard of the TIC slip. When we asked the community leader of this particular village, we were informed that the husbands hold the slips of the women.

(iii). Identity Card for Nationality Verification (ICNV)

In June 2015 INRD announced that those who surrendered their TIC and received a slip should exchange this for an “Identity Card for Nationality Verification” (ICNV). As of 2015, this green-coloured card had a validity of two years and entitled the person to apply for citizenship. It did not contain any information about race or religion. Of the 390,000 TICs surrendered in Rakhine in 2015, the estimated number of individuals who currently hold an ICNV is around 3,162 at the time of writing.¹² Communities overwhelmingly report that they did not receive any official information regarding the ICNV before the resumption of ICNV distribution in June 2016. Most people that UNHCR spoke to in the context of this study were completely unaware of the card. In particular, almost all women and youth had no knowledge of this card. The lack of clarity on what the card is for and which entitlement it will bring, is aggravating their concern and therefore creating a lack of trust and unwillingness to apply for it.

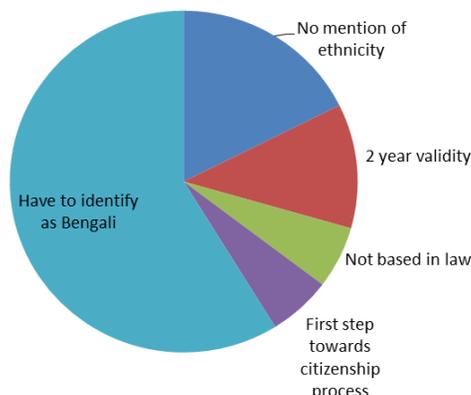
assistant ensuring that the soon-to-be-married couple is free from communicable diseases; and a recommendation letter from the respective RPVT/VAs, confirming that the person is single, unmarried and that a marriage dissolution is beyond three years if he/she was married previously.

⁹ Children not on household lists can usually access the primary education facilities (if available and based on the goodwill of the headmaster) in villages and camps. However, as secondary and higher education requires documentation, those not on household lists will not be able to access such documents.

¹⁰ In order to marry, both spouses must be on their respective household lists. In northern Rakhine State local orders are in place that require spouses to request for marriage permission. Once this has been received spouses must transfer to the same household list and only at this point will their future children be registered on the household list of their parents. The costs involved are burdensome to many, particularly those who marry spouses from other townships, resulting in newborn children not being added to household lists.

¹¹ It is possible to get a Form 4 if the person holds a TIC slip and Village Administrator recommendation for travel within Rakhine State only. For more information see UNHCR Information Note on Movement Restrictions for Stateless Residents in Rakhine State, Myanmar (2016).

¹² This includes 1,232 issued in 2015 and according to INRD figures 1,930 issued by 1 August 2016.

Figure 2: Community concerns regarding the ICNV (NVC)**Community concerns - ICNV (NVC)**

One of the main reasons for the reluctance to receive ICNV during the first phase of distribution in 2015 was having to self-identify as Bengali in the application form, although the card itself does not state ethnicity. In the current implementation process for issuing ICNV cards which started in June 2016, it is no longer necessary to indicate ethnicity or religion on the application form, and it remains absent from the card itself. In addition, another key concern raised by the community was the validity of only two years from the time of issuance. As of June 2016, the expiration date on the ICNV has been removed. Despite these Government changes to the ICNV in 2016, findings following the distribution indicate that communities remain reluctant towards accepting the ICNV.¹³ The reasons for this can be correlated with the concerns highlighted below.

Communities indicate that the lack of ethnicity on the ICNV is of concern to them as it perpetuates not being recognized as an ethnic group. In the current implementation process, this continues to be a persistent challenge where some communities have insisted that ethnicity be included. The term “Identity Card for Nationality Verification” (ICNV) has also been highlighted as a concern, as it implies that one has to undergo a verification of his or her nationality, while many believe they had a claim to Myanmar citizenship through the now-invalidated TIC. This is linked to the general concern that the Muslim community will be obliged to undergo the citizenship verification process, which does not automatically guarantee them citizenship. Further, the ICNV is not a citizenship document and does not provide any legal status. Moreover, there is a general understanding that the ICNV is not in accordance with the existing law. Communities perceive that if they accept the ICNV they will never be recognized as citizens and obtain the CSC. It would instead mean accepting to be recognized as “Bengali” and therefore be a foreigner or illegal immigrant. Further, there is an expectation that accepting these terms would bring about no positive changes to their lives. These perceptions are fueled by the realities observed whereby the issuance of the ICNV has not been linked to improvement in enjoying rights. For example, freedom of movement is not fully granted for individuals holding an ICNV as they are still required to obtain permission to travel. Movement is still a significant concern.

(iv). Citizenship Scrutiny Cards (CSCs, “pink cards”)

Consistently all communities feel that they are entitled to the Citizenship Scrutiny Card (CSC) which the stateless community refers to as the “pink card” or “red card”. This was expressed in 63 out of the 72 focus group discussion sessions held with the stateless community. Youth and women groups were the exceptions, as women sometimes had no knowledge of the CSC and youth often had no

¹³ Although falling outside of the time ambit of this report, preliminary analysis of the community perceptions of the ICNV following the distribution post June 2016, where ethnicity in the application form and the expiration date have been removed, suggests that the situation remain the same. Communication to communities of the purpose of the ICNV has been limited and the concerns related to the citizenship verification remain process.

Stateless community voices

Citizenship is perceived as political, creating instability

An IDP in central Rakhine expressed the perception that *“the rejection of our ethnicity and denial of citizenship is political. This issue is not concerned with our actual or current existence. This creates an unstable situation in Rakhine State. Citizenship should be the same for all.”*

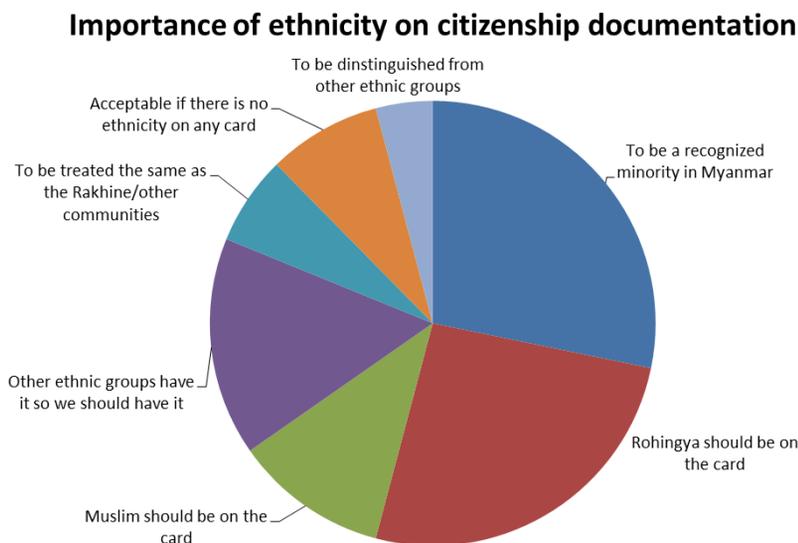
Citizenship law is perceived as discriminatory

A non-displaced host-community member in central Rakhine expressed that *“since the 1982 law the Government has been discriminatory towards the Rohingya community. The Rohingya were recognized under the 1948 law and before that we were recognized as Bamar Muslims. Previously in 1961 our language was also recognized. We want the citizenship law not to be discriminatory.”*

(d). Community Perception on Ethnicity and Citizenship

The overwhelming majority of the stateless communities, regardless of sex or age group, perceive that formally recognizing ethnicity is important for citizenship purposes. Communities feel it is important that their identity cards state Rohingya in order for the ethnic group to be recognized, not to be referred to or seen as “Bengali”, and to confirm their Myanmar citizenship. To have to identify themselves as “Bengali” for citizenship purposes is perceived to be seen as foreigners or illegal immigrants, and hence not ever to be recognized as full citizens with full rights. Consequently, communities suggest that stating ethnicity as they perceive it is crucial for their future in the country. Many also state that their religion Islam should also be included on the citizenship card. The stateless communities in addition highlight that as ethnicity is recorded on the citizenship cards of other ethnic groups, it should equally be done so for the Muslim stateless population (*See visual graph below*). Some community members perceive an alternative terminology such as “Rakhine Muslim” to be acceptable, this is however not representative of the entire Rohingya community’s perception and varies depending on location.

Figure 6: Importance of ethnicity on citizenship documentation



Primarily in discussions with men, stateless communities highlight that if ethnicity is removed from all citizenship cards it would be acceptable, with a condition that the removal be applicable to all other recognized ethnicities in Myanmar. The NRC displayed no ethnicity and was held equally by all in Myanmar and communities often refer to the NRC as being a card they were happy with. The NRC also provided equal access to rights.

The term Bengali is seen as problematic by all. If ethnicity is removed from all documentation across the country, this has been described as acceptable. Nevertheless, communities explain that as the 1982 *Citizenship Law* grants full citizenship based on ethnicity, it is important to have ethnicity on the card in order to be recognized as a citizen and treated equally to other ethnic groups. Therefore, for the Rohingya the ethnicity question remains an unsolved dilemma which will continue to affect the implementation of the 1982 *Citizenship Law*.

Stateless Community Voices - Stateless women on ethnicity and citizenship

“Ethnicity is important on a card as it provides people with the recognition that they need in order to ensure that they will be able to live peacefully. Ethnicity must be recognized for peace. Peace does not depend on anyone – no donor is needed and no donations are needed. Peace means no one is needed to provide for us.”

“Not being recognized by the government is like living without parents.”

(e). Community perceptions of the citizenship verification exercise (pre-June 2016)

Most people, including all women and youth, report being unaware of the citizenship verification exercise and its process. In approximately 49 FGDs out of the 72 FGD held the stateless community members report being unaware of the process or of any way to apply for citizenship. Communities are more aware of the 1989 citizenship verification process, which was the same across the country but where the stateless community report never having received a CSC after submitting an application and handing in their NRC.

Albeit a minority, those who have heard of the pilot verification programme in Myebon in 2015 are usually also aware that the distribution of cards (CSC and NCSC) has not granted freedom of movement or increased access to rights for the Muslim population, both Rohingya and Kaman.¹⁵

For those who have heard of the citizenship verification their various concerns include:

- Uncertainty of how the verification process works and the documents needed to apply.
- 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?*
- Requirement of the ICNV to apply for citizenship.
- The verification process does not guarantee citizenship for the Rohingya.
- Only Rakhine get full citizenship through the verification process i.e. CSC.
- The process is not accessible and INRD does not accept applications from Muslims.

The community was asked in what ways the citizenship verification process could be improved. Some of the recommendations from the community include:

- A fair process that recognizes that they have lived in Myanmar for generations.
- A fair and inclusive process that recognizes their ethnicity.
- The process should be carried out in consultation with trusted community leaders.
- Consent from the communities should be ensured and people should not be forced to apply.
- The process should be simple, clear and transparent and the information provided to the communities should be consistent.
- Decisions should be handed down more quickly.
- The process should be free from discrimination and be the same as for the Rakhine and other ethnic groups.
- The documentation burden for applying should be alleviated.
- The Government should recognize that all are citizens in one round and not have various steps in the application process.
- The Government should apply similar standards as in other countries. Citizenship cards should be provided depending on the years people have been in the country.
- The outcome should provide equal rights with other citizens and should improve the welfare of the community and lead to peace.

¹⁵ See UNHCR *Update on White Card Surrender and Citizenship Verification in Rakhine: 26 August 2015*

- Trusted community leaders chosen by the communities, and UN/INGO representatives should accompany all mobile teams during implementation.
- Trusted lawyers for consultation should be made available.
- The process should be officially announced in Hluttaw (Upper House/Lower House) and should be known to everyone and posted on the Government website. Official pamphlets and posters should be provided to all communities.
- Due to restrictions on freedom of movement, communities consider it important that INRD come to the villages through mobile teams. Complications and higher costs arise for applying in the verification process when applicants must travel to INRD.¹⁶

In sum, most community members are unaware of the citizenship verification process. People are not aware of what the process entails, what kind of card they could potentially receive or how to access the procedure. For those who are aware of the process there is confusion on what is needed to apply and what the result is likely to be. Communities feel the process lacks transparency and fear that it is discriminatory against them due to their race and religion. The stateless population also underscores the importance of tangible changes from the acquisition of citizenship, as this has yet to be seen for any decisions handed down from the citizenship verification process.

(f). Community perceptions and hopes towards the new Government

The majority of the stateless population (51 FGD out of 72 FGD in total) perceives that their situation concerning documentation has become considerably worse over the past few decades. In their view, the deterioration started when the NRC was exchanged with the TIC in 1990s, then the TIC was annulled and a slip was given upon surrendering the invalidated TIC during the course of 2015. The community clearly links their worsening documentation status to gradual deterioration in accessing rights. Currently the stateless population faces significant difficulties in accessing other types of identity documentation such as birth certificates or updating household lists, particularly in central Rakhine State since the displacement.

Holding the 'right' kind of documentation is seen as a rights enabler while citizenship, in form of legal status, is seen as directly linked to rights access. As a result, communities feel their citizenship situation has not changed (29 FGD out of 72 FGD) or is getting worse (31 FGD out of 72 FGD). As described above, communities link citizenship to rights access and therefore give examples when explaining the deterioration, such as not being able to vote in the 2015 elections and their freedom of movement becoming more restricted. Youth of both sexes emphasize their wish to have freedom of movement in order to access higher education. This is linked to the ability to work, including for the Government as teachers, doctors and nurses.

Overall communities were hopeful that the new Government would introduce positive changes to their situation. However, during the approximately three to four month period when the FGDs for this study took place (which coincided with the initial few months after the new Government took power), a decrease in hope towards the new Government was observed. Some communities also expressed that they are losing hope for a better future, and that some Rohingya no longer have an expectation to become Myanmar citizens.

The graph below visualises the various hopes that the stateless community had for the new Government at the time of the FGD sessions. UNHCR asked them to list their main priorities they would ask the Government to address. Freedom of movement ranked at the top of the list. This was followed by access to higher education; access to equal rights as other citizens; the granting of the CSC and to be recognized as Myanmar citizens; recognition of Rohingya ethnicity; access to livelihoods and jobs; equal treatment and freedom from discrimination; freedom of religion; access to healthcare; peaceful coexistence; rule of law; access to jobs with Government such as teachers, doctors, nurses, MPs, etc.

¹⁶ See UNHCR Information Note on Movement Restrictions for Stateless Residents in Rakhine State, Myanmar.

Annex 30

UN OHCHR, *Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016: FLASH REPORT* (3 February 2017)

Report of OHCHR mission to Bangladesh

**Interviews with Rohingyas fleeing from
Myanmar since 9 October 2016**

FLASH REPORT

3 February 2017



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Police forces of Myanmar

Non-border police forces were also engaged in operations in nRS. They are typically dressed in uniforms with grey shirts and dark trousers (also pictured above). They feature in the disturbing video footage of Myanmar Police personnel beating men – and children – who were rounded up during the security operations.²²

Rakhine villagers recently integrated into the security forces

Several testimonies were gathered from interviewees who claimed to have been attacked by Rakhine villagers²³ dressed in security force uniforms, indicating that the villagers had recently been provided with such uniforms and weapons. When asked how they could distinguish a uniformed Rakhine villager from a regular, long-standing officer, many witnesses – including several women – stated that the Rakhine villagers would have longer hair (without a military style hairstyle) and were less likely to be shaved. Others had recognized their own Rakhine neighbours in military uniforms:

“I know Buddhist boys in my village who have been given military uniforms and weapons. We can distinguish them from the regular military, even when they wear uniforms. There are Buddhist villages next to our village. They had a marketplace there, where both we Muslims and Buddhists went, we used to see them there every day. I know many of the young boys, those of my age, I used to talk with them.”²⁴

These testimonies are consistent with statements by the Government, the media and others about the recruitment of local non-Muslims. Reportedly, the GoM has clarified that it has an “accelerated BGP training program with loosened admission criteria and trainees deployed as regular BGP”.²⁵

Rakhine villagers joining/supporting the security forces in civilian clothing

Several interviewees also testified about having been attacked by Rakhine villagers who were dressed in civilian clothing, but were assisting and supporting the security forces. Sometimes Rakhine villagers would join the security forces in whatever they were doing; on

²² <https://www.theguardian.com/world/video/2017/jan/02/rohingya-police-beating-footage-myanmar-government-investigate-video>. The UN Special Rapporteur on the situation of human rights in Myanmar reports in her press statement of 20 January that Myanmar acknowledged this video’s veracity and responded by arresting some of the police officers featured in the video.

²³ Rakhine villagers were occasionally called “Buddhists” or, pejoratively, “Mogh” by the interviewees. These terms have been retained in the original interview reports where they were used, but are not used in this report.

²⁴ Interview with a 22-year old man from Doe Tan.

²⁵ ICG report nr 283, 15 December 2016 and <http://www.moi.gov.mm/moi:eng/?q=news/18/11/2016/id-9208> which quotes Lwin, the chief of the No. 1 Border Guard Police Force, saying that “every Rakhine national wishing to protect their state will have a chance to become part of the local armed police” and that “healthy Rakhine women and wives of the members of Rakhine State Police Force also have received basic military training”.

other occasions, Rakhine villagers would engage in looting, beating or sexual abuse on their own initiative (but in the presence of security forces who did nothing to stop it).²⁶

Other armed elements

According to the Government of Myanmar²⁷ and a recent International Crisis Group report²⁸, Rohingya insurgent elements have also been operating in nRS during the period, and were allegedly responsible for the attacks on the three BGP sites that occurred on 9 October and involved in skirmishes on 12 November.

Of the witnesses and victims OHCHR spoke with, no one reported having witnessed or having been subjected to any abuse by these alleged insurgents.

Testimonies received in relation to these armed elements instead mainly referred to statements made by Tatmadaw or BGP during their “area clearance operations”, in which soldiers or police officers stated to villagers that they were searching for members of the Rohingya Solidarity Organization (RSO). Other testimonies similarly referred to the security forces having blamed the Rohingya villagers for having sheltered “bad people” or “terrorists”, although without any reference to any concrete group.

Assessment

All eyewitness testimonies the team gathered referred to violations allegedly perpetrated by the Myanmar security forces or Rakhine villagers acting jointly with security forces (or at least with their acceptance). A description of these follows below in the chapters on the types of alleged violations.

6. Extrajudicial and summary executions or other killings

Many victims and witnesses interviewed by OHCHR claimed that several of their immediate and/or extended family members, neighbours and other Rohingya civilians in the nRS were killed in different circumstances and by different methods by the Myanmar army, police and Rakhine villagers.

²⁶ Some interviewees referred to the Rakhine villagers as members of the so-called 969 movement.

²⁷ SR Lee reported the following on 20 January in her end-of-mission press statement concerning those attacks: “What has been said to me over and over by Government representatives regarding the 9 October attacks is that this was not an inter-communal violence or crisis; that this was a calculated attack against the sovereignty of Myanmar and that the Government rightly launched a security response. The Government described to me how the attacks occurred and I saw the three Border Guard posts concerned. I deplore these attacks carried out in a brutal manner and I convey my deepest condolences to the families of those killed.”

²⁸ ICG report nr 283, 15 December 2016. The ICG refers to an armed group (known as Harakat al-Yaqin (HaY)), as having been responsible for three attacks on BGP posts that occurred on 9 October.

6.1. Death due to random firing

Many victims reported that several of their family members and friends were killed by random firing and the use of grenades²⁹ 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.

The allegations of the random nature of shootings were corroborated by witness testimonies that showed that people were shot either while fleeing, when they were working on their farms, shopping in markets, or while fishing. Some of those interviewed mentioned that they did not know from which direction bullets or grenade splinters hit them. Many attacks were reportedly conducted by the security forces in early hours of the morning around Fajar prayer time, when it was still dark and the visibility was poor, making it difficult for the security forces to see who they were firing at and for the innocent civilians to flee.

A man from Yae Khat Chaung Gwa Son stated: *“The day the army attacked my village, my father and I had just come out of prayers, when we heard sounds of shooting. We had just walked to a farm, where we were sitting and talking to the owner of the farm. While the firing was still going on, my father stood up, which is when a grenade came and exploded close to us, killing my father, the farm owner’s son, and severely injuring me and the farmer.”* (OHCHR picture of victim’s injuries on file.)

In another case, a man from Kyar Gaung Taung reported: *“The day the army attacked, it was 3 a.m., and I was sleeping. After hearing the firing, I woke up and to save my life I wanted to run and hide. All of a sudden a projectile hit my body, and I was hurt”.*

Similar attacks occurred in Doe Tan, as reported by a 25-year old male interviewee: *“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.”* (OHCHR picture on file of his lower back and side, where a bullet entered and exited.)

The use of helicopters for firing bullets and dropping of grenades also confirm the indiscriminate and random nature of the attacks. Witnesses from Dar Gyi Zar and Yae Khat

²⁹ In testimonies, victims and witnesses would describe projectiles and explosions seemingly caused by grenades but possibly also by mortars.

Chaung Gwa Son recounted to the OHCHR team the horror, destruction and casualties that helicopter attacks caused in their villages.

One eye witness from Dar Gyi Zar explained: *“Two helicopters were deployed to our village. The helicopters flew over the village for over 20 minutes, firing randomly at the villagers. The first round of attack was 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.”*

A young teenager from Yae Twin Kyun stated: *“They were shooting from a helicopter when I was in Yae Khat Chaung Gwa Son, 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.”* (OHCHR picture on file, taken of three different gunshot wounds, on each arm plus in armpit.)

Many of those interviewed reported having lost one or more family members, friends or neighbours due to shooting while fleeing such attacks. Some recalled that bullets “rained” on them when they were fleeing their villages, along with hundreds of others.

OHCHR photographed and documented injuries on victims that were either still fresh or had left scars on their body, due to surgeries performed on them to remove bullets/grenade splinters.

6.2. Death due to shooting at close range

Influential and respected members of the community, particularly teachers, imams, religious scholars and community leaders were reportedly specifically targeted. In several cases, the army entered houses, shops or villages and shot and summarily executed them with a rifle shot at close range. While describing the situation, several victims mentioned that the army and Rakhine civilians, sometimes up to 400 individuals, would arrive in a village, and between six and 10 of them would then go from house to house attacking Rohingyas. In some cases, prior to the killing, victims were reportedly questioned about “infiltrators” or “people from Bangladesh” or arms, while in other cases, they were simply executed by shooting from close range. A man from Nga Khu Ya said:

“The military had locked us down for almost 10 days. I ran out of food and my three children were starving to death. The situation became desperate and unbearable, so I went to the nearby canal to fish. When I reached the canal, I found two other villagers fishing. Suddenly, two police officers approached us and pointed their guns at us. We were asked to kneel down and were then hit with rifle butts. After a few minutes of beatings, the police shot the two other villagers from close range. Both died on the spot. They continued kicking and punching me and yelling ‘call your Allah to come and save you’. After about 10 minutes of beatings, they aimed at me. I was hit by a bullet in my back and fell into the water. They

continued shooting at me. I received a second bullet in my shoulder. I pretended to be dead and the police left.” (OHCHR pictures of bullets wounds on file.)

6.3. Death due to stabbing by knife

Testimonies were also collected from witnesses and victims whose family members were killed when their throats were slit by knives carried by the army or by other long knives which are usually used for slaughtering livestock.

Many such killings have been committed in presence of family members, friends and immediate neighbours (see also the section on killings of children below). A 14-year-old girl from Yae Khat Chaung Gwa Son, who had already been raped by soldiers, saw her mother beaten to death and her two sisters killed in a knife attack. *“When my two sisters, 8 and 10 years old, were running away from the house, having seen the military come, they were killed. They were not shot dead, but slaughtered with knives.”*

An 18-year old girl from Kyet Yoe Pyin lost her mother in a knife attack: *“My mother is rather old, over 60, so when the military came she could not run very well, so we saw them catching her and cut her throat with a long knife.”*

When the police, army or civilian Rakhines arrived in their homes, family members usually fled in different directions, separating from each other. In the ensuing chaos, fear and confusion, some family members were captured by the army, while those who managed to flee hid in nearby hills, villages or paddy fields. Those who managed to return to their villages once the army had left the village reported that they found the dead bodies of their captured relatives, killed either by shooting or stabbing. A woman from Yae Khat Chaung Gwa Son: *“My father, who was also living with me, was slaughtered with a knife. He was a religious person.”*

6.4. Death by burning

Another major cause of deaths was due to burning of houses. Numerous testimonies collected from people from different villages such as Kyet Yoe Pyin, Yae Khat Chaung Gwa Son, Dar Gyi Zar and Pwint Hpyu Chaung village tracts confirmed that the army deliberately set fire to houses with families inside and in other cases pushed Rohingyas into already burning houses. People of different age groups who managed to escape the fire also died later due to burns.

Testimonies were collected of several cases 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. An eyewitness from Yae Khat Chaung Gwa Son stated: *“The army set fire to my house, burning my elderly mother-in-law and a sister-in-law, who was mentally disabled, alive. We were unable to carry them with us, when the military attacked the village.”*

In another incident from Yae Khat Chaung Gwa Son recorded by OHCHR, elderly people were dragged out of their houses and set on fire in open spaces: *“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.”*

In some cases, the army also burned bodies of people who had already died of bullet or stab wounds. Pictures and videos of charred bodies, which were beyond recognition in many cases, were shared with OHCHR (although the team has not yet had a chance to confirm their veracity at the time of writing). Family members claimed that in several cases the bodies were so badly burnt that the only way of recognising them was by identifying the personal belongings on the remains, such as bangles and watches.

An 18-year-old girl from Ngar Sar Kyu recounted: *“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.”*

The concerted and coordinated efforts by the army, police and Rakhine villagers to burn people and property (see also the below section on destruction) seem to indicate that these acts were deliberate and intentional.

An 11-year-old girl from Yae Khat Chaung Gwa Son explained: *“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.”*

6.5. Beating to death

Reports of deaths due to beating by the security forces and Rakhine villagers were also recorded. A number of men, women and children were beaten to death with sticks, gun butts and metal rods, or kicked to death with boots. They were hit on the back of their head, the chest and face, causing fatal bleeding and other severe injuries. Some of the victims mentioned that they were severely beaten either by the army or Rakhine villagers and then dumped by the roadside as the alleged perpetrators took them for dead.

A resident of Laung Don informed OHCHR: *“The military rounded me and some 85 other villagers up. They tied our hands behind our backs. We were taken to an open space, where we were forced to sit in a stress position, with our body bent and looking down towards the ground. They were hitting us with rifle butts, wooden sticks, kicking and punching us,*

inflicting severe injuries. An elderly villager was beaten to death by five army officers in front of our eyes."

6.6. Killings of children

Several testimonies gathered by the OHCHR team concern the killing of children - boys and girls of different age groups ranging from newborns to teenagers - by the security forces. Children were killed by live ammunition or stabbed while at home; while fleeing to safety; or while in the farms or fields.

In several particularly disturbing cases, mothers witnessed the killings of their children by knife attacks:

A 25-year old woman from Yae Khat Chaung Gwa Son: *"They beat and killed my husband with a knife. They went into my house. Five of them took off my clothes and raped me. My eight-month- old son was crying of hunger when they were in my house because he wanted to breastfeed, so to silence him they killed him too with a knife. I thought I would die, but I survived."*

A mother of four from Pwint Hpyu Chaung: *"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 of the kind we use to slaughter goats. I saw this from where I was hiding."*

A mother of three from Kyet Yoe Pyin: *"They 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."*

In one case, witnessed by a 19-year old woman from Ngar Sar Kyu, a new-born baby was killed: *"In Kyet Yoe Pyin I saw the military killing a newborn baby of a distant relative. She was about to deliver the baby just after military entered the village. We were all inside the house and the military made us come out. My relative could not come out as she was in labour so they dragged her out and hit her stomach with a big stick. They killed the baby by stomping on it with their heavy boots. Then they burned the house."*

Several children also reportedly died when their houses were set on fire by the army while they were inside, some having been prevented from coming out by the security forces. Children also drowned in the river between Myanmar and Bangladesh, when escaping the attacks in nRS and crossing into Bangladesh. In most cases, it was reported that the Myanmar border guards opened fire on them, resulting in the sinking of their boats.

A 46 year old inhabitant of Yae Twin Kyun stated the following: *"I, along with my family and other Rohingyas boarded two fishing boats one night to cross into Bangladesh. We were in*

the middle of the river, when the Myanmar Border Guards approached us, and opened fire at us, hitting our boats. The boat sank and we all fell into the river. Three of my cousins between two and four years of age drowned in the river. A number of children in the second boat also sank. Bangladeshi border guards and fishermen came to our rescue.”

7. Enforced disappearance

Since 9 October 2016, hundreds of Rohingyas have been “picked up or rounded up” by the Myanmar security forces. Of the 204 people that OHCHR interviewed, 91 (45%) reported family members – often several - who were still missing after having been taken away by the security forces. In addition to family members, many interviewees also named and listed many neighbours and distant family members who were taken away and who are still missing. In all, 115 (56%) of interviewees reported disappearances.

Men were rounded up by the police and army in local schools, mosques, madrasas, police stations and open fields and transported to unknown destinations. Some were also taken away from their homes, farms, roadsides and around villages.

Boys and men between the age of 17 and 45 were particularly targeted, as they are considered to be strong and seen as a potential threat to the army and authorities. Men would typically have their hands tied behind their backs or behind their heads during these round ups.

Women and girls of fertile age were also rounded up, separated and taken away.

Before being transported in vehicles (ranging from smaller minibuses to large open military trucks in witness testimony), those rounded up were body searched for money and valuables, which, if found, were kept by the security forces. The groups of people rounded up varied in numbers from village to village, from small groups of 10-15 to larger ones of 70 to 150. Many interviewees cited dozens of family members and neighbours, usually men, who were missing after having been rounded up and taken away in this way.

One of the victims, a man from Yae Twin Kyun who was injured while escaping the army said: *“They took women, girls and men to a large playing field in our village. They kept almost the entire village on the field, and then picked 17 people who are respected by the villagers and took them away to an unknown destination. To date, we have no information about them. They also took six beautiful women and girls.”*

Cases of individual disappearances were also presented to the OHCHR team. Several victims from different villages in Rakhine mentioned that the army and police targeted and picked up influential individuals such as imams, teachers, preachers, rich business men, chairmen or village leaders and respected elders. Such influential people were targeted, as

they were potential sources of information for the army and police about insurgents or could be involved in resisting the authorities' operations. No information was available on the current whereabouts of these individuals. A majority of the interviewees believed that those who were picked up by the army or police may no longer be alive. Lists of names were shared with OHCHR.

A victim from Yae Khat Chaung Gwa Son informed the OHCHR team that: *"The military arrested my son, a Mullah and religious teacher in our mosque. He was taken to an unknown location and his whereabouts remains unknown. We don't know if he is still alive."*

The number of persons missing after having been taken away by the security forces is difficult to estimate, but could potentially exceed several hundred. According to the testimonies gathered, most are men and boys. OHCHR spoke with many women and children whose husbands, brothers and fathers are missing, and whose remaining families in Bangladesh now consist entirely of women, or are at least headed by women. Humanitarian workers in Bangladesh confirmed this and informed the OHCHR team that the vast majority of the estimated 66,000 Rohingyas who have crossed the border since 9 October are women and children.

Not knowing the fate of a loved one is a particularly difficult burden to bear, and many interviewees broke down during the interviews when this issue was mentioned. Most interviewees were in desperate need of services to help trace family members.

8. Rape and other forms of sexual violence

52 (52%) of the 101 women the team interviewed reported having survived rape or experienced other forms of sexual violence. The team interviewed 26 survivors of rape, of whom 2 were girls. An additional 28 women and 5 girls reported having suffered other forms of sexual violence. Nine of the rape survivors were from the same village. Some women were raped or sexually abused in a village other than their own, following the displacement caused by the violence and burning of houses.

The perpetrators have been identified as mainly military in green or black/green camouflage uniforms, with red scarfs, carrying rifles, knives and wooden sticks, although rapes by police and Rakhine villagers were also reported.

The victims reported that the perpetrators usually spoke in Burmese while committing the acts of rape or otherwise sexually assaulting them and thus the majority of victims did not understand what they were saying. The accounts of those who understand Burmese or who were assaulted by perpetrators who also used, at least in part, words they could understand suggest that the women were targeted as a punishment for: (a) not revealing or knowing where their male relatives and/or the "insurgents" were hiding or (b) allegedly supporting

the “insurgents” e.g. cooking for them or (c) simply for being Rohingya. This suggests that rape was being used as a form of torture.

“The one who raped me asked me where my husband was. I said ‘I do not know, my house burned’. He said: ‘Tell the truth and we will release you. Then he beat me and raped me.” 22-year-old woman from Dar Gyi Zar.

“When they were raping me, they were saying that I am cooking for the RSOs but I never did it”, woman, 25, from Yae Khat Chaung Gwa Son.

“I only understood one word “khalar” that they were repeating, which means Bengali people from Bangladesh,” 30 year-old woman rape-survivor from Nga Khu Ya.

8.1. Gang rape and rape by an individual

The majority of interviewed rape victims were raped by more than one soldier, usually three to four but even up to eight officers. 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. While the majority of interviewed rape victims were aged 20-30, the team interviewed several girl victims of a gang rape, with the youngest one being only 11 years old. In some cases pre-adolescent girls were targeted. In the case of the 11 year-old victim of a gang rape from Kyein Chaung, the military caught her and her mother alone in the house. The soldiers locked the mother outside the house and then gang-raped the girl.

“The next time the military came, there were eight to 10 of them, they were asking where my father and sisters were. They were also saying that they were searching for people from Bangladesh. They removed all my clothes and all my mother’s clothes and kicked us with their boots. Then they left. I do not know why. But the next day they came again. This time there were seven of them. They dragged my mother outside the house and locked themselves in the room with me. I do not know if they all abused me, I lost consciousness at some point. My mother woke me up with water. I was bleeding a lot.”

Pregnant women were also raped. The team interviewed pregnant survivors of rape, including gang rape, one of whom was raped in her 9th month of pregnancy. Penetration by objects such as rifles or bamboo sticks has been alleged in second hand accounts but was not reported by any of the rape victims met by the team. Penetration by hand was rare. Only in one case was sodomy and penal penetration of the mouth reported by the victim.

The rapes usually took place following one of these scenarios: In the first scenario, women and girls would be rounded up by military and several of them would be taken to nearby schools, mosques, houses or the forest/jungle to be gang raped. The remaining women (not targeted for rape but rounded up) were made to sit in the heat of the sun for several hours or in some cases all day. The terror of being made to witness (albeit from a distance and

without actually seeing, although in some cases hearing) the rape of others in combination with the physical discomfort of being forced to sit in the sun was in itself traumatizing for those who experienced it and whom the team interviewed. In some cases, the gang rapes and rapes took place in a common room/space and in some cases each girl or woman was taken to a separate room, toilet or other area. In the second scenario, military would follow women and girls fleeing to individual houses and rape or gang rape them there. In the third scenario, military unexpectedly attacked women in their homes or the homes in which they were taking shelter.

In several cases, one or two soldiers usually held the victim, often crushing/pinning her legs and hands, while another penetrated her. This was the case also for some cases of rape by only one soldier; the perpetrators would not take turns in this case. Often the perpetrators held rifles against the victim's face, chest or belly or a knife to their neck and threatened to stab or kill her, while the others raped her. Some victims also reported having been grabbed by their throats, having their hair pulled, being punched, including on lips and face, being kicked, and being severely beaten with rifle butts on their breasts, stomachs, lower abdomen and on their vaginas as well as other parts of the body, including eyes. One of the victims had a stitched up 8-10 cm long scar in the proximity of her vagina, having been stabbed when trying to defend herself against rape (picture on file with OHCHR team). Another victim was burned on her leg with a burning piece of plastic (picture on file with OHCHR team). Many women reported that the soldiers were "pressing their breasts very hard" before and during the rapes. Some of the victims lost consciousness during the rapes.

The victims of rape would often be left without clothes or with torn clothes, at times unconscious, in public spaces such as the schools, mosques, yards or the jungle. and some had to flee to nearby villages in search of clothes and help or return naked from a faraway place to which they were taken. In one case in which several girls were raped in a school, one of the victims reported that the military took photos of the naked victims with their mobiles before raping them.

Most victims of rape that the team have spoken to expressed distress and were visibly upset and crying during the interviews. Some have explicitly reported severe mental consequences such as insomnia, depression, fainting, persistent fear, and getting startled at any noise.

"I get counselling once a week and prenatal checks. I cannot sleep properly. I am depressed. I faint sometimes. My husband is trying to help me but it's hard." 32 year old woman from Kyet Yoe Pyin, raped in the fifth month of pregnancy.

"I feel very nervous and scared all the time. Every noise startles me. I am afraid to even go to the bathroom by myself." 25 year old woman from Nga Sar Kyu village tract.

Some reported the following physical and medical consequences of the rape: bleeding (in some cases severe) ranging from 2 hours to 17 days; symptoms of and treatment for severe urinary and vaginal infections; abdominal pain (in some cases severe); being unable to move or walk for several days; difficulties to walk because of bruising, and pain throughout the body from the accompanying punches.

“After the rape I was struggling to urinate, but my baby inside me is still alive. I was bleeding from my vagina for 17 days. When I came here to Bangladesh, about 22 days after I was raped ...at the clinic they inserted a small pipe into my urinary tract which helped me to urinate. But when it was removed I could still not urinate, so then I was brought to the hospital.. They tested me there and saw that the rape had caused an infection. I felt like I would die of the pain. They gave me a medicine that I must take for several months, and now I can fortunately urinate again.” 25-year old woman from Kyet Yoe Pyin.

“When I woke up I found myself bleeding profusely from the vagina. I thought that I would die; it took four to five days to flee and to cross the forest with my children, for 10-15 days I was bleeding. It did not stop even after coming here. Doctors treated me and after that the bleeding stopped.” 37-year old woman from Kyein Chaung.

“I have been bleeding a lot since the rape. The last time I had that type of bleeding was immediately after I had given birth to my second child.” 30-year old woman from Kyet Yoe Pyin.

Women and girls who were raped, typically, did not have any access to health care in nRS, either because there were no doctors, because they could not afford such care or because they were worried about social stigma that would be attached to them in their communities. Even women with severe bleeding were usually given only herbal medicine by other villagers and properly treated only upon arrival in Bangladesh. Health clinic workers in Cox's Bazar confirmed to the team that they had treated significant numbers of Rohingya women who had been raped and who arrived since the 9 October attacks.

Several interviewees mentioned cases of women and girls dying as a consequence of gang rape. While the team did not come across any direct eyewitness testimony of such deaths, it gathered several indirect accounts:

A 27-year old old fisherman from Kyein Chaung: *“During their operations, the army entered our house, where they found my mother, wife and sister at home. They took my 18-year-old sister to nearby bushes and gang-raped her. She was brought back after the rape. She was in a critical situation and died the same day. I was in the canal fishing and upon my return, I found her dead.”*

A 35-year old father from Kyet Yoe Pyin: *“There were also many young women and girls who were abused. I know three of them. Two came with us when we crossed the border, although I don't know where they are now. They were raped together with a third girl, Hasina. She is*

the one who was killed. She was from Kyet Yoe Pyin. She was my very close neighbour. She was 16.”

Women and girls who were raped in their homes or other people’s homes were frequently raped in front of their children or siblings of all ages, or other female members of the household; men were usually in hiding when the rapes took place. Family members and others who tried to defend the victims were beaten with sticks, punched and kicked. One mother had her hand broken when defending her daughter; a boy aged two and a half who was trying to defend his mother was kicked by the military and had his shoulder dislocated; and a 15-year-old girl had a scar on her face from defending her mother. Another victim reported that all of her three children (two daughters, aged seven and 12 and one son, aged six) were beaten and pushed as the military raped her. In two of the most gruesome cases, a woman described how her five-year-old daughter, who was trying to stop soldiers raping her mother, had her throat slit and another mother recounted how her eight-month baby boy was similarly killed. (See also above under the section on killings.)

1.1. Sexual violence other than rape

Sexual violence happened in similar scenarios to rape – when Rohingya were being rounded up, by unexpectedly attacking women in their own homes or in homes they were visiting or taking shelter in, be it in their own village or a village to which they had been displaced. While rapes were widespread, other forms of sexual violence were even more so, as reflected in this quote from a 30-year-old woman from U Shey Kya: . *“You will not find a single house in our village where women were not subjected to this.”* OHCHR’s interviews confirm that this was the case in many of the villages that the victims and witnesses came from. The most common form of sexual violence was invasive body searches during the round-ups or house checks during which women and girls of all ages, even toddlers, had their private body parts touched and/or exposed.

The purpose of this form of sexual violence appears two-fold - a) to intimidate and humiliate the women and b) to loot any valuables that the women and girls might be hiding such as money and jewellery. Women frequently reported that during these checks the military would press their breasts very hard, pinch their nipples, press on their nipples with rifle butts, beat or slap those who did not want to remove their clothes and in some cases even put hands inside their vaginas to search for any objects they may be hiding. As with rapes, victims who protested or those witnesses trying to protect the victims were kicked or beaten with rifle butts and sticks.

“They body-searched us all, one by one. They pressed my breast very hard with their hands and pushed hard on my nipple with a rifle butt. I dropped my baby when they did that. We were all scared, my mother-in-law was trying to hold my baby who was crying and another military man beat her repeatedly with a rifle butt on her neck.” Woman, aged between 20-25, from U Shey Kya.

These checks were often conducted in public, as exemplified in the two following testimonies:

“They would also press our breasts and put hands in our vaginas in the name of searching for objects we were hiding. They did this to me, my daughter and my daughter-in-law. They did this in front of everyone in the paddy field, it was so embarrassing. They even touched my seven-year-old daughter on her chest and near her private parts.” 45-year-old woman from U Shey Kya.

“Several men came into my house. They held me forcefully and they touched my breasts. It was so awful; there was a very young man, much younger than me, almost a boy. He touched my breasts in front of everyone.” 30-year-old woman from Yae Khat Chaung Gwa Son.

In addition to these bodily intrusions, some women and girls were on the verge of being raped but managed to escape or were saved when others arrived or the military had to leave. Those women and girls reported having experienced similar violence as rape victims such as being punched and beaten in the abdomen and genital area with rifle butts.

9. Physical assault including torture, cruel, inhuman or degrading treatment

Rohingya were subjected to beatings, other forms of torture, cruel inhuman or degrading treatment or punishment by the security forces during “area clearance operations” in homes, mosques, and sometimes outdoors as well as in makeshift detention centres. Reference to torture, cruel or inhumane treatment can be found in other sections of this report. Testimonies provided to OHCHR included cases of rape, burning of plastic on different parts of the body, burning of beards, beatings on different parts of the body and administering stress positions.

9.1. Beatings and death threats

Testimonies of victims and witnesses revealed that physical assault, including beating, was widespread. Hundreds of Rohingya men, women and children of all age groups were victims of severe beatings by Myanmar police, military and Rakhine villagers.

While several victims were questioned about the presence and provision of shelter to ‘insurgents’, and accused of supporting the RSO, several others were simply beaten because they were Rohingyas, or were victims of mob attacks by Rakhine villagers. Many of them were threatened with being killed, told to leave Myanmar or told that they did not belong in the country.

Random beatings in people’s homes during house to house attacks and searches or while fleeing were commonly used to threaten, intimidate, and instill fear among the Rohingya

population. Several people interviewed claimed that the only reason they survived the beatings is because the mobs and army thought they were dead and so stopped beating them.

Mass beatings were reported to have happened either during round-ups or when groups of Rohingyas were escaping attacks by the army and police.

Bamboo sticks, gun butts, slingshots or catapults and metal rods were used for beatings but the attackers also resorted to using their bare hands. In numerous cases, a group of four to five soldiers, police or Rakhine villagers would use bamboos sticks and gun butts to inflict severe injuries on one single individual. Soldiers were also reported to often resort to kicking victims, including a boy aged two and a half who lost consciousness after being kicked and a six-year old boy whose arm was broken. (When OHCHR interviewed the boy, he still had a cast on his arm).

Pregnant women were not spared beating and in at least one reported case this led to the death of the foetus: *“Another time when we were made to sit outside the houses, the military asked my young sister who was heavily pregnant to walk. She was not well, she could not walk. They beat her on her back, stomach, waist and buttocks with rifle butts. Afterwards she had a lot of swelling and when they took her to the doctor, they found out that the baby was dead.”* (30 year-old woman from U Shey Kya.)

Scars and severe injuries were shown to the OHCHR team, as evidence of various forms of beatings. Many victims suffered broken arms, broken legs, and injuries to the back or other body parts. In one case, a victim lost the sight in his right eye due to severe injury caused by a marble launched by a sling shot. Several others were unable to walk or sit up due to severe external and internal injuries sustained due to beatings.

A 55-year old from U Shey Kya recalled that the army surrounded his village at around Fajar prayer time: *“They came to the mosque and rounded up 12 elderly people, including myself. They dragged us outside, tied our hands behind our backs and started beating us. They then took us to the village school building, where they again beat us with sticks and rifle butts. They were constantly asking, ‘Where are you hiding weapons? Where are the armed insurgents? Show us the weapons, or we will kill you all’. They beat us from Fajar to Asr prayer time³⁰. We were then forced to take our own belongings to the Rakhine villagers. I had to carry a very heavy battery from my home to the other edge of the village. After we had delivered our things, the army again beat us and then let us go.”*

In a case from Yae Khat Chaung Gwa Son, the victim was caught by a Rakhine mob as he was trying to flee the attack on the village. He was then severely beaten with sticks and left

³⁰ Morning prayer and late afternoon prayer time

by the roadside for dead. When OHCHR met him, he was bedridden. While he mentioned that he no longer had pain in his legs, he is unable to move.

Elderly people, persons with physical disabilities and pregnant women were also victims of beatings. An 80-year old woman from Nga Khu Ya was thrown onto the ground, while leaving her house. She said that the army kicked and stamped on her with boots. She was so severely beaten that she could barely move after the attack. She mentioned that while beating her, the military shouted *“you don’t belong to this country, you are Bangladeshis, and you should go back”*. The victim still suffers from pain and injury. Her daughter-in-law (interviewed separately), who was pregnant at the time of the attack, was in the kitchen cooking when the army arrived in the village and entered the house. She was held by her hair and thrown on the ground and kicked by the army. She mentioned that due to severe beatings, she lost consciousness for some time, and when she recovered, she fled.

Many victims reported being stabbed with knives (OHCHR pictures on file). Sometimes the attackers were apparently intent on killing and at other times on getting information about hidden family savings such as money and valuables.

Reports indicate that the army also beat children. OHCHR gathered a number of testimonies and information that showed that children ranging from 2 to 13 years old were subjected to beatings, slapping, kicking, hitting with sticks, and in some cases with metal rods. In most cases, children were beaten either while crying or while pleading with the security forces to spare their family members. OHCHR observed visible signs of severe beatings on several children’s bodies.

A 12-year old boy from Gone Nar (Ngan Chaung village tract) explained his ordeal as follows: *“I was at home with my 13-year old uncle, when the army broke into the house. They beat us with sticks, metal rods and kicks. We were crying, pleading for mercy. An army officer hit me hard with a metal rod on my right arm, causing severe injury.”³¹ We were dragged out of the house, which was set on fire. My uncle, who attempted to flee was caught, beaten and thrown into a burning house.”*

9.2. Stress positions

A number of victims and witnesses informed OHCHR about the wide and systematic use of stress positions during the rounding-up of individuals in houses, open spaces and detention facilities. Individuals were forced to sit in stress positions for between one hour and three days. In many cases, interviewees and victims noted that villagers were taken to an open space, where they were put in groups and then forced to sit in stress positions, holding their hands on their heads and looking down at the ground. In most cases, victims were sitting in the sun and in stress positions for up to eight hours and without any food or water. Several

³¹ Photo of the injuries taken by OHCHR on file.

victims informed OHCHR that the combination of beatings and sitting in a stress position for long periods resulted in internal injuries and also severe pain, particularly in the back. Some complained that the severe beatings and the accompanying stress positions severely affected their vision and hearing and they constantly have headaches and feel dizzy. A 45-year old inhabitant from Kyar Gaung Taung informed OHCHR that *“I was held in a military camp for three days, where I was subjected to stress positions throughout my detention. We were not allowed to look up, and failure to comply with the order was met with violence and beating.”*



Several victims and witnesses claimed that they or their family members were severely beaten to extract information or sometimes merely because they were Rohingyas. In many cases torture victims were either tied to a chair or their hands were tied behind their backs or heads. Many victims were stripped fully or to their underwear and tied next to each other.

9.3. Psychological torture

In several situations, psychological torture was also inflicted on Rohingyas. The army and its supporting Rakhine villagers forced victims, including small children, to watch their family members suffer. In certain cases individuals were beaten, sexually abused, raped or killed in front of their relatives, with the intention of inflicting severe mental torture, humiliating and instilling fear. A 22 year old resident of Myaw Taung informed OHCHR that *“after entering our home, the army raped my two sisters, 14 and 17 years old, before the eyes of my elderly parents. They were raped collectively by at least eight army men. They had severely beaten my parents prior to raping my sisters.”*

A 54 year old inhabitant of Laung Don explained: *“After rounding-up villagers, the army and Rakhine civilians separated 14 girls, who were beautiful and healthy. These girls were left naked for three hours. We were asked to look at them. The soldiers were playing with the girls’ sexual organs and mocking them. I could not tolerate this situation.”*

Annex 31

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)



**A review for staff in mental health
and psychosocial support programmes
for Rohingya refugees**



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Cover photo: Thousands of new Rohingya refugee arrivals cross the border near Anzuman Para village, Palong Khali, Bangladesh. As an estimated 500,000 Rohingya sought safety in Bangladesh between late-August and October 2017, UNHCR worked with the authorities to create a transit centre to prepare for a further influx, as some 11,000 people crossed the border on 9th October. © UNHCR/Roger Arnold, 9 October, 2017

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TABLE OF CONTENTS

1. Introduction	8
1.1 Rationale for the desk review	8
1.2 Methodology	8
2. Context	11
2.1 Myanmar: Geographical and demographic aspects.....	11
2.2 The Rohingya of Myanmar: A history of persecution and human rights violations	11
2.3 Rohingya refugees.....	12
2.4 Rohingya and religion.....	16
2.5 Gender and family aspects.....	17
2.6 Customs and language.....	19
2.7 General health aspects	21
3. Mental health and psychosocial wellbeing of Rohingya	23
3.1 Epidemiological studies of mental disorders and risk/protective factors.....	23
4. Rohingya cultural concepts around mental health and mental illness	29
4.1 Rohingya beliefs and expressions (idioms) of distress and mental illness.....	29
4.2 Concepts of the self/ person.....	33
4.3 Religion, faith, and traditional healing and their role in mental health and psychosocial support.....	33
4.4 Help-seeking behaviour	35
5. Interventions to improve mental health and psychosocial wellbeing of Rohingya	37
5.1 Role of the social sector in MHPSS.....	37
5.2 Role of the formal and informal educational sector in MHPSS	38
5.3 Role of the health sector in MHPSS.....	39
5.4 Coordination of MHPSS services for Rohingya refugees in Bangladesh.....	40
5.5 Documented experiences involving mental health and psychosocial support for Rohingya	40
5.6 Towards a multi-layered system of services and supports.....	42
6. Challenges in providing culturally relevant and contextually appropriate services for mental health and psychosocial support to Rohingya refugees	44
6.1 Language	44
6.2 Concepts of psychological problems.....	44
6.3 Help seeking behaviour	45
6.4 Gender norms and SGBV	45
6.5 Adaptation of materials.....	45
6.6 MHPSS Settings.....	45
6.7 Acknowledging diversity within Rohingya refugee populations	45
7. Conclusion	46
Appendices	47
References	61

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LIST OF ACRONYMS

ACF	Action Against Hunger (Action Contre La Faim)
GAM	Global Acute Malnutrition
GOB	Government of Bangladesh
IASC	Inter-Agency Standing Committee
IOM	International Organization for Migration
LSHTM	London School of Hygiene and Tropical Medicine
MOHFW	Ministry of Health and Family Welfare
MHPSS	Mental Health and Psychosocial Support
MSF	Médecins sans Frontières
NGO	Non-Government Organization
NLD	National League for Democracy
PTE	Potentially Traumatic Events
PTSD	Posttraumatic Stress Disorder
RA	Research Assistant
RRRC	Refugee Relief and Repatriation Commissioner
SAM	Severe Acute Malnutrition
SGBV	Sexual and Gender-based Violence
UK	United Kingdom
UNHCR	United Nations High Commissioner for Refugees
UNSW	University of New South Wales
USA	United States of America
WFP	World Food Programme
WHO	World Health Organization



EXECUTIVE SUMMARY

In August 2017, a major humanitarian crisis in the Rakhine State of Myanmar triggered a mass exodus of around three-quarters of a million stateless Rohingya refugees into neighbouring Bangladesh, adding to the estimated 200,000–300,000 Rohingya refugees in Bangladesh who had fled Myanmar earlier and the estimated 73,000 Rohingya refugees in Malaysia.

Limited information is available on the culture and mental health of the Rohingya, which poses significant challenges to the provision of Mental Health and Psychosocial Support (MHPSS) and related services to this group. Therefore, UNHCR commissioned this document with the aim of providing a concise review of the literature concerning the culture, context, mental health and psychosocial wellbeing of Rohingya refugees.

The content of the document is based on an extensive review of the published and grey literature including various sources of information provided by United Nations agencies, non-governmental organizations, and governments. The search included published and unpublished archival data, academic articles,

documents, and other relevant documentary materials from disciplines ranging across the social sciences, anthropology, ethno-cultural studies, psychology and public health. A core group of multidisciplinary personnel wrote and reviewed draft versions of the document after which an advanced draft was sent out for wide review among academics, NGO staff and UN experts.

The first part of the review provides a broad overview of the general context focusing on the historical, geographic, demographic, economic, political, religious, gender, and cultural factors relevant to the Rohingya people. The Rohingya are the largest Muslim group in Myanmar. Their history is complex, involving exposure to a long legacy of human rights violations including torture, rape, assault, extrajudicial killings, and restricted access to education and health care. Many, and probably most, Rohingya have been displaced, either within Myanmar or as refugees now residing in Bangladesh, Malaysia and other countries.

The second part of the report focuses on the mental health of the Rohingya people, including



the epidemiology of mental health conditions, the range of risk factors (e.g. exposure to potentially traumatic events, poverty, shortage of food, shelter, healthcare, loss of identity, being stateless, sexual and gender-based violence), and protective factors (e.g. religion, spiritual adherence and practice, formal and informal social support). This section also describes the various terms in the Rohingya language to indicate mental health conditions. These concepts are not equivalent to the psychological concepts of depression, posttraumatic stress disorder or anxiety disorder, although they could overlap to some extent overlap with them. Thus, MHPSS service providers need to clearly explain what they mean when they use international constructs of mental ill-health in conversations with Rohingya clients. Rohingya cultural idioms of distress (common modes of expressing distress within a culture or community) and explanatory models (the ways that people explain and make sense of their symptoms or illness) are closely related to religious ideas and concepts held by the person. The Rohingya worldview of the self/person tends to distinguish between the brain (*mogos/demag*), the mind-soul (*dilor/foran*), and the physical

body (*jism*). It is important that MHPSS providers working with Rohingya have a global idea of these concepts since they influence the expectations and coping strategies of their Rohingya clients.

The third part of the review describes the current humanitarian context, particularly in Bangladesh where multiple agencies are involved in MHPSS interventions within various sectors such as health, nutrition, education and protection (including child protection, community-based protection and prevention and response around sexual and gender-based violence – SGBV).

This review highlights the importance of understanding the key sociocultural aspects of mental health and wellbeing to assist humanitarian agencies, government, and non-government organizations in providing effective culturally informed services to the Rohingya. An overarching aim in providing this information is to encourage a consistent and coordinated multi-sectoral approach to address the mental health needs of the Rohingya.



1. INTRODUCTION

The Rohingya constitute the largest Muslim minority group in Myanmar. Over the last decades, discrimination and oppression have resulted in the mass displacement of Rohingya from and within Myanmar, with substantial numbers fleeing to neighbouring countries and beyond, including Bangladesh, Saudi Arabia, Pakistan, Malaysia, India, Thailand, and Indonesia [1–3]. Since late August, 2017, the exacerbation of violence and military operations in the northern townships of Rakhine State, where the majority of Rohingya resided, has led to more than 700,000 Rohingya refugees fleeing across the border into Bangladesh [4].

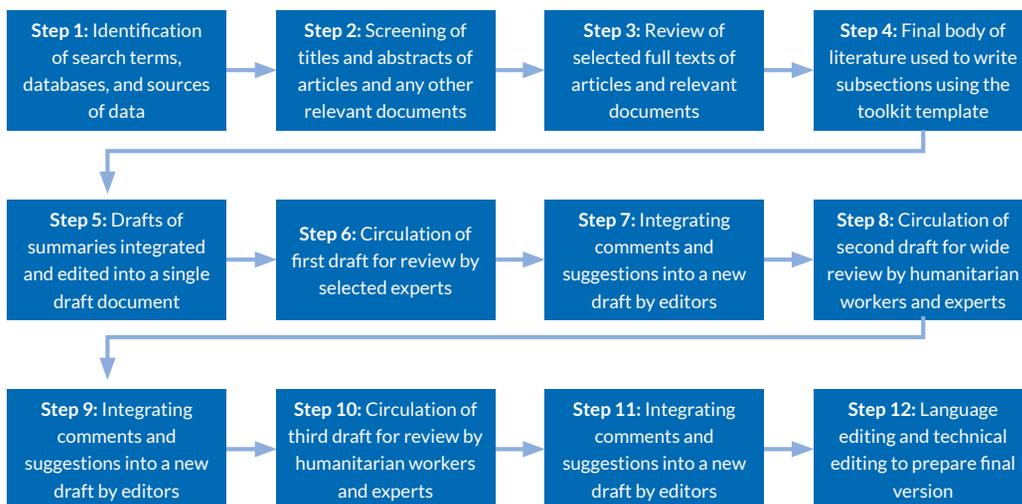
1.1 Rationale for the desk review

Although documentation of the history of human rights violations against Rohingya is extensive, there is a lack of information concerning the mental health and psychosocial status of this group. The key objective of this desk review is to synthesize what is known about the mental health and psychosocial wellbeing of the Rohingya, situating this knowledge within the broader socio-political and cultural context. The goal is to assist humanitarian actors and agencies in providing culturally relevant Mental Health and Psychosocial Support (MHPSS) for this group. While the focus of this review is on Rohingya refugees in Bangladesh, we expanded the scope of our review to include other relevant information concerning Rohingya communities within Myanmar and in other countries of displacement.

1.2 Methodology

We conducted a comprehensive desk review using the WHO-UNHCR toolkit for MHPSS needs and resource assessments [5]. The process started in October 2017 with an extensive search of all sources of information including peer-reviewed literature, grey literature (such as reports and documents from NGOs and humanitarian agencies) and articles in the news media. The search strategy used broad search terms to include any relevant sources with reference to the contextual, social, economic, cultural, mental health, and health related factors among Rohingya refugees living in the Asia-Pacific and other resettlement regions (see Flowchart 1 below).

In the first step, the lead author formulated a comprehensive work plan which engaged expert reviewers, volunteer students, and research

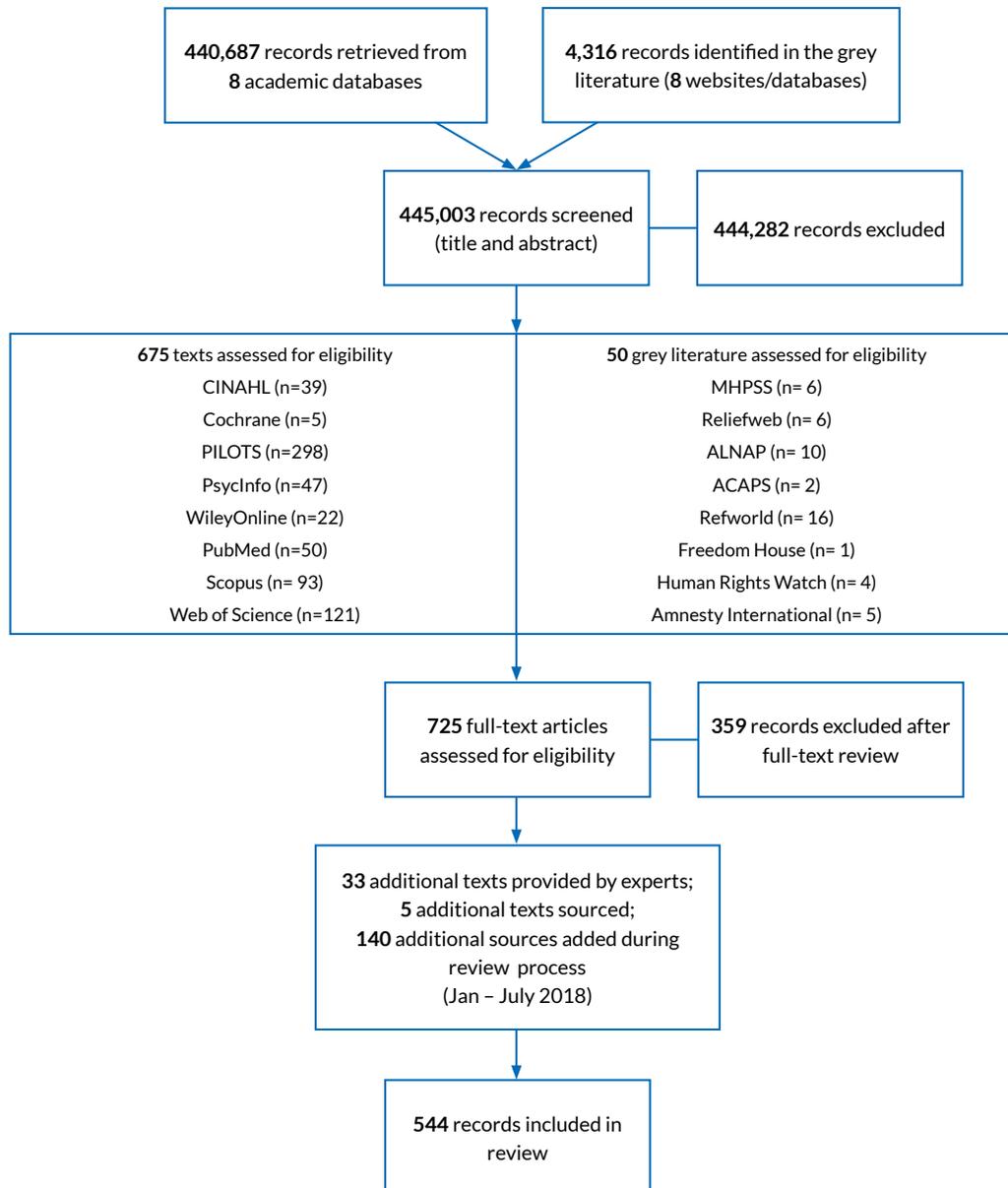
Flow Chart 1. Overview of the desk review process

assistants from Australia, the UK, and the USA. The editorial team included the lead author (a researcher and clinician from Australia), the UNHCR senior mental health officer, and other academics from the University of New South Wales (UNSW) in Australia and the University of Denver in the United States. The editorial assistant team and contributor team comprised a research assistant from UNSW and nine Master's Degree students from the London School of Hygiene and Tropical Medicine (LSHTM) and the University of Denver, selected based on their qualifications and experiences in a wide range of disciplines including Medicine, Public Health, Mental Health, Psychology, International Relations, Anthropology, and Cultural Studies. An expert review committee included a multidisciplinary team from various backgrounds (e.g. Anthropology, Psychiatry, Psychology, International Relations) and were selected based on recommendations and relevant prior experiences working with Rohingya.

The search terms used, provided in Appendix 1, were organized in a structured string format. The online databases were selected with the intention of sourcing peer-reviewed texts from a diverse range of disciplines including Anthropology, Ethno-cultural Studies, Psychology and Public Health. The websites used to collect grey literature were identified from previous UNHCR desk reviews. Flow Chart 1 outlines the steps involved in the literature search, screening processes and review procedure.

In the second step, the research assistant conducted the literature search over the period 23–25 October 2017, under the supervision of the lead author. The third step involved the delegation of tasks to student assistants, whereby the database reference lists were distributed for screening and then full-text review. Each text was screened for either inclusion or exclusion based on the criteria specified. The students compiled draft sections (third step) that were assessed independently by the research assistant and the lead author who together resolved any discrepancies (fourth step). In the fifth step, the assistants and the lead author undertook the writing of the sub-sections and compiled them into a single first draft report. In step six, a group of eight experts reviewed the first draft, provided comments and added additional literature. Step seven consisted of an extensive and rigorous editorial process by the author and the senior mental health officer, resulting in a second draft. In step eight, the text was sent out to the core group of experts plus 40 other experts from UN agencies, NGOs and individual experts. Based on the reviews and the additional literature, a fully revised third draft was compiled (step nine) that was circulated among a targeted group of experts for further input and review (step ten). Step eleven consisted of drafting a pre-final version that was subsequently edited, formatted and released.

Flow chart 2. Literature search flow chart



2. CONTEXT

2.1 Myanmar: Geographical and demographic aspects

Myanmar, in the past known as Burma, is a country located in South-East Asia and bordered by Bangladesh and India to the west, China to the northeast, Laos to the east and Thailand to the southeast. The southern half of the country reaches the Andaman Sea and Bay of Bengal. The country's largest city and former capital Yangon is situated in the southern delta region of Myanmar. Naypyidaw, a newly-constructed city located to the north of Yangon, was officially declared to be Myanmar's new capital in 2006.

The population of Myanmar comprises approximately 51 million persons with nearly 30% of the population living in urban areas [6, 7]. It is an ethnically and religiously diverse country, with 135 officially recognized and recorded ethnic groups as well as several other ethnic groups, such as the Rohingya, that are not officially recognized. The majority ethnic group are the Bamar, who constitute about two thirds of the population, and who dominate the military and government. Myanmar has seven regions (or divisions) that are largely inhabited by the Bamar [8]. Additionally, there are seven states, named after the ethnic minorities residing in that state: Chin, Kachin, Karen, Kayah, Mon, Rakhine, and Shan [8, 9]. The regions and states are divided into 74 districts and sub-divided into 413 townships [7].

Rakhine State has five districts and 17 townships [10]. It is one of the poorest states in Myanmar with an estimated 78% of the population living in extreme poverty [11, 12]. The largest ethnic groups in Rakhine State are the Buddhist Rakhine and the Muslim Rohingya. A smaller Muslim group in Rakhine State are the Kaman, who are recognized as citizens by the government [10, 13, 14].

Until recently, Rakhine State was home to around 1.2 million Rohingya, comprising around approximately 40% of the total state population [15]. Accurately estimating the Rohingya population is difficult because they are excluded from census data by the government [16, 17]. Roughly two-thirds of the

Rohingya resided in three northern townships of the state: Maungdaw, Buthidaung, and Rathedaung (Yethedaung) [18]. Rohingya were the majority ethnic group in Maungdaw and Buthidaung, the only townships in Myanmar with a majority Muslim population.

2.2 The Rohingya of Myanmar: A history of persecution and human rights violations

In the eighth century, people living in the coastal areas of the Bay of Bengal in what is currently called Bangladesh and Myanmar, converted to Islam under the influence of Arab traders [19, 20]. The Rohingya trace their history to that period [21, 22]. The Muslims in Rakhine State strongly self-identify as Rohingya but this term is not used as an indicator of an ethnic group in government documents and in Myanmar the term is controversial [12, 20, 23]. The government of Myanmar does not view Rohingya as *taingyintha* ('natives of the soil') [24] but considers them to be descendants of Bengal migrants who migrated during British colonial rule in the 19th and 20th century from more northern coastal areas, in what is now Bangladesh [25, 26]. Discussions about the ethno-history of the Rohingya and the origins of the term Rohingya have become highly polarized and sensitive [21, 27, 28].

Hostile attitudes towards the Rohingya fuelled a long history of systematic violence and discrimination, although there have been relatively better times: In the period from independence (1948) till the military coup (1962), Rohingya had full citizenship rights, and could serve in Parliament [17, 29]. During the military rule, their situation worsened and their civil, political, educational and economic rights were gradually stripped away [30]. The 1982 Citizenship Act enforced the exclusion of the Rohingya people from the list of officially recognized minority ethnic groups and denied them many basic rights including citizenship, freedom of movement, access to healthcare and education, marital registration rights and voting rights [31]. This effectively rendered them

the largest stateless group in the world. In spite of a series of political and economic reforms in the last decade led by former President Thein Sein, violence and discrimination against ethnic minority groups continued, although Rohingya were allowed to vote and serve in Parliament in the 2010 general election. Anti-Muslim sentiments have been provoked by Buddhist extremist groups who have created public support for systematic campaigns of violence and discrimination against Rohingya [22, 32]. While previously the ethnic groups in Rakhine State had a history of positive community relationships and close mutual dependency, relations between the Rohingya and other ethnic groups have become increasingly complex and sensitive since 2012 [21, 22, 32]. All people in Rakhine face difficulties in meeting basic needs, but the Rohingya and other Muslim communities, face particular challenges, related to discrimination and the lack of citizenship [33].

Restrictions against Rohingya are manifold. They are not allowed to form organizations or vote. They face major challenges in accessing education in general, and particularly university education. They often experience extortion (when going through check points, when marrying, having children, when building a new home, when repairing a home) and may have their names arbitrarily changed by officials creating the official family lists. Rohingya are not allowed to build homes with permanent materials like concrete, and at times were not allowed to install fencing around their homes. Mosques have been closed or destroyed [21, 34–37].

In October 2016, an armed group of Rohingya insurgents calling themselves Harakah al-Yaqin (Faith Movement) attacked Border Guard Police bases in the northern townships of Rakhine State. The government reacted with military force that the International Crisis Group said failed to adequately distinguish militants from civilians and stepped up the process of further restricting humanitarian assistance to Rohingya [38]. Based on interviews with refugees who fled to Bangladesh after the eruption of violence in 2016, the Office of the High Commissioner for Human Rights and Amnesty International documented a wide range of human rights violations against the Rohingya population in Rakhine State including killings, disappearances, torture and other inhumane treatment, rape and other forms of sexual violence and arbitrary detention [37, 39].

In August 2017, the same insurgent group, now under the name Arakan Rohingya Salvation Army (ARSA), carried out attacks against police posts in northern Rakhine State. According to reports by the Independent International Fact-Finding Mission on Myanmar, the International Crisis Group, Amnesty International and investigative reporters, these incidents were followed by a massive clearance operation by the Myanmar army, during which Rohingya homes and villages were systematically burnt down and thousands were killed by violence [40–44]. These events prompted an unprecedented exodus of Rohingya to neighbouring Bangladesh [45, 46].

A brief overview of historical events in Myanmar/Burma is provided in Appendix 2

2.3 Rohingya refugees

The oppression of the Rohingya people resulted in repeated population movements within Myanmar and to other countries, culminating in the mass displacement of Rohingya to Bangladesh in the second half of 2017. It is unclear how many Rohingya remain in Myanmar. At least 120,000 Rohingya remain in the central part of Rakhine State in Myanmar remain in camps for Internally Displaced People (IDPs) in overcrowded shelters and under generally poor conditions [34, 47]. Due to lack of access, the UN agencies have not been able to independently verify numbers of Rohingya left in Rakhine State or displaced within Myanmar [34].

Over the years, many Rohingya have fled to neighbouring countries including Bangladesh and Malaysia. A substantial number have also sought refuge in Saudi Arabia, Pakistan, India, and small numbers are found in Nepal, Thailand and Indonesia [1, 48, 49]. None of these countries is party to the 1951 Refugee Convention or 1967 Protocol, which poses challenges to efforts to provide international protection for Rohingya refugees. A minority of Rohingya have been resettled in high-income countries such as the United States, Canada, United Kingdom and Australia.

Table 1. Period of arrival of Rohingya refugees in Cox's Bazar Bangladesh [54]

Arrival period	Number of persons	% of total
Before 9 Oct 2016	72,821	8%
Between 9 Oct 2016 and 24 Aug 2017	93,645	11%
Between 25 Aug 2017 and 31 Dec 2017	712,179	80%
Jan 2018 to current	13,223	1%

Table 2: protection vulnerabilities among Rohingya refugees in Cox's Bazar Bangladesh [54]

Protection concern	Percentage of families
Single mother	16%
Serious medical conditions	5%
Older persons at risk	4%
Disability	4%
Separated child	2%
Older person with children	2%
Unaccompanied child	1%
Single male parent with infant	1%

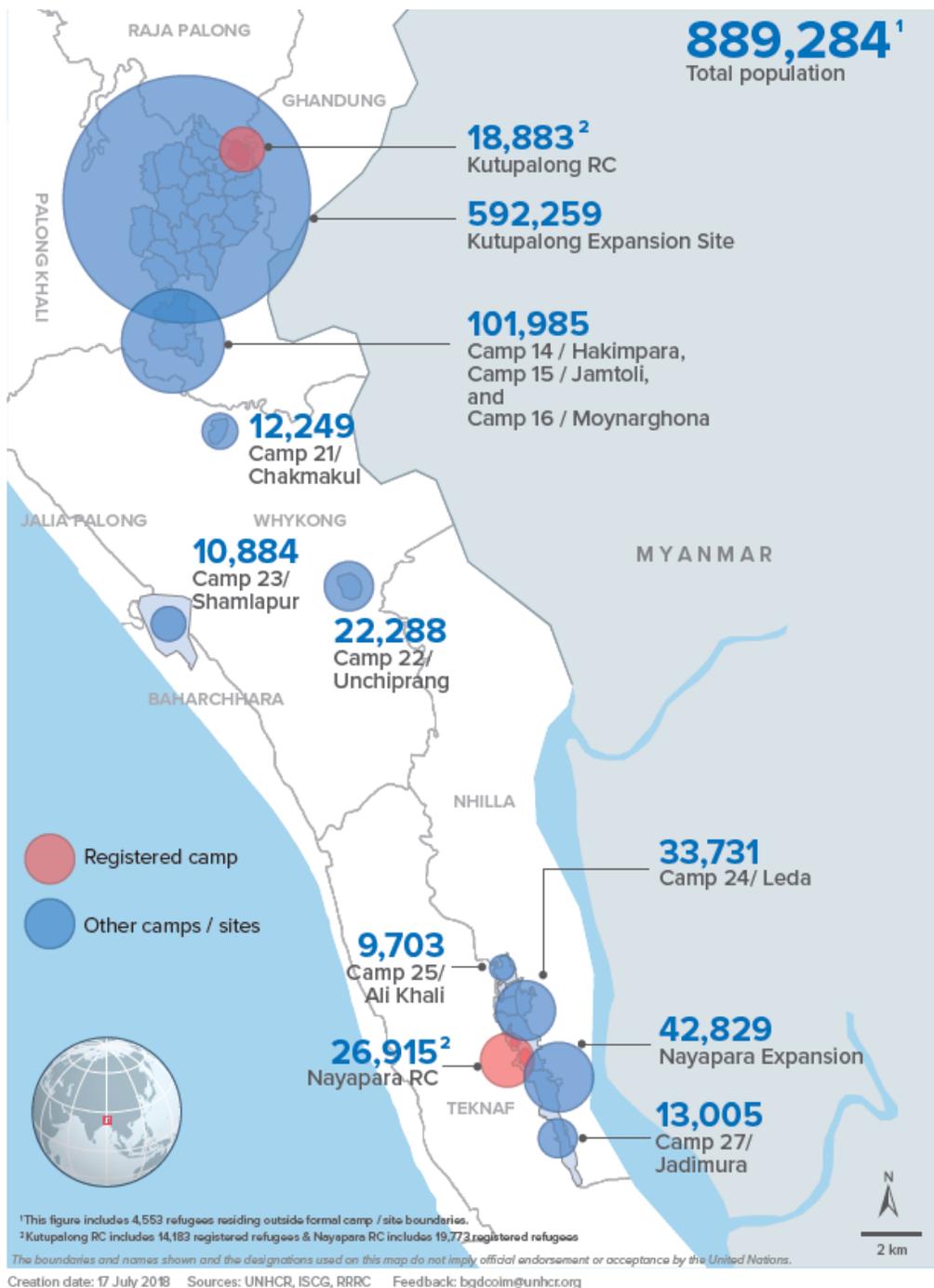
Rohingya refugees in Bangladesh

Bangladesh has a long history of hosting Rohingya from Rakhine State in Myanmar. The Cox's Bazar district in the Chittagong Division borders the northern part of Rakhine. This district received large numbers of Rohingya refugees in 1978 (around 250,000 people) most of whom returned to Myanmar after international pressure on the Myanmar government to allow them to return [50]. Another large wave of Rohingya refugees arrived in Bangladesh in 1991–1992 when again around 250,000 people crossed the border [2, 51]. They were recognised by the Government of Bangladesh (GoB) as refugees and hosted in camps in the Cox's Bazar district. After several years, the Bangladeshi authorities enforced a policy of repatriation of the refugees. Living conditions in the camps deteriorated which forced most of the refugees to return to Myanmar [52]. Some of the Rohingya who arrived in 1991 and 1992 remained in two camps (Kutupalong 'registered camp' and Nayapara 'registered camp'). Until 2017, these camps were home to around 32,000 registered refugees. The camps still exist but they have now become part of much larger refugee sites accommodating more recently arrived refugees.

Many more Rohingya, who arrived after 1992, were not recognized as refugees by the Bangladesh authorities and lived in poor conditions in 'refugee-like situations' in makeshift camps surrounding the official camps and Shamlapur at the coast [53]. These unrecognized refugees were not allowed to receive the services that UNHCR and its partners provided to registered refugees. After the crisis of October 2016 in Rakhine State, an additional 70,000 Rohingya fled to Bangladesh. The Government of Bangladesh allowed them to cross the borders unimpededly and the Bangladesh community responded with an outpouring of private assistance. Without waiting for GOB authorization, the refugees further expanded the makeshift settlements around the registered camps and also established an entirely new area of makeshift settlements in Balukhali (in what is now called Camp 10 in Kutupalong).

The mass influx of 712,179 refugees from 25 August to 31 December 2017 and an additional 13,223 who arrived since January 2018, caused a major humanitarian emergency that gravely compounded the existing challenges around the provision of assistance to the estimated 200,000 to 300,000 Rohingya refugees who were already in Bangladesh. On 31 August 2018, UNHCR estimated that 889,753 Rohingya refugees were in need of assistance in

Map 1: Myanmar and its neighbours



Cox's Bazar District [54]. See table 1 for details of the current Rohingya refugee population in Bangladesh.

Two thirds of the refugees in Bangladesh originate from Maungdaw township in the northern part of Rakhine State. Thirty one percent of the refugee families have been identified as having at least one protection vulnerability. See table 2.

The arrival of so many refugees to the South-eastern districts of Bangladesh has caused a significant increase in population in Cox's Bazar district: in the sub-districts of Teknaf, the Rohingya refugees form 29% of the total population and in Ukhia (which hosts the very large Kutupalong refugee settlement) they form an estimated 76% of the total population. Most Rohingya live in camps, but an estimated 79,000 live among the Bangladeshi host communities [55]. The considerable growth of the refugee population in Ukhia and Teknaf has seriously impacted the Bangladeshi host communities due to deforestation, inflation, and competition for labour opportunities, [4, 56]. While segments of the host community, such as medium size and small traders, benefit economically from the presence of refugees, other sectors of the local communities feel neglected in relation to the aid provided by humanitarian agencies, leading to reported tensions between the Rohingya and Bangladeshi communities [55].

Rohingya refugees in Malaysia

Currently, there are over 70,000 Rohingya refugees registered with UNHCR Malaysia and an estimated 30,000–40,000 more who remain unregistered. The Rohingya came in waves with the highest numbers of arrivals in the period 1990–1994, 2000–2004 and 2012–2015. In the period from 2012 to 2015, many arrived by boat in Thailand after undertaking dangerous journeys across the Andaman Sea prior to being smuggled or trafficked into Malaysia [1, 57]. Rohingya live throughout Peninsular Malaysia, all being considered 'illegal' or 'prohibited' immigrants under the Immigration Act and therefore are at risk of arrest [58, 59]. The Rohingya in Malaysia live in overcrowded housing with lack of access to educational opportunities, employment, and healthcare [60, 61]. Some Rohingya have lived for

decades in Malaysia and have established livelihoods and/or are in receipt of remittances from relatives resettled in Australia, Canada, Denmark, or Sweden [62] but many continue to live in precarious economic situations [63]. Those who have been detained in immigration detention centres are at risk of indefinite confinement, malnutrition, physical and mental abuse and assault, exploitation and extortion [64, 65].

Rohingya refugees in Thailand

The UNHCR currently assists around 100 Rohingya refugees in Thailand who are confined to shelters or kept in detention centres. A few thousand more live in the community throughout Thailand [66]. Southern Thailand is a transit point to Malaysia [66] which has attracted smugglers and traffickers taking Rohingya to Malaysia. Rohingya have experienced severe abuses at the hands of the smugglers and traffickers, and in 2015, mass graves were discovered with what are believed to be Rohingya remains in southern Thailand [67, 68].

Rohingya refugees in India

As of April, 2018 around 17,705 Rohingya refugees are registered with UNHCR in India, in addition to an unknown number who remain unregistered.¹ Rohingya live across different urban/semi-urban locations in the country. They often live in impoverished slum-like settings [69, 70] in poor sanitary conditions with limited access to water and toilets [71, 72]. In principle, all refugees in India have access to government health and education services, but at times they have difficulties in accessing these facilities. UNHCR supports them to the extent possible through governmental/non-governmental agencies and partners. Most Rohingya refugees in India lack skills and are poor, only being able to find low skilled jobs in the informal sector (which also employs a large majority of Indians).

¹ Information obtained through UNHCR in India

Rohingya in Saudi Arabia and other countries on the Arabian Peninsula

There are approximately 250,000 documented and an unknown number of undocumented Rohingya in the Kingdom of Saudi Arabia. Most came to the country in different waves since 1960. The majority are believed to have entered the country without documents or on Pakistani, Bangladeshi, Nepali, and Indian passports that expired during their stay. Saudi Arabia is not a state party to the 1951 Convention and does not have a national legal structure supporting asylum. Deemed to be a persecuted group on religious grounds, a Royal Decree made an exception to allow the Rohingya to obtain four-year residency visas (known as an *iqama*) to ensure access to education, the labour market, and health services. This process of regularization and documentation of Rohingya applies only to those who entered Saudi Arabia before 2008. Individuals who entered the country after that date cannot benefit from these provisions.²

Other states on the Arabian Peninsula, such as the United Arab Emirates, also house significant numbers of Rohingya but the exact figures are not known [3, 73].

2.4 Rohingya and religion

Rohingya are the predominant adherents of Islam in Myanmar, practicing a conservative form of Sunni Islam, based on the Hanafi *mazhab* (school of thought) [63] and that according to some observers has become more orthodox under influence of movements such as the *Tablighi Jamaat* [74]. Religious identity remains important to Rohingya refugees [49, 75]. For example, in a randomly selected sample of 30 Rohingya in Gombak, Malaysia, all concurred that faith in God helped them in difficult times and that religious beliefs were vital to the way they lived their life.³

Older men grow beards and the women usually wear the *hijab* (veil covering the head and chest) [76]. Women are restricted from participating in some parts of public and civic life. The traditional houses

are surrounded by fences of bamboo, which enables the practice of *purdah* (strict gender segregation) preventing women to be seen by outsiders.

There used to be mosques and *madrasahs* (religious schools) in every Rohingya settlement. Men visited the mosque to pray together, while women prayed at home. A governmental ban in 2012 on gatherings of more than four people in Muslim-majority areas made it difficult for Rohingya to pray together. Traditionally, Rohingya have mechanisms to maintain a strong sense of solidarity and collectivism in the villages, a tradition called *samaj*. Practices include communal meat distribution during the religious festival of Eid, and support arrangements for orphans and widows [76]. Rohingya also generally make the obligatory Muslim donation (*zakat*) to the needy in the community. Like other Muslims, Rohingya celebrate the Islamic holidays including *Eid al-Fitr* ('feast of breaking the fast'), *Lailat al-Barat* ('night of salvation'), *Lailat al-Qadr* ('night of decree') and *Eid al-Adha* ('feast of the sacrifice').

Historically, *mullahs* (Islamic theologians), *moultvis* (qualified Islamic teachers), and elders played important roles in Rohingya villages in Rakhine State [75]. Government restrictions on Rohingya community life in Myanmar have greatly diminished these roles over the past 20 years.

Highly respected in the community are the *hafes*, persons who have memorized the Quran. They are often descendants of prominent religious figures, *Hafes* are usually men, but women can also become *hafes*, even though this is rare. Female *hafes* are often consulted by other women for guidance on personal matters, such as how to deal with the husband and may give informal religious classes to small groups of girls or women [74].

While the vast majority of refugees from Rakhine State are Muslim, a small percentage are Hindu [77]. In Rakhine State there were around 21,000 Hindu who are not recognized as an official ethnic group in Myanmar [23]. They speak the same dialect as the Rohingya but usually do not self-identify as Rohingya. Reportedly, there are tensions arose between the two communities in Rakhine in 2017 following Rohingya attacks. On their request, a few hundred Hindu refugees were accommodated in separate refugee settlements in Bangladesh [78, 79].

² Information obtained through UNHCR in Saudi Arabia

³ Information obtained through C. Welton-Mitchell (May 4th 2018).



2.5 Gender and family aspects

Gender roles and family dynamics

Polygamy, although prohibited by the Myanmar government, remains a traditional practice in the Rohingya culture. The Rohingya typically live in extended families with men heading the household, although women and girls may assume the head-of-household role in the absence of a male [80]. Many Rohingya women and children in Bangladesh live in extremely vulnerable conditions of insecurity as they lost or became separated from their husbands and fathers while fleeing for their lives. Marriage continues to be the primary means of attaining social and economic security for Rohingya women and girls, who are traditionally discouraged from working [75, 81]. The responsibilities of women and girls include all aspects of childcare, food preparation, cleaning, laundry, and caring for the elderly.

Both nuclear and extended family structures are observed in camps for displaced persons in Bangladesh [80]. There are also single mothers, single fathers, and children living with extended family members who are not their biological parents [80].

The practice of *purdah* is widespread in Maungdaw and Buthidaung townships. While girls up to the age of 12 years are commonly seen outdoors in the villages, frequently caring for younger siblings, at the point of puberty, girls often are required to remain within the family home until marriage, and often even following that milestone. The *burqa* and *niqab* (sometimes in combination with an umbrella, for additional modesty) offer increased mobility for women who otherwise would face even greater scrutiny and harassment for conducting their normal business out of doors. Some women, particularly those who have had greater access to education, and as well those who are heads of households, seek work outside the home. Employed women frequently face admonition from their communities and accusations against their character. The perceived 'failure' to adhere to cultural restrictions curtailing women's liberty of movement is seen to reflect poorly on the social status of their families.

The power of women within the home is not uniform as it varies with age and status. When Rohingya women marry, they leave their family and are considered part of their husband's family from that point onward. They join the husband's household and are under the supervision and control of the

mother-in-law. According to a traditional hierarchy, the wife of the eldest son of a family has relatively greater influence within the household than the wife of the next son, and so on. Decisions related to children's health are traditionally made by the most powerful woman within the household. Marriage is accompanied by a 'dowry': a gift by the family of the bride to the family of the groom. Among the Rohingya in Rakhine State the dowry varies according to the bride's family resources, extending from a simple pair of gold earrings to large amounts of money, or land. The practice of dowry can be a major source of conflict in the household, including between the husband and wife, but particularly between the bride and her mother-in-law, a factor that contributes to risk of domestic violence against the wife/bride [82].

One of the few acceptable reasons for a woman to leave the home amongst Rohingya in Myanmar is to access health services, particularly for children, although approval is still required from the husband or head of household. Respected women in the community provide antenatal and postnatal care, consult with women on pregnancy and fertility concerns, and act as traditional birth attendants, overseeing labour and delivery [83, 84]. These services traditionally are provided free of charge, although attendants often receive symbolic gifts of food and clothing. However, as movement restrictions were intensified on the Rohingya, many traditional birth attendants either ceased providing services, particularly during the night, or began charging fees.⁴

Sexual and gender-based violence

Rohingya women and girls are frequently subjected to multiple forms of abuse including harassment, economic deprivations and psychological and physical violence. High rates of exposure to sexual and gender-based violence (SGBV) have been reported by a range of humanitarian agencies and human rights organizations amongst Rohingya communities in Myanmar and countries of displacement. Nevertheless, accurate documentation of SGBV remains a challenge given the stigma and fear of retaliation if these abuses are reported by female survivors [85, 86]. The potential social impact of rape is far-reaching. If it is suspected that a woman had

been raped, she may be ostracized by the community and her family, and at times husbands may disavow wives, even on suspicion that the wife has been subjected to this form of SGBV [52]. For girl survivors of rape, the chances of marriage are much diminished, particularly of finding a 'good husband'.

Within Rakhine state, SGBV against Rohingya women has been documented via testimonies of refugee women arriving in Bangladesh in 2017. They recounted multiple forms of violations including harassment, sexual molestation, forced prostitution, and rape by Myanmar military soldiers and members of the other ethnic groups in the Rakhine state [86–89].

Outside Myanmar, among Rohingya refugees, SGBV remains a major protection concern. In the longstanding camps for registered Rohingya refugees in Bangladesh, SGBV was reportedly widespread [52]. In 2013, 12.8% of respondents in a random household survey (n=148) reported exposure to sexual abuse, humiliation, or exploitation (e.g., coerced sexual favours) and 8.1% said they had been exposed to rape (forced, unwanted sex with a stranger, acquaintance, or family member) [90]. Collecting firewood around the camps was a high-risk activity for rape and kidnapping, sometimes involving 'block leaders' known as the *majhi* [51].

In the refugee settlements in Bangladesh that were established in the second part of 2017, SGBV is a serious problem [88, 91]. A joint report in the early stages of the humanitarian response in Cox's Bazar highlighted several concerns around prevailing practices for SGBV survivors, including limited privacy and safety issues for women survivors living in shelters (safe houses for women), a lack of gender-segregated latrines and washing facilities, and the risk of retaliation against female survivors by family members and members of the community [92]. The general living conditions of the refugee settlements in Bangladesh are conducive to various forms of SGBV, including exploitation and increased intimate partner violence, which expose both men and women to protection risks.

⁴ Information provided by MHPSS worker in Myanmar who wishes to remain unnamed.

Women who were trafficked or smuggled to third countries reported rape and exploitation by smugglers and traffickers [93]. There are indications that refugee women and girls are being trafficked or smuggled from the large refugee settlements in the Cox's Bazar district to cities in Bangladesh and other countries to work in the sex industry [94–96].

SGBV is not only committed by outsiders. In the refugee settlements in Bangladesh prior to the crisis in 2017, experiences of intimate partner violence were abundant, and often related to the economic disempowerment of Rohingya men who were not allowed to work and grew increasingly frustrated [97]. Organizations working on sexual and gender-based violence prevention and response in the refugee settlements in Bangladesh are reporting increased violence among polygamous families. In Malaysia, Rohingya women reported high levels of intimate partner violence, with the vast majority indicating that their partner had pushed, shoved, or slapped them in the last year, and over half reporting that their partner had punched, kicked or beat them up in the last year [98].

Child marriage (involving persons under 18) is another form of SGBV that is common among Rohingya communities [99, 100]. Girls and women generally marry at an early age and have limited access to educational opportunities, knowledge about reproductive health, and influence over family planning [101]. Married underage girls are at increased risk of a range of physical and psychological consequences including intimate partner violence.

Men and boys also report SGBV incidents. During focus group discussions, rape and genital mutilation was reported to have happened among men in Myanmar and men were reportedly forced to witness the rape of their wives or other members of their families.⁵

Appendix 7 presents a list of common Rohingya terms for gender and intimate partner violence.

2.6 Customs and language

Clothing

Rohingya women typically dress in traditional clothing, such as a *sarong* (also called *ta-mi*, *ta-ine*, or a female *longyi*) which is a large cut of fabric, often wrapped around the waist. Men often dress in *longyi* (a sheet of cloth wrapped around the waist extending to the feet that is widely worn in Myanmar). Rohingya women wear a *hijab* (head covering veil) or a *niqab* (face covering veil) [102, 103]. Many Rohingya use the term *burqa* to refer to a black dress/robe worn over the *longyi* and blouse. Women wear this outside their house or place of work, but there are important regional differences. Due to remoteness and restrictions on movement, Rohingya in rural areas in the northern townships of Rakhine State tend to be more conservative than those in the central townships (i.e. Sittwe, Pauk Taw, Min Bya, Mrauk Oo and Kyauk Taw) which are more urbanized and where people have easier access to higher levels of education. In the central townships, women do not necessarily wear the full *hijab* while women in the northern townships of Rakhine may, in addition to the *hijab*, also wear a *burqa* and *niqab*. Several humanitarian workers observed that this custom has changed rapidly since the encampment of internally displaced persons in 2012 in that there is an increase of conservative values within the groups now confined within the camps for internally displaced persons in Myanmar. Within refugee settings in Bangladesh, some humanitarian workers report an increase in the use of face-covering clothing.

As part of their traditional cultural practice, Rohingya women decorate their skin with henna paste, or '*mehendi*' for marriage or religious ceremonies. Women and girls also use sandal wood powder on their face. Older men use henna to colour their beards as a religious practice [104]. *Henna* may also be used as traditional medicine to heal broken bones, headache, backache, stomach pain or burns [104].

⁵ Focus groups discussions facilitated by the UNHCR Bangladesh, in Cox's Bazar, in June and July 2018

Food

The common Rohingya diet consists of rice, fresh and dried fish, potatoes, vegetables, rice noodles, chicken, milk and chillies. Occasionally, for example at religious holidays, people eat meat (beef, mutton and chicken) slaughtered according to the Islamic law (halal). Islamic law prohibits consumption of tortoise, crab and pork. If they can afford it Rohingya use three meals per day. The family usually has the meal in the house, men and children taking their meal first with the women and older girls taking their meal after the men have finished.

For recreational purposes, people widely use betel leaf (*paan*) with areca nut and tobacco. After chewing it is either spat out or swallowed. When people meet each other or make a home visit, they habitually offer *paan* (betel leaf) and areca nut. Many men smoke, either cigarettes or *biri* (handmade cigarette). Some women also smoke. Use of alcohol is prohibited by Islamic law.⁶

There are significant dietary restrictions around pregnancy and particularly during the lactation period. Many Rohingya believe that pregnant women should not eat beef and not have contact with cold water, particularly rain water and should drink only hot water/tea. During 40 days after giving birth a woman eats mainly plain rice and chillies and if the family can afford it, dried fish. Dry food, particularly dried chillies, are thought to fasten the mothers' recovery. Vegetables and beans are prohibited during this period. In fact, there are many dietary restriction for women in the six months after giving birth. These restrictions vary between families and communities and are to a large extent idiosyncratic. Forbidden food items may include 'fish with navel', shrimps, meat (particularly goat meat), certain fruits (such as coconut and pineapple) and vegetables (such as eggplant and fresh beans [74, 82]. Children are usually breastfed till the age of two years [105].

⁶ Personal communication A.N.M. Mahmudul Alam (UNHCR, Bangladesh), 5 August 2018.

Names

Rohingya do not have surnames and names do not change when individuals get married. The use of names is dictated by custom, for example, it is cultural practice that younger persons do not address older persons by their name, but according to their age, gender, and position in the family and society. In Myanmar, particularly in central Rakhine, Rohingya may have two names, one Muslim and one Burmese [106]. Rohingya often abbreviate names: for example, Mohamed will be pronounced as 'Mammad', Hussein as 'Hussaun' or 'Hussinya', Ahmed as 'Ammad', Mohamed Ullah as 'Madullah' and Hafiz as 'Habes'.

Language

The Rohingya language (Ruáingga or Rohingya) is an Indo-Aryan language that is closely related to the Chittagonian (Chittagong) dialect of Bengali (Bangla) which is spoken by the Bangladeshi host population around Cox's Bazar. The Rohingya language is primarily an oral language and does not have a standardized and internationally recognized written script. Various scripts are used to capture the Rohingya language in written form: Arabic, Urdu, Rohingyalish (a simplified Rohingya script using Latin letters), and Hanifi that is named after its developer Maulana Mohammed Hanif. The Rohingya language may also be transliterated at times using the Burmese alphabet, but even native speakers who are fluent in Burmese and English still struggle to read Rohingya in this form. Many Rohingya have low levels of education and even those who can read and write continue to face challenges in reading and writing Ruáingga due to inconsistencies and differences between different language systems [107].

Music and poetry

There is an oral tradition among the Rohingya that is expressed through poems and songs. *Tarana* poems/songs express emotions (often related to despair, melancholy and fear). They can be recited or sung, sometimes with aid of musical instruments such as the *tobla* (small drums) or *juri* (traditional guitar-like instrument) Songs constitute a medium to keep alive the history and preserve the collective identity [102, 108].

Annex 32

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)*

Go to navigation | Go to content العربية | 中文 | English | Français | Русский | Español



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HUMAN RIGHTS BY COUNTRY
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HUMAN RIGHTS BODIES
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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

Mr. President, distinguished representatives, ladies and gentlemen,

I am honoured to present today my fourth report to this Council in the year of the 70th anniversary of the Universal Declaration of Human Rights. Minister U Kyaw Tin reminded us that Burma, as it was then called, was among the first nations to vote in favour of the Declaration when it was adopted by the General Assembly on 10 December 1948. I am also reminded, sadly, that when the UDHR was adopted it was when the world first said “never again”.

I am presenting my report without having access to Myanmar for the first time. I used to have the privilege of saying that I am the only Special Rapporteur on Myanmar to have been allowed into the country each time I requested a visit, no matter how fraught with obstacles. During my last few visits, I saw that the current civilian-led Government had been adopting tactics of the military past; it is rather ironic that I was informed last December of that Government’s decision to no longer cooperate with me.

Mr. President,

When I assumed my mandate in 2014, I vowed to discharge it in fairness and with impartiality. In all my reports, I have attempted to shed light on the plight of several communities, not just one; and I have tried to engage the Government in an open and constructive way. This includes on benchmarks which this Council mandated me to arrive at jointly with the Government to track progress and prioritize areas for technical assistance and capacity-building. Despite my efforts to remain impartial, I am now declared unwelcome in Myanmar, accused of being unfair and biased. I am hopeful that Myanmar will revisit their decision and grant me access in July. In the event that they continue not to cooperate with me, I will seek to travel to India and China in preparation of my report to the General Assembly.

Distinguished representatives,

It is irrefutable is that there are now more Rohingya people outside Myanmar than within – the vast majority of whom are taking refuge in Cox’s Bazar. The alleged 25 August attacks by the Arakan Rohingya Salvation Army and ensuing attacks by security forces led to record numbers of people fleeing Rakhine State in the weeks that followed. I dreaded the worst was coming to pass and that the Myanmar military was finally looking to complete what it described as its ‘unfinished business from World War II’ – the clearing of the Rohingya out of the country.

In January this year, I spoke to over 100 **refugees in Cox’s Bazar**, who had fled the violence in

In January, this year, I spoke to over 100 refugees in Cox's Bazar, who had fled the violence in Maungdaw, Buthidaung and Rathidaung Townships in northern Rakhine. I heard first-hand 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. Parents told me harrowing accounts of witnessing their young children being thrown into fires. Survivors described the security forces calling families out of their homes, separating men and boys to be executed in front of their families or taken away. I heard testimony of women and girls being raped and then killed, some burned alive in their homes while unconscious or tied up.

The **repatriation process** for the refugees must be voluntary and they must be informed fully of what they are going back to in Rakhine. While Myanmar says it has constructed facilities to receive verified returnees from Bangladesh, it also appears to be engaging in large-scale development projects in areas that were once Rohingya villages. There is an increasing amount of credible evidence, including satellite images, which indicates that whole villages that were once home to Rohingya have been bulldozed to the ground. Just yesterday, new satellite imagery has revealed that military bases are being constructed in these bulldozed areas. This casts further doubt on the sincerity of Myanmar regarding repatriating the Rohingya from Bangladesh. Importantly, it will be impossible for anyone to claim where they are from or describe where they had previously lived if the region's landscape has been so significantly altered. Additionally, there appears to be a policy of forced starvation in place, designed to make life in northern Rakhine unsustainable for Rohingya who remain. Before repatriation can be really considered, Myanmar must break the cycle of violence in Rakhine, recognize the Rohingyas' right to self-identify, restore their citizenship and uphold their human rights.

Ladies and Gentlemen,

While the scale of violence in Rakhine appears to have eclipsed anything seen in recent years in Myanmar, ethnic minority groups in other areas of the country have, much like the Rohingya, been victims of the military's campaign of domination and discrimination for generations. Minorities in **Kachin, Shan, Kayin** and other conflict-affected States have told me that the accounts they have heard coming from Rakhine State evoke memories of their own brutal treatment at the hands of the Myanmar military. Continuing and escalating armed conflicts in Kachin and Shan, which receive scant international attention, are having a devastating impact on civilian populations.

While preparing this statement, I received information of the military conducting **new ground offensives** last week using heavy artillery in the Tanai gold and amber mining area of Kachin. Additionally, the Tatmadaw has advanced into Mutraw District in Kayin State, an area controlled by the Karen National Union which is a Nationwide Ceasefire Agreement signatory. This ceasefire violation led to 1,500 villagers from 15 villages having to flee. I am very concerned about these continuing offensives; the path to peace is through inclusive political dialogue, and not through military force.

Friends and colleagues,

In the two years since the victory of the NLD in national elections, the Government has yet to make any real progress on **legal and judicial reform**. The statute books still contain several repressive laws from the colonial era while more recent laws are also being used to target people and stifle dissenting voices.

The democratic space continues to shrink, with journalists, civil society actors and human rights defenders placed in an increasingly perilous position, particularly when speaking out about human rights abuses.

The level of **hate speech**, particularly on social media, has a stifling impact on asserting sensitive and unpopular views, and this is very concerning. In January, a Muslim student was chased, beaten and detained by police in for no reason other than being on the street in downtown Yangon late at night. This prompted a social media onslaught of disgraceful anti-Muslim slurs and violent threats against him. Because I speak out on behalf of Muslims and other religious minorities in Myanmar, I, too, am the target of vulgar, hateful, and violent threats on social media. As I have repeatedly stated, Myanmar needs to enact legislation to counter incitement to discrimination, hostility and violence that complies with international standards.

While the Government continues to push forward with its **economic development agenda** around the country, I remain concerned about governance and transparency.

Mr. President,

No one doubted that the democratic transition from decades of military rule to a civilian government would be challenging for Myanmar. As we are now unfortunately witnessing, a change in the political context does not automatically lead to positive change in the human rights context.

This Council was given notice four years ago about the possible commission of **crimes against humanity** regarding the Rohingya. The High Commissioner for Human Rights in June 2016 made that same warning, as well as about possible commission of war crimes in other parts of the country. Yet just months after, Member States discontinued the General Assembly resolution on Myanmar – even as reports were coming out of violations perpetrated during the post-9 October 2016 attacks.

This Council notably established the **International Independent Fact Finding Mission on Myanmar** in March 2017, yet this did not stop the ongoing persecution against the Rohingya nor de-escalated the armed conflict in Kachin and Shan. Indeed, perhaps the military was emboldened to proceed with the attacks following 25 August 2017 which resulted in the Rohingya population being forcibly displaced from northern Rakhine. I urge members of the civilian government to visit the settlements in Cox's Bazar to see the scale of displacement – the lives affected and destroyed.

Distinguished Representatives,

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**. Not only does the Myanmar Government have a responsibility to account for the alleged crimes in Rakhine State since 9 October 2016 and 25 August 2017, and the violations that continue today, but the international community must also be vigilant. It must not be beguiled by the proliferating Government committees and commissions, and by promises and commitments yet to be fulfilled.

As a step towards arriving at an understanding of the truth of what had happened in Rakhine State in recent months and years, I am recommending the establishment of a **structure to be based in Cox's Bazar**, Bangladesh, under the auspices of the United Nations to investigate, document, collect, consolidate, map, analyze and maintain evidence of human rights violations and abuses. Its aim would be to facilitate impartial, fair and independent international criminal proceedings in national or international courts or tribunals in accordance with international criminal law standards. The focus should include incidents of violence during the security operations following the attacks on 9 October 2016 and 25 August 2017 in Rakhine State, as well as alleged attacks and abuses by ARSA and Rakhine Buddhist villagers.

The violence and suffering calls not just for accountability but also for self-reflection by the UN and the question – could we have prevented this? To that end, I have recommended in my report for the conduct of a comprehensive **review of actions by the United Nations** system in the lead-up, during and after the events of 9 October 2016 and 25 August 2017 regarding the implementation of its humanitarian and protection mandates and within the Human Rights Up Front framework. I believe this is in line with the Secretary-General's own priority on advancing a preventive approach to human rights.

I want to end by reminding the international community what it had agreed to 70 years ago: That "all human beings are born free and equal in dignity and rights." All members of the international community must respect the basic rights guaranteed to all human beings, and that everyone has the right to exercise their rights, without any discrimination.

I have shortened my oral statement to accommodate Member States' questions, and look forward to answering questions.

I want to close by sharing with you an account which has left me distressed until this day. In Cox's Bazar, I met a grandmother who had fled Rakhine State with her daughter-in-law and grandson. The three-year old boy, with big innocent eyes came up to me and simply said, "They chopped up my

father.” No one, let alone a child, should ever have to witness the killing of their parent. No child should ever have to recount such a dreadful incident. No child should ever have to grow up with this horrific visual memory the rest of their lives. I have two children. Ladies and gentlemen, you also may have children. Some of you may even have grandchildren. Imagine if this was your own child or grandchild.

Thank you for your attention.

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Annex 33

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)



United Nations
Secretary-General

Dhaka, Bangladesh

12 March 2018

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

From 7 to 13 March I visited Bangladesh to assess the situation of the Rohingya population who have crossed the border from Myanmar to Bangladesh since the most recent incidents of violence in northern Rakhine state in October 2016 and August 2017. During my visit, I had the opportunity to meet Bangladeshi authorities, civil society actors and members of the diplomatic community. I also visited refugee camps in Cox's Bazaar, where survivors I met shared horrifying stories of what they have endured.

What I have heard and witnessed in Cox's Bazaar is a human tragedy with the fingerprints of the Myanmar government and of the international community. The scorched earth campaign carried out by the Myanmar security forces since August 2017 against the Rohingya population was predictable and preventable. Despite the numerous warnings I have made of the risk of atrocity crimes, the international community has buried its head in the sand. This has cost the Rohingya population of Myanmar their lives, their dignity and their homes.

Let us be clear: international crimes were committed in Myanmar. 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. However, whether or not we consider that the crimes committed amount to crimes against humanity or genocide, this should not delay our resolve to act and to act immediately. We owe this to the Rohingya population.

First, the root causes of the problem must be addressed. Only then can this population return in safety and dignity to Myanmar. The fate of the Rohingya has been sealed since the day they were born. A fate of persecution and exclusion. We must change this and give them the opportunity that every human being should be afforded in life: to enjoy their fundamental human rights in freedom and safety. The recommendations of the Rakhine Advisory Commission provide a road map for the Myanmar Government. As a priority the stateless status of the Rohingya community must end and the issue of their citizenship be addressed properly and definitively.

Second, there must be accountability for the crimes that have been committed. I am perplexed by the denial of the widespread commission of serious crimes that has characterized the response of the Myanmar authorities. I urge the international community, in particular the United Nations Security Council, to consider different accountability options. The world needs to show that it is not ready to tolerate such barbaric acts.

Third, the Rohingya must receive protection and support as refugees while in Bangladesh. I welcome the remarkable work done by the Bangladeshi authorities in responding to the arrival of almost 700,000 Rohingya refugees in Cox's Bazar in the space of six months. I call on the international community to do more to support Bangladesh in shouldering this responsibility by providing support to the refugees and host communities. The social and economic strains and the environmental impact that this influx of refugees is placing on the area and the host community is clearly visible. I encourage the Bangladesh government to facilitate more dialogue between the two communities to avoid misperceptions and the build-up of tension.

I was encouraged by the commitment made by the Bangladeshi authorities I met that refugees would not be repatriated against their will. What I have heard and seen makes it clear that the majority of the Rohingya want to return to Myanmar, but only when they are able to do so in safety, dignity and with access to the basic rights that are fundamental to us all. So far, the Myanmar authorities have shown no genuine efforts to allow this. In fact, refugees continue to cross the border. It is imperative also that the Rohingya, while in Bangladesh, are afforded more chances to uplift themselves educationally and through access to livelihoods. Doing so will help them both in Bangladesh and when they are able to return to Myanmar.

We must not fail the Rohingya population again. They have endured what no human beings should have to endure. The solution to this problem lies first and foremost with the Myanmar authorities, by creating the conditions for the Rohingya population to return home in safety and be entitled to the same rights as any other citizen of Myanmar. The international community also has a responsibility to protect this population from the risk of further atrocity crimes. Under the present conditions, returning to Myanmar will put the Rohingya population at risk of further crimes. However, accepting the current status quo would be a victory for those who planned the attacks. We must not accept either of these scenarios.

* * * * *

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Annex 34

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)

United Nations

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Seventy-third year

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Monday, 14 May 2018, 3 p.m.

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Agenda

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Briefing by Security Council mission to Bangladesh and Myanmar
(28 April to 2 May 2018)

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account. All States have a responsibility to address and prevent violations of international law, including human rights violations and abuses. In this case the primary responsibility lies with the Government of Myanmar, which must genuinely address the issue of accountability. Otherwise, the international community will need to assist and look seriously into the possible mechanisms available for that purpose. We are aware of the ongoing process at the International Criminal Court. Without true accountability, the trust needed for refugees to return will be hard to garner. We fully support the work of the fact-finding mission, which should be given full and unhindered access to do its work. Evidence-gathering at Cox's Bazar could also prove to be an important contribution.

The visit was a demonstration of solidarity with the refugees sheltering in the camps in Bangladesh. There was a strong and clear call from the refugees for the Council's ongoing support and action. We must not let them down. The visit also represented solidarity with the Government of Bangladesh and the Bangladeshi host communities, whom we must continue to support. The visit also represented commitment to supporting the Government of Myanmar to create the conditions for return and to build peace and prosperity for all people in Rakhine state. We invite them to fully engage with the United Nations agencies on the ground and with other regional and international partners. Sweden stands ready to continue to support Myanmar on its path towards democracy and peace.

Mrs. Gueguen (France) (*spoke in French*): Allow me to begin by warmly thanking Kuwait, Peru and the United Kingdom for their efforts in organizing and conducting this mission, which was a particularly important moment for all of us. I also thank Bangladesh and Burma for their hospitality.

The field visits, in particular to the zero line, Kutupalong camp and northern Rakhine, and the various interviews allowed Council members to determine for themselves the severity of the suffering of the Rohingya, the extent of the destruction in northern Rakhine and the complexity of the crisis and the urgency with which it must be resolved. I should like to give an overview of what France took away from the visit and the priorities that we believe should guide international action, in particular by the United Nations, in support of Rohingya refugees.

In Bangladesh, we witnessed the admirable efforts and generosity of the Government and of the local population, which, in all, are hosting more than 1 million Rohingya refugees, who are particularly vulnerable and live in very precarious conditions. That exemplary hospitality must be sustained. We also noted that the Office of the United Nations High Commissioner for Refugees (UNHCR) and all the relevant United Nations and humanitarian agencies and organizations are doing an outstanding job in that regard. For France, the immediate strengthening of international support would mean action on three fronts.

First, the funding rate for the humanitarian response plan must be increased, as it remains well below that required to meet current needs. According to the most recent assessment provided by UNHCR, the rate stands at 16 per cent.

Secondly, there is an urgent need for appropriate measures and steps to be taken to meet needs and protect the Rohingya in order to prepare for monsoon-related security and health risks in refugee camps. Such measures, which the Government of Bangladesh has started to take, include the reinforcement and relocation of shelters.

Thirdly, we must continue to assist Bangladesh, humanitarian workers and local host communities in ensuring that the living conditions of the Rohingya refugees are as bearable as possible, while preserving the promising national goal of economic development for Bangladesh. It is essential that specific attention be paid to the needs of children, including with regard to education, and of women who have suffered unspeakable violence.

Interviews in Burma served to reiterate the expectations of the Security Council to civil and military authorities, which are very clearly expressed in the presidential statement of 6 November 2017 (S/PRST/2017/22). France's priority remains the full implementation of that statement. Commitments have been made, but that is not enough, as the Permanent Representative of the United Kingdom just underscored. France therefore calls upon the Burmese authorities to take the following measures.

First, it is important to address the root causes of the crisis by fully cooperating with the new Special Envoy of the Secretary-General and by committing to implementing all of the recommendations in the Annan report. 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. 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 enjoy their rights and fundamental freedoms. That will be achieved only when their citizenship is restored.

Secondly, the Burmese authorities must conduct investigations and prosecute those who commit systematic human rights abuses in Rakhine state, including sexual violence, and cooperate with the United Nations on the issue. The testimony heard by the members of the delegation on the violence and abuse suffered by the Rohingya is harrowing. The destruction observed in northern Rakhine state of homes, mosques and villages burned to the ground speaks for itself. The Rohingya are victims of ethnic cleansing; there is no other word for it. Prosecuting the perpetrators of such crimes is a moral, legal and political imperative. Starting today, the Burmese authorities can send a positive sign by agreeing to cooperate with the Human Rights Council's fact-finding mission, establishing an on-site office of the High-Commissioner for Human Rights and cooperating with him.

Together we must also reflect on the best way to collect and protect evidence, which, when the time comes, will enable the perpetrators of such atrocities to be prosecuted in a fair and just trial with full respect for the law. France recalls that the forced displacement of people constitutes a crime against humanity under the Rome Statute of the International Criminal Court, and we note that Bangladesh is party to it.

Thirdly, restoring immediate, safe and unhindered humanitarian access is imperative. It is essential that the Burmese authorities sign the memorandum of understanding with the Office of the United Nations High Commissioner for Refugees and the United Nations Development Programme so as to demonstrate their commitment to respecting international standards on refugees. The onus is on the Burmese authorities to create conditions conducive to the safe, voluntary and dignified return of refugees who, regrettably, are not all in the same location. Accepting technical assistance and expertise from the specialized agencies of the United Nations is the best way to achieve that goal. The challenges are real. Under no circumstances can inaction be justified. Specific commitments with

regard to the points I just mentioned will serve to create the necessary conditions.

This year we mark the seventieth anniversary of the Universal Declaration on Human Rights, which I recall was adopted following the genocide and massacre of the Second World War to prevent the recurrence of such a tragedy. Let me conclude by citing article 1.

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

I urge the Council to see reason and appeal to its conscience because the plight of the Rohingya underscores that respect for the most fundamental principle of the Charter of the United Nations is at stake. Its Preamble reaffirms faith in fundamental freedoms, dignity and the worth of the human person. The Security Council and we, the Members of the United Nations, are duty-bound to ensure respect for those principles.

Mr. Temenov (Kazakhstan): I join others in thanking the three co-leads — the Permanent Representatives of Peru, Kuwait and the United Kingdom — for their detailed briefings on the Security Council mission to Bangladesh and Myanmar. I would like to express special gratitude to the Government of Kuwait for its generosity in providing flight arrangements and logistical support to the Security Council delegation. The mission would not have been possible without the joint efforts of the Governments of Bangladesh and Myanmar and of the United Nations country teams and other member States of the Council that worked very hard to make it happen.

On behalf of the delegation of Kazakhstan, I express gratitude to the host Governments for their assistance in organizing meetings with Government officials, as well as other stakeholders, including civil society representatives. It was a very special opportunity indeed to hold discussions with the highest authorities of both Governments on the issue of Rohingya refugees — the world's greatest and worst refugee crisis today.

The Security Council mission to Bangladesh and Myanmar was a vivid and stark revelation and an opportunity to obtain direct and first-hand experience of the true plight of the Rohingya people. Being on the front lines presented a glaring and shocking reality and

awakened our conscience, prompting us to act more robustly and collectively.

During the visit to the refugee camps in Cox's Bazar, we were able to witness a severe humanitarian catastrophe that affects the entire region. We would like to commend the Government of Bangladesh on its generous hospitality in receiving such a large number of refugees and providing them with shelter and other forms of assistance. We hope that the Government of Bangladesh, as well as the United Nations and other humanitarian partners, will continue to undertake monsoon-preparedness activities to mitigate the effects of the rains on refugees and prevent a high number of human casualties. That is especially relevant given that 60 per cent of the Rohingya refugees are children, including 41 per cent who are under the age of 12, and therefore particularly vulnerable to emergency situations.

We noted the efforts of the Government of Myanmar to find a solution to the issue of Rohingya refugees and its preparations for their repatriation. We understand that the crisis cannot be solved overnight and will be an arduous process that will demand the active participation of all stakeholders. Given the magnitude of the problem, the repatriation of refugees will be a most formidable task and will require concerted efforts on the part of many organizations, countries and actors. We therefore hope that the Government of Myanmar will continue to cooperate with the United Nations Development Programme and the Office of the United Nations High Commissioner for Refugees. Gradually, other relevant United Nations agencies, international donors and partners should be able to lend the necessary support. We see the beginning of efforts by Myanmar and would encourage that they be directed at establishing the rule of law and good governance.

One of the most critical problems is ensuring the safe, voluntary and dignified return of refugees and internally displaced persons to their homes in Rakhine state. As underlined by my delegation during previous meetings on the issue, there can be no lasting solution for the Rohingya issue without addressing the root causes of the crisis. They include primarily the issues of citizenship for the Rohingya people, the restoration of their rights and freedoms, poverty alleviation and development, access to education, employment and freedom of movement.

It is hoped that the visit by the Security Council will pave the way for closer cooperation and finding long-term solutions through truth, reconciliation and transitional justice, as occurs after every conflict. With the United Nations fact-finding mission at work, we realize that justice is a precondition for re-establishing trust among all communities and deterring future violence.

Unhindered access for humanitarian assistance to the affected population is crucial. We hope that the goodwill created by the visit will result in unfettered and safe access to United Nations agencies offering emergency assistance and seeking to alleviate suffering, in particular of children, women and the elderly.

The Red Cross Movement, which has been providing humanitarian assistance in northern Rakhine at the request of the Government, cannot meet all the needs. We therefore call on the Government of Myanmar to allow full and safe access to Rakhine for the Office for the Coordination of Humanitarian Affairs, the World Food Programme, the World Health Organization, UNICEF and other United Nations agencies to effectively deliver life-saving humanitarian assistance.

We are encouraged by the commitment of the Government of Myanmar to working with the United Nations, and to endorsing and implementing the recommendations of the Rakhine Advisory Commission in order to restore intercommunal harmony, sustainable peace, stability and prosperity. We are confident that the new Special Envoy of the Secretary-General on Myanmar, Ms. Christine Schraner Burgener, will bring new impetus for enhanced cooperation with the United Nations, and we hope that Naypyidaw will fully support the Special Envoy in discharging her mandate.

My delegation is committed to joining efforts to find a sustainable solution to the plight of the Rohingya refugees and people affected by the recent crisis and mass displacement.

Mr. Ndong Mba (Equatorial Guinea) (*spoke in Spanish*): At the outset, our delegation would like to express its deep gratitude and appreciation to Peru, Kuwait and the United Kingdom, through their Ambassadors Gustavo Meza-Cuadra, Mansour Alotaibi and Karen Pierce, for the briefings they have just presented and for organizing the very important mission to visit Cox's Bazar, Dhaka, Naypyidaw and Rakhine state. The mission enabled the members of the Security Council to see and hear first-hand the reality

Annex 35

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)

3 July 2018

English only

Human Rights Council

Thirty-eighth session

18 June - 06 July 2018

Agenda item 2

**Annual report of the United Nations High Commissioner
for Human Rights and reports of the Office of the
High Commissioner and the Secretary-General**

**Oral update of the High Commissioner for Human Rights on
Situation of human rights of Rohingya people**

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1. This update on the situation of the Rohingya people is presented pursuant to Human Rights Council resolution S-27/1 which requested the High Commissioner to track progress concerning the human rights situation of the Rohingya and to provide oral updates, including at the thirty-eighth session of the Human Rights Council.
2. The Human Rights Council adopted resolution S-27/1 at a special session held on 5 December 2017 in the context of the outbreak of violence in Rakhine State in October 2016 and August 2017 that caused the displacement of hundreds of thousands of Rohingya civilians to Bangladesh, and following reports of grave human rights violations and abuses carried out in a systematic, targeted and deliberate manner by the Myanmar security forces, assisted by non-State actors in Rakhine State. This update is delivered in the context of immense humanitarian challenges in Cox's Bazar, Bangladesh, resulting from these violations.
3. The High Commissioner recalls the statement on Myanmar delivered by the President of the Security Council on 6 November 2017. He also recalls the General Assembly resolutions on the situation of human rights in Myanmar, particularly Assembly resolution 72/248 adopted on 24 December 2017, as well as the resolutions of the Human Rights Council, the latest being resolution 37/32 of 23 March 2018. Since the special session of December 2017, the independent international fact-finding mission on Myanmar and the United Nations Special Rapporteur on the situation of human rights in Myanmar have provided updates to the Human Rights Council while not being allowed access to Myanmar.
4. In June 2018, following a request for information by the Office of the United Nations High Commissioner for Human Rights (OHCHR), the Government of Myanmar provided updates on the status of implementation of the Recommendations of the Kofi Annan-led Advisory Commission on Rakhine State ("Rakhine Commission").
5. This oral update outlines the current humanitarian situation facing refugees in Cox's Bazar; developments pertaining to repatriation of those refugees to Myanmar; the current situation in Rakhine State; the root causes of the current crisis, including the denial of citizenship to the Rohingya in Myanmar; and advocacy of racial and religious hatred against the Rohingya in their home country.

Humanitarian situation

6. As of 31 May 2018, 721,641 refugees from Myanmar had arrived in Cox's Bazar, Bangladesh, since the beginning of so-called "clearance operations" conducted by Myanmar security forces in northern Rakhine from August 2017.¹ They have joined 166,020 Rohingya who had sought protection in Bangladesh from previous episodes of violence, nearly half of whom were driven from their homes during the 1991-1992 Phi Thaya, or "Clean and Beautiful Nation", military operation.² These refugees live in camps and settlements throughout the district of Cox's Bazar. The biggest of these camps houses over 700,000 people, making it the largest refugee camp in the world, and the fourth largest city in Bangladesh, a country of 166 million.
7. The situation of the refugees in the camps is precarious. It is estimated that 215,000 live in areas at risk of flooding and/or landslides.³ A single day of rain in June flooded vast areas of the camp. Further floods pose a grave risk to services and facilities, including by

¹ UNHCR, Bangladesh Refugee Emergency, Population Factsheet as of 14 June 2018.

² UNHCR, Bangladesh Refugee Emergency, Population Factsheet as of 14 June 2018.

³ Inter Sector Coordination Group (ISCG), Monsoon Emergency Preparedness and Response, Cox's Bazar Rohingya Refugee Crisis, 14-21 June 2018.

threatening to overflow latrines which would lead to a contamination of water-wells and may trigger a widespread outbreak of waterborne diseases. In the pre-monsoon period, within one week, landslides in the camps damaged 1,152 shelters, affecting 9,748 people.⁴ Five refugees have already died this year as a result of landslides, three of whom were children aged eight or under. The entire refugee population lacks access to structures that are safe during high winds or cyclones. An additional 1,500 acres of land is needed to relocate those living in areas most threatened by floods and landslides.

8. Camp conditions are dire and the humanitarian action is perilously under-funded. As of 21 June 2018, only 22 per cent of the \$950 million needed for the Joint Humanitarian Response Plan has been secured. By sector, only 13 per cent of the funds required to meet the health needs of the refugee population had been secured; 15 per cent of that needed to ensure food security; and 25 per cent of the entire education budget.

9. Humanitarian needs are growing rapidly: As of mid-May, 16,000 babies were born in the camps since 25 August 2017 - an average of 60 a day - of whom only 3,000 were born in health facilities.⁵ With 1 June 2018 marking 40 weeks since 25 August, pregnancies coming to term are likely to include those resulting from rape that allegedly occurred during the clearance operations. With only a fraction of births occurring in health facilities, and given the stigma generally affecting victims of sexual violence, it is difficult to estimate the number of births resulting from rape. What is clear is that support for de-stigmatization programmes for victims of sexual violence and their children is critical, including for those who may be rejected by their families.

10. In opening its border to the Rohingya last year, Bangladesh set an example for all governments to follow. However, the monsoon season has already highlighted how precarious the situation is for refugees in the camps. The plan of the Government of Bangladesh to relocate 100,000 refugees to Bhasan Char, a flood-prone island recently reclaimed from the sea and not easily accessible, does not appear to be a credible solution. What is needed is more land in safe locations, and permanent structures that can withstand wind and rain. It is also imperative that the authorities in Bangladesh officially acknowledge the status of the Rohingya they are hosting as refugees, and ensure they have the rights they need to live with dignity, including the rights to education, to access livelihood, and to an adequate standard of living.

Repatriation

11. In January 2018, at the signing of the Physical Arrangement deal that is to facilitate the return of the Rohingya in line with the 23 November 2017 Arrangement on Return of Displaced Persons from Rakhine State (“Repatriation Agreement”), Bangladesh and Myanmar stated that repatriation would preferably be complete within six months. Seven months later, repatriation has yet to begin.

12. The Government of Myanmar has reported on the building of physical infrastructure to house returnees, including two reception centres as well as a transit centre at Hla Poe Kaung, with 600 long-house style buildings that can accommodate 30,000: a complex built in a village tract that was home to an estimated 2,500 Rohingya before 25 August 2017. While the authorities have arranged visits for media and diplomats to these facilities, scant information has been provided on the expected timeframe for processing returns, particularly the length of time the Rohingya will be required to stay in the reception and transit centres.

⁴ ISCG, Emergency Preparedness and Response, Cox’s Bazar Rohingya Refugee Crisis, 30 May 2018.

⁵ UNICEF, ‘More than 60 Rohingya babies born in Bangladesh refugee camps every day’, 17 May 2018.

The two reception centres that have been established in Taung Pyo Let Wae and Nga Khu Yar are reportedly able to process 300 returnees a day, five days a week. At this rate, it would take over 10 years to process the 815,000 people who have arrived in Cox's Bazar since October 2016, if the reception centres were to work at full capacity, every working day, 52 weeks a year. In the six months since signing the Physical Arrangement, the Government of Bangladesh has given the names of 8,032 Rohingya to the Government of Myanmar for verification and return. To date, Myanmar has verified only 1,387 names. The refugees included on these lists were neither consulted on the process, nor did they apply for voluntary return to Myanmar.

13. Notwithstanding the agreements it has signed and the committees it has established, the actions of the Government of Myanmar cast doubt on its willingness to repatriate the Rohingya. This is evidenced by continued ill-treatment, violence and discriminatory practices against Rohingya who remain in northern Rakhine, as reported by the hundreds still arriving in Bangladesh each month; the ongoing deprivation of the most basic rights of the Rohingya held in camps for internally displaced persons in central Rakhine for the past six years; and the situation of the Rohingya trapped on the border between Myanmar and Bangladesh.

14. In May 2018, Myanmar authorities resumed loudspeaker announcements demanding that the approximately 4,000 Rohingya who have been staying at the international border between Myanmar and Bangladesh since August 2017, leave the area. Although the area is located outside Myanmar's border fence and is routinely referred to in media as a "no-man's land", the area is generally understood to be part of Myanmar territory. It is adjacent to the area of Myanmar that is home to the group in question. The loudspeaker announcements state that it is illegal for the group to occupy this area and doing so is punishable under Myanmar criminal law.

15. In April 2018, the return of one Rohingya family of five to Rakhine State was highly publicized, with photographs of the family receiving National Verification Cards from local officials circulated by Government media. While their return received international press attention, it was later reported that they had never left Myanmar, traveling only as far as the "no-man's land" on the border. In May 2018, the Government of Myanmar stated that it had arrested 62 refugees who had returned to Rakhine over the course of the preceding four months of their own accord and outside the framework agreed with Bangladesh. Fifty-eight received prison sentences in apparent violation of the provision of the Repatriation Agreement that returning refugees will not face legal action. Criminal charges were dropped against the remaining four. It is unclear what specific charge the 58 were convicted under but the Office of the State Counsellor announced they had been pardoned by President U Win Myint.⁶ They are reported to have been detained initially in Buthidaung prison and were subsequently moved to Nga Khu Yar reception centre.

16. Around 90 Rohingya that were on board a boat that had reportedly left Bangladesh for Malaysia in June 2018, but landed in Rakhine State after engine problems forced it ashore, were also sent to Nga Khu Yar reception centre. Photographs were posted online showing the passengers sitting on the ground, surrounded by armed security forces and people in plain-clothes holding swords. They were later moved to Hla Poe Kaung Transit Camp and reportedly handed over on the same day to the authorities of various village tracts which, in half of the cases, are not their village tracts of origin.

17. The situation of 127,953 Muslims - mostly Rohingya - who have lived as IDPs in central Rakhine since the violence that erupted there in 2012, provide an ominous indication

⁶ Minister of the Office of the State Counsellor, 'The first returnees from the Camps in Cox's Bazar arrived in Reception Centres', 27 May 2018.

of what can be expected for any Rohingya returning from Cox's Bazar to Myanmar under current conditions. While Rakhine Buddhists displaced by that episode of violence have all been permitted to return to their places of origin or have been relocated to resettlement sites, and although some camps housing Muslims have also been closed over the years since 2012, the remaining Muslim IDPs have been confined to camps for six years. The Assistant Secretary-General for Humanitarian Affairs recently described the conditions of these camps as being "beyond the dignity of any people", without any freedom of movement, access to sufficient food, adequate health care, education and livelihoods.⁷

18. In 2017, two camps, housing Kaman Muslims and Rakhine Buddhists respectively, were reported to have been closed in response to recommendations of the Rakhine Commission's interim report. During her last visit to Myanmar in July 2017, the Special Rapporteur met with IDPs who had been living in these camps but was denied access to IDPs in a third camp which houses Rohingya - Kyein Ni Pyin, in Pauktaw township. The Government of Myanmar states that that camp is closed but according to reports, it remains active, and continues to receive humanitarian assistance. As many as twelve other camps have been mentioned by the Government of Myanmar for possible closure at different times since issuance of the recommendations of the Rakhine Commission, but the timeline for this is unclear.

19. While the Rakhine Commission recommended the closure of IDP camps, it insisted it should be in line with international standards and that the "aim should be to facilitate returns to places of origin as a matter of priority, or otherwise respect the choices of the displaced". With the details still being finalized for most locations, the Government of Myanmar has suggested that IDPs will be moved from long-house style buildings to individual houses or multi-storey apartment blocks on or near their current location. They have not been given any immediate guarantees of freedom of movement and access to livelihoods. This would not be consistent with the recommendation of the Rakhine Commission that IDPs should not be confined to substandard areas without equal access to basic services and livelihoods.

20. Humanitarian actors have expressed concerns that by taking these steps, the Government of Myanmar is simply reclassifying the camps rather than closing them down. Their concerns are that in practice, the confinement of the Rohingya will continue as will their dependence on humanitarian assistance. The IDPs have expressed fears about future access to assistance after the camps have been declared "closed" and most have expressed their preference to return to their places of origin, something that has been mostly ruled out by the Government of Myanmar. Rohingya interviewed by OHCHR in Cox's Bazar have stated that they are unwilling to return until the IDPs remaining in central Rakhine are granted citizenship and equal rights, and permitted to return to their places of origin.

21. The IDPs are also worried that the Government is considering the reclassification of camps as a durable solution, and in the process is taking away their rights to eventually reclaim their previous land and property. In this regard, the Rakhine Commission had specifically stated that "the choice to relocate must not be regarded as a renunciation of the right to return in safety and with dignity to the original place of residence, should that choice become feasible later."

Situation in Rakhine State

22. In their 31 May 2018 announcement of a tripartite Memorandum of Understanding being concluded with Myanmar, the United Nations Development Programme (UNDP) and

⁷ Video interview posted by Ursula Mueller, Assistant Secretary-General for Humanitarian Affairs, 4 April 2018.

the United Nations High Commissioner for Refugees (UNHCR) stated that conditions in Rakhine were not yet conducive for returns. This observation is confirmed by the continuous movement of Rohingya fleeing to Bangladesh by land and, in smaller numbers, to Malaysia and Indonesia by sea.

23. According to UNHCR, between 550,000 and 600,000 Rohingya remain in Rakhine State. Between January and mid-June 2018, there were 11,432 new arrivals of Rohingya to Bangladesh, 620 in May alone. In April, 140 Rohingya in three boats landed in Malaysia and Indonesia, which were the first confirmed maritime arrivals to countries other than Bangladesh since the Andaman Sea crisis of 2015. The passengers included IDPs from the camps in central Rakhine. Ten passengers on one boat reportedly died at sea. Although the Government of Myanmar states it is ready to accept returnees, it would appear that Rohingya are still prepared to risk dying at sea to escape the current conditions in Rakhine State.

24. In June 2018, OHCHR staff interviewed Rohingya refugees who had crossed into Bangladesh in the days and weeks before. The interviews indicate that killings and enforced disappearances of Rohingya, and the burning of their homes are ongoing. One woman who arrived in Cox's Bazar in late May said she had left after two incidents in which Rohingya homes in her village in Rathedaung township were burned to the ground by military. On both occasions, soldiers allegedly fired indiscriminately into the street to prevent villagers from approaching the fires, killing three people. A man from Buthidaung township, who also arrived in Bangladesh in late May, said that he had left shortly after 10 to 20 homes were burned to the ground in a neighbouring village. A woman from Buthidaung township reported that her local Imam was hacked to death with a machete around two months before she arrived in Cox's Bazar. Another man from Buthidaung said he had fled in early June after he and his father were attacked by military and Rakhine Buddhists as they were cutting down trees in their garden. They were beaten and told that they were not allowed to cut down trees as the land did not belong to them. The man's father was then taken away. After waiting for two days in the hope of discovering his father's whereabouts, he fled to Bangladesh. He has had no news of his father's fate.

25. Almost all the people interviewed by OHCHR who arrived in Bangladesh in recent weeks provided similar accounts. They described how they fled continued violence, persecution and other human rights violations, and ran out of money due to routine extortion by military and police in Rakhine State. They said they could not continue living there in a state of fear and anxiety due to the constant danger and uncertainty, the loss of livelihood and property, and the inhumane restrictions on their most basic rights. They described having to stay in their homes 24 hours a day; never venturing out, unless absolutely necessary, for fear of being extorted by military or physically attacked. Curfews limit their ability to move within even short distances. Some had stayed in Myanmar to nurse ailing parents who have since died because they were unable to get adequate treatment and medicine.

26. The 4,071 Rohingya living in Aung Mingalar, in Sittwe, live in perilous conditions. That community was not displaced by the 2012 violence but has since been held in ghetto-like conditions, with no freedom of movement outside the community, which is surrounded by armed guards. Every day, a single truck takes 20 people outside the community to a Muslim market adjacent to the Sittwe IDP camps to get food and attend to other necessities. The estimated 200,000 Muslims, mostly Rohingya, who live in villages elsewhere in central Rakhine, primarily in Kyauktaw, Minbya and Mrauk-U, are also subject to severe movement constraints and other forms of discrimination.

27. None of those interviewed by OHCHR in Cox's Bazar came with identification papers, explaining that whatever documentation they possessed was either destroyed or lost as they fled. One woman told OHCHR that since her home was burnt down during the post-25 August 2017 violence with her identification documents, she had been living with her sick and blind mother. She had recently fled after a local official told her she had to leave town

due to her lack of documentation. Many of the Rohingya who arrived in Bangladesh recently are coming from parts of Rakhine State that are further away: one woman from a remote area of Buthidaung township, interviewed by OHCHR in June, said that it took her 15 days to walk to Bangladesh with her ailing mother. Those who fled in recent weeks avoided travelling on the main roads as these are reportedly dotted with military checkpoints. They were forced to travel through mountain passages and only by night.

28. As access to Rakhine State is severely restricted, it is difficult to ascertain what is happening there. However, reports emerging from within northern Rakhine and satellite imagery indicate that a huge scale construction project is underway in areas that were previously home to the Rohingya: entire villages that were burned during the post-25 August 2017 violence have been razed to the ground and evidence appears to show that Rohingya-owned properties and religious buildings that survived the violence unscathed have since been destroyed. Reports suggest that some of the buildings under construction are new bases for military and other security forces. Villages of Rakhine Buddhists and other non-Rohingya communities are also reported to have been built where Rohingya villages once stood, and there are regular reports of initiatives by Rakhine civil society to relocate non-Muslim communities from other parts of Rakhine to previously Rohingya-majority areas. This includes Inn Din, a village tract in Maungdaw township where the Myanmar military has admitted responsibility for the killing of ten Rohingya, and where two Rohingya villages that were previously home to more than 4,000 people have reportedly been emptied entirely. This concerted effort to change the landscape and demographics of Rakhine State contributes further to the question of how the Rohingya will be able to return to their places of origin when those places have been utterly changed and, in some cases, inhabited by others.

Citizenship and the National Verification Card

29. Zarina Khatum is a 52-year-old refugee who is currently in Kutupalong-Balukhali camp, in Cox's Bazar. In June 2018, she spoke to OHCHR, recounting how, as a 12-year-old in 1978, she fled Rakhine State to Bangladesh when the Myanmar military launched Operation Nagamin or Dragon King. The stated objective of that operation was to tackle illegal immigration but it violently targeted Rohingya, over 200,000 of whom crossed the border to Bangladesh in search of safety. After one year, and following the signing of a repatriation deal between Bangladesh and Myanmar, she returned home. In 1992, after the launch of Operation Pyi Thaya, Zarina fled again, together with about 250,000 Rohingya targeted once again as 'foreign immigrants' to Myanmar. On that occasion, Zarina fled with her young son and remained in Bangladesh for three years before returning to Myanmar after the signing of another repatriation deal. Last year, when violence broke out in Rakhine State, Zarina was forced to flee again. For the third time, she is living in a camp in Bangladesh, now with her grandchildren. Zarina is just one of many of the Rohingya refugees who have experienced repeated displacement caused by cyclical violence against the Rohingya in Myanmar.

30. In May 2018, Government media in Myanmar outlined a closed-door Security Council briefing by the Permanent Representative of Myanmar to the United Nations in New York, U Hau Do Suan.⁸ He stated that the current refugee crisis was a consequence of the terrorist attacks by Arakan Rohingya Salvation Army (ARSA) on 30 Border Guard posts in northern Rakhine on 25 August 2017. While it is critical that ARSA's role and actions in last year's violence be investigated, the claim that their alleged attacks on 25 August 2017 are

⁸ *The Global New Light of Myanmar*, 'Myanmar Permanent Representative to the United Nations delivers a Statement at Security Council on Government's efforts in Rakhine State', 15 February 2018, pp. 1 and 3.

the root cause of the current crisis is misleading. Little is clear about ARSA but they appear to have been established in 2013, long after the seeds of the current crisis were sown.

31. As the experiences of Zarina Khatun attest, to understand the root causes of the situation in Rakhine, it is necessary to look back to at least 1978, when the cycle of violence against the Rohingya and a concomitant campaign to erode their legal personality began. It is recalled that the final report of the Rakhine Commission acknowledged that successive governments over the decades since independence have adopted measures that progressively eroded the political and civil rights of the Rohingya. It also noted that prior to the military coup in 1962, the community did enjoy some degree of recognition and was for a short while even allotted a designated administrative area in northern Rakhine.

32. The military regime of Ne Win passed the Citizenship Law in 1982. The law provides for access to “full” citizenship on the basis of ethnicity; with eight “national ethnic groups” – broken down into 135 sub-groups – automatically acquiring citizenship. Despite having lived in Myanmar for generations and enjoying citizenship under the previous legal regime, the Rohingya are not included among the 135 national ethnic groups and cannot apply as Rohingya for citizenship under the 1982 Law. While a strict application of the 1982 Law allows the Rohingya to acquire a form of citizenship, they are required to self-identify as “Bengali” in order to apply. Those willing to submit themselves to the procedures in place are generally frustrated by practical impediments such as slow decision-making, high levels of corruption, and inaccessible immigration officers.

33. In the years since 1982, citizenship has become an increasingly distant prospect for the Rohingya as authorities have engaged in what has been described as a protracted campaign to ensure their “administrative destruction”. Beginning in the 1990’s, a two-child policy was enforced against Rohingya through orders at the local level in townships of northern Rakhine; in 2014, they were excluded from the national census unless they conceded to being registered as “Bengali”; and in 2015, a package of laws known as the “four laws to protect race and religion” introduced a range of highly discriminatory provisions affecting women, children and religious minorities, with disproportionate effect on the Rohingya population. At the same time, restrictions on the day-to-day exercise of rights by Rohingya were imposed with increasing severity with the passing of time, including the rights to freedom of movement, religion, health, education, and access to livelihood.

34. At various points over the years, the authorities in Myanmar have announced different identification regimes for the Rohingya. In 1989, as part of a citizenship verification programme under the 1982 law, the Rohingya handed over the National Registration Cards they had held since 1951 in exchange for Citizenship Scrutiny Cards that were never issued to them; in 1995, they received Temporary Registration Certificates (TRC) which afforded certain rights but expressly did not confer citizenship. Included in the rights conferred to the holders of TRCs, was the right to vote. In 2015, with a national election approaching, the TRCs were revoked, disenfranchising the 797,504 people who held them, the vast majority of whom were Rohingya. The election that year, which brought Aung San Suu Kyi and the National League for Democracy (NLD) to power, was the first since 1948 in which the Rohingya could neither vote nor run.

35. The latest form of documentation required of the Rohingya is the Identity Card for National Verification (ICNV) or the National Verification Card (NVC). It was introduced in 2015 following the invalidation of the TRCs as part of a pilot citizenship verification process scheme under President Thein Sein. It has been expanded under the NLD Government albeit in a revised manner so that applicants are no longer, in principle, required to state their religion or ethnicity in the application. The National Verification Card are at the core of the current discussion surrounding the status of the Rohingya in Myanmar.

36. The National Verification Card does not grant citizenship but states that holders “need to apply for citizenship in accordance with Myanmar Citizenship Law”, namely the 1982 Citizenship Law. According to the Government, the “NVC process is [the] first step towards citizenship”, however that has not been the case for the Rohingya. To the Rohingya, the National Verification Card mark them out as non-citizens, in keeping with the Government’s characterization of them as foreign or Bengali interlopers on Myanmar territory. Their scepticism of the process is borne out by repeated similar experiences in the past – 20 years ago, the Rohingya were told in the very same language that the TRCs were the first step towards a citizenship status that was never granted to them.

37. The Rakhine Commission recommended that the National Verification Card process be voluntary. This is demonstrably not the reality for Rohingya in Rakhine. OHCHR has interviewed refugees in Cox’s Bazar who said that their decision to flee Myanmar was partly due to the pressure they were under to accept the NVC. Such pressure appears to be growing, with widespread reports of physical force being used across Rohingya communities remaining in northern Rakhine to accept the NVC. One man interviewed by OHCHR in February 2018 stated that he was tied up and beaten by authorities who demanded that he accept the NVC; he refused and fled to Bangladesh. Another man, a Rohingya local official, informed OHCHR that his son was kidnapped by security forces and held hostage until he could convince Rohingya in his village to accept the NVC.

38. While the Government of Myanmar insists that the National Verification Cards confer certain rights on holders, it is through restrictions on these same rights that they pressurize the Rohingya to accept it. A man who arrived in Cox’s Bazar in late May 2018 stated he had stayed in Myanmar to avoid losing his grocery shop but fled when he learned he would have to accept the NVC in order to continue crossing a particular checkpoint between his home and his business.

39. Recently, OHCHR has received reports that in Rakhine state, security forces started going from village to village, house-to-house, demanding that Rohingya present their National Verification Card for inspection. Recently arrived refugees also describe villagers being forced to accept NVC at gunpoint. One refugee told OHCHR in June 2018 that Rohingya can only stay if they accept the NVC.

40. In April 2018, the Minister of Social Welfare of Myanmar, Dr. Win Myat Aye - who is the Vice-Chair of the Union Enterprise for Humanitarian Assistance, Resettlement, and Development in Rakhine (UEHRD) and the Chair of the Implementation Committee on the Rakhine Commission recommendations - visited Bangladesh. This visit highlighted the absence of a consensus within the Government of Myanmar on the rights that the National Verification Card provides its holders. Indeed, the Minister told Rohingya that the card would allow them to secure citizenship within five months; at a subsequent press conference in Myanmar, he stated that holders would enjoy freedom of movement, access to healthcare and education, and freedom to cross international borders. He was promptly contradicted by the Minister for Labour, Immigration and Population, U Thein Swe, who stated that the NVC would only permit holders to travel within their home townships. The military-aligned Union Solidarity and Development Party has since pointed out that the administrative procedure that Dr. Win Myat Aye said that National Verification Card holders would go through to access freedom of movement is the procedure designated to control movement of foreigners within Myanmar territory. In May 2018, Dr. Win Myat Aye was reported in Government-aligned media as refuting reports that he had stated NVC holders would have freedom of movement.⁹

⁹ *The Global New Light of Myanmar*, ‘Pyidaungsu Hlutaw puts implementation of record on Rakhine State on the record’, 15 May 2018, p. 2.

41. According to the June 2018 progress report by the Committee for Implementation of Recommendations on Rakhine State, a road map “is currently being implemented to ensure that all people in Rakhine State - regardless of religion, race and citizenship status - enjoy freedom of movement” and that “people holding [National Verification] Cards can now enjoy freedom of movement”.¹⁰ It is clear from the above that this is not the case.

42. International law permits significant scope to sovereign States in defining rules governing citizenship but provides that the right of States to decide who their nationals are is not absolute and that the State must comply with its international obligations in this regard. In particular, customary international law includes a norm that prohibits racial discrimination, including in the acquisition and loss or deprivation of nationality. By providing for the acquisition of nationality primarily on the basis of ethnicity, the 1982 Citizenship Law relies on a distinction, exclusion, restriction or preference that is grounded in race, and is in violation of the principle of non-discrimination. Moreover, the 1982 Law violates Article 15(2) of the Universal Declaration of Human Rights which provides that “no one shall be arbitrarily deprived of his nationality”. It also contravenes Myanmar’s international obligations to prevent statelessness, including as a State Party to the Convention on the Rights of the Child, which obliges the registration of children at birth and their acquisition of nationality. Any deprivation of nationality leading to statelessness is generally considered arbitrary as is the deprivation of nationality based on discriminatory grounds, as in the case of the Rohingya who are the world’s single largest stateless group.¹¹

43. Despite the violations the Rohingya refugees have been subjected to, often repeatedly, most indicate that they wish to return to Myanmar, but only if the Government meets their demands for citizenship, equal rights and safety. Under the Bangladesh-Myanmar repatriation framework, all Rohingya returnees will automatically be issued an NVC. This appears to contradict the Rakhine Commission recommendation that the process should be voluntary considering the general rejection of the NVC process by the Rohingya. The Government of Myanmar has stated that the Rakhine Commission recommendation to change the 1982 Citizenship Law in line with international standards cannot be implemented in the current political climate.

44. If the Government of Myanmar maintains its position on the 1982 Citizenship Law and the National Verification Card process, or promises other form of status to the Rohingya that is less than citizenship, the vicious cycle that has brought three generations of many thousands of Rohingya families to Bangladesh is likely to continue. To uphold its legal obligations and resolve the situation of the Rohingya, the Government of Myanmar must agree to put in place a credible, non-discriminatory citizenship process that ensures the Rohingya can access their right to nationality and enjoy the same rights as other citizens of the country.

Hate Speech

45. In March 2018, developments resulting from the closure, in 2017, of the IDP camp in Ramree township - previously home to 55 Kaman Muslim families - highlighted the depth of anti-Muslim sentiment in Myanmar. A motion protesting the relocation of the families to Yangon was defeated in the Lower House of Parliament but received the backing of more than 100 members of Parliament. It was initiated by a parliamentarian for the Union Solidarity and Development Party who described Kaman Muslims as “cancer cells” which had spread through Rakhine State but which could not be permitted to “spread across the

¹⁰ The Committee for Implementation of Recommendations on Rakhine State, ‘Report to the People on the Progress of the Implementation of Recommendations on Rakhine State, January to April 2018’, 1 June 2018, p. 7.

¹¹ UNHCR, ‘This Is Our Home, Stateless Minorities and their Search for Citizenship’, November 2017.

country”. Kaman Muslims are a recognized ethnic group of Myanmar and while domestic law, in principle, guarantees their full citizenship rights, they often face difficulties in securing citizenship or exercising their rights to freedom of movement and to live anywhere in the country.

46. Advocacy of racial and religious hatred has fuelled the decades-long campaign of violence and persecution of the Rohingya. A comment in March 2018 by Maung Thway Chun, the chief editor of the publication of the ultra-nationalist religious organization Ma Ba Tha, that 70 years after Myanmar gained its independence it will soon “be subjugated again” and “lose its race, religion and territory”, is typical of the type of message that have mobilized public support to anti-Rohingya violence.

47. In Myanmar, Facebook has become the main medium for incitement to hatred or violence against the Rohingya. OHCHR has received reports of coordinated hate speech campaigns targeting Muslims and Rohingya on Facebook, spreading hate to an extensive audience.

48. It is imperative that Facebook urgently enhances its capacity to combat the spread of hate speech on its platform, including by improving and promoting mechanisms by which users can report hate speech and potential “trigger” posts - messages that may lead to hostility, discrimination or violence - and enhancing its capacity to promptly and comprehensively remove such messages and suspend or terminate the accounts of those who disseminate them. Facebook should conduct a thorough investigation of these networks and invest in the necessary technology to guarantee their permanent removal from the platform.

49. Moreover, the Government should take further action to publicly condemn and speak out against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. It should also increase efforts further to promote tolerance and peaceful coexistence in all sectors of society in accordance with Human Rights Council resolution 16/18 and the Rabat Plan of Action.¹² In addition, the Beirut Declaration and its 18 commitments on ‘Faith for Rights’ can be useful to address advocacy of hatred that incites to violence, discrimination or hostility, particularly when it is conducted in the name of religion or belief.

Accountability

50. In May 2018, the Government of Myanmar announced the establishment of an “Independent Commission of Enquiry” mandated to “investigate the violation of human rights and related issues following the terrorist attacks by ARSA”. While efforts to investigate are welcome, including its proclaimed objectives of addressing reconciliation, peace, stability and development in Rakhine, it is of concern that it does not aim at addressing accountability.

51. This latest initiative is consistent with a pattern where violence is followed by investigations designed to give the appearance of action. These inquiries do not meet any of the requirements for a credible process, including independence and impartiality, and have not resulted in accountability or availability of effective remedies for victims, as required by international human rights law.

52. For example, the Commission of Inquiry on Sectarian Violence in Rakhine State, established following the violence in Central Rakhine in 2012 - that left over 200 Rohingya and Rakhine Buddhists dead - did not identify perpetrators nor call for accountability. Its report referred to Rohingya as “Bengali” and concluded that those insisting on using the term Rohingya were “fanning the flames of sectarian violence”. An investigation led by Vice-President Swe Myint into the post-9 October 2016 violence summarily dismissed allegations

¹² A/HRC/22/17/Add.4, appendix.

of ethnic cleansing and crimes against humanity, concluding that it was too difficult to establish who was responsible for setting fire to 1,152 buildings. It also concluded that some allegations of murder, rape and arson were fabricated.

53. In November 2017, an internal investigation by the military into the post-25 August 2017 violence found that the military had not engaged in any violations, and blamed ARSA for setting fire to villages, forcing people to flee to Bangladesh. Weeks later, following the publication by Reuters of incontrovertible evidence of a massacre by military officers in Inn Din village, the military publicly accepted responsibility following an investigation by the same general who had led the previous investigation.¹³ Seven unnamed soldiers were quietly sentenced to ten years in prison by a military court for participating in the massacre. The two journalists who reported the events, Kyaw Soe Oo and Wa Lone, have been subjected to a protracted show trial and face up to 14 years in prison on allegations they violated the Official Secrets Act. On 1 February 2018, an article by Associated Press outlining the discovery of five mass graves in Gu Dar Pyin was met with threats of legal action by the Rakhine State Government.¹⁴

54. The Government of Myanmar must grant immediate access to Rakhine State to international independent investigators. In September 2018, the independent international fact-finding mission on Myanmar will deliver its final report to the Human Rights Council. Since its formation in May 2017, it has been denied access to Myanmar. However, it has been able to interview Rohingya and other victims of human rights violations and abuses in the countries they have fled to for safety. Since December 2017, the elected Government has resumed the practice of previous military governments of barring access to the United Nations Special Rapporteur on the situation of human rights in Myanmar. OHCHR has not had access to Myanmar for over one year but recently entered into discussions with the Government with a view to extending technical cooperation to it and other partners to promote and protect human rights. This could constitute a first step towards greater and more consequential engagement. The tripartite MoU Myanmar recently concluded with UNHCR and UNDP reportedly raises the prospect of humanitarian access to northern Rakhine.

55. The announcement by the International Criminal Court that it is examining the question of jurisdiction in relation to the commission of the crime of deportation as a crime against humanity on the grounds that an essential legal element of that crime occurred on the territory of Bangladesh, which is a state party to the Rome Statute, is welcome. The United Nations Security Council should immediately refer the situation in Myanmar to the International Criminal Court in order to ensure that the investigation is not limited to the crime of deportation but includes the full range of crimes alleged to have been perpetrated against the Rohingya and other ethnic groups in Myanmar, including the Shan and Kachin. This includes allegations of war crimes, crimes against humanity and genocide.

56. The High Commissioner strongly urges the Human Rights Council to make a recommendation to the General Assembly to establish a new independent international accountability mechanism in line with recommendations of the Special Rapporteur on the situation of human rights in Myanmar presented to the Human Rights Council on 27 June 2018. The mechanism should continue the critical monitoring and reporting work of the Fact-Finding Mission, and should investigate, monitor and report human rights violations and abuses and violations of international humanitarian law. It should build case files for the purpose of assisting individual criminal responsibility processes. Finally, this mechanism

¹³ The brief findings of the investigation by the military were published on the Facebook page of Commander-in-Chief of the Myanmar military, Senior General Ming Aung Hlaing. See for example, *BBC*, 'Rohingya crisis: Myanmar army admits killings', 10 January 2018.

¹⁴ See *The Irrawaddy*, 'Rakhine Govt to Sue AP over Report of Mass Graves in Buthidaung', 5 February 2018

should develop a framework for the reintegration of the Rohingya and other victims, and provision of immediate and long-term support to victims, including to enable them to realize their fundamental human rights and their right to an effective remedy.

Conclusion

57. History shows that genocide does not begin with physical violence but with the stigmatization and dehumanization of the intended targets. As outlined in this document, this process appears to have been underway in Myanmar for decades. At its heart has been the contentious discussion on the identity of the Rohingya, with successive governments - military and democratic - and large portions of the Myanmar population refusing to accept this term, choosing instead the term “Bengali” which the Rohingya reject as discriminatory. In recent years, there has been an alarming trend within the international community of refraining from using the term Rohingya in official documents and statements, including at the Human Rights Council. Whatever motivation lays behind the refusal to use the term, those who refuse to acknowledge the right of the Rohingya to self-identify are ultimately acceding to a narrative that characterizes Rohingya as foreign interlopers on Myanmar territory. The recent refusal by Radio Free Asia to comply with the demand of the Government of Myanmar to refrain from using the term Rohingya resulted in a ban on the airing of its programmes in the country is a commendable example of a principled stance for the international community to follow.

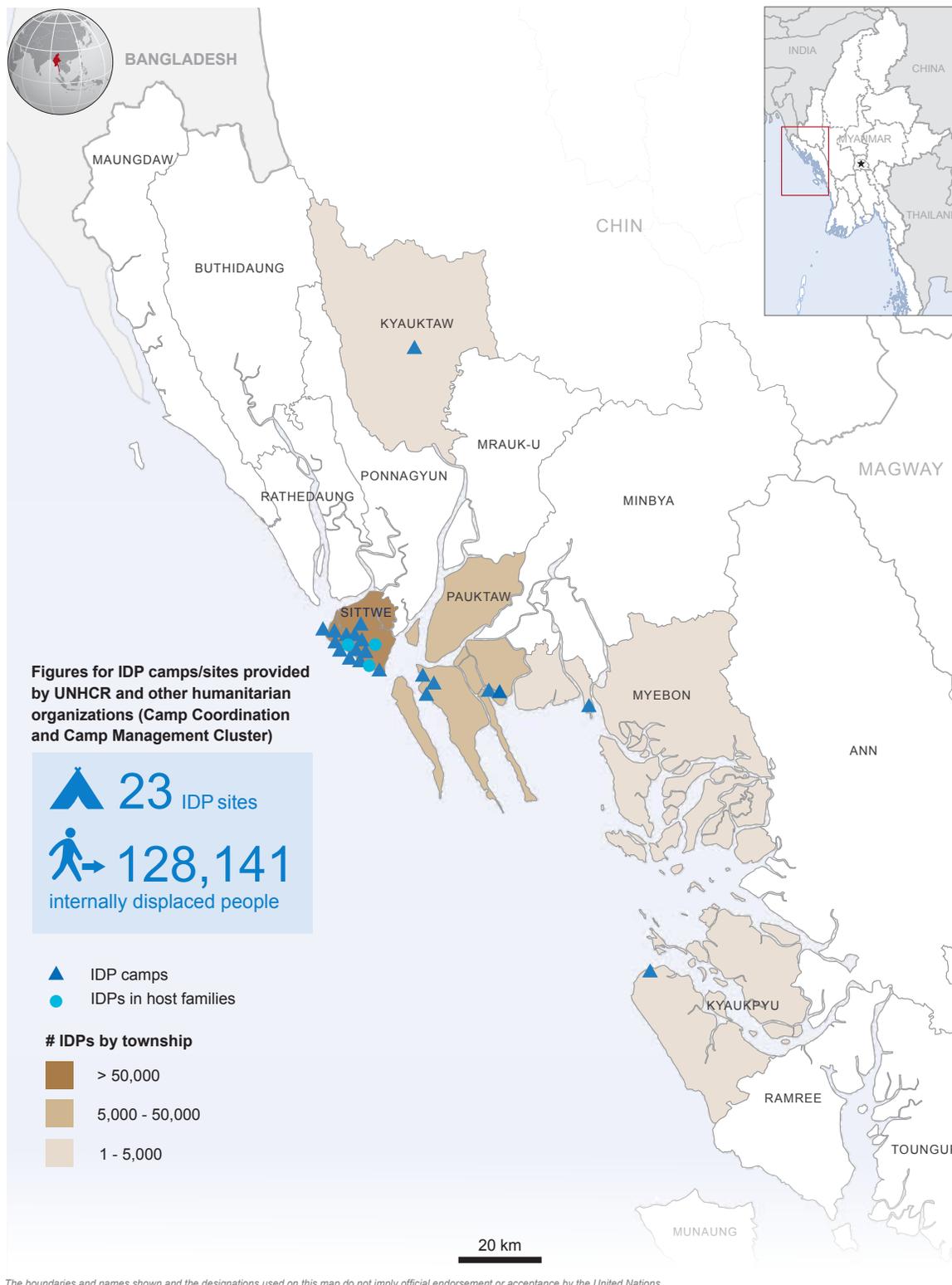
58. A further failing of the international community has been its unwillingness to consult and include the Rohingya community in decisions on their future. For years, Myanmar has excluded Rohingya from society, including by preventing them from being able to run for parliament in 2015. Rohingya voices have not been included in the various commissions and investigations Myanmar has established in the wake of different episodes of violence perpetrated against them. In June 2018, Rohingya in Kutupalong-Balukhali camp held a demonstration calling for their voices to be heard and demanding that they be consulted in all discussions related to repatriation and to their future more generally.

59. The international community must ensure accountability for the serious violations perpetrated against the Rohingya and ensure that conditions are created for Rohingya refugees in Bangladesh to return to their homes. It must also ensure that all future discussions on these issues include Rohingya and give due consideration to their demands.

Annex 36

United Nations Office for the Coordination of Humanitarian Affairs, *Myanmar: IDP Sites in Rakhine State as of 31 July 2018* (20 August 2018)

Myanmar: IDP sites in Rakhine State (as of 31 July 2018)



Annex 37

UN General Assembly, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, UN Doc. A/73/332 (20 August 2018)

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Promotion and protection of human rights: human rights situations and reports of special rapporteurs and representatives**Situation of human rights in Myanmar****Note by the Secretary-General**

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur of the Human Rights Council on the situation of human rights in Myanmar, Yanghee Lee, submitted in accordance with Human Rights Council resolution 37/32.

* [A/73/150](#).



Report of the Special Rapporteur on the situation of human rights in Myanmar

Summary

The present report provides an overview of human rights developments and challenges in Myanmar. It contains recommendations to address them, including the establishment of an accountability mechanism proposed by the Special Rapporteur.

rate of students. Reportedly, 324 of 424 schools in the townships of Maungdaw, Buthidaung and Rathedaung, Rakhine State, that had been closed since the violence of August 2017 were reopened in March 2018. However, a lack of teachers, materials and facilities hinder access to education and limit its quality. Moreover, many schools continue to segregate students, limiting opportunities for dialogue and social cohesion. Restrictions on movement continue to hamper travel by Rohingya children for post-primary education.

34. Although the Government has committed itself to guarantee universal birth registration, inequities remain. There have been improvements in coverage in the areas that were prioritized, including south Shan State, Tanintharyi Region and Nay Pyi Taw, where an estimated 120,000 children have been newly registered. The Special Rapporteur calls for continued action and for the Government to conduct universal birth registration campaigns in all parts of the remaining areas, including parts of Shan, Kachin and Rakhine States, with adequate financial, technical and capacity support.

35. The Union Accord includes a commitment to provide accessible and inclusive universal health coverage. The Special Rapporteur is concerned, however, about the limited availability in Myanmar of mental health and psychosocial support services, which are especially important for conflict-affected populations. It is essential to build capacity and strong mechanisms to provide such services to those who require support. A lack of access makes it difficult for humanitarian actors to intervene to prevent maternal mortality and morbidity. Parts of Kachin, Shan and Rakhine States affected by violence and conflict have the highest maternal mortality ratios.

V. Conflict and violence-related rights violations and the peace process

A. Armed conflict and situations of violence from March 2018

36. The Special Rapporteur condemns the widespread and systematic violations of human rights and international humanitarian law that are alleged to have been perpetrated by the Tatmadaw in several places around the country for decades. Those violations, including killing, rape, torture, looting, arson, enforced disappearances and forced displacement, may amount to genocide, crimes against humanity and war crimes. Ethnic armed organizations are also alleged to have committed serious violations of international humanitarian law and human rights law, including the forced recruitment and use of child soldiers. The recurring clashes between the Tatmadaw and those armed groups, resulting in the loss of civilian lives and displacement, suggest that the parties to the conflict do not meet their obligations under international humanitarian law in the conduct of hostilities.

37. There is credible information that the 33rd and 99th Light Infantry Divisions were among those responsible for perpetrating extreme violence against the Rohingya population in northern Rakhine State from 25 August 2017 and that, in the first half of 2018, they and other units were active in Kachin and Shan States, where civilians were subjected to violence.

1. Rakhine State from 25 August 2017

38. The Special Rapporteur has previously reported on the heinous violence unleashed on the Rohingya of northern Rakhine State following alleged attacks by the Arakan Rohingya Salvation Army on 25 August 2017. Credible reports about serious violations that are alleged to have occurred and those alleged to be responsible continue to be published.

39. In August 2017, the 33rd and 99th Light Infantry Divisions were reportedly deployed to northern Rakhine State. They, along with soldiers from the 564th Light Infantry Battalion, which is based in northern Rakhine State under the Western Command, and other security forces, allegedly engaged in widespread and systematic human rights violations against the Rohingya population. The 564th Light Infantry Battalion reportedly carried out a massacre at the village of Maung Nu, Buthidaung Township, while the 33rd Light Infantry Division did the same at the village of Chut Pyin, Rathedaung Township, and the 99th Light Infantry Division at the village of Min Gyi, Maungdaw Township; all three massacres involved the killings of many men, women and children, beatings, rapes and the burning of houses.⁶ That type of violence took place in villages across northern Rakhine State with varying degrees of severity and continued for weeks. In what was ostensibly a “counter-terrorism” operation, the entire Rohingya population of northern Rakhine State appears to have been targeted, leading the vast majority to flee to safety in Bangladesh.

40. The Arakan Rohingya Salvation Army has allegedly committed human rights abuses.⁷ Its members allegedly kidnapped and killed dozens of Hindus in Ah Nauk Kha Maung Seik and several members of the Mro minority in Khu Daing, and conducted targeted killings of Rohingya accused of being informants to the authorities in the months between October 2016 and August 2017. The Special Rapporteur firmly believes that those allegations should be investigated. The Government, however, should not use such abuses to justify crimes allegedly committed against the entire Rohingya population.

2. Kachin and Shan States from December 2017

41. Following frequent clashes between the Tatmadaw and ethnic armed organizations in December 2017 and January 2018, armed conflict intensified significantly in northern Myanmar from April 2018, with devastating impact on civilians. Frequent, indiscriminate aerial bombings, mortar shellings and the use of landmines across nine townships and in the town of Laiza, Kachin State, which is controlled by the Kachin Independence Organization, in April and May 2018 resulted in the displacement of more than 8,000 people. In northern Shan State, fighting took place between the Tatmadaw and ethnic armed organizations, and among those organizations themselves.

42. There have been several cases of summary executions by the Tatmadaw. On 18 March, two civilians, one of whom was a human rights defender, were shot dead as they drove a motorbike near the Upper Yeywa dam site in Kyaukme Township, Shan State. In March, two men were found dead in Man Si Township, Kachin State; they had been missing since 31 January, when they were seen in the custody of the Tatmadaw. Members of the 88th Light Infantry Division of the Tatmadaw allegedly abducted, detained, beat, raped and killed six women medical staff from the Ta'ang National Liberation Army on 11 July 2018 near Awe Law, Manton Township. The women's severely mutilated bodies were found by villagers three days later. Those allegations should be the subject of a credible independent investigation; violence against and the killing of persons in detention are serious violations of common article 3 of the Geneva Conventions.

43. Reports of the indiscriminate use by the Tatmadaw of all kinds of weapon in civilian areas continue. On 14 March, four civilians died and 14 houses were destroyed by heavy artillery in the village of Tawphey, Kyaukme Township, in Shan

⁶ Amnesty International, “We will destroy everything: military responsibility for crimes against humanity in Rakhine State”, 27 June 2018.

⁷ Amnesty International, “Myanmar: new evidence reveals Rohingya armed group massacred scores in Rakhine State”, 22 May 2018.

State. On 11 April, the Tatmadaw regional operations command in Tanai reportedly launched mortar shells and airstrikes on several villages, killing at least two civilians. More than 2,000 civilians fled three villages in Tanai for the jungle as soldiers, allegedly wearing civilian attire, started a simultaneous ground attack. The civilians, including pregnant women who gave birth en route, were unable to leave the remote area, where some had to stay until June. In May, clashes between the Tatmadaw and the Ta'ang National Liberation Army around Mu Se Township reportedly left 19 people dead and more than 20 injured, including some Chinese nationals. On 28 June 2018, troops of the 88th Light Infantry Division reportedly fired eight mortar rounds at the village of Ma Nane Un, Kutkai Township, killing one child and injuring seven civilians. There had been no fighting in or around the village at the time.

44. The Special Rapporteur has received multiple distressing reports of what appears to be collective punishment and the use of human shields; both are prohibited by customary international humanitarian law. On 1 April in the village of Nam Wa, in Mu Se Township, Shan State, the military reportedly threatened to burn down the entire village unless families aligned with the Kachin Independence Army left immediately. While fleeing on 11 April, villagers from Lai Nawng Khu, Hpakant Township, Kachin State, were reportedly forced by the 424th Light Infantry Battalion to lead soldiers through the jungle while being monitored by a drone, and a civilian was injured by a landmine. In late April, the 33rd Light Infantry Division reportedly conducted operations in Njangyang Township, Kachin State, against the Kachin Independence Army, during which they burned two homes in the villages of Sani Tu Yang and Tangbau Yang after villagers had fled, allegedly to punish them for the activities of the Kachin Independence Army.

45. Hostilities in northern Shan State in March between the Ta'ang National Liberation Army and the Restoration Council of Shan State resulted in the displacement of nearly 4,000 people from three townships and the deaths of at least five civilians. Clashes between those groups and the Tatmadaw and the Shan State Progressive Party in July reportedly led to the temporary displacement of 3,000 people, mostly from Monewi, Namtu and Hsipaw. A further 800 people were displaced from Namtu in early August.

3. Kayin State from March 2018

46. In March 2018, conflict resumed in Kayin State. More than 1,500 Tatmadaw soldiers reportedly went into civilian areas to repair a road in Hpapun District. That led to clashes between the Tatmadaw and the Karen National Liberation Army, a signatory to the Nationwide Ceasefire Agreement, and the subsequent displacement of more than 2,400 civilians, who have been unable to return home since. Those incidents were in violation of the ceasefire, under which troop reinforcement in ceasefire areas, other than for administrative or emergency medical support and the routine rotation of troops, is prohibited.

4. Chin State in May and June 2018

47. In Paletwa Township, Chin State, clashes in May between the Tatmadaw and Arakan Army resulted in the deaths of five civilians. Further clashes in May and June led to the internal displacement of approximately 1,000 people, in addition to the approximately 1,300 people who had been displaced to India in late 2017 and who reportedly have not returned home.

5. Sexual violence

48. The Special Rapporteur received troubling information concerning the alleged rape of a 73-year-old woman by a Tatmadaw soldier in Mong Phyak, eastern Shan

State, on 2 April 2018. The report of the Secretary-General on conflict-related sexual violence of March 2018 listed the Tatmadaw as being credibly suspected of committing or being responsible for patterns of rape or other forms of sexual violence in situations of armed conflict. Women and girls have reportedly been raped in Kachin State, northern Shan State and Tanintharyi Region by members of the Tatmadaw and ethnic armed organizations. The report found that the widespread threat and use of sexual violence was integral to the Tatmadaw's strategy of humiliating, terrorizing and collectively punishing the Rohingya community and a tool to force them to flee and prevent their return.

6. Landmine use

49. The use of landmines continues unabated, with 23 people killed and 136 injured from January to May in Kachin and northern Shan States. According to recent data, at least 3,337 casualties involving mines have been reported since 2007; Myanmar has the second highest number of antipersonnel landmine casualties in Asia.⁸ The Special Rapporteur remains extremely concerned about the threat posed to civilians by mines and calls on all parties to cease laying mines immediately, increase mine-awareness education and clear mines without further delay.

B. Displacement and humanitarian aid

50. The escalation of conflict has resulted in the displacement of approximately 20,000 people in Kachin and Shan States since the start of 2018, most of whom have since been able to return home. People who have been recently displaced reportedly have not been allowed to build shelters in camps and the Government has not recognized them as internally displaced persons. An estimated 106,000 internally displaced persons reside in camps and displacement sites in Kachin and northern Shan States. Many of them have been in those locations since 2011 and remain unable to return home safely.

51. Humanitarian access, including for national organizations, is increasingly constrained. On 23 April, a food convoy organized by the Myanmar Red Cross was prevented from entering the village of Man Wai, Kachin State. More than 100 civilians were trapped in that village for three weeks with little or no access to food, medicine and other items needed for survival. In June, the Kachin Baptist Convention, an organization that has been providing humanitarian assistance to displaced people in Kachin for many years, was threatened with prosecution under section 17 (1) of the Unlawful Associations Law if it continued to travel to territory held by the Kachin Independence Organization, where thousands of people in need are living. That and other restrictions imposed by the Tatmadaw and Government on access by international and national humanitarian actors are violations of the obligation of Myanmar under international humanitarian law to allow and facilitate the rapid and unimpeded passage of humanitarian relief for civilians in need.

52. Some 128,000 Rohingya and Kaman people have been confined to squalid camps in central Rakhine State since 2012. They include Kaman Muslims, who have full citizenship rights under Myanmar law, living in dire conditions in Kyaukphyu. Their situation remains precarious; they live without privacy in undignified, overcrowded longhouses and are subject to extreme movement restrictions. They are the subject of policies that prevent them from engaging in livelihoods, attending school or accessing health services and they regularly face exploitation by the authorities. In addition, 200,000 mostly Rohingya Muslims who live in villages in

⁸ Myanmar Information Management Unit, "Townships with known landmine contamination (2017) and casualties in Myanmar (as of Dec 2016)".

central Rakhine State also face severe hardship brought about by movement restrictions that limit their access to livelihoods, education, health care and other basic services and have led to avoidable deaths in medical emergencies.

C. The closure of camps for internally displaced persons

53. The Special Rapporteur is disturbed by the Government's recent announcement of a national strategy to close camps for internally displaced persons. Given that conflict continues in Kachin and northern Shan States, as do violence and discrimination against the Rohingya in Rakhine State, she has serious concerns about the Government's premature intention to close the camps and its capacity to facilitate the return of internally displaced persons to their places of origin in accordance with international standards.

54. There is a great need for an open and transparent conversation between the Government, the international humanitarian community and the internally displaced persons themselves. The Government is reportedly collecting data, including photographs, in Kachin State at the household level and internally displaced persons have not been told how the data will be used. Prior to any movement of people or closure of camps, it is critical that they be informed about locations, services, freedom of movement, livelihoods and security and express their free and informed consent to any relocation to their place of origin or elsewhere. Any relocation should be durable, so that their need for assistance is reduced. Their land and property should be restored to them or adequate compensation made. Special consideration, assistance and support should be provided to people with disabilities, women, children and persons in vulnerable situations. The Special Rapporteur calls on the Government of Myanmar to make public its precise plans for the closure process.

D. The peace process

55. The Special Rapporteur welcomes the fact that the Government, the military and all ethnic armed organizations came together for dialogue about the nation's future at the third session of the 21st-Century Panglong Conference. However, she is concerned that several issues slated for discussion were deemed too sensitive and urges all stakeholders to resolve differences on substantive issues through negotiation and to build trust and mutual understanding, so that the nation might finally see peace.

56. The Special Rapporteur is disappointed by reports that women made up only 17 per cent of the delegates, a drop from the estimated 19 per cent who attended the previous session and falling well short of the 30 per cent target. Women should be afforded genuine opportunities for representation and participation, including in substantive discussions not only about their protection but also their roles and experiences in conflict-affected communities, conflict prevention and recovery and peacebuilding. The women and peace and security agenda (prevention, participation, protection and relief and recovery) should be seized upon to ensure sustainable peace. Under the Union Accord, 30 per cent involvement of women in each political sector and capacity-building for women is encouraged. The meaningful participation of women in all areas of life is essential for the country's future prosperity.

57. The Special Rapporteur was greatly troubled to receive reports of armed clashes taking place at the time of the conference and just as non-signatory groups were being encouraged to sign the National Ceasefire Agreement. The clashes, themselves in violation of the ceasefire, reportedly pitted the Tatmadaw against the Restoration Council of Shan State, a signatory to the ceasefire, in Mong Kung Township, southern Shan State, and led to the displacement of at least 450 civilians. The Special

Rapporteur reaffirms that the road to peace is through political dialogue and not violence.

VI. Rakhine State

A. Dignity and the right to recognition

58. Rohingya people have lived in Rakhine State for generations, alongside Hindus and members of the Rakhine, Mro, Daingnet and Kaman ethnic groups. It is accepted practice that nationality is acquired at birth, either through a parent or the country of birth. The right to nationality is guaranteed under international law, including human rights treaties to which Myanmar is a party.⁹ States do not have an absolute right to decide who their nationals are and are prohibited from discriminatory or arbitrary deprivation of nationality.¹⁰ The Citizenship Law of 1982 does not comply with the obligations of Myanmar under international law and the way in which it is applied results in discriminatory and arbitrary deprivation of nationality for many of the Rohingya. In addition, the law and its implementation contravene the rights to equality and non-discrimination enshrined in the Constitution of 2008. The Special Rapporteur is disturbed by reports that other Myanmar Muslims are being required to identify as “Bengali” on citizenship documentation.

59. The so-called “pathway to citizenship” that the Government has been promoting for the Rohingya applies to non-nationals; those who migrated from outside and are seeking status in an alien country. It does not apply to those who were born in the country, those who have been living in the country for decades, or those who were, or are the descendants of, citizens of the country. Moreover, it denies people dignity and does not provide a durable citizenship solution for the Rohingya. Their right to nationality should be recognized.

60. The status of Rohingya people in Cox’s Bazar as refugees should also be recognized. The definition of refugees contained in article 1 of the Convention Relating to the Status of Refugees of 1951, which has the status of customary international law, applies to Rohingya people living in Bangladesh and other countries. They fled Myanmar owing to a well-founded fear of persecution for reasons of their ethnicity, race and religion, and are protected from refoulement to Myanmar.

B. Human rights violations and abuses in northern Rakhine State

61. By 31 July, a total of 12,120 individuals had so far crossed the border from Myanmar to Bangladesh in 2018. The statements by newly arrived refugees in Cox’s Bazar to the Special Rapporteur indicated that the situation in northern Rakhine State is far from stable or safe for them. They reported that conditions had worsened significantly since before the violence of August 2017 as a result of heightened movement restrictions, lack of access to livelihoods, education, health and basic services, and ongoing violence, intimidation and extortion by security forces. Discriminatory laws, policies and local orders, including those relating to freedom of movement, family registration, marriage and birth, remain in place and a curfew has been imposed in the townships of Maungdaw and Buthidaung since December 2016.

⁹ Convention on the Rights of the Child (art. 7), Convention on the Elimination of All Forms of Discrimination against Women (art. 9), Convention on the Rights of Persons with Disabilities (art. 18).

¹⁰ Convention on the Reduction of Statelessness of 1961 (art. 7).

Annex 38

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)



Office of the Special Representative of the Secretary-General on
Sexual Violence in Conflict

Press Release: For Immediate Release

New York, 24 August 2018: One year ago, on 25 August, the world witnessed a series of brutal attacks against the Rohingya community in Rakhine state, Myanmar, which triggered the mass exodus of almost 890,000 civilians to neighboring Bangladesh in search of safety.

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, murder, torture, looting and the burning of homes and villages. Thousands are believed to have been killed and forcibly displaced. The conditions in Rakhine state remain precarious and the future of the Rohingya population is bleak.

“On two occasions, I visited the camps in Cox’s Bazar, Bangladesh, which now have become the world’s largest refugee camps. I spoke with members of the Rohingya community who shared their horror stories of escaping persecution by the Tatmadaw, and I promised them that I would bring their voices to the world”, Special Representative Patten says. “During my visits, almost every woman and girl I spoke with described patterns of rape, gang-rape, forced nudity and abduction for the purpose of sexual slavery during military campaigns of slaughter, looting and the razing of villages to the ground”, Special Representative Patten recalls.

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.

As set out in the latest annual *Report of the Secretary-General on Conflict-Related Sexual Violence*, in 2017 alone, humanitarians have provided services in the refugee camps in Cox’s Bazar, Bangladesh, to some 2,700 survivors of sexual violence let alone that many other survivors chose not to report these incidents due to

fear, shame and stigma. UN agencies on the ground, report an average of 60 births per day in the camps, many of which may have resulted from rape.

Currently, women and children comprise 80 per cent of the camp population. “Rohingya children have been deprived of formal education for a year now and are unable to attend schools in Bangladesh. Education, as well as economic livelihood and self-reliance opportunities, are fundamental rights and a safeguard against poverty, marginalization, trafficking and sexual exploitation”, Special Representative Patten states.

The signing of a Memorandum of Understanding between the UN Refugee Agency (UNHCR), the UN Development Programme (UNDP), and the Government of Myanmar in June 2018 is a critical first step aimed at creating conducive conditions for the voluntary, safe, dignified and sustainable repatriation of Rohingya refugees from Bangladesh. The international community must not forget that the Rohingya crisis is not only a humanitarian emergency, but is also closely tied to issues of identity, security and development. Long-term reconciliation processes will only be possible if underlying issues, such as discrimination, land dispossession, and the denial of citizenship rights and status, are resolved.

Repeated calls for action and demands for justice are falling on deaf ears and the world is becoming immune to the plight of the Rohingya. The Office of the Special Representative on Sexual Violence in Conflict stands ready to support the Government of Myanmar to undertake efforts to prevent and respond to conflict-related sexual violence, and urges the national authorities to agree upon a Joint Communiqué with the Office. The Office of the Special Representative has also proposed partnering with the Government of Bangladesh, through a Framework of Cooperation, to help mitigate and address the risks of sexual violence, trafficking and sexual exploitation facing Rohingya women and children in the camps.

The Government of Bangladesh demonstrated a profound spirit of humanity in opening their borders to the persecuted Rohingya community. However, national institutions and communities in the settlement areas are stretched to the limits of their capacity to provide basics needs. The international community must continue to support the Government of Bangladesh in meeting the humanitarian needs of all Rohingya refugees as well as in applying concerted and persistent pressure on the Government of Myanmar to meet all conditions necessary for the safe, dignified and sustainable return of the Rohingya refugees.

Refugee return cannot be separated from the question of impunity for the grave international crimes committed. “Perpetrators of sexual violence crimes must be held accountable and all measures should be put in place to facilitate the survivors’ access to justice and redress”, concludes Special Representative Patten.

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Friday, 24 August 2018

Annex 39

UN Human Rights Council, *Report of the independent international fact-finding Mission on Myanmar*, UN Doc. A/HRC/39/64 (12 September 2018)

**Human Rights Council****Thirty-ninth session**

10–28 September 2018

Agenda item 4

Human rights situations that require the Council's attention**Report of the independent international fact-finding mission
on Myanmar****Summary*

The Human Rights Council established the independent international fact-finding mission on Myanmar in its resolution 34/22. In accordance with its mandate, the mission focused on the situation in Kachin, Rakhine and Shan States since 2011. It also examined the infringement of fundamental freedoms, including the rights to freedom of expression, assembly and peaceful association, and the question of hate speech.

The mission established consistent patterns of serious human rights violations and abuses in Kachin, Rakhine and Shan States, in addition to serious violations of international humanitarian law. These are principally committed by the Myanmar security forces, particularly the military. Their operations are based on policies, tactics and conduct that consistently fail to respect international law, including by deliberately targeting civilians. Many violations amount to the gravest crimes under international law. In the light of the pervasive culture of impunity at the domestic level, the mission finds that the impetus for accountability must come from the international community. It makes concrete recommendations to that end, including that named senior generals of the Myanmar military should be investigated and prosecuted in an international criminal tribunal for genocide, crimes against humanity and war crimes.

* The present report was submitted after the deadline in order to reflect the most recent developments.



Contents

	<i>Page</i>
I. Introduction	3
II. Mandate and methodology	3
A. Mandate	3
B. Methodology	3
C. Legal framework	4
III. Context	4
IV. Emblematic situations	5
A. Rakhine State	5
B. Kachin and Shan States	11
C. Fundamental freedoms	14
V. Hallmarks of Tatmadaw operations	14
A. Targeting of civilians	15
B. Sexual violence	15
C. Exclusionary rhetoric	15
D. Impunity	15
VI. Crimes under international law	16
A. Genocide	16
B. Crimes against humanity	16
C. War crimes	17
VII. Responsibility	17
VIII. Accountability	18
IX. Conclusions and recommendations	19

I. Introduction

1. In its resolution 34/22, the Human Rights Council established the independent international fact-finding mission on Myanmar. The President of the Council appointed Marzuki Darusman (Indonesia) as chair, and Radhika Coomaraswamy (Sri Lanka) and Christopher Sidoti (Australia) as members. A secretariat was recruited by the Office of the United Nations High Commissioner for Human Rights (OHCHR).
2. The mission presented an oral update to the Human Rights Council at its thirty-sixth session, and an oral interim report at its thirty-seventh session; it also delivered a video statement to the Council at its twenty-seventh special session, on 5 December 2017. The mission submits the present report to the Council pursuant to its decision 36/115.¹
3. The mission regrets the lack of cooperation from the Government of Myanmar, despite the appeals made by the Human Rights Council and the mission. The mission addressed a letter to the Government on 4 September and 17 November 2017 and 29 January 2018 to request in-country access. It forwarded a detailed list of questions on 27 March 2018. Although the mission had limited informal contact with government representatives, it received no official response to its letters. The mission shared the present report with the Government prior to its public release. No response was received.

II. Mandate and methodology

A. Mandate

4. In its resolution 34/22, the Human Rights Council mandated the mission 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, with a view to ensuring full accountability for perpetrators and justice for victims.
5. The mission focused on the situation in Kachin, Rakhine and Shan States since 2011, namely, since the resumption of hostilities in Kachin State and escalation in Shan State in 2011, and the outbreak of major violence in Rakhine State in 2012. These events were turning points, generating renewed allegations of serious human rights violations and abuses. The mission selected several significant incidents for in-depth fact-finding, allowing detailed findings on specific allegations of violations and abuses, while revealing broader patterns of conduct. Serious allegations have also arisen in other contexts, meriting further investigation.

B. Methodology

6. Factual findings are based on the “reasonable grounds” standard of proof. This standard was met when a sufficient and reliable body of primary information, consistent with other information, would allow an ordinarily prudent person to reasonably conclude that an incident or pattern of conduct occurred.
7. The mission amassed a vast amount of primary information. It conducted 875 in-depth interviews with victims and eyewitnesses, both targeted and randomly selected. It obtained satellite imagery and authenticated a range of documents, photographs and videos. It checked this information against secondary information assessed as credible and reliable, including the raw data or notes of organizations, expert interviews, submissions and open-source material. Specialized advice was sought on sexual and gender-based violence, child psychology, military affairs and forensics. The mission relied only on verified and corroborated information.

¹ The findings and recommendations of the mission are detailed in document A/HRC/39/CRP.2.

8. To collect information, the members of the mission travelled to Bangladesh, Indonesia, Malaysia, Thailand and the United Kingdom of Great Britain and Northern Ireland. The secretariat undertook numerous additional field missions between September 2017 and July 2018. The mission also held over 250 consultations with other stakeholders, including intergovernmental and non-governmental organizations, researchers and diplomats, either in person and remotely. It received written submissions, including some in response to a public call.

9. The mission strictly adhered to the principles of independence, impartiality and objectivity. It sought consent from sources on the use of information, ensuring confidentiality as appropriate. Specific attention was paid to the protection of victims and witnesses, considering their well-founded fear of reprisals. The mission expresses its grave concern at the intimidation and threats faced by persons cooperating with the mechanisms of the Human Rights Council examining the situation in Myanmar. It urges Myanmar to protect human rights defenders.

C. Legal framework

10. The mission assessed facts in the light of international human rights law, international humanitarian law and international criminal law, as applicable in Myanmar. In addition to non-international armed conflicts in Kachin and Shan States, the mission considered that the violence in Rakhine State between the Arakan Rohingya Salvation Army (ARSA) and the Myanmar security forces constituted a non-international armed conflict, at least since 25 August 2017.²

III. Context

11. A succession of military regimes have ruled Myanmar since 1962. In 2008, a new Constitution was adopted, designed by the military to retain its dominant role in politics and governance. It instituted a system of government with military and civilian components. The Tatmadaw (armed forces) appoints 25 per cent of seats in both legislative bodies, and selects candidates for three key ministerial posts (Defence, Border Affairs and Home Affairs), and at least one of two Vice-Presidents. This is sufficient to control the National Defence and Security Council and the entire security apparatus, and to block constitutional amendments. The Tatmadaw has the right to administer and adjudicate its affairs independently, without civilian oversight. Current or former military officers occupy positions of authority across all branches of government, within the civil service and the judiciary, and in many State-owned enterprises. In 2010, the Government led by Thein Sein embarked on wide-ranging reforms towards political and economic liberalization, without amending the Constitution. The National League for Democracy won the election held in November 2015, and a Government led by that party took office on 31 March 2016. Sanctions were lifted and foreign investment welcomed.

12. In addition to the Bamar, Myanmar includes other ethnic groups that constitute 32 per cent of the estimated population.³ Since independence, the numerous ethnically-based armed conflicts have been used by the Tatmadaw to justify its power, presenting itself as the guarantor of national unity. Several groups hold deep-rooted grievances, struggling for greater autonomy and an equitable sharing of natural resources. While Governments have made overtures towards negotiated peace agreements, hostilities have continued. These conflicts indicate that the nation-building efforts of the military have failed: there is no unifying “Myanmar” national identity, and resentment against Bamar-Buddhist domination has only grown. Notably, under military rule, the concept of “national races” has gradually

² Assessment in line with that of the International Committee of the Red Cross (ICRC). See for example, ICRC, “Rakhine: Returns must be safe, dignified and voluntary”, speech by the ICRC President at the Shangri-La Dialogue, Singapore, 2 June 2018.

³ See 2014 Population and Housing Census of Myanmar (available from <http://myanmar.unfpa.org/en/publications/2014-population-and-housing-census-myanmar-data-sheet>).

become the key criterion for membership in the country's political community, creating a common "other". The military regime has constructed eight major ethnic groups, broken down further into 135 "national races". The list defines those who "belong" in Myanmar; all others, regardless of how many generations they have lived in Myanmar, are considered outsiders or immigrants. This includes the Rohingya.⁴ According to the Tatmadaw, "Despite living among peacocks, crows cannot become peacocks."⁵

13. According to the 2014 census, 87.9 per cent of the population of Myanmar is Buddhist, 6.2 per cent Christian, and 4.3 per cent Muslim. While the Bamar are predominantly Buddhist, many other ethnic groups contain large numbers of non-Buddhists. Attempts in the 1960s to designate Buddhism as the State religion were divisive. The Constitution adopted in 2008 recognizes the "special position" of Buddhism, while acknowledging other religions. Since reforms began in 2011, Myanmar has seen an increase in Buddhist nationalism, virulent anti-Muslim rhetoric and violence between Buddhists and Muslims. Among the largest Buddhist nationalist organizations is the Association for the Protection of Race and Religion (known also as "MaBaTha"), which cast itself as the protector of Buddhism. While MaBaTha was nominally disbanded, its successors are still widely supported.

14. Today, the Tatmadaw enjoys greater popularity among the Bamar-Buddhist majority. The violence, particularly the "Rohingya crisis", has been used by the military to reaffirm itself as the protector of a nation under threat and to cement its political role further. This is remarkable considering its appalling human rights record and the long struggle of the democracy movement against its rule. Myanmar has been a country of concern for the United Nations for 30 years, with resolutions condemning its human rights situation since 1991. For three decades, successive special rapporteurs on the situation of human rights in Myanmar concluded that patterns of human rights violations were widespread and systematic, linked to State and military policy. Allegations of gross human rights violations have continued since 2011 and were the focus of the mission.

IV. Emblematic situations

15. The mission focused on three emblematic situations: the crisis in Rakhine State; the hostilities in Kachin and Shan States; and the infringement on the exercise of fundamental freedoms and the issue of hate speech.

A. Rakhine State

16. Rakhine State has a poverty rate nearly twice the national average. All communities in Rakhine suffer from poor social services and a scarcity of livelihood opportunities. The State's two largest groups are the Rakhine Buddhists and the Rohingya Muslims; the former constitutes the majority; the latter, the majority in the north. There are several other ethnic minorities, including the Kaman Muslims. The problems in Rakhine State are often ascribed to poor relations between the Rohingya and the Rakhine, reflective of deeply-rooted grievances and prejudices. Nonetheless, the majority of Rohingya and Rakhine interviewed by the mission indicated that relationships with the other community had been good prior to 2012, citing examples of business dealings and friendships.

⁴ The mission is conscious of the sensitivity concerning the term "Rohingya" in Myanmar, where the group is generally referred to as "Bengali". The term is used in the present report in accordance with the right to self-identify.

⁵ "Myanmar Politics and the Tatmadaw", Tatmadaw, Directorate of the Public Relations and Psychological Warfare, 2018, p. 115.

1. Violations against ethnic Rakhine

I want to share my story with the whole world because the world does not know what is happening in our place.⁶

17. The members of the mission spoke with many ethnic Rakhine, who highlighted serious human rights violations perpetrated by the Myanmar security forces against them. These violations are similar to those experienced by other ethnic groups in Myanmar.

18. The Tatmadaw used Rakhine men, women and children for forced or compulsory labour, mostly for “portering”. Other violations included forced evictions through land confiscation, arbitrary arrest and detention, and violations of the rights to life, to physical and mental integrity, and to property. Tatmadaw soldiers also subjected Rakhine women to sexual violence, often in the context of forced labour; for example, one victim explained how, in 2017, she was taken to a military base, beaten and raped by a Tatmadaw captain.

19. The mission also received reports of repressive action against the assertion of Rakhine identity. For example, in January 2018, the police used excessive force in dispersing a demonstration in Mrauk-U against the cancellation of an annual ethnic Rakhine event, killing seven protesters.

2. Systemic oppression and persecution of the Rohingya

In Rakhine State, Muslims are like in a cage, they cannot travel outside. There are no human rights for the Muslims of Rakhine. I don't know why God sent us there.

20. The process of “othering” the Rohingya and their discriminatory treatment began long before 2012. The extreme vulnerability of the Rohingya is a consequence of State policies and practices implemented over decades, steadily marginalizing them. The result is a continuing situation of severe, systemic and institutionalized oppression from birth to death.

21. The cornerstone of the above-mentioned oppression is lack of legal status. Successive laws and policies regulating citizenship and political rights have become increasingly exclusionary in their formulation, and arbitrary and discriminatory in their application. Most Rohingya have become de facto stateless, arbitrarily deprived of nationality. This cannot be resolved through the citizenship law of 1982, applied as proposed by the Government through a citizenship verification process. The core issue is the prominence of the concept of “national races” and the accompanying exclusionary rhetoric, originating under the dictatorship of Ne Win in the 1960s. The link between “national races” and citizenship has had devastating consequences for the Rohingya.

22. The displacement of Rohingya in the 1970s and 1990s, in the context of the military regime’s implementation of this exclusionary vision, were earlier markers. Observers, including United Nations human rights mechanisms and civil society, have alerted the Myanmar authorities and the international community to a looming catastrophe for decades.

23. The travel of Rohingya between villages, townships and outside Rakhine State has long been restricted on the basis of a discriminatory travel authorization system. This has had serious consequences for economic, social and cultural rights, including the rights to food, health and education. The degree of malnutrition witnessed in northern Rakhine State has been alarming. Other discriminatory restrictions include procedures for marriage authorization, restrictions on the number and spacing of children, and the denial of equal access to birth registration for Rohingya children. For decades, security forces have subjected Rohingya to widespread theft and extortion. Arbitrary arrest, forced labour, ill-treatment and sexual violence have been prevalent.

⁶ Quotes are from victim interviews, unless stated otherwise.

3. Violence in 2012

We cried when we left; 25 years of hard work lost. My time is almost finished, but what will happen to my children and grandchildren?

24. In this context, two waves of violence swept Rakhine State, in June and in October 2012, affecting 12 townships. The murder, and alleged rape, of a Rakhine woman and the killing of 10 Muslim pilgrims are commonly presented as key triggers. According to the government inquiry commission, the violence left 192 people dead, 265 injured and 8,614 houses destroyed. Actual numbers are likely much higher. Further violence broke out in Thandwe in 2013.

25. Although the Government's depiction of the violence as "intercommunal" between the Rohingya and the Rakhine has prevailed, it is inaccurate. While there certainly was violence between Rohingya and Rakhine groups, resulting in killing and the destruction of property, these attacks were not spontaneous outbursts of hostility; they resulted from a plan to instigate violence and amplify tensions. A campaign of hate and dehumanization of the Rohingya had been under way for months, and escalated after 8 June 2012, led by the Rakhine Nationalities Development Party (RNDP), various Rakhine organizations, radical Buddhist monk organizations, and several officials and influential figures. It was spread through anti-Rohingya or anti-Muslim publications, public statements, rallies and the boycott of Muslim shops. The Rohingya were labelled "illegal immigrants" and "terrorists", and portrayed as an existential threat that might "swallow other races" with their "incontrollable birth rates". In November 2012, the RNDP, in *Toe Thet Yay*, an official publication, cited Hitler, arguing that "inhuman acts" were sometimes necessary to "maintain a race".

26. Myanmar security forces were at least complicit, often failing to intervene to stop the violence, or actively participated. They injured, killed and tortured Rohingya and destroyed their properties. Witnesses from Sittwe and Kyaukpyu described cases of security forces preventing Rohingya or Kaman from extinguishing houses set on fire by Rakhine, including by gunfire. Witnesses from Maungdaw described security forces shooting indiscriminately at Rohingya and conducting mass arbitrary arrests, including of Rohingya workers from non-governmental organizations. Large groups were transferred to Buthidaung prison, where they faced inhuman conditions and torture. Prisoners were beaten by prison guards and fellow Rakhine detainees, some fatally.

27. The violence in 2012 marked a turning point in Rakhine State: the relationship between the Rakhine and Rohingya deteriorated; fear and mistrust grew. Although the Kaman are a recognized ethnic group, they were targeted alongside the Rohingya as Muslims, and have since suffered increasing discrimination and marginalization.

28. The Government responded to the violence by an increased presence of security forces and enforced segregation of communities. A state of emergency declared on 10 June 2012 was lifted only in March 2016. Township authorities in Rakhine State imposed a curfew and prohibited public gatherings of more than five people. These restrictions remain in force today in Maungdaw and Buthidaung and have been applied in a discriminatory manner against the Rohingya. They have an impact on freedom of religion, as people are prevented from praying collectively in mosques.

29. The violence displaced more than 140,000 people, mostly Rohingya. The few thousand displaced ethnic Rakhine were able to return or were resettled by the Government. Six years after the violence, 128,000 Rohingya and Kaman remain segregated, confined in camps and displacement sites, without freedom of movement, access to sufficient food, adequate health care, education or livelihoods. The displaced are prevented from returning to their place of origin. Such confinement exceeds any justifiable security measure and constitutes arbitrary deprivation of liberty. Other Rohingya in central Rakhine, including those resettled, also face severe restrictions, including on freedom of movement, which has an impact on daily life.

30. The violence exacerbated the oppression of the Rohingya. Movement outside Rakhine State became even more difficult. Rohingya students have not been able to enrol at Sittwe University since 2012; their access to higher education has been effectively removed.

This is a violation of the right to education, and a powerful tool to ensure cross-generational marginalization. Although Rohingya were allowed to vote in 2010, the right was revoked prior to the elections in 2015. The oppressive climate led to an increase in Rohingya leaving Rakhine State by boat in the following years.

4. 25 August 2017 and the “clearance operations”

That day felt like the last day of this world, as if the whole world was collapsing. I thought judgment day had arrived.

31. What happened on 25 August 2017 and the following days and weeks was the realization of a disaster long in the making. It was the result of the systemic oppression of the Rohingya, the violence of 2012, and the Government’s actions and omissions since then. It caused the disintegration of a community.

32. In the early hours of 25 August, ARSA launched coordinated attacks on a military base and up to 30 security force outposts across northern Rakhine State, in an apparent response to increased pressure on Rohingya communities and with the goal of global attention. A small number of minimally-trained leaders had some arms, and a significant number of untrained villagers wielded sticks and knives. Some had improvised explosive devices. Twelve security personnel were killed.

33. The response of security forces, launched within hours, was immediate, brutal and grossly disproportionate. Ostensibly to eliminate the “terrorist threat” posed by ARSA, in the days and weeks that followed, it encompassed hundreds of villages across Maungdaw, Buthidaung and Rathedaung. The operations targeted and terrorized the entire Rohingya population. The authorities called them “clearance operations”. As a result, by mid-August 2018, nearly 725,000 Rohingya had fled to Bangladesh.

34. Even though the operations were conducted over a broad geographic area, they were strikingly similar. Tatmadaw soldiers would attack a village in the early hours, frequently joined by other security forces, often by Rakhine men and sometimes men from other ethnic minorities. The operations were designed to instil immediate terror, with people woken by intense rapid weapon fire, explosions or the shouts and screams of villagers. Structures were set ablaze, and Tatmadaw soldiers fired their guns indiscriminately into houses and fields, and at villagers.

35. The nature, scale and organization of the operations suggest a level of preplanning and design by the Tatmadaw leadership that was consistent with the vision of the Commander-in-Chief, Senior General Min Aung Hlaing, who stated in a Facebook post on 2 September 2018, at the height of the operations, that “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.”

(a) Human rights catastrophe

Everyone was just running for their lives. I was not even able to carry my children.

36. The “clearance operations” constituted a human rights catastrophe. Thousands of Rohingya were killed or injured. Information collected by the mission suggests that the estimate of up to 10,000 deaths⁷ is a conservative one. Mass killings were perpetrated in Min Gyi (Tula Toli), Maung Nu, Chut Pyin and Gudar Pyin, and in villages in the Koe Tan Kauk village tract. In some cases, hundreds of people died. In both Min Gyi and Maung Nu, villagers were gathered together before the men and boys were separated and killed. In Min Gyi, women and girls were taken to nearby houses, gang raped, then killed or severely injured. Houses were locked and set on fire. Few survived. In numerous other villages, the number of casualties was also markedly high. Bodies were transported in military vehicles, burned and disposed of in mass graves.

⁷ Médecins Sans Frontières, “‘No one was left’: Death and violence against the Rohingya in Rakhine State, Myanmar”, March 2018.

37. People were killed or injured by gunshot, targeted or indiscriminate, often while fleeing. Villagers were killed by soldiers, and sometimes by Rakhine men, using large bladed weapons. Others were killed in arson attacks, burned to death in their own houses, in particular the elderly, persons with disabilities and young children, unable to escape. In some cases, people were forced into burning houses, or locked in buildings set on fire.

38. Rape and other forms of sexual violence were perpetrated on a massive scale. Large-scale gang rape was perpetrated by Tatmadaw soldiers in at least 10 village tracts of northern Rakhine State. Sometimes up to 40 women and girls were raped or gang-raped together. One survivor stated, “I was lucky, I was only raped by three men”. Rapes were often in public spaces and in front of families and the community, maximizing humiliation and trauma. Mothers were gang raped in front of young children, who were severely injured and in some instances killed. Women and girls 13 to 25 years of age were targeted, including pregnant women. Rapes were accompanied by derogatory language and threats to life, such as, “We are going to kill you this way, by raping you.” Women and girls were systematically abducted, detained and raped in military and police compounds, often amounting to sexual slavery. Victims were severely injured before and during rape, often marked by deep bites. They suffered serious injuries to reproductive organs, including from rape with knives and sticks. Many victims were killed or died from injuries. Survivors displayed signs of deep trauma and face immense stigma in their community. There are credible reports of men and boys also being subjected to rape, genital mutilation and sexualized torture.

39. Children were subjected to, and witnessed, serious human rights violations, including killing, maiming and sexual violence. Children were killed in front of their parents, and young girls were targeted for sexual violence. Of approximately 500,000 Rohingya children in Bangladesh, many fled alone after their parents were killed or after being separated from their families. The mission met many children with visible injuries consistent with their accounts of being shot, stabbed or burned.

40. Numerous men and boys were rounded up, marched into the forest by security forces or taken away in military vehicles. While some families hope that their fathers and brothers were imprisoned, others suspect they have been killed.

41. Hundreds of thousands of Rohingya fled, without shelter, food or water. They walked for days or weeks through forests and over mountains. People died on the way, some succumbing to injuries sustained during the attacks. Women gave birth; some babies and infants died. An unknown number of people drowned after their boat capsized, or when crossing rivers. The Tatmadaw also killed Rohingya during the journey and at border crossings. Landmines planted in border areas by the Tatmadaw in early September 2017, apparently to prevent or dissuade Rohingya from returning, led to further loss of life and severe injuries.

42. Satellite imagery and first-hand accounts corroborate widespread, systematic, deliberate and targeted destruction, mainly by fire, of Rohingya-populated areas across the three townships. At least 392 villages (40 per cent of all settlements in northern Rakhine) were partially or totally destroyed, encompassing at least 37,700 individual structures. Approximately 80 per cent were burned in the initial three weeks of the operations, a significant portion of which after the Government’s official end date of the “clearance operations”. More than 70 per cent of the villages destroyed were in Maungdaw, where the majority of Rohingya lived. Most destroyed structures were homes. Schools, marketplaces and mosques were also burned. Rohingya-populated areas were specifically targeted, with adjacent or nearby Rakhine settlements left unscathed.

(b) A foreseeable and planned catastrophe

My Rakhine neighbour warned me, “You cannot stay here and we cannot control the bad behaviour of our own people. The Government is planning to drive away your people.”

43. The attacks conducted by ARSA in 2017 and the ensuing “clearance operations” did not occur in a vacuum. They were foreseeable and planned.

44. ARSA emerged as a Rohingya resistance organization in response to the violence in 2012 and increased State oppression over all aspects of life. On 9 October 2016, the group⁸ launched a small first offensive against three border guard police posts in northern Rakhine State. Nine police officers were killed, and ARSA obtained some arms. The security forces, led by the Tatmadaw, responded with the “clearance operations”. Some 87,000 Rohingya fled to Bangladesh. The same tactics and violations were seen in this operation as later in 2017, albeit on a smaller scale. A government investigation commission led by the Vice-President, and the security forces’ own inquiries, cleared the security forces of wrongdoing, endorsing the lawfulness and appropriateness of the response.

45. As in 2012, the violence in 2016 resulted in a further intensification of oppressive measures against the Rohingya. Security forces, camps and checkpoints were increased. Daily life for the Rohingya became unbearable, with extreme movement restrictions. Protective fences around Rohingya houses were removed, and knives and other sharp implements were confiscated. Security patrols, house searches and cases of beatings, theft and extortion increased. Hundreds of men and boys were arrested, with the most educated and influential frequently targeted. Many were subjected to ill-treatment or torture in detention. Some were later released on payment of bribes; others have not been seen since. Women and girls were subjected to sexual violence, including gang rape.

46. In parallel, the authorities embarked on a renewed effort to impose the National Verification Card on the Rohingya, a card that the latter had refused, seeing it as symbol of a discriminatory system that would entrench their status as “Bengali immigrants”. The card increasingly became a prerequisite for passing through checkpoints, gaining access to farmland, and for fishing. Intimidation and force were used, including at community meetings in the presence of the police and military, during which threats were made at gunpoint. At these meetings, villagers were told to “take the card or leave the country”; others, for example in Chut Pyin, were told by soldiers to accept it or be killed. Most Rohingya still refused.

47. In May and July 2017, the ultranationalist monk Wirathu visited northern Rakhine, where he conducted mass public sermons. The village of Zay Di Pyin (Rathedaung Township) was blockaded by Rakhine villagers and security forces throughout August. Amid heightened tension immediately before 25 August 2017, Myanmar media increasingly reported on alleged ARSA activity in an inflammatory manner. State-sponsored hate speech towards the Rohingya also continued.

48. A large build-up of troops and other military assets across northern Rakhine began in early August 2017, following a meeting between Rakhine politicians and the Tatmadaw Commander-in-Chief. Soldiers from the 33rd and 99th Light Infantry Divisions were airlifted into Rakhine State, with additional deliveries of military equipment. The increased presence was evident. Soldiers took over border guard police posts. Rakhine men were recruited into the security forces, including “fast-track” recruitment into the police. Other local Rakhine men were mobilized and armed. This build-up was significant, requiring logistical planning and time to implement, considerations that indicate that the subsequent operations were foreseen and planned.

(c) An enduring catastrophe

I will not go back until they recognize our rights like others in Myanmar. Otherwise, I would prefer to die here.

49. While the Government claimed that “clearance operations” had ended on 5 September,⁹ military engagement continued well into October. Freedom of movement was further constrained, restricting remaining Rohingya to their houses, with limited access to markets and livelihoods and exacerbating malnutrition. Humanitarian access was severely restricted or blocked. Conversely, no protection was provided to Rohingya against vigilante

⁸ Then known as Harakah al-Yaqin.

⁹ See www.facebook.com/state.counsellor/posts/speech-delivered-by-her-excellency-daw-aung-san-su-kyi-state-counsellor-of-the-1121130291354519/ (accessed on 10 September 2018).

attacks and the theft of property, livestock and other possessions by members of other ethnic groups. Sporadic attacks, including sexual violence, continued. These factors forced more Rohingya to flee to Bangladesh, at an average rate of 1,733 per month since the beginning of 2018.

50. The mass displacement and the burning of Rohingya villages were followed by the systematic appropriation of the vacated land. Bulldozers flattened burned, damaged and even surviving structures and vegetation, erasing every trace of the Rohingya communities, while also destroying criminal evidence. Dozens of Rohingya villages have vanished. New structures include posts for security forces and housing for other ethnic groups. Government “resettlement” plans suggest that almost all houses to be constructed for displaced communities are designated for non-Rohingya. Other infrastructure projects appropriating Rohingya lands, including new roads and mines, are under way.

51. While the Government has, in principle, made a commitment to Rohingya repatriation, nothing indicates to date that this will be in a manner that ensures respect for human rights, which is essential for a safe, dignified and sustainable return of those displaced. The repatriation procedure requires acceptance of National Verification Cards and processing in barbed-wired reception centres. The root causes of the exodus, including State-sanctioned oppression and an exclusionary and divisive rhetoric, are denied, yet continue unabated. The security forces that perpetrated gross human rights violations with impunity would be responsible for ensuring the security of returnees.

(d) Perpetrators

52. The “clearance operations” were led by the Tatmadaw, with other security forces, mainly the Myanmar police force and the border guard police. Units of the Western Command were actively engaged, together with the 33rd and 99th Light Infantry Divisions, which report directly to the Deputy Commander-in-Chief, General Soe Win. The Divisions were responsible for some of the most serious violations. Almost all instances of sexual violence are attributable to the Tatmadaw.

53. In some villages, Rakhine men participated in the operations, mostly looting and burning, but also killing and injuring Rohingya. Civilians from other minority ethnic groups were also involved in some places. The recurrent and organized involvement of civilian groups in the operations, and the consistent way in which they were equipped, tasked and executed their roles across the three townships, demonstrate orchestration by the Tatmadaw.

54. ARSA also committed serious human rights abuses, including the killing of dozens of suspected informants and the burning of the Rakhine village of Ah Htet Pyu Ma on 25 August 2017. Although the Government has claimed that ARSA burned Rohingya villages, the mission found no such indication. Other abuses allegedly perpetrated by ARSA, including several incidents where Rakhine and members of other ethnic groups, including the Mro, were killed, require further investigation, as does the killing of up to 100 Hindu men and women from Kha Maung Seik. The mission’s primary source information on the latter incident corroborates the killing, but is inconclusive as to the perpetrator. Other militant or criminal groups were also active in the region and may have been responsible also for abuses.

B. Kachin and Shan States

The Tatmadaw soldiers don’t treat us like humans, they treat us like animals. They look at us as though we shouldn’t even exist.

55. Similar patterns of conduct by security forces, particularly the Tatmadaw, have been witnessed elsewhere. The mission focused on the situation in northern Myanmar (Kachin and Shan States), where interlocutors considered their plight ignored.

56. Successive Governments have signed bilateral ceasefire agreements and a nationwide ceasefire agreement with various “ethnic armed organizations”. In parallel, since 2011, northern Myanmar has witnessed a sharp increase in fighting between the Tatmadaw and armed groups, in particular those excluded from or not signatories to the

ceasefire agreement; these include the Kachin Independence Army, after a 17-year ceasefire broke down in 2011; the Shan State Army-North; the Myanmar National Democratic Alliance Army; and the Ta'ang National Liberation Army. Clashes also erupted between the Ta'ang National Liberation Army and the Shan State Army-South.

57. Each of the above-mentioned conflicts has a complex history and is fuelled by various grievances, including with regard to land use, development projects, the exploitation of natural resources and illegal narcotics trading. The underlying factors, however, are demands for greater autonomy, self-determination and the elimination of ethnic or religious discrimination, as well as resentment about Tatmadaw tactics targeting civilians and violating human rights.

58. The mission verified a number of incidents in the context of these armed conflicts, and subsequently confirmed consistent patterns of violations of international law. With continuing hostilities and prevailing insecurity, these violations persist.

1. Violations by the Tatmadaw

There were no rebels in my village. But the army just came and attacked the people.

59. The Tatmadaw operations in northern Myanmar are characterized by systematic attacks directed at civilians and civilian objects, and indiscriminate attacks. Attacks are often carried out in civilian-populated residential areas, without any apparent military objective and in flagrant disregard for life, property and the well-being of civilians. Tatmadaw soldiers have shot directly at and shelled civilians fleeing or seeking shelter. Attacks routinely resulted in civilian deaths and injuries. Widespread looting and the destruction and burning of homes were commonplace. This conduct was observed in most conflict-affected areas in northern Myanmar, especially in or around territory under the control of ethnic armed organizations.

60. This modus operandi is a catalyst for other violations. Civilians are targeted because they belong to the same ethnic group or because they are considered to be of “fighting age”, seemingly in an effort to dissuade civilians from becoming involved with ethnic armed organizations. The mission established a pattern of violations of the right to life, with numerous unlawful killings, mostly committed in the context of military operations, as a consequence of indiscriminate attacks, attacks targeting civilians, or the murder or extrajudicial execution of persons in Tatmadaw custody. Unlawful killings are committed in other contexts also, without any immediate or apparent link to hostilities, for example in the context of forced labour.

61. Similar patterns emerge for cases of torture and other forms of ill-treatment, often against men, women and children to obtain information or confessions regarding the activities of ethnic armed organizations or as punishment for perceived sympathy for the opponents of the Tatmadaw. Torture and ill-treatment were used to coerce individuals into forced labour, and conditions of detention often amounted to ill-treatment; civilians were forced to precede military units on patrol in conflict areas, sometimes in Tatmadaw uniforms, thereby exposing them to attacks, death and injury.

62. Women have been subjected to rape and other forms of sexual violence. Some have been abducted by soldiers and then raped, or even gang-raped, before being killed. Women and girls have been selected for forced marriage, and targeted in their homes for sexual violence. In many cases, sexual violence was accompanied by degrading behaviour, including insults and spitting. When women did escape, Tatmadaw soldiers would frequently search for them, threaten and physically abuse members of their family, and destroy or steal their property. Sexual violence against men has been inflicted as a means of torture, including to obtain information or confessions.

63. The Tatmadaw has engaged in arbitrary arrest and deprivation of liberty, in many cases amounting to enforced disappearance. Men and women, and in some cases children, were taken from their villages and detained for forced labour or because of suspected links to ethnic armed organizations. Victims have been held incommunicado in unofficial places of detention for periods ranging from one day to two years. Most were not informed of the

reason for arrest, nor brought before a judge. In one incident in Monekoe, Shan State, more than 100 individuals were arrested and detained in November 2016.

64. As in other areas of Myanmar, forced labour has been a common feature of life for many in northern Myanmar. The mission verified a pattern of systematic use by the Tatmadaw of forced labour, including for portering or digging trenches, or as guides or cooks. Soldiers routinely arrived in villages without warning and took people for forced labour for up to weeks at a time. Some of those taken were required to fight for the Tatmadaw. The Tatmadaw recruited children throughout the period under review, although it has made some effort to address this issue.

65. Violations against ethnic and religious minorities in northern Myanmar are often committed with persecutory intent, in a context of severe discrimination based on ethnic or religious grounds. This has led, for example, to the destruction or ransacking of churches and religious objects during military operations (and sometimes to the subsequent construction of Buddhist pagodas), but also in the use of insulting language while the acts were being committed.

2. Violations and abuses by “ethnic armed organizations”

Since my son was forcibly recruited in 2016, I have not heard from him. I always check Facebook to see if I will recognize him in a post, either dead or alive.

66. Ethnic armed organizations committed international humanitarian law violations and human rights abuses, many in the context of hostilities between the Ta'ang National Liberation Army and the Shan State Army-South, including abduction and detention, ill-treatment and destruction or appropriation of civilian land and property. There have been instances where these groups, as well as the Kachin Independence Army and the Myanmar National Democratic Alliance Army, have failed to take precautionary measures to protect civilians in attacks and forcibly recruited adults and children. Some put immense economic pressure on civilians through arbitrary “taxation”. The extent to which rape, torture and killings were committed requires further investigation.

67. While the mission’s information on violations and abuses by ethnic armed organizations may not be representative, accounts would indicate that these are frequent but generally not systematic. This warrants further investigation.

3. Devastating humanitarian impact

68. Poverty levels in Kachin and Shan are high. The hostilities in northern Myanmar have compounded the humanitarian situation. People trapped in conflict-affected areas have been denied safe passage to leave. Others are unable to return because their homes have been looted and/or destroyed, because of continuing fighting or the presence of landmines, or because their land was appropriated after they fled, including by the Tatmadaw and corporations. This has resulted in protracted situations of internal displacement.

69. An estimated 100,000 people in Kachin and Shan have been living in displacement camps or camp-like situations since 2011. They live in overcrowded conditions with inadequate shelter. Access to food and health care is limited, while the rate of chronic malnutrition is well above the national average. Outbreaks of preventable diseases are reported. Access to education at all levels is inadequate. Furthermore, the cycle of temporary displacements continues. Among non-displaced populations, access to education and health care is often disrupted by fighting.

70. Humanitarian assistance has been frequently and arbitrarily denied, and despite the clear need thereof, the movement of relief personnel has been restricted for long periods of time. Access has significantly deteriorated since June 2016, to a point where international humanitarian actors are unable to assess needs or provide assistance to the majority of displaced persons, exacerbating already dire conditions. Local organizations also are increasingly restricted.

C. Fundamental freedoms

*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. All must be loyal to the State in serving their duties, so that such cases will never happen again.*¹⁰

71. The mission examined the issue of democratic space and the enjoyment of the rights to freedom of expression, association and peaceful assembly. While Myanmar has taken significant strides on this front, especially between 2011 and 2015, disturbing trends have emerged. Violence and human rights violations, including in Kachin, Rakhine and Shan States, are fuelled by the silencing of critical voices by the Myanmar authorities, who at the same time amplify a hateful rhetoric that emboldens perpetrators.

72. The Myanmar authorities, in particular the Tatmadaw, do not tolerate scrutiny or criticism. They use various laws to arrest, detain or harass civil society actors, journalists, lawyers and human rights defenders who express critical views. The case against two Reuters journalists for their investigative work into the Inn Din massacre and the prosecution of persons peacefully protesting the conflicts in northern Myanmar, including in Yangon, are recent examples. The mission verified instances of reprisals for engagement with the United Nations and of excessive use of force in managing demonstrations.

73. The Government's response to hate speech has been inadequate. The mission is deeply disturbed by the prevalence of hate speech, offline and online, often including advocacy of national, racial or religious hatred constituting incitement to discrimination, hostility or violence. This has accompanied outbreaks of violence, especially in Rakhine State. Dehumanizing and stigmatizing language against the Rohingya, and Muslims in general, has for many years been a key component of the campaign to "protect race and religion", spearheaded by extremist Buddhist groups like MaBaTha (see para. 13 above). Hate narratives are common. The Myanmar authorities have condoned these developments and, although generally using less inflammatory language, their rhetoric has mirrored and promoted the narratives espoused. This includes the insistence that "Rohingya" do not exist or belong in Myanmar, even denying use of the term; denial of the suffering of Rohingya; the association of Rohingya identity with terrorism; and the repeated allusions to illegal immigration and uncontrollable birth rates. The impact of this rhetoric is compounded by the stream of false or incomplete information and explicit calls for patriotic action (for example, in a Facebook post, "every citizen has the duty to safeguard race, religion, cultural identities and national interest"). The Myanmar authorities, including the Government and the Tatmadaw, have fostered a climate in which hate speech thrives, human rights violations are legitimized, and incitement to discrimination and violence facilitated.

74. The role of social media is significant. Facebook has been a useful instrument for those seeking to spread hate, in a context where, for most users, Facebook is the Internet. Although improved in recent months, the response of Facebook has been slow and ineffective. The extent to which Facebook posts and messages have led to real-world discrimination and violence must be independently and thoroughly examined. The mission regrets that Facebook is unable to provide country-specific data about the spread of hate speech on its platform, which is imperative to assess the adequacy of its response.

V. Hallmarks of Tatmadaw operations

75. The mission highlights four key common characteristics of Tatmadaw operations in Kachin, Rakhine and Shan States.

¹⁰ Senior General Min Aung Hlaing, "Gallant efforts to defend the HQ against terrorist attacks and brilliant efforts to restore regional peace, security are honoured", Facebook post, 21 September 2017.

A. Targeting of civilians

76. The military has consistently failed to respect international human rights law and the international humanitarian law principles of distinction, proportionality and precaution. The deliberate targeting of civilians has been part of Tatmadaw policies, tactics and conduct for decades. The “Four Cuts” counterinsurgency policy, initiated in the 1960s and still implemented, is aimed at cutting off non-State armed groups from access to food, finances, intelligence, and recruits from the local civilian population. The policy has been implemented through “clearance operations”, essentially scorched earth campaigns in which civilians are killed and entire villages destroyed, leading to mass displacement.

77. Such policies and practices violate the State’s obligations under international law and amount to criminal conduct. They are also unwarranted; military necessity would never justify killing indiscriminately, gang-raping women, assaulting children and burning entire villages. The tactics used by the Tatmadaw are consistently and grossly disproportionate to actual security threats, especially in Rakhine State, but also in northern Myanmar.

78. While the mission outlines in the present report the violations against civilians from many ethnic groups in Kachin, Rakhine and Shan States, the contempt shown by the Tatmadaw for human life, integrity and freedom, and for international law generally, should be of concern to the entire population. The number of refugees from areas outside these three States attests to the existence of similar human rights concerns elsewhere in the country.

B. Sexual violence

79. Rape and sexual violence have been a particularly egregious and recurrent feature of the targeting of the civilian population in Rakhine, Kachin and Shan States since 2011. Similar patterns of rape and sexual violence have been reported for at least three decades. Rape, gang rape, sexual slavery, forced nudity, sexual humiliation, mutilation and sexual assault are frequently followed by the killing of victims. The scale, brutality and systematic nature of these violations indicate that rape and sexual violence are part of a deliberate strategy to intimidate, terrorize or punish a civilian population, and are used as a tactic of war. This degree of normalization is only possible in a climate of long-standing impunity.

C. Exclusionary rhetoric

80. The Tatmadaw has historically cast itself as the protector of the nation, preserving “national unity in the face of ethnic diversity” while prioritizing Bamar-Buddhist identity and interests. Discrimination against ethnic and religious minority groups has been well-documented for decades. Military operations are often accompanied by deeply insulting slurs and outright threats linked to ethnicity and religion.

81. The situation of the Rohingya has been aggravated by their gradually increasing exclusion from the Myanmar nation since the 1960s, amid decades of State-sponsored stigmatization, leading to their de facto statelessness and being reviled by much of the population. The members of the mission were struck by the normality of deeply exclusionary and dehumanizing rhetoric in Myanmar society, actively nurtured by the Tatmadaw. While other ethnic and religious minorities are, at least in theory, accepted as belonging to the nation under their “national race” status, the lack of status of the Rohingya has dramatically increased their vulnerability, which contributes to the extreme scale and intensity of the violence against them.

D. Impunity

82. The Tatmadaw acts with complete impunity and has never been held accountable. Its standard response is to deny, dismiss and obstruct. It publicly lauds the discipline of troops and operations conducted “in full accordance with the law”. It promotes perpetrators. Occasional superficial investigations have only been undertaken when the Tatmadaw has

been faced with public exposure of undeniable evidence. It consistently fails to attribute responsibility, thereby reinforcing its message to troops that they will face no consequences. This pattern is a result of the political and legal construct of the country, whereby the Tatmadaw is removed from all civilian oversight and is given the constitutional right to adjudicate its own affairs. The Commander-in-Chief makes “final and conclusive” decisions in matters of military justice. The documented history of crimes committed by the Tatmadaw demonstrates an absence of responsible command, and of measures to prevent or repress crimes.

VI. Crimes under international law

83. On the basis of the body of information collected, the mission has reasonable grounds to conclude that serious crimes under international law have been committed that warrant criminal investigation and prosecution.

A. Genocide

84. Genocide is when a person commits a prohibited act with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. The Rohingya are a protected group under this definition. Their treatment by the Myanmar security forces, acting in concert with certain civilians, includes conduct that amounts to four of the five defined prohibited acts: (a) killing; (b) causing serious bodily or mental harm; (c) inflicting conditions of life calculated to bring about the physical destruction of the group in whole or in part; and (d) imposing measures intending to prevent births.

85. The critical element of the crime is “genocidal intent”. The mission assessed its body of information in the light of the jurisprudence of international tribunals regarding the reasonable inference of such intent. The 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. Factors pointing to such intent include the broader oppressive context and hate rhetoric; specific utterances of commanders and direct perpetrators; exclusionary policies, including to alter the demographic composition of Rakhine State; the level of organization indicating a plan for destruction; and the extreme scale and brutality of the violence committed.

86. Having given careful consideration to other possible inferences regarding intent, the mission considers that these can be discounted as unreasonable. In this regard, it recalls the statement made by the Tatmadaw Commander-in-Chief that the “clearance operations” were not a response to a concrete threat from ARSA, but to the “unfinished job” of solving the “long-standing” “Bengali problem” (see para. 35 above).

87. In the light of the above considerations on the inference of genocidal intent, the mission concludes that there is sufficient information to warrant the investigation and prosecution of senior officials in the Tatmadaw chain of command, so that a competent court can determine their liability for genocide in relation to the situation in Rakhine State.

B. Crimes against humanity

88. On the basis of information gathered, the mission finds that crimes against humanity have been committed in Kachin, Rakhine and Shan States, principally by the Tatmadaw. In the case of Kachin and Shan States, the crimes include murder, imprisonment, enforced disappearance, torture, rape, sexual slavery and other forms of sexual violence, persecution, and enslavement. In Rakhine State, these and other crimes against humanity have been committed. The elements of extermination and deportation are also present, while the systematic oppression and discrimination not only supports a finding of persecution but may also amount to the crime of apartheid. For both northern Myanmar and Rakhine State, the acts were committed as part of a widespread and systematic attack on a civilian population.

C. War crimes

89. Given the mission's consideration that non-international armed conflicts have been ongoing in Kachin and Shan States (for the entire period under review) and in Rakhine State since at least August 2017, much of the conduct amounting to crimes against humanity will also satisfy the war crime elements of murder, torture, cruel treatment, outrages upon personal dignity, attacking civilians, displacing civilians, pillaging, attacking protected objects, taking hostages, sentencing or execution without due process, as well as rape, sexual slavery and sexual violence. Certain acts committed by ethnic armed organizations and ARSA may also constitute war crimes.

VII. Responsibility

90. Non-State armed groups have committed crimes against civilians, for which they should be held accountable. During the period under review, the Tatmadaw was the main perpetrator of serious human rights violations and crimes under international law in Kachin, Rakhine and Shan States. In addition, in Rakhine State, the Myanmar police force, NaSaKa¹¹ and Border Guard Police were also perpetrators. Local authorities, militias, militant "civilian" groups, politicians and monks participated or assisted in violations, to varying degrees.

91. The Tatmadaw command exercises effective control over its own soldiers, as well as over other armed actors deployed in military operations. The consistent tactical formula employed by the Tatmadaw exhibits a degree of coordination only possible when all troops are acting under the effective control of a single unified command. This effective control, combined with the knowledge of crimes committed by subordinates, a failure to take necessary and reasonable measures to prevent and punish crimes, and a causal link between these failures and the atrocities committed, indicate that individual criminal liability would extend beyond individual perpetrators to their hierarchical commanders.

92. The mission has drawn up a non-exhaustive list of alleged perpetrators of crimes under international law, indicating priority subjects for investigation and prosecution. The list includes the names of alleged direct perpetrators, but focuses on those exercising effective control over them. In relation to the recent events in Rakhine State, this includes the Tatmadaw Commander-in-Chief, Senior-General Min Aung Hlaing, and:

- 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

The full list will be held in the mission's archives, kept in the custody of OHCHR, and may be shared with any competent and credible body pursuing accountability in accordance with recognized international norms and standards.

93. The constitutional powers of the civilian authorities afford little scope for controlling the actions of the Tatmadaw, nor is there any indication that they participated directly in planning or implementing security operations or were part of the command structure. Nevertheless, nothing indicates that the civilian authorities used their limited powers to influence the situation in Rakhine State where crimes were being perpetrated. The State Counsellor, Daw Aung San Suu Kyi, has not used her *de facto* position as Head of Government, nor her moral authority, to stem or prevent the unfolding events, or seek alternative avenues to meet a responsibility to protect the civilian population. On the contrary, the civilian authorities have spread false narratives, denied the wrongdoing of the

¹¹ The "Border Area Immigration Control Headquarters", disbanded in 2013.

Tatmadaw, blocked independent investigations (including that of the fact-finding mission), and overseen the destruction of evidence. Through their acts and omissions, the civilian authorities have contributed to the commission of atrocity crimes.

94. Systemic discrimination and crimes under international law were committed during a period of significant international engagement in Myanmar, and while the United Nations was supposed to be implementing its Human Rights Up Front action plan. While Myanmar was repeatedly identified as a crisis situation requiring a human rights-driven response by the “whole of the United Nations”, this approach was rarely, if ever, taken. Rather, many United Nations agencies have continued to prioritize development goals, humanitarian access and quiet diplomacy. That approach has demonstrably failed; and the United Nations as a whole has failed adequately to address human rights concerns in Myanmar. Even now, the approach taken displays few signs of any lessons learned, with human rights missing from agreements recently signed with the Government. While thanking those United Nations entities that have provided it with valuable assistance and information, the mission regrets the lack of cooperation from others.

VIII. Accountability

I am not a very educated person but I hope the United Nations has the ability to get us justice by making sure that the Government of Myanmar can be questioned about what they did to us.

95. Justice has remained elusive for victims in Myanmar for decades, with the authorities systematically failing to condemn, investigate and prosecute perpetrators. Impunity for gross human rights violations has significantly and demonstrably contributed to the validation of deeply oppressive and discriminatory conduct, enabled recurrence of human rights violations and atrocity crimes, emboldened perpetrators and silenced victims. Unless impunity is addressed, and all ranks within the security forces are held accountable for their past, current and future actions, similar outbreaks of violence and associated atrocity crimes can be expected to continue, with further devastating domestic and regional impact.

96. In the face of the Rakhine crisis, the Myanmar authorities have created ad hoc inquiry commissions and boards. The mission has examined eight such efforts since 2012. None meets the standard of an impartial, independent, effective and thorough human rights investigation. To the mission’s knowledge, none has led to any prosecution for gross human rights violations and redress for victims. The reason is simple: this is not possible in Myanmar.

97. Impunity is deeply entrenched in the State’s political and legal system, effectively placing the Tatmadaw above the law. The Constitution and other laws provide for immunities and place the Tatmadaw beyond civilian oversight. The Tatmadaw can independently adjudicate its own matters, with the Commander-in-Chief having the final word. The rare cases, brought mostly before military courts without transparency, are wholly insufficient to counter the overall trend of impunity. Furthermore, military courts are inadequate forums to deal with large-scale human rights violations perpetrated by the military. Nor are civilian courts the answer; the domestic justice system is not independent and lacks the capacity to respect fair trial standards or to deal with the breadth and gravity of the violations perpetrated by high-level officials, especially crimes under international law. Those who file complaints often face intimidation and reprisals. In short, accountability at the domestic level is currently unattainable.

98. Even though the primary responsibility for investigating and prosecuting crimes under international law lies with the Government of Myanmar, it has demonstrated that it is unable and unwilling. Accountability would require an overhaul of the entire national justice and security sectors. The mission has concluded on reasonable grounds that the Government’s recently-created commission of inquiry will not and cannot provide a real avenue for accountability, even with some international involvement. The impetus for accountability must come from the international community.

99. The Mission proposes an accountability process that is transformative, victim-centred, comprehensive and inclusive.¹² The process is aimed at contributing to three fundamental shifts: breaking the climate of impunity, ensuring that all State institutions, including the security forces, are answerable to the people, and promoting a concept of the State and the nation of Myanmar that is inclusive, based on equality and respect for the human rights of all. These considerations should permeate all measures adopted in the areas of truth, justice, reparations and guarantees of non-recurrence.

IX. Conclusions and recommendations

100. The gross human rights violations and abuses committed in Kachin, Rakhine and Shan States are shocking for their horrifying nature and ubiquity. Many of these violations undoubtedly amount to the gravest crimes under international law. They are also shocking because they stem from deep fractures in society and structural problems that have been apparent and unaddressed for decades. They are shocking for the level of denial, normalcy and impunity that is attached to them. The mission concludes that these abusive patterns are reflective of the situation in Myanmar as a whole.

101. Myanmar has a heavy responsibility to remedy the situation as a matter of the utmost urgency; otherwise, it risks destroying its democratic reform process. The international community also bears responsibility and must take a united stand both to condemn the violations and to assist Myanmar in addressing the root causes of its recurrent problems. This begins by ensuring that the perpetrators of crimes are held to account, and by giving hope to victims of a future without the fear and insecurity that have to date characterized their existence.

102. The steps required to address the human rights crises in Myanmar are well known. For nearly three decades, five consecutive special rapporteurs on the situation of human rights in Myanmar have presented an annual report to the General Assembly and the Human Rights Council, with detailed recommendations for all stakeholders. Similarly, the United Nations High Commissioner for Human Rights has formulated concrete recommendations, as have many international and national civil society organizations. The Advisory Commission on Rakhine State also presented a detailed report. These recommendations should be implemented immediately.

103. Besides its comprehensive recommendations,¹³ the mission draws particular attention to the priority areas for action by the international community below.

104. The international community, through the United Nations, should use all diplomatic, humanitarian and other peaceful means to assist Myanmar in meeting its responsibility to protect its people from genocide, crimes against humanity and war crimes. It should take collective action in accordance with the Charter of the United Nations, as necessary.

105. The Security Council should ensure accountability for crimes under international law committed in Myanmar, preferably by referring the situation to the International Criminal Court or, alternatively, by creating an ad hoc international criminal tribunal. Furthermore, the Security Council should adopt targeted individual sanctions, including travel bans and asset freezes, against those who appear most responsible for serious crimes under international law. It should also impose an arms embargo on Myanmar.

106. Until the Security Council acts, the General Assembly, or alternatively the Human Rights Council, should create an independent, impartial mechanism to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files to facilitate and

¹² See A/HRC/39/CRP.2.

¹³ Ibid.

expedite fair and independent criminal proceedings in national, regional or international courts or tribunals.

107. The Human Rights Council should continue to support the mandates of the Special Rapporteur on the situation of human rights in Myanmar, the United Nations High Commissioner for Human Rights and the Office of the High Commissioner, and ensure they have adequate resources to maintain a strong focus on the human rights crisis in Myanmar.

108. The Human Rights Council should specifically request OHCHR to focus on ensuring accountability for human rights violations and abuses in Myanmar, including by enhanced monitoring, documentation, analysis and public reporting on the situation of human rights; raising awareness among civil society and other actors engaged in documenting human rights violations about relevant international standards; working with victim communities to raise awareness about justice options; and supporting comprehensive rule of law and security sector reform in Myanmar in accordance with international human rights norms and standards. Appropriate resources should be allocated.

109. The Human Rights Council should establish a second fact-finding mission for a limited period to build on the work undertaken by the mission, until either one of the mechanisms outlined in paragraphs 103 and 104 above are operational, or the reinforced work of OHCHR set out in paragraph 107 is in place.

110. The United Nations should urgently adopt a common strategy to ensure that all engagement with Myanmar takes into account and addresses human rights concerns, in accordance with the Human Rights Up Front action plan. This should guide all engagement of the United Nations in Myanmar, particularly in relation to Rakhine State, and include policies and public advocacy stances. All support provided by the United Nations to the Myanmar authorities should undergo a full human rights due diligence analysis.

111. As a matter of urgency, a comprehensive, independent inquiry should be conducted into the involvement of the United Nations in Myanmar since 2011, with a view to establishing whether everything possible to prevent or mitigate the unfolding crises was done, identifying lessons learned and good practices, making recommendations as appropriate, including on accountability, and enabling more effective work in future.

112. The United Nations and the international community must ensure that the repatriation of refugees and the return of internally displaced persons are allowed only when safe, voluntary and dignified, with explicit human rights protections in place, including citizenship. In the current circumstances, such returns are not possible.

113. All Member States should ensure that engagement with Myanmar, and support for aid, development and reform projects, take into account and address human rights concerns and explicitly conform to the principles of non-discrimination and equality. They should ensure that humanitarian organizations working on the situation in Myanmar are appropriately funded. States should cease operational support for the Tatmadaw and other security forces until there is (a) a demonstrable commitment to genuine reform; (b) international assistance in implementing reform; and (c) acceptance of and cooperation with international mechanisms to hold those responsible accountable for crimes under international law.

114. Regardless of the imposition of an arms embargo by the Security Council, States should not authorize the transfer of arms to Myanmar, considering the overriding risk that they would be used to undermine peace and security and in the commission of serious crimes under international law.

115. Relevant regional organizations, including the European Union and the Association of Southeast Asian Nations (ASEAN), should develop strategies to ensure accountability for perpetrators of crimes under international law in Myanmar,

including through sustained engagement with Myanmar and support for an international justice mechanism.

116. Member States should exercise jurisdiction to investigate and prosecute alleged perpetrators of serious crimes under international law committed in Myanmar.

117. The United Nations should establish a trust fund for victim support, through which victims can receive psychosocial support, legal aid and livelihood support, and others means of assistance. All trust fund projects should be designed in consultation with victims.

Annex 40

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)

17 September 2018

English only

Human Rights Council**Thirty-ninth session**

10–28 September 2018

Agenda item 4

Human rights situations that require the Council's attention**Report of the detailed findings of the Independent
International Fact-Finding Mission on Myanmar****Summary*

The Human Rights Council established the Independent International Fact-Finding Mission on Myanmar in its resolution 34/22. In accordance with its mandate, the Mission focused on the situation in Kachin, Rakhine and Shan States since 2011. It also examined the infringement of fundamental freedoms, including the rights to freedom of expression, assembly and peaceful association, and the question of hate speech.

The Mission established consistent patterns of serious human rights violations and abuses in Kachin, Rakhine and Shan States, in addition to serious violations of international humanitarian law. These are principally committed by the Myanmar security forces, particularly the military. Their operations are based on policies, tactics and conduct that consistently fail to respect international law, including by deliberately targeting civilians. Many violations amount to the gravest crimes under international law. In the light of the pervasive culture of impunity at the domestic level, the mission finds that the impetus for accountability must come from the international community. It makes concrete recommendations to that end, including that named senior generals of the Myanmar military should be investigated and prosecuted in an international criminal tribunal for genocide, crimes against humanity and war crimes.

The present document contains the detailed findings of the Mission. Its principal findings and recommendations are provided in document A/HRC/39/64.

* The information contained in this document should be read in conjunction with the report of the Independent International Fact-Finding Mission on Myanmar (A/HRC/39/64).



Contents

	<i>Page</i>
I. Introduction.....	6
II. Mandate and methodology and legal framework.....	6
A. Mandate.....	6
B. Methodology.....	7
C. Legal framework.....	11
III. Context.....	21
A. Military domination in politics.....	21
B. Ethnic and religious diversity.....	25
C. History of human rights violations.....	27
IV. Emblematic situation 1: Kachin and Shan States.....	30
A. Patterns of violations committed by Myanmar military and security forces.....	32
1. Conduct of hostilities in flagrant disregard of civilian life and property.....	32
2. Unlawful killings.....	37
3. Torture and other ill-treatment.....	42
4. Sexual and gender-based violence.....	50
5. Arbitrary deprivation of liberty and enforced disappearance.....	56
6. Forced labour and forced recruitment of adults and children.....	64
7. Forced displacement, confiscation and destruction of property, and denial of humanitarian assistance.....	70
8. Emblematic incidents.....	78
B. Patterns of violations and abuses committed by non-State armed actors.....	82
1. Legal framework.....	83
2. Findings.....	83
C. Impact of conflict, violations and abuses on civilians.....	91
1. Fear, trauma, displacement and humanitarian impact.....	91
2. Landmines.....	94
3. Lack of recourse.....	95
V. Emblematic situation 2: Rakhine State.....	99
A. Human rights violations against the ethnic Rakhine.....	100
1. Forced or compulsory labour.....	101
2. Forced evictions.....	104
3. Confiscation of food and livestock.....	106
4. Sexual and gender-based violence.....	107
5. Emblematic incident: shooting in Mrauk-U on 16 January 2018.....	108
6. Conclusion.....	109
B. Systemic oppression and persecution of the Rohingya.....	110
1. Denial of legal status and identity.....	110
2. Denial of the right to freedom of movement.....	119

3.	Restrictions on access to food, livelihoods, health care and education	127
4.	Restrictions on humanitarian access.....	136
5.	Restrictions affecting private life	138
6.	Oppression through arbitrary arrest and detention	143
7.	Other forms of oppression.....	144
8.	Conclusion.....	147
C.	Violence in 2012.....	147
1.	Emblematic incidents	147
2.	Kaman Muslims of Rakhine State.....	156
3.	Torture and ill-treatment at Buthidaung prison	156
4.	Government response to the 2012 violence.....	159
5.	Spreading hate.....	166
6.	Overall analysis.....	172
7.	Conclusion.....	176
D.	25 August 2017 and the “clearance operations”	177
1.	A human rights catastrophe.....	178
2.	A foreseeable and planned catastrophe	255
3.	An enduring catastrophe.....	278
4.	Perpetrators	308
5.	Violations of international law	313
VI.	Emblematic situation 3: Democratic space and the exercise of fundamental freedoms.....	315
A.	Silencing of critical voices.....	315
1.	Legal toolbox for restricting fundamental freedoms	316
2.	Intimidation and reprisal for engagement with the United Nations.....	319
3.	Curtailment of peaceful protests.....	320
B.	The issue of “hate speech”.....	320
1.	Legal framework	321
2.	Findings.....	322
C.	Conclusion	344
VII.	Hallmarks of Tatmadaw operations	345
A.	Targeting civilians	345
B.	Sexual violence.....	347
C.	Exclusionary and discriminatory rhetoric	348
D.	Command climate and impunity.....	350
VIII.	Crimes under international law	351
A.	Genocide.....	351
B.	Crimes against humanity	364
C.	War crimes.....	380
IX.	Responsibility.....	382
A.	Tatmadaw and other security forces	382

B.	Civilian authorities.....	388
C.	Non-State armed groups and individuals.....	389
D.	Non-exhaustive list of alleged perpetrators	390
E.	International community.....	391
X.	Impunity and accountability.....	393
A.	Legal framework and international standards on accountability	393
B.	History and climate of impunity in Myanmar.....	396
C.	Way forward.....	410
XI.	Conclusions and recommendations	419
A.	Conclusions	419
B.	Recommendations.....	420
Annexes		
I.	Map of Myanmar.....	430
II.	Correspondence with the Government of the Republic of the Union of Myanmar	431

Acronyms

AA	Arakan Army
ARSA	Arakan Rohingya Salvation Army
ASEAN	Association of Southeast Asian Nations
CAT	Convention against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CPED	International Convention for the Protection of All Persons from Enforced Disappearance
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
EAO	Ethnic Armed Organization
FPNCC	Federal Political Negotiation and Consultation Committee
GAD	General Administration Department
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESC	International Covenant on Economic, Social, and Cultural Rights
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILO	International Labour Organization
KIA	Kachin Independence Army
LIB	Light Infantry Battalion
LID	Light Infantry Division
MNDAA	Myanmar National Democratic Alliance Army
NLD	National League for Democracy
OHCHR	Office of the United Nations High Commissioner for Human Rights
SGBV	Sexual and Gender Based Violence
SLORC	State Law and Order Restoration Council
SPDC	State Peace and Development Council
SSA-N	Shan State Army North
SSA-S	Shan State Army South
TNLA	Ta'ang National Liberation Army
UDHR	Universal Declaration of Human Rights
UNHCR	Office of the United Nations High Commissioner for Refugees
UNITAR	United Nations Institute for Training and Research
UNOSAT	UNITAR's Operational Satellite Applications Programme
USDP	Union Solidarity and Development Party
UWSA	United Wa State Army
WFP	World Food Programme
MaBaTha	Association for the Protection of Race and Religion
MaHaNa	Sangha Maha Nayaka Committee
NaSaKa	Border Area Immigration Control Headquarters
NaTaLa	Ministry for Development of Border Areas and National Races "model villages"
SaYaPa	Myanmar Intelligence Office

I. Introduction

1. The Independent International Fact-Finding Mission on Myanmar (hereinafter “the Mission”) was established by Human Rights Council resolution 34/22, adopted on 24 March 2017. The President of the Council appointed Marzuki Darusman (Indonesia) as chairperson and Radhika Coomaraswamy (Sri Lanka) and Christopher Sidoti (Australia) as members. A secretariat was recruited by the Office of the United Nations High Commissioner for Human Rights (OHCHR). The core team was composed of a coordinator, fact-finding team leader and five human rights officers, legal adviser/reporting officer, military adviser, sexual and gender-based violence adviser, security officer, two language assistants and administrative support.

2. The Mission presented an oral update at the Human Rights Council’s thirty-sixth session (19 September 2017) and an oral interim report at the thirty-seventh session (12 March 2018), and delivered a video statement at the twenty-seventh special session of the Council (5 December 2017). In its decision 36/115, the Council requested the Mission to submit its final report at its thirty-ninth session. The main findings and recommendations of the Mission are contained in document A/HRC/39/64. A/HRC/39/CRP.2 contains the full factual and legal analysis, with supporting information, underpinning document A/HRC/39/64. It also includes recommendations directed more broadly than the accountability recommendations in that document.

3. The Mission deeply regrets the lack of cooperation from the Government of Myanmar, despite repeated appeals from the Human Rights Council and the Mission. The Mission requested in-country access through letters of 4 September 2017, 17 November 2017 and 29 January 2018. It sent a detailed list of questions on 27 March 2018. Each time its members travelled to Geneva, the Mission requested a meeting with the Permanent Mission of the Republic of the Union of Myanmar to the United Nations and Other International Organizations in Geneva, Switzerland. The Mission had some limited informal contact with Government representatives but received no official response to its letters requesting formal meetings, in-country access or information. The Mission’s draft main findings and recommendations were shared with the Government prior to their submission and public release, providing an opportunity to comment or make factual corrections. No response was received. The Mission’s letters to the Government are in annex 2.

II. Mandate, methodology and legal framework

A. Mandate

4. Resolution 34/22 mandated the Mission “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, including but not limited to arbitrary detention, torture and inhuman treatment, rape and other forms of sexual violence, extrajudicial, summary or arbitrary killings, enforced disappearances, forced displacement and unlawful destruction of property, with a view to ensuring full accountability for perpetrators and justice for victims”.

5. In the interpretation of this mandate, the Mission considered the resumption of hostilities in Kachin State and escalation in Shan State in 2011 and the outbreak of major violence in Rakhine State in 2012 as key recent turning points that generated renewed violence and further allegations of serious human rights violations and abuses. The Mission therefore determined that focusing on the situation in Kachin, Rakhine and Shan States since 2011 would allow it to fulfil its mandate in a contextualised manner. The Mission selected several significant incidents for in-depth fact-finding, aiming to make findings on specific allegations of human rights violations and abuses while revealing broader patterns of conduct.

6. The Mission considered that the types of violations and abuses listed in the Council resolution were illustrative, and that it was mandated to consider the full range of violations

of international law as appropriate. In line with the Council's request to examine alleged human rights violations and abuses, the Mission decided to examine allegations against both State and non-State actors. Finally, considering the objective of the mandate ("with a view to ensuring full accountability for perpetrators and justice for victims"), the Mission endeavoured to identify perpetrators, as well as to make findings about responsibility and recommendations on accountability.

7. The Mission notes with concern that allegations of human rights violations and abuses occurring in other parts of Myanmar also merit in-depth fact-finding. Time and resource constraints led the Mission to limit itself to Rakhine, Kachin and Shan States, particularly in light of the events that unfolded since August 2017 that required significant attention. The Mission is comfortable, however, that its geographic, temporal and subject matter focus allowed for solid overall findings and recommendations.

B. Methodology

8. The Mission was acutely aware of the complexity and sensitivity of the situation it was mandated to examine, as well as of allegations from all sides that the spread of false information about events has been commonplace. This awareness reinforced its commitment to meticulously follow established methodologies and best practices for human rights fact-finding, as developed by the United Nations. In doing so, the Mission strictly adhered to the principles of "do no harm", independence, impartiality, objectivity, transparency and integrity.

9. In particular, the Mission followed the best practices established for commissions of inquiry and fact-finding missions, outlined in the 2015 OHCHR publication, *International Commissions of Inquiry and Fact-Finding Missions on International Human Rights Law and International Humanitarian Law – Guidance and Practice*.¹

1. Standard of proof

10. Consistent with the practice of United Nations fact-finding bodies, the Mission employed the "reasonable grounds" standard in making factual determinations on individual cases, incidents and patterns of conduct. The standard was considered met when a sufficient and reliable body of primary information, consistent with other information, would allow an ordinarily prudent person to reasonably conclude that a case, incident or pattern of conduct occurred. This standard of proof is lower than that required in criminal proceedings.

11. Individual cases or incidents contained in the report are based on at least one credible source of first-hand information, which was independently corroborated by at least one other credible source of information. Specific major incidents, such as those set out in chapter V on Rakhine State, are based on multiple accounts from eyewitnesses and victims, allowing for in-depth fact-finding and detailed event reconstruction. Where the report describes patterns of conduct, these are based on multiple credible sources of first-hand information, which are consistent with and corroborated by the overall body of credible information collected. In the few instances where this standard was not met, but the Mission still considered it appropriate to include the information, this is stated explicitly.

12. In cases of torture or sexual and gender-based violence, where a second independent source of information was often unavailable, the Mission considered the case or incident corroborated when it obtained one first-hand account which it assessed as credible and was consistent with what was known about the incident or the established patterns of similar incidents in the area, and in line with the interviewer's own observations (for example, scars or signs of trauma).

13. The Mission considered the following to be sources of first-hand information:

- confidential interviews conducted by the Mission or its staff with victims, witnesses, victim's close family members, perpetrators or former Myanmar officials with direct

¹ Available at: https://www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf

knowledge of the issues brought before the Mission, where it was assessed that the source was credible and reliable;

- satellite imagery from reliable sources, authenticated video and photo material as well as documents containing first-hand information from a reliable source;
- publicly available admissions of relevant facts by Myanmar officials;
- laws, policies and directives of Myanmar as well as internal Myanmar documents, provided that they were received from a credible and reliable source and their authenticity could be confirmed; and
- statistics, surveys and other quantitative information generated by Myanmar or the United Nations, to the extent that the data was based on an apparently sound methodology and the inputs underlying the data were considered originating from a credible and reliable source.

14. The Mission relied on the following types of information to corroborate first-hand information and providing overall context to violations:

- confidential interviews conducted by the Mission or its staff with witnesses who received the information directly from a person known to them (and not as a rumour), provided that the Mission assessed the source to be credible and reliable;
- summaries of witness accounts contained in publications or in submissions from the United Nations, research institutes and human rights organizations, where the Mission assessed the source to be credible and reliable;
- summary descriptions of patterns of conduct contained in expert interviews, public reports, submissions, academic research publications, documentaries and similar materials, where the Mission assessed the source to be credible and reliable.

15. In its assessment of second-hand sources, the Mission endeavoured to interview the researcher or author of the publication, submission or text to assess its credibility and the methodology used.

16. The reliability and credibility of each source was carefully assessed. The Mission considered whether the source was trustworthy, consistently probing the veracity of their statements. Such assessment took into account, among other considerations:

- the witness' political and personal interests, potential biases and past record of reliability, where known;
- the witness' apparent capacity to recall events correctly, considering his or her age, trauma, how far back the events occurred, and so on;
- the position of the witness in relation to the subject of the information;
- where and how the witness obtained the information;
- the reasons for which the witness provided the information.

17. The Mission also considered the information's relevance to the fact-finding work, its internal consistency and coherence, and its consistency with and corroboration by other information, among other factors. Assessment of the validity of the information was separate from the assessment of its reliability and credibility. The Mission did not assume that a credible and reliable source would necessarily provide accurate and valid information.

18. Where this report refers to an account of a witness, the Mission has accepted the statement as assessed and described to be truthful and relevant, unless stated otherwise. Direct references to specific witness statements in the report should not be taken as an indication that it was the sole basis of judgment in relation to the issues under analysis. These direct references and citations were included to provide an example or illustration.

2. Collection of information

19. The Mission obtained a vast quantity of primary and secondary information. It conducted 875 in-depth interviews with victims and eyewitnesses. The Mission took care to

diversify its sources of information. It interviewed individuals from different ethnic and religious backgrounds (including Bamar, ethnic Rakhine, Rohingya², Kaman Muslims, Hindus and individuals from Kachin and Shan ethnic groups). It also interviewed a number of members of non-State armed groups, as well as some former officials of Myanmar State institutions. Due to the lack of cooperation from the Government of Myanmar, it was unable to interview any serving government officials or members of its military forces.³

20. The Mission used various methodological approaches to select persons for interviews. This included random selection, for example by visiting different areas of a refugee camp or different refugee centres without pre-arrangement. Specifically in relation to the situation in Rakhine State, each visit to southern Bangladesh also prioritised interviews with persons who had most recently arrived from Myanmar to ensure the receipt of “fresh” information. Additionally, the Mission targeted interviewees to corroborate specific incidents or patterns. The Mission ensured that it did not rely on any single organization or individual to assist. To the extent possible, the Mission also 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.

21. Nearly 40 per cent of interviewees were female. While the majority of interviews predominantly pertained to the situation in Rakhine State, more than 200 interviews were related to the situation in Kachin and Shan States, with further interviews relating to both situations, or to the country as a whole. Interviews were mostly conducted in person, in a safe and private setting and in the presence of a trusted, professional interpreter where required. Some interviews were conducted remotely, through secure channels of communication and taking additional precautions to ensure reliability (for example, a visual link or a known and trusted intermediary).

22. The Mission obtained a large body of satellite imagery and analysis with the support of UNOSAT⁴, and received a vast amount of documents, photographs and videos – some clandestinely recorded or obtained by the source. It only used those materials that it was able to authenticate. All information was checked against secondary information assessed as credible and reliable, including organizations’ raw data or notes, expert interviews, submissions and open source material. The Mission’s internal expertise included human rights and law, sexual and gender-based violence, psychology and child psychology, military affairs and forensics, and specialist advice was sought in digital verification.

23. To collect information, the Mission members travelled to Bangladesh, Indonesia, Malaysia, Thailand, and the United Kingdom of Great Britain and Northern Ireland. Requests to visit China and India did not receive a response. Mission members visited the refugee camps in Cox’s Bazar (Bangladesh) at the start of the mandate, shortly after the arrival of vast numbers of Rohingya refugees, and once again near the end of the mandate in July 2018 to take stock of the situation prior to the finalization of their report to the Human Rights Council. The Mission secretariat undertook numerous additional field-missions between September 2017 and July 2018, of several weeks at a time, primarily to interview victims and witnesses. Specifically in relation to the unfolding events after 25 August 2017 in Rakhine State, a team was deployed immediately to conduct interviews with persons who had just fled Myanmar. The Mission also held over 250 consultations with other stakeholders, including intergovernmental and non-governmental organizations, researchers, and diplomats – in person and remotely. It received written submissions, including through a public call. The Mission further engaged with a number of United Nations entities and other humanitarian actors. It is particularly grateful to the Office of the United Nations High Commissioner for Human Rights and to other United Nations officials and entities that provided relevant

² The Mission is conscious of the sensitivity concerning the term “Rohingya” in Myanmar, where the group is generally referred to as “Bengali”. The Mission uses the term in line with the concerned group’s right to self-identify.

³ The Mission did, however, undertake an extensive analysis of public statements made by government and military officials.

⁴ UNOSAT is the Operational Satellite Applications Programme of the United Nations Institute for Training and Research (UNITAR).

information and support. It regrets that a number of United Nations entities did not provide similar support.

24. The Mission further regrets that it was not able to visit Myanmar and undertake in-country fact-finding. The Mission was nevertheless able to gather the information necessary to establish facts and draw conclusions in accordance with its mandate. As is apparent from the preceding paragraphs, the Mission accessed a large volume and wide variety of sources, mostly outside but also inside the country. Importantly, it had access to victims and eyewitnesses who left Myanmar throughout the period under review, including very recently. Moreover, considering the severe risk of intimidation and reprisals against individuals who engage with independent human rights bodies (see below) and the restrictions imposed on other international actors operating inside Myanmar, the Mission is convinced that access to the country would not necessarily have generated more reliable or valid information. The Mission is confident that it spoke with victims and witnesses in a safe environment, where they could speak freely and without fear of reprisals.

25. The Mission expresses its deep gratitude for the invaluable support it received from a number of non-governmental organizations and all the persons who agreed to be interviewed. Their dedication to the betterment of the human rights situation in Myanmar is truly admirable.

3. Protection of victims and witnesses

26. The Mission paid specific attention to the protection of victims and witnesses. Its initial protection assessment indicated that persons who speak out about the human rights situation in the country and who engage with United Nations mechanisms have been subject to reprisals. The Mission was therefore extremely cautious in all interactions with victims and witnesses, making constant assessments of the need to establish contact with persons who may be placed at risk as a result. The Mission established strict security protocols to guide these interactions and to ensure that they were conducted through means to mitigate the risks. Contacts were not pursued if the Mission could not ensure the safety of the cooperating person, if the risk of harm was assessed to be too high, or if the Mission did not have sufficient information to make an informed determination on the level of risk. In line with this policy, the Mission has not pursued multiple leads.

27. The most significant challenge for the Mission therefore arose from the fear of reprisals. For the Myanmar population, this fear is well founded. The Mission received information and verified incidents of reprisals against persons who have interacted with international actors. Numerous potential witnesses were afraid to speak with the Mission, even on a confidential basis, because they feared for the repercussions on themselves or family members. The Mission did not pressure anyone to speak with it.

28. Many international actors operating in Myanmar, including aid workers, journalists, diplomats and other foreign visitors to Myanmar, were also unwilling to share knowledge and information with the Mission from fear that this would negatively affect their access if it became known to the Myanmar authorities that they had cooperated with the Mission.

29. The Mission is gravely concerned at the intimidation and threats faced by Myanmar nationals cooperating with Human Rights Council mechanisms mandated to examine the situation in Myanmar. It urges Myanmar to guarantee the protection of victims and witnesses, and everybody who engages with the Mission and with other international human rights mechanisms, and to undertake that no one shall suffer harassment, threats, intimidation, ill-treatment, arrest or other forms of reprisal because of such contact.

4. Storage of information

30. A secure, confidential electronic database was created to enable the Mission to securely record and store information. It contains the summary records of all interviews and meetings conducted as well as electronic copies of relevant materials collected. As a fully searchable tool, the database facilitated the organization and retrieval of information for analysis and report writing.

Significantly, it is also responsible for the collection of taxes. The GAD falls under the Ministry of Home Affairs, one of the three ministries controlled by the Tatmadaw.

B. Ethnic and religious diversity

1. Ethnic diversity and insurgencies

84. The territory of present-day Myanmar is inhabited by a large number of groups with various ethnic, cultural, linguistic and religious backgrounds. The largest group are the Bamar, who are believed to comprise 60 to 70 per cent of the total population. They are predominantly Buddhist and most live in the central lowlands of the country. Many other ethnic groups, with their distinct cultures, languages, traditions and sometimes religions, live mainly in the peripheral areas, near the borders with Bangladesh, China, India and Thailand. Before Burma gained independence, General Aung San and a number of ethnic leaders agreed, at the Panglong Conference in 1947, on a constitutional framework that recognised the distinctive identities of minorities and granted them a high degree of autonomy⁹⁹. The Panglong Agreement has never been implemented.

85. Several of these groups hold deep-rooted grievances, struggling for greater autonomy and an equitable sharing of natural resources. Since independence, the incessant ethnically based armed conflicts have been used by the Tatmadaw to justify its power, presenting itself as the guarantor of national unity. While successive Governments have made overtures towards negotiated peace agreements, hostilities have continued, in recent years predominantly in Kachin and Shan States. These conflicts indicate that the nation-building efforts of the military have failed:¹⁰⁰ there is no unifying “Myanmar” national identity, resentment against Bamar-Buddhist domination has grown, and the Tatmadaw has failed to end the insurgencies by military or negotiated means. Notably, under military rule, the concept of “national races” has gradually become the key criterion for membership in the country’s political community,¹⁰¹ creating a common “other”. The military regime has constructed eight major ethnic groups (Kachin, Kayah, Karen, Chin, Bamar, Mon, Rakhine and Shan), broken down further into 135 “national races”. There is no scientific basis for this division, which contains both gaps and overlaps. The arbitrary list defines those who “belong” in Myanmar; all others, regardless of how many generations they have lived in Myanmar, are considered outsiders or immigrants. This includes the Rohingya. According to the Tatmadaw, “Despite living among peacocks, crows cannot become peacocks”.¹⁰²

86. Since 2016, the NLD-Government has led a peace process, the “Union Peace Conference-21st Century Panglong”; sessions have been held in August 2016, May 2017 and July 2018. In the run up to the third session in July 2018, the United Nations Special Rapporteur on Myanmar expressed concern that “the peace process appears to be losing its momentum”, with “ethnic armed organizations” pointing to a failure by the Government and the Tatmadaw to take steps to earn the trust of stakeholders,¹⁰³ and through their blocking of internal consultations by parties to the Conference.¹⁰⁴ Nevertheless, all members of the Federal Political Negotiation and Consultative Committee, who had previously not been

⁹⁹ See 1947 Panglong Agreement (available at https://peacemaker.un.org/sites/peacemaker.un.org/files/MM_470212_Panglong%20Agreement.pdf).

¹⁰⁰ M. Walton, “Nation-Building” in *Routledge Handbook of Contemporary Myanmar*, A. Simpson, N. Farrelly, I. Holliday eds. (London and New York, Routledge, 2018), pp. 393-403.

¹⁰¹ N. Cheesman, “How in Myanmar ‘National Races’ Came to Surpass Citizenship and Exclude Rohingya”, *Journal of Contemporary Asia* (2017), 47:3, pp. 461-483.

¹⁰² Tatmadaw, Directorate of the Public Relations and Psychological Warfare, “Myanmar Politics and the Tatmadaw” (2018), p. 115. Hard copy on file with the Mission.

¹⁰³ A/HRC/37/70, para. 40.

¹⁰⁴ *Ibid.*

invited, were invited to and attended the third session of the Conference. This has been identified as a positive development.¹⁰⁵

2. Place of Buddhism in society

87. According to the 2014 census, 87.9 per cent of the population of Myanmar is Buddhist, 6.2 per cent Christian and 4.3 per cent Muslim.¹⁰⁶ While the Bamar are predominantly Buddhist, many other ethnic groups contain large numbers of non-Buddhists. The 2008 Constitution recognizes the “special position” of Buddhism in Myanmar, while acknowledging other religions.¹⁰⁷

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. The monkhood has acted as a counterpoint where the State is perceived to act against the interests of its people. This is exemplified in the role of the Sangha¹⁰⁸ in opposing colonial rule and, more recently, military rule.

89. Since reforms began in 2011, a vocal component of the monkhood has perceived threats to Buddhist culture and responded through increased nationalist and anti-Muslim rhetoric. Myanmar has witnessed episodes of violence between Buddhists and Muslims across the country, although mainly in Rakhine State. The 969 Movement, led by vocal Buddhist monks, was especially forthright in establishing a narrative in which Muslims sought to “take over” Myanmar through the marriage and conversion of Buddhist women. Perceptions around illegal immigration from Bangladesh and the dominance of local capital by Muslims have also been identified as concerns, notwithstanding that the Muslim population in Myanmar as whole is estimated only at around 4 per cent, and has not drastically increased in recent decades.¹⁰⁹

90. In 2013, the Sangha prohibited the 969 Movement based on its unauthorised use of Buddhist symbolism. While the authority of the 969 group subsequently waned, its ideology was carried forward, notably through a successor group, the Association for the Protection of Race and Religion (known also as “MaBaTha”), established in June 2013 and rising to prominence in January 2014. One of its most prominent and radical leaders is controversial monk Ashin Wirathu.

91. While international attention focused on the group’s anti-Muslim rhetoric, MaBaTha developed widespread grassroots support for its activities, promotion of cultural values and the provision of essential services, including social care, disaster relief, education, legal aid

¹⁰⁵ L. Weng, “All Members of Northern Alliance Invited to Attend Panglong Peace Conference” (The Irrawaddy, 4 July 2018). Previously, only those groups with ceasefire agreements in place had been invited to participate.

¹⁰⁶ According to the 2014 Population and Housing Census, the first census undertaken in Myanmar in three decades, the total population of Myanmar is approximately 51.5 million. The census was controversial as it only allowed participants to identify as belonging to one of 135 officially recognised ethnic groups (under eight major ethnic races: Kachin, Kayah, Karen, Chin, Bamar, Mon, Rakhine and Shan) or as “other”. It did not include “Rohingya” and participants were not allowed to self-identify as such. This led to a significant part of the population in Rakhine State not participating in the count. Widespread fears that the release of data on the ethnic and religious composition of the population would lead to violence, initially led the Government to release the outcome of the census without data on ethnicity and religion. See International Crisis Group, *Update Briefing: Counting the Costs: Myanmar’s Problematic Census* (2014).

¹⁰⁷ Constitution of Myanmar, s. 361-362.

¹⁰⁸ Sangha Maha Nayaka Committee (MaHaNa) is the Government-appointed body that regulates the Myanmar Buddhist clergy.

¹⁰⁹ In 2016, the Government released the census data related to religion. It showed that Buddhism remained the main religion in the country, with 87.9 per cent of the participants identifying as Buddhist in 2014, compared to 89.4 per cent in 1983. 2.3 per cent of the enumerated population identified as Muslim, a drop from 3.9 per cent in 1983. However, the census report noted that, assuming that the entirety of the more than 1 million estimated non-enumerated residents of Rakhine State were Muslim, the percentage of Muslims would increase to 4.3 per cent. The number of Christians rose slightly, from 4.9 per cent in 1983 to 6.2 per cent in 2014.

and dispute resolution at a local level.¹¹⁰ MaBaTha has thus been perceived to be responsive to local community needs and concerns.¹¹¹ Further, the leadership of the MaBaTha is comprised of popular members of the monkhood.

92. On 23 May 2017, the Sangha issued a statement declaring that MaBaTha was not formed in accordance with the Sangha Organization Law and the Sangha Organizational Procedures, that neither the group nor individuals associated with it can use the full Myanmar language name it was using and that all of the organization's signboards across the country had to be taken down.¹¹² On 20 July 2018, the Sangha reportedly banned the Dhamma Wunthanu Rakkhita Association, the successor of MaBaTha, as well.¹¹³ Regardless of their formal status, the narratives spread by these groups have become accepted in many circles across Myanmar.

C. History of human rights violations

93. Today, the Tatmadaw enjoys considerable popularity among the Bamar-Buddhist majority. The violence, particularly the "Rohingya crisis" in Rakhine State, has been used by the military to reaffirm itself as the protector of a nation under threat and to cement its political role further. This is remarkable considering its appalling human rights record and the long struggle of the democracy movement against its rule.

94. During the military dictatorship (1962-2011), Myanmar was considered one of the most repressive countries in Asia. The main concern of the rulers was to maintain power and to attain and preserve "national unity in the face of ethnic diversity". Human rights were "subordinate to these imperatives".¹¹⁴ In 1997, the then United Nations Special Rapporteur on the situation of human rights in Myanmar observed that "the absence of respect for the rights pertaining to democratic governance is at the root of all the major violations of human rights in Myanmar in so far as this absence implies a structure of power which is autocratic and accountable only to itself, thus inherently resting on the denial and repression of fundamental rights".¹¹⁵ Reports of serious human rights violations were pervasive, affecting the entire spectrum of civil, political, economic, social and cultural rights.

95. During Ne Win's rule (1962-1988), reports of serious human rights issues arose largely in two contexts: the suppression of critics and the security forces' operations against insurgencies in ethnic areas. Types of human rights violations frequently reported included the arbitrary deprivation of life (including through excessive use of force), arbitrary detention and torture, sexual violence, forced labour, violations of land and housing rights (including through mass expulsions), and violations of the rights to freedom of expression and peaceful assembly.

96. Following the violent repression of anti-Government protests in 1988 and the 1990 elections, Myanmar became a country of concern at the United Nations. The General Assembly adopted its first resolution on the situation in Myanmar in 1991, noting with concern the "substantive available information indicating a grave human rights situation in Myanmar".¹¹⁶ Similar resolutions were adopted most years thereafter. The Commission on Human Rights created the mandate of Special Rapporteur on the human rights situation in Myanmar in 1992.¹¹⁷ The United Nations Secretary-General appointed a Special Envoy to

¹¹⁰ International Crisis Group, *Buddhism and State Power in Myanmar* (2017).

¹¹¹ M. Walton, "Misunderstanding Myanmar's Ma Ba Tha" (Asia Times, 9 July 2017).

¹¹² *Ibid.*

¹¹³ The Irrawaddy, "Nationalists Rally in Yangon to Denounce New Ban on Ma Ba Tha" (13 August 2018).

¹¹⁴ C. Renshaw, "Human rights under the new regime", in *Constitutionalism and Legal Change in Myanmar*, A. Harding, K.K. Oo, eds. (Oxford and Portland, Hart Publishing, 2017), pp. 215 and 218.

¹¹⁵ E/CN.4/1997/64, para. 102.

¹¹⁶ A/RES/46/132

¹¹⁷ E/CN.4/RES/1992/58

231. In nearly all accounts, Tatmadaw soldiers were identified as the perpetrators of arbitrary arrests and detention.⁴⁰⁵ The Mission also received credible accounts of militias participating in arrests and detention alongside members of the Tatmadaw.⁴⁰⁶ Accounts were also received of the SaYaPa intelligence officers being responsible.⁴⁰⁷

Lack of compliance with procedural safeguards

232. The Mission amassed a consistent body of information drawing a pattern of civilians being detained in locations not officially recognised as places of detention, both in the context of forced labour and because they were suspected of links with ethnic armed organizations. Detained individuals were often kept in military bases or camps,⁴⁰⁸ sometimes in makeshift lock ups,⁴⁰⁹ and in SaYaPa offices.⁴¹⁰ Other places of detention included houses⁴¹¹ and monasteries⁴¹² or in multiple locations in forest areas for example during forced labour portering.⁴¹³ In some cases, victims were initially held in the location where they were arrested and then moved to military camps or SaYaPa offices.⁴¹⁴

233. The Tatmadaw also systematically detained individuals in these unofficial places of detention without compliance with procedural safeguards. Victims consistently told the Mission they were not informed of the reasons for their arrest.⁴¹⁵ For example, a female victim reported how she was arrested, together with her two children, without being given reasons, in Mogaung Township, Kachin State, in August 2017:

*There was fighting between the Tatmadaw and the KIA. We ran away and when we came back to the village there were soldiers everywhere. I was arrested with my two children. I was taken to a primary school and put in a classroom with a guard. They did not give us any reasons, they just locked us in all day. In the evening they took us to the forest, and two days later they let us go.*⁴¹⁶

234. Most victims were held incommunicado without being able to inform their families of their location, had no access to a lawyer and were not brought before a court.⁴¹⁷

235. In some cases, individuals arrested and detained for suspected links to armed groups were eventually brought to court and charged, usually under the Unlawful Associations Act.⁴¹⁸ However, in these instances this was after a period of being detained incommunicado in unofficial places of detention.⁴¹⁹ For example one individual from Waingmaw Township, Kachin State, reported how her relative was arrested and held on a farm before being transferred to a Police Station:

In 2016, my relative was on the way to farm crops when he was arrested by the Tatmadaw. A friend told me they saw him tied-up with guns pointed at him. The soldiers were saying that he was a member of the KIA and my brother was denying this. The soldiers asked for 3,000 Kyat in exchange for his release. We tried to gather the money but they said it was taking too long so they took him to a farm nearby. Then

⁴⁰⁵ PI-006, PI-011, PI-020, PI-021, PI-026, PI-062, PI-068, PI-074, PI-089, PI-096.

⁴⁰⁶ PI-054, PI-056, SI -004.

⁴⁰⁷ PI-052, PI-055, PI-056.

⁴⁰⁸ DI-067, DI-058, DI-060, PI-006, PI-020, PI-061, PI-062, PI-066, PI-067, PI-068, PI-078, PI-079, PI-084.

⁴⁰⁹ DI-064, PI-011.

⁴¹⁰ PI-052, PI-055, PI-056.

⁴¹¹ PI-053, PI-075, SI-004.

⁴¹² PI-056, PI-074, PI-076, PI-111.

⁴¹³ PI-047, PI-080, PI-085, PI-095, PI-096.

⁴¹⁴ PI-035, PI-052, PI-056.

⁴¹⁵ PI-011, PI-019, PI-047, PI-054, QI-080.

⁴¹⁶ PI-047.

⁴¹⁷ DI-067, PI-006, PI-035, PI-044, PI-077, PI-080.

⁴¹⁸ See this chapter, section A.C: Lack of recourse.

⁴¹⁹ PI-022, PI-052, PI-055, PI-056, PI-109.

*he was moved to a district police station and held there for one month. Now he is in prison.*⁴²⁰

236. The Mission received information that, in some instances, individuals, including children, who were transferred to recognised places of detention were still not afforded full procedural safeguards, including:

- not being provided with information about the charges against them in a language which they understand;⁴²¹
- being held incommunicado; and⁴²²
- being denied access to legal counsel until after their hearing.⁴²³

237. The Mission received accounts of Tatmadaw soldiers or SaYaPa officers forcing victims to sign pre-written statements during detention. Victims reported different issues in relation to these statements, including not being aware of the contents of the written statement or document;⁴²⁴ the statements wrongly asserting the individual had not been subject to ill-treatment;⁴²⁵ or the statements being admissions of guilt.⁴²⁶ For example, one victim from a village in Kyaukme Township, Shan State, who was arrested in August 2017 and held for more than 24 hours, was made to sign a document with his thumb which stated that he was “the enemy”, was involved in political activities and would “not be involved with political activities in the future”.⁴²⁷

Detention in inhuman conditions

238. Victims consistently gave accounts of inhuman conditions in unofficial places of detention which could amount to ill-treatment⁴²⁸ including being held for periods:

- in inadequate accommodation, including in the open air without bedding;⁴²⁹
- without access to adequate sanitary facilities;⁴³⁰
- without adequate food being provided, including being denied food,⁴³¹ receiving insufficient food or food of poor quality;⁴³²
- without access to safe drinking water when needed, including being denied access to water entirely or being allowed only a limited amount or only water that is unsafe;⁴³³ and
- without access to health care,⁴³⁴ in one account leading to death.⁴³⁵

239. For example, a male victim from a village in Puta-O Township, Kachin State, who was detained for six days in 2017 reported poor conditions and his friend dying in detention:

I was arrested by the Tatmadaw during a church festival with nine other people. We had to carry rice between a military base and our village. We were given only a small portion of hard rice to eat each day and felt hungry all the time. We could only drink one cup of water per day and were not allowed to drink from the stream nearby. One

⁴²⁰ PI-022.

⁴²¹ V-055.

⁴²² PI-052 V-118.

⁴²³ V-055, V-112.

⁴²⁴ PI-046, PI-056.

⁴²⁵ PI-044.

⁴²⁶ PI-035, PI-052.

⁴²⁷ PI-035.

⁴²⁸ See this chapter, section A.3: Torture and other ill-treatment.

⁴²⁹ DI-058, DI-060, PI-079, PI-095.

⁴³⁰ DI-058, DI-060, PI-109.

⁴³¹ DI-060, PI-038, PI-096.

⁴³² DI-058, DI-060, PI-019, PI-020, PI-044, PI-080, PI-083, PI-085, PI-092, PI-095.

⁴³³ DI-060, PI-019, PI-020, PI-077, PI-083, PI-084, PI-085, PI-095.

⁴³⁴ PI-035, PI-077, PI-080.

⁴³⁵ PI-077.

*a senior officer would come and ask if we had something to say about the training. I was always beaten because I wanted to go home and because I was the youngest.*⁸⁰⁴

(g) Sexual and gender-based violence

370. One incident of sexual violence concerning perpetrators belonging to an EAO was reported by a source and involved the rape of a headmistress by several TNLA officers at her home in Kyaukme Township, Shan State in October 2017. Following the victim's report to local authorities, the TNLA negotiated for the perpetrators to pay compensation to the victim, and brought two soldiers to kneel and apologize to her. The TNLA held a "court case" in the forest to address the crime. The victim was invited, but chose not to attend.⁸⁰⁵ The Mission also received unverified reports of KIA men raping women in Kachin State during the reporting period who were subsequently tried before courts in KIO controlled territory.⁸⁰⁶ These allegations require further verification.

(h) Killings

371. The Mission has also obtained credible but unverified information suggesting that some EAOs have unlawfully killed civilians or fighters *hors de combat* in their custody.⁸⁰⁷

372. For example, the Mission recorded an account of the Shan Army⁸⁰⁸ killing a Lahu man in 2011 in Maungdaw Township, Shan State. According to the witness, the victim, a former Tatmadaw soldier, was mutilated and tortured before being killed.⁸⁰⁹ In February 2016, it was reported that an unspecified ethnic armed group killed seven civilians in Kyaukme Township, Shan State. The bodies were found by the Tatmadaw the day after their abduction.⁸¹⁰ In March 2016, the UWSA reportedly executed two persons after they were convicted of murder by the Wa Special Administrative Zone's court.⁸¹¹ A further reported case suggests that SSA-S men killed a Ta'ang villager in Namkham Township, Shan State, on 1 July 2016.⁸¹² Similarly, it was reported that TNLA men killed four villagers in the forest near a village of Namkham Township, Shan State, on 8 February 2016.⁸¹³

373. These cases require further verification, including regarding the protected status of the persons killed.

C. Impact of conflict, violations and abuses on civilians

1. Fear, trauma, displacement and humanitarian impact

374. Irreversible harm has been inflicted on civilians by all parties to the conflicts in northern Myanmar: civilians were killed and injured; families were separated and displaced multiple times; homes, churches and schools were looted or destroyed, also preventing many children from attending school regularly;⁸¹⁴ and entire villages were burned and destroyed. The civilian population continues to live in constant fear and terror of an army that has thoroughly failed to protect them, and in many instances directly attacked them.

375. Victims have informed the Mission of how their lives have been altered as a consequence of the perpetration of human rights violations. Victims remain highly traumatised.⁸¹⁵ For example, a source mentioned that children are afraid of opening doors and

⁸⁰⁴ PI-014.

⁸⁰⁵ PI-110.

⁸⁰⁶ K-145.

⁸⁰⁷ K-143, QI-077.

⁸⁰⁸ Unclear if Shan State Army-S (RCSS) or Shan State Army-N (SSPP).

⁸⁰⁹ QI-077.

⁸¹⁰ K-143.

⁸¹¹ K-143, V-305.

⁸¹² K-137.

⁸¹³ K-144.

⁸¹⁴ PI-087, DI-067, PI-016.

⁸¹⁵ PI-042, PI-103.

hide when they see or hear planes.⁸¹⁶ Other victims are no longer able to work to sustain a livelihood.⁸¹⁷ For instance, a tea plantation farmer explained that she can no longer work on her plantation after she was injured from shrapnel and bullet wounds on her leg and arm during a Tatmadaw attack in northern Shan State on 2 May 2017. She remained hospitalised for several weeks and she can hardly move. Her husband has since become a monk and her only income is from the work undertaken by her children. Their house was also destroyed during the attack and they now live in a rented home.⁸¹⁸ A torture victim shared that since an incident in northern Shan State in August 2017, and because of injuries inflicted by Tatmadaw soldiers, he can no longer work and sustain his family: “The Tatmadaw soldiers tortured me and destroyed my life”.⁸¹⁹ Other torture and ill-treatment victims have stated that they suffer from severe trauma, cognitive dysfunction, and other mental and physical consequences that require medical care.⁸²⁰

376. Many victims reported that it had been extremely challenging to obtain medical services to treat their injuries, and some have felt compelled to travel to China to seek medical attention.⁸²¹ Victims have also reportedly died because of the lack of timely medical care.⁸²² For example, a victim from the Monekoe area in Shan State reported that on 15 January 2016 a mortar shell exploded in her compound, close to a main road, causing injuries to herself and her daughter:

*The shell pieces are still in our bodies. My daughter is not normal now. She doesn't respond to me sometimes. When I was in the hospital, doctors didn't take the shell pieces out of my body because it was too risky. Doctors said it might harm the baby as I was already 8 months pregnant then. I had to have a surgery to deliver my baby because my whole body was swollen.*⁸²³

377. Victims and witnesses' accounts indicate the Tatmadaw frequently went to the villages of individuals who had escaped detention or forced labour looking for them,⁸²⁴ and in some cases beat family members of the escaped individual.⁸²⁵ For example, one victim from Myitkyina, Kachin State, who was arrested and detained overnight in 2012 and whose brother was killed by the Tatmadaw during this detention, reported that after he escaped detention and fled the country, the Tatmadaw went to his village to look for him. His parents and siblings were afraid to stay in the village so they fled to an IDP camp.⁸²⁶ Another victim from Myitkyina, Kachin State reported how, as retaliation for her escape after several months of forced labour in 2012, her house was destroyed and her mother beaten, and made to undertake forced labour for the Tatmadaw.⁸²⁷

378. An estimated 97,000 people in Kachin and 9,000 people in Shan remain in displacement camps or camp-like situations, many in overcrowded conditions with inadequate shelters, which are in urgent need of repair and provide little privacy. Many of them have been displaced for extended periods of up to seven years. Displaced peoples, particularly in non-government controlled areas, have told the Mission that the quality of education afforded in camps is poor and not recognized by the authorities to attain higher education.⁸²⁸ Meeting food needs is, in the words of one local organization working in these camps “a constant struggle”, with limited food rations and a rate of chronic malnutrition well above the national average.⁸²⁹ Access to health care remains limited, and psycho-social

⁸¹⁶ PI-103.

⁸¹⁷ PI-042, PI-046, PI-072.

⁸¹⁸ PI-073.

⁸¹⁹ PI-035.

⁸²⁰ PI-021, PI-035, PI-115.

⁸²¹ PI-029, PI-055, PI-065, DI-057.

⁸²² DI-070, PI-105.

⁸²³ PI-115.

⁸²⁴ PI-066, PI-067, PI-077, PI-078.

⁸²⁵ PI-007, PI-068.

⁸²⁶ PI-062.

⁸²⁷ PI-068.

⁸²⁸ PI-087, QM-014.

⁸²⁹ PI-056.

support is largely non-existent. Insecurity levels in camps are high and many displaced persons have a sense of despair for the future.⁸³⁰ Thousands of others, approximately 68,000 since 2017 alone, have suffered from temporary displacements over the reporting period. Some of these individuals have been displaced multiple times.

379. Many families have been separated because of the war and many do not have contact with family members left behind.⁸³¹ For example, a woman explained that she was separated from her child while fleeing a Tatmadaw attack on her village in November 2017 in Kachin State and had not seen her since.⁸³²

380. Victims frequently told the Mission that after being released or escaping from detention they were too afraid to return to their villages,⁸³³ in particular if the Tatmadaw had taken their identification documents.⁸³⁴ Many victims decided to leave the country,⁸³⁵ and in some cases family members also had to leave.⁸³⁶ Leaving Myanmar also impacted victims that fled and family members left behind. A man said that his aunt had to mortgage her land to pay for his trip to Malaysia, after he had escaped arbitrary detention by the Tatmadaw.⁸³⁷

381. Civilians continually suffer as a consequence of the continuing conflicts between the Tatmadaw and the EAOs.⁸³⁸ Many express a feeling of being caught in the middle: for example, one witness mentioned that, “villagers want nothing to do with this, all they want is to live in peace and farm their land. Instead we are caught in between so many wars.”⁸³⁹ Another stated that, “it is very difficult to live in the KIA controlled area. It is also very hard to live under the Tatmadaw controlled areas. Why can’t we live in peace?”⁸⁴⁰

(a) Consequences on women

382. The consequences for women, especially for those who lost their spouse or fathers as a result of attacks, killings or whose husbands were forcibly disappeared, are particularly severe.⁸⁴¹ Many face a dire economic situation having lost the main breadwinner of the family, and are vulnerable to other violations, including sexual and gender-based violence. The mother of a victim killed by the Tatmadaw in June 2017 in Namhsan Township, Shan State, stated the following:

*Before my son died, we relied on him to pay for medicine and food as we are aged. Now without him it is very difficult to survive, and our life is very hard now. I live with my husband, but he is also old. There is no one else to care for us anymore.*⁸⁴²

383. Another woman recalled the impact of the disappearance of her husband in Kachin State in 2014:

*I became the head of the household. My children lost their father, and I had to find income to maintain my children and my aging parents. I had to start selling vegetables and to travel from one village to another. That is where Tatmadaw soldiers raped me in February 2018. Ever since my husband was taken away by the Tatmadaw, we have been struggling for survival. I decided to leave my children in Kachin State with my elderly parents so I can work abroad and ensure they stay alive.*⁸⁴³

⁸³⁰ QM-014, QM-017.

⁸³¹ PI-020, PI-027, PI-074, PI-084, PI-086.

⁸³² PI-086.

⁸³³ PI-089, PI-085, PI-084, PI-079, PI-078.

⁸³⁴ PI-011, PI-029.

⁸³⁵ PI-062, PI-033, PI-029, PI-006.

⁸³⁶ PI-001, PI-008, PI-012, PI-027, PI-062, PI-096, QI-089.

⁸³⁷ PI-079.

⁸³⁸ PI-044, PI-074, PI-095, PI-094, PI-097, QI-077, QI-079, QI-080, QI-087.

⁸³⁹ PI-094.

⁸⁴⁰ PI-044.

⁸⁴¹ PI-070, PI-073, PI-074.

⁸⁴² PI-074.

⁸⁴³ PI-069; see this chapter, section A.4: Sexual and gender-based violence.

384. The impact of sexual and gender-based violence on women and men reported to the Mission is severe, varied and long-lasting. The Mission found one case of rape that resulted in death caused by contracting HIV.⁸⁴⁴ Other injuries reported by women included experiencing pain in the vagina and lower abdomen region during sexual intercourse.⁸⁴⁵ Similarly, men who experienced sexual torture in detention continue to suffer enduring physical and psychological injuries, including bleeding from the anus, loss of cognitive function, loss of emotional control, loss of erectile function and inability to work.⁸⁴⁶

385. The lack of specific medical expertise related to rape exacerbates the effects of sexual violence in the region. As victims are predominantly women, this creates gender-based inequality in access to medical services. In several cases, women did not have the access to medical attention and women have fallen pregnant, sometimes even after seeing a doctor immediately after the rape, because they were not given medication to prevent pregnancy.⁸⁴⁷ A 2017 report by the United Nations Special Rapporteur on the situation of human rights in Myanmar had also found that the limited capacity of providers, as well as restrictions on women's freedom of movement due to increased militarization, limited access to life-saving services for survivors of sexual and gender-based violence.⁸⁴⁸

2. Landmines

386. There is no systematic nationwide collection of casualty data related to landmines, but across Myanmar at least 1,000 people have been killed or injured by anti-personnel landmines since August 2011 across 14 states and regions.⁸⁴⁹ Of the recorded incidents in recent years, Kachin and Shan States have among the highest number of landmine casualties, and numbers are increasing.⁸⁵⁰ For example, from 2016 to April 2018, the United Nations recorded 199 casualties in Kachin State including 42 deaths, and 182 casualties in Shan State, including 48 deaths.⁸⁵¹ Despite the signing of the Nationwide Ceasefire Agreement in October 2015, which committed all parties to end the use of landmines and cooperate on mine-clearance operations, new landmines continue to be laid.⁸⁵²

387. Several victims and witnesses reported instances where civilians were injured or killed due to landmines.⁸⁵³ Individuals informed encountering landmines in forest areas, either while detained by the Tatmadaw or while fleeing fighting,⁸⁵⁴ while travelling to their tea plantations or farm,⁸⁵⁵ and in or around villages.⁸⁵⁶ The Mission was unable to verify the party responsible for laying the mines in these cases, but credible reports indicate that both the Tatmadaw and EAOs have laid landmines.⁸⁵⁷ Credible reports indicate that Tatmadaw soldiers lay landmines in villages they have attacked or after civilians have fled, or on roads frequently used by civilians.⁸⁵⁸ Civilians have also laid landmines in order to protect their property.⁸⁵⁹

⁸⁴⁴ PI-007.

⁸⁴⁵ PI-063, PI-068.

⁸⁴⁶ PI-052, PI-055, PI-056.

⁸⁴⁷ PI-066, PI-067, PI-068, PI-069, QI-098.

⁸⁴⁸ A/HRC/34/67, para. 56.

⁸⁴⁹ Myanmar Information Management Unit, *Townships with Known Landmine Contamination (2017) and Casualties in Myanmar* (December 2016).

⁸⁵⁰ Ibid. K-064, V-306, V-307.

⁸⁵¹ K-064.

⁸⁵² V-308.

⁸⁵³ PI-103, PI-104, PI-094, PI-085, PI-046, PI-045, DI-061, PI-076.

⁸⁵⁴ PI-016, PI-104, PI-085, PI-046, PI-045. See also this chapter, section A.6: Forced labour.

⁸⁵⁵ PI-016, PI-094.

⁸⁵⁶ DI-061, QI-094, PI-046, PI-098.

⁸⁵⁷ K-137, K-144, PI-045, PI-049, PI-094, PI-098, SI-003, V-309.

⁸⁵⁸ PI-045, PI-049, PI-094, PI-098, SI-002, SI-003.

⁸⁵⁹ PI-085; G. Cathcart, "Landmines as a form of community protection in Eastern Myanmar", in *Conflict in Myanmar: War, Politics, Religion*, 2nd ed., N. Cheesman, N. Farrelly, eds. (ISEAS, 2016), pp. 127-131.

455. The forced and compulsory labour imposed by the Tatmadaw against the ethnic Rakhine is widespread, in violation of Myanmar's obligations under international labour law and international human rights law. The documented cases show that the work is exacted under the menace or use of physical force and (death) threats. Victims have no free choice and cannot but comply. The types of work consistently described to the Mission, and the circumstances of their imposition, cannot be construed as minor communal services that are permissible under international law. The Tatmadaw bully, force and coerce villagers into submission. This is further manifested in the numerous forced evictions and the total disrespect for villagers' property rights. Tatmadaw soldiers take anything they want, when they want. In doing so, they further push ethnic Rakhine villagers and their families into economic hardship and poverty. The level of arbitrariness and abuse of power on the part of the Tatmadaw is astounding.

456. Such conduct is a catalyst for numerous other human rights violations, including the arbitrary deprivation of life, arbitrary arrest and detention, sexual and gender-based violence, and other forms of severe ill-treatment.¹⁰¹⁷ Such violations are often linked to attempts at escape, protest, or the inability to pay bribes.

457. The Mission is further concerned about additional information received, pointing at other violations, including of the rights to education, health, culture, freedom of expression, freedom of peaceful association and assembly, and freedom of religion. However, the information on these allegations is insufficient to make findings at this stage.

B. Systemic oppression and persecution of the Rohingya

*In Rakhine State, Muslims are like in a cage, they cannot travel outside. There are no human rights for the Muslims of Rakhine. I don't know why God sent us there.*¹⁰¹⁸

458. 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.

459. The cornerstone of this system of oppression is the lack of legal status of the Rohingya. This is compounded by restrictions affecting their movement, subsistence and development, and numerous other human rights violations. The life of Rohingya in Rakhine State has gradually become more and more untenable.

1. Denial of legal status and identity

460. The Myanmar authorities consistently and vocally assert that "there are no Rohingya in Myanmar". They object to the use of the name "Rohingya", call the group "Bengali", and argue that the Rohingya do not belong in Myanmar. They are not considered a "national race" and often referred to as "illegal immigrants" from Bangladesh. This was not always the case. Successive laws and policies regulating citizenship and legal status have become increasingly exclusionary in their formulation, and arbitrary and discriminatory in their application. Today, the overwhelming majority of Rohingya are *de facto* stateless, without proof of legal status or identity.

(a) Denial of birth certificates

461. Legal identity starts with a birth certificate: it provides legal recognition to a child. According to article 7 of the Convention on the Rights of the Child, all children have the right to be registered immediately after birth. Access to registration must not be undermined by discrimination of any kind, including on the basis of the child's or the child's parents' race, colour, sex, language, religion, political or other opinion, national, ethnic or social

¹⁰¹⁷ CI-057, CI-059, CI-061, CI-157, CI-162, DI-014, DI-029, QI-072, QI-073.

¹⁰¹⁸ DI-007.

origin, property, disability, birth or other status. All children should have access to birth registration in the country where they are born, including non-nationals and stateless children.¹⁰¹⁹

462. In Myanmar, there is a multiplicity of laws and procedures related to birth registration. The system is administered by several Ministries, making procedures complex and difficult to navigate, especially for the Rohingya.¹⁰²⁰ According to article 9 (b) of the Myanmar 1993 Child Law, “parents and guardians shall register the birth of the child in accordance with the law”. The 1982 Citizenship Law contains a similar requirement but is only applicable to “citizens born inside and outside the State”, and carries punitive measures for parents or guardians who fail to register their children. Failure to register a birth on time is also subject to criminal penalties under the Ward or Village Tract Administration Law.

463. According 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.¹⁰²¹ Since then, the only “registration” of birth for Rohingya children in northern Rakhine is their inclusion in the so-called “household list”.¹⁰²² Such inclusion is a pre-requisite for obtaining identity documents, travel authorizations, marriage permissions, and enrolment in most government schools. Upon the request of parents, the village administrator or the “representative person from the village tract” can issue a “certificate of proof of birth”.¹⁰²³ The cost of this procedure varies from one location and one family to another. Parents must then approach the immigration authorities and request that their household list be updated, paying another arbitrary fee.¹⁰²⁴ One interviewee from Buthidaung stated:

*The Rohingya need to pay a large amount of money for receiving a certificate of proof of birth and include new born babies in the family list. The amount appears to vary from case to case. There is no written rule. The authorities made up all these rules only for the Rohingya in northern Rakhine State.*¹⁰²⁵

464. An interviewee from Maungdaw explained how cumbersome this procedure is given the restrictions on movement and the risks associated with not updating the household list on time:

*After the birth of my first daughter, I went to the village administrator and gave him 15,000 Kyat to send someone from his office to convey the message to the NaSaKa about my daughter’s birth and to ask for her to be included on the household list. I could not go to the checkpoint myself because of the unavailability of transportation and the need for travel permission. I thought the village administrator had taken action to include my daughter on the list. A few days later, the authorities came to my village to check the family lists. They saw my daughter but she was not on the list. I had to give them 50,000 Kyat. I managed to gather the money with the help of others. Otherwise, I would have been imprisoned for six months.*¹⁰²⁶

465. In December 2015, a new procedure targeting Rohingya children was outlined in a document setting out requirements for “birth list insertion of children from Bengali ethnics in household population list”. According to credible reports, these additional administrative requirements have further slowed down the process. As a result, only a small number of new-

¹⁰¹⁹ See A/HRC/27/22, para. 11.

¹⁰²⁰ K-063.11. Myanmar’s birth registration system differs by geographical area and the following Ministries have reportedly acquired parallel competences: Ministry of Immigration and Population; Ministry of Home Affairs; Ministry of Health; and Ministry of National Planning and Economic Development. Since 2012, village administrators were also attributed responsibilities.

¹⁰²¹ K-063.10, K-063.11.

¹⁰²² See this chapter, section B.5.b: Restrictions related to household lists.

¹⁰²³ K-063.11.

¹⁰²⁴ CI-061, CI-082, CI-094, DI-001, K-063.10.

¹⁰²⁵ CI-061.

¹⁰²⁶ CI-094.

borns were added to household lists in 2016, with inconsistent implementation from one area to another and reported cases of applications being rejected.¹⁰²⁷

466. Some Rohingya children were added to a separate “black-listed children form” or “illegitimate children form”. This included children whose parents had not received official marriage permission, children whose parents were not present at the household list updating exercise, adopted children, and children born in contravention of the local order limiting the number of children in Rohingya families to two. In April 2013, it was assessed that there were 5,111 “black-listed” children.¹⁰²⁸ It is believed that the number of children who were placed on these “black lists” is much higher.

467. The registration of new-borns in the household list has not been undertaken consistently, and as a consequence the number of unregistered Rohingya children in Rakhine State remains unknown. Estimates suggest that almost half of the children in Rakhine State remain unregistered.¹⁰²⁹

468. The interim report of the Advisory Commission on Rakhine State included a recommendation to the Government to “roll out a comprehensive birth registration campaign - with door-to-door visits carried out by mobile teams - in order to reach all children”.¹⁰³⁰ In July 2017, the Special Rapporteur on the situation of human rights in Myanmar stated that she had been informed by the authorities of efforts to improve birth registration in line with the interim recommendations from the Advisory Commission. She welcomed the issuance of over 20,000 birth certificates in Rakhine State.¹⁰³¹ The Mission is not aware of further details regarding the issuance of these or any other birth certificates in relation to the interim recommendations. In its report on implementation (January to April 2018) the Committee for Implementation of the Recommendations on Rakhine State did not make any reference to the issuance of birth certificates for Rohingya children.¹⁰³²

(b) Denial of citizenship

469. Legal status and identity is further determined by citizenship. The right to a nationality has been described as the “right to have rights”.¹⁰³³ It is of vital importance to the realization of all other human rights and is recognised and protected in a series of international legal instruments,¹⁰³⁴ most of which apply to Myanmar. The prerogative of States to decide who their nationals are is not absolute. States must comply with their human rights obligations concerning the granting and loss of nationality.¹⁰³⁵

470. The right to a nationality implies the right of each individual to acquire, change and retain a nationality. International human rights law explicitly prohibits the arbitrary deprivation of nationality. In order not to be arbitrary, denial of access to a nationality must be in conformity with domestic law and standards of international law, in particular the principle of proportionality. States have the obligation to ensure that all persons enjoy the

¹⁰²⁷ K-063.12, K-076.

¹⁰²⁸ K-063.10.

¹⁰²⁹ See Advisory Commission on Rakhine State, *Interim Report and Recommendations* (March 2017), p. 12; see also: CRC/C/MMR/CO/3-4, para. 43 and 44(d).

¹⁰³⁰ *Ibid.*

¹⁰³¹ Yanghee Lee, United Nations Special Rapporteur on the situation of human rights in Myanmar, “End of mission statement” (21 July 2017).

¹⁰³² Committee for Implementation of the Recommendations on Rakhine State, *Report to the People on the Progress of Implementation of the Recommendations on Rakhine State - January to April 2018*.

¹⁰³³ See for example, S. DeGooyer, A. Hunt, et al., *The Right to Have Rights* (Verso, London, 2018). The fundamental nature of the right to a nationality has been consistently reaffirmed by the United Nations General Assembly (for example, A/RES/50/152) and the United Nations Human Rights Council (for example, A/HRC/RES/7/10; A/HRC/RES/10/13; A/HRC/RES/13/2; A/HRC/RES/20/5; A/HRC/RES/26/14).

¹⁰³⁴ UDHR (art. 15), ICCPR (art. 24), CRC (art. 7), ICERD (art. 5), CEDAW (art. 9), CRPD (art. 18), ICPRM (art. 29), ASEAN Declaration (art. 18).

¹⁰³⁵ See A/HRC/13/34, para. 57.

right to nationality without discrimination of any kind, and that no one is denied or deprived of their nationality based on discriminatory grounds.¹⁰³⁶

471. Deprivation of nationality resulting in statelessness will generally be arbitrary, unless it serves a legitimate purpose and is proportional.¹⁰³⁷ States should ensure that nationality is not denied to persons with relevant links to that State who would otherwise be stateless.¹⁰³⁸ This is particularly so for children. While States are not obliged to grant nationality to every child born in their territory, they are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he or she is born.¹⁰³⁹ One such measure is the conferral of nationality to a child born in the State if they would otherwise be stateless.¹⁰⁴⁰ Decisions regarding the acquisition, retention or loss of nationality must also meet minimum procedural standards, for example, issued in writing and open to effective administrative or judicial review.¹⁰⁴¹ The statelessness of a person resulting from the arbitrary deprivation of his or her nationality cannot be invoked by States as a justification for the denial of other human rights.¹⁰⁴²

Historical background

472. The current citizenship status of the Rohingya can only be understood in a historical context.¹⁰⁴³ The 1947 Constitution and the 1948 Union Citizenship Act of the newly independent Myanmar provided a relatively inclusive citizenship framework.¹⁰⁴⁴ In addition to citizenship based on ethnicity, section 4(2) of the Union Citizenship Act provided that “any person descended from ancestors who for two generations at least have all made any of the territories included within the Union their permanent home and whose parents and himself were born in any of such territories shall be deemed to be a citizen of the Union”.¹⁰⁴⁵ Additionally, section 7 provided that a person could apply for citizenship if they were 18 years, resided in the country for at least five continuous years, and intended to reside in the country. As such, most long-term residents fulfilled the criteria, regardless of whether they belonged to one of Myanmar’s “indigenous races”.¹⁰⁴⁶

473. Most Muslims who then lived in what currently constitutes Rakhine State were therefore included, whether their ancestry could be traced to pre-colonial times, or whether they were colonial-era migrants from the region. Additionally, there are strong indications that at the time the Myanmar authorities accepted the Rohingya as an “indigenous group”. Both Prime Minister U Nu, and Sao Shwe Thaik, the country’s first President, are reported to have referred to the Rohingya as an indigenous group of Myanmar, with U Nu referring to the Rohingya by name in a 1954 radio address, as “... our nationals, our brethren”.¹⁰⁴⁷

474. Citizens were required to register, after which a National Registration Card (NRC) was issued. At the end of 1960, the Government reportedly claimed to have issued 18 million

¹⁰³⁶ A/HRC/13/34, paras. 21, 29, 57-58.

¹⁰³⁷ A/HRC/13/34, para. 59.

¹⁰³⁸ A/HRC/13/34, para. 36; see also 1961 Convention on the Reduction of Statelessness (although not ratified by Myanmar).

¹⁰³⁹ CRC, art. 7; United Nations Committee on the Rights of the Child, *General Comment No. 11: Indigenous children and their rights under the Convention*, 12 February 2009, CRC/C/GC/11; United Nations Human Rights Committee, *General Comment No. 17: Rights of the child* (Art. 24), 7 April 1989.

¹⁰⁴⁰ A/HRC/13/34, para. 60; A/HRC/31/29, para. 10.

¹⁰⁴¹ A/HRC/13/34, para. 43.

¹⁰⁴² See for example, A/HRC/RES/32/5.

¹⁰⁴³ The Mission has relied on credible secondary sources to summarise the relevant historical context.

¹⁰⁴⁴ 1947 Constitution, s. 11.

¹⁰⁴⁵ The 1948 Union Citizenship Act lists a range of other pathways to citizenship not reproduced here, including several non-automatic modes of acquiring citizenship (for example, naturalisation).

¹⁰⁴⁶ Defined as “the Arakanese, Burmese, Chin, Kachin, Karen, Kayah, Mon or Shan race and such racial group as has settled in any of the territories included within the Union as their permanent home from a period anterior to 1823 A. D. (1185 B.E.)”, see 1948 Union Citizenship Act, s. 3(1).

¹⁰⁴⁷ E.g. M. Haque, “Rohingya Ethnic Muslim Minority and the 1982 Citizenship Law in Burma”, *Journal of Muslim Minority Affairs*, 37:4 (2017), pp. 454-469.

NRCs, nearly the entire population at the time.¹⁰⁴⁸ Temporary Registration Cards (TRCs), known as “white cards”, were issued in case of loss, damage or pending application for the NRC. Although NRCs or TRCs were not intended to be citizenship certificates, in reality they served as such.

475. At the start of General Ne Win’s regime, the citizenship legal framework remained unchanged. The 1974 Constitution also did not alter the definition of “citizen” significantly. All Rohingya who were citizens during the 1948-1962 period were still to be considered citizens. However, in practice, the narrative that most Muslims in Rakhine State were illegal Bengali immigrants took root, in the context of an increasing emphasis on the importance of “national races” and the need to deport alleged aliens.¹⁰⁴⁹ In 1978, the Tatmadaw and immigration officials implemented a nationwide project called “Operation Dragon King” to register all citizens and aliens ahead of a national population census. Its implementation in Rakhine State led to more than 200,000 Rohingya fleeing to Bangladesh, amid allegations of serious human rights violations. The Government claimed that the number of Rohingya escaping from scrutiny was an admission of their illegal status. However, analysis suggests that the number of alleged illegal immigrants identified was very low.¹⁰⁵⁰ The Government agreed with Bangladesh to repatriate the “lawful residents of Burma who are now sheltered in the camps in Bangladesh”.¹⁰⁵¹ Nearly all refugees returned to Myanmar.

476. In this context General Ne Win initiated a review of the country’s citizenship laws. He argued that citizenship under the civilian government had been poorly administered, often wrongly attributed, and leaving many people in legal limbo.¹⁰⁵² He acknowledged that many people had lived in Myanmar for long and that the government was “not in a position to drive away all those people who had come at different times for different reasons from different lands”. However, he added that “leniency on humanitarian grounds cannot be such as to endanger ourselves”, and there should be a system based on “three classes of citizens”, with full citizenship reserved for “pure-blooded nationals”. The two other classes were for people who “cannot be trusted fully” and who would therefore not receive “full citizenship and full rights”. From the statement, it is clear that the people targeted included Muslims and Chinese.

Current citizenship regime

477. The 1982 Citizenship Law marked a further step towards an exclusively “ethnic” concept of citizenship.¹⁰⁵³ Together with the implementing regulations (the 1983 Procedures), the law created a citizenship framework with three distinct categories (or “classes”) of citizens:

- Full citizenship is primarily reserved for “national ethnic groups ... such as the Kachin, Kayah, Karen (Kayin), Chin, Burman (Bamar), Mon, Arakan (Rakhine) or Shan and ethnic groups who settled in Myanmar before 1823”.¹⁰⁵⁴ The law further states that “the Council of State may decide whether any ethnic group is national or

¹⁰⁴⁸ Nyi Nyi Kyaw, “Unpacking the Presumed Statelessness of Rohingyas”, *15(3) Journal of Immigrant & Refugee Studies* (2017), p. 276.

¹⁰⁴⁹ Other groups were also considered “foreign”, including Indians and Chinese. N. Cheesman, “How in Myanmar ‘National Races’ Came to Surpass Citizenship and Exclude Rohingyas”, *Journal of Contemporary Asia*, Volume 47, 2017 - Issue 3, pp. 461-483.

¹⁰⁵⁰ See analysis in Nyi Nyi Kyaw, “Unpacking the Presumed Statelessness of Rohingyas”, *15(3) Journal of Immigrant & Refugee Studies* (2017), pp. 274-275, where the author quotes several State officials and State-run media indicating that the numbers of illegal immigrants found in operation Dragon King were very low (for example, that action was taken against a total of 2,296 people across the country).

¹⁰⁵¹ 1978 Repatriation Agreement between the Government of the People’s Republic of Bangladesh and the Government of the Socialist Republic of the Union of Burma (9 July 1978). Available at: <https://dataspace.princeton.edu/jspui/bitstream/88435/dsp01th83kz538/1/1978%20Repatriation%20Agreement.pdf>

¹⁰⁵² Meeting held in the Central Meeting Hall, President House, Ahlone Road, 8 October 1982; translation of the speech by General Ne Win provided in *The Working People’s Daily*, 9 October 1982.

¹⁰⁵³ 1948 Citizenship Act and 1948 Citizenship (Election) Act were repealed in 1982.

¹⁰⁵⁴ 1982 Citizenship Act, art. 3.

not”.¹⁰⁵⁵ These initial eight groups were later broken down in a list of 135 sub-groups. They do not include the Rohingya or people of Chinese, Indian or Nepali descent.¹⁰⁵⁶ Full citizens are those with both parents holding a category of citizenship, including at least one full citizen; third generation offspring of citizens in the two other categories of citizenship; and persons who were citizens when the law entered into force.¹⁰⁵⁷ Full citizens receive a Citizenship Scrutiny Card.

- “Associate” citizenship is for those whose application for citizenship under the 1948 Citizenship Law was pending when the 1982 law came into force. A central body is tasked to decide on applications.¹⁰⁵⁸ They receive an Associate Citizenship Scrutiny Card.
- “Naturalized” citizenship may be granted to persons who provide “conclusive evidence” of entry and residence in Myanmar before 1948, and of the birth of their children in Myanmar.¹⁰⁵⁹ It may also be granted under certain circumstances by marriage or descent. In addition, applicants for “naturalized” citizenship must be at least 18 years, have command of one of the national languages, and be of “good character” and “sound mind”. Naturalised citizens receive a Naturalised Citizenship Scrutiny Card.

478. Despite this legal framework being discriminatory in intent and purpose, Rohingya are not necessarily fully excluded from citizenship. First, the Constitution and the law provide that whoever was a citizen at its entry into force would remain a citizen.¹⁰⁶⁰ Second, while it is disputed whether the Rohingya are a “national race” and automatically entitled to full citizenship on that ground, many Rohingya would have at least qualified for “associate” or “naturalised” citizenship. Their third generation offspring would have been full citizens by now. Third, the law also explicitly authorizes the State to confer any of the three categories of citizenship on any person “in the interests of the State”.¹⁰⁶¹

479. In reality, however, the law has been implemented in a discriminatory and arbitrary manner.¹⁰⁶² The authorities commenced enforcement of the law only after the SLORC took power in 1988. In a nationwide citizenship scrutiny exercise, the National Registration Card (NRC) had to be turned in and replaced by a Citizenship Scrutiny Card (CSC). However, Rohingya who presented their NRCs were reportedly refused a CSC, even when meeting the conditions for citizenship. Such arbitrary action was facilitated by provisions of the 1982 Citizenship Law allowing for broad discretion in decision making.¹⁰⁶³ NRCs were not returned to Rohingya; instead they received Temporary Registration Cards (or “white cards”).¹⁰⁶⁴ These interim “white cards” became the *de facto* identification documentation for the approximately 700,000 Rohingya to whom they were issued for the next 20 years.¹⁰⁶⁵

¹⁰⁵⁵ Ibid., art. 4.

¹⁰⁵⁶ The list of 135 regularly features in State publications, including for example The Working People’s Daily issue of 26 September 1990 (“Our Union of Myanmar where 135 national races reside”).

¹⁰⁵⁷ 1982 Citizenship Act, arts. 5-7.

¹⁰⁵⁸ 1982 Citizenship Act, art. 23.

¹⁰⁵⁹ 1982 Citizenship Act, art. 42.

¹⁰⁶⁰ Section 345 of the 2008 Constitution explicitly provides that any person who is already a citizen according to law on the day of entry into force of the Constitution remains a citizen. Section 346 provides that citizenship, naturalisation and revocation of citizenship shall be prescribed by law. No laws have been adopted since the 1982 Citizenship Law, so this regime still applies.

¹⁰⁶¹ 1982 Citizenship Act, art. 8.

¹⁰⁶² N. Cheesman, “How in Myanmar ‘National Races’ Came to Surpass Citizenship and Exclude Rohingya”, *Journal of Contemporary Asia*, Volume 47, 2017 - Issue 3, 2017, p. 12.

¹⁰⁶³ 1982 Citizenship Law, art. 71: “... no reasons need to be given by organizations invested with authority under this law in matters carried out under this law.”

¹⁰⁶⁴ N. Cheesman, “How in Myanmar ‘National Races’ Came to Surpass Citizenship and Exclude Rohingya”, *Journal of Contemporary Asia*, Volume 47, 2017 - Issue 3, 2017, p. 12; Nyi Nyi Kyaw, “Unpacking the Presumed Statelessness of Rohingyas”, *15(3) Journal of Immigrant & Refugee Studies* (2017), p. 278.

¹⁰⁶⁵ Nyi Nyi Kyaw, “Unpacking the Presumed Statelessness of Rohingyas”, *15(3) Journal of Immigrant & Refugee Studies* (2017), p. 279-280, referring to sources in the Department of Immigration and National Registration.

480. Further security operations in Rakhine State in the early 1990s again caused approximately 250,000 persons to leave for Bangladesh, with widespread allegations of serious human rights violations. While the Myanmar government again made claims that the issue was one of illegal Bengali immigrants,¹⁰⁶⁶ a repatriation agreement was signed with Bangladesh and Rohingya were accepted back in Myanmar.

Citizenship verification process

481. In 2011, the government introduced a “citizenship process” for members of the 135 recognised ethnic groups, with expedited applications.¹⁰⁶⁷ The Rohingya were not eligible for this process but subjected to a separate “citizenship verification” process, which has been protracted, cumbersome and increasingly coercive. By 2017, it had been completed for only a very small number of Rohingya.

482. A pilot citizenship verification exercises took place in Taung Pyo IDP camp in Myebon Township in July 2014. Rohingya were required to identify as “Bengali” when registering.¹⁰⁶⁸ Following protest from both Rohingya and ethnic Rakhine¹⁰⁶⁹, the programme was suspended, and then ended in December 2014, with less than one hundred Citizenship Scrutiny Cards issued by August 2015.¹⁰⁷⁰ Those granted citizenship in this process were allowed to vote in the 2015 election but remain confined in camps without freedom of movement.¹⁰⁷¹ The citizenship verification process was extended across Rakhine State in January 2015 but was suspended shortly after.¹⁰⁷²

483. On 11 February 2015, President Thein Sein announced that the white cards would expire on 31 March 2015 and ordered them to be returned by 31 May 2015. This order pushed Rohingya further into legal uncertainty. Holders were given a “white card receipt” in exchange for the surrendered white card.¹⁰⁷³ By the deadline, only around 67 per cent of cards had been surrendered of which 80 per cent in Rakhine State.¹⁰⁷⁴

484. Following the invalidation of the white cards, a new Identity Card for National Verification (ICNVs) was introduced with the stated aim to “scrutinize whether the applicant meets the eligibility to become a citizen of Myanmar”.¹⁰⁷⁵ Rohingya applicants were required to indicate “Bengali” ethnicity on the application form, and the rights associated with the card were unclear, including the implication of the limited two-year validity.¹⁰⁷⁶ A campaign to compel acceptance of the card was conducted. It was reportedly accompanied by threats,¹⁰⁷⁷ with those retaining white card receipts in parts of northern Rakhine State facing

¹⁰⁶⁶ E/CN.4/1993/62, including the response letter from the Government to the United Nations Special Rapporteur on freedom of religion or belief. The letter stated that the allegations were “fabricated by some big countries and certain foreign news agencies”, that “among those who fled were mostly poor people who were lured by stories that relief food and goods were being distributed on the other side” and that “some left because they were threatened by terrorist insurgents to burn down their houses”, that the issue was one of “illegal immigration” which had also been the cause of the “outflow of people of Bengali stock back in 1978”, and that the “Rohingya do not exist in Myanmar either historically, politically or legally”. These are essentially the same explanations as those given by the Myanmar Government to the massive flight of Rohingya in late 2017.

¹⁰⁶⁷ V-054.

¹⁰⁶⁸ Ibid.

¹⁰⁶⁹ Advisory Commission on Rakhine State, Final Report, *Towards a peaceful, fair and prosperous future for the people of Rakhine* (August 2017).

¹⁰⁷⁰ K-063.1. Of approximately 1,300 eligible adult applicants, around 1,200 had applied. By late August 2015, Citizenship Scrutiny Cards had been issued to 97 adults and Naturalised Citizenship Scrutiny Cards to 820 adults, 656 children.

¹⁰⁷¹ K-063.1

¹⁰⁷² K-063.2.

¹⁰⁷³ K-063.1.

¹⁰⁷⁴ Ibid.

¹⁰⁷⁵ Ibid.

¹⁰⁷⁶ Ibid.

¹⁰⁷⁷ Ibid.

increased restrictions.¹⁰⁷⁸ Despite this, the number of Rohingya applying for ICNVs was very low.¹⁰⁷⁹

485. The “citizen verification process” restarted in 2016 under the NLD government, with a new attempt to persuade the Rohingya to accept the rebranded National Verification Cards (NVCs).¹⁰⁸⁰ However, scepticism following past experience and a limited understanding of the new process remained. Following the post-9 October 2016 “clearance operations”, reports increasingly surfaced of attempts to coerce individuals into accepting the NVCs.¹⁰⁸¹ By January 2017, just over 6,000 NVCs had been issued in Rakhine State, compared with nearly 400,000 white cards which were surrendered.¹⁰⁸² On 8 February 2017, the Government appointed a Steering Committee in charge of issuing NVCs to expedite the process.

486. In August 2017, the Advisory Commission on Rakhine State observed that the sporadic implementation process and lack of communication, consultation and outreach from the Government had undermined public trust. It made a number of recommendations including ensuring those who had received citizenship would immediately enjoy the associated benefits, and a simplified verification process. It also urged the Government to ensure that the process was voluntary.¹⁰⁸³ In direct contradiction to this recommendation, from October 2017, the approach of requesting NVCs to be able to fish was extended to central Rakhine.¹⁰⁸⁴ The continued coercion on the Rohingya to accept the NVCs, and the build-up of pressure and tension in this regard in the lead-up to the August 2017 violence in northern Rakhine State, is discussed below.¹⁰⁸⁵

487. The rights granted by the NVC remain unclear. Despite the State Counsellor’s Office stating that card holders could travel anywhere in the country, specific additional provisions were included for Rakhine State.¹⁰⁸⁶ These provisions meant that, in practice, movement for the Rohingya is still severely limited.¹⁰⁸⁷ The Minister of Social Welfare, Resettlement and Relief indicated that movement restrictions may be relaxed.¹⁰⁸⁸ However, the Minister for Labour, Immigration and Population indicated in April 2018 that travel for NVC holders in Rakhine State would remain limited to travel within their townships, reportedly stating, “the information that NVC holders are entitled to travel to any place in the country is not true at all. We can’t allow that to happen. I want to stress that the rights, entitlements and restrictions stipulated at the time of issuing NVCs remain unchanged.”¹⁰⁸⁹

488. Following decades of arbitrary treatment and legal uncertainty about their legal status and documentation, it is unsurprising that the Rohingya do not trust the Myanmar authorities and remain sceptical about the “citizenship verification process”. In their view, these efforts

¹⁰⁷⁸ Ibid.

¹⁰⁷⁹ V-047.

¹⁰⁸⁰ The requirement to state ethnicity on the application form and the two year validity period were removed. See: Advisory Commission on Rakhine State, Final Report, *Towards a peaceful, fair and prosperous future for the people of Rakhine* (August 2017).

¹⁰⁸¹ K-063.5, V-047. See also chapter V, section D.2: A foreseeable and planned catastrophe.

¹⁰⁸² The process was not only applicable in Rakhine, but also in other areas of the country. As of January 2017, over 16,000 NVCs had been issued in Shan State and 3,500 in Kayin. In both states, more than a quarter of the population do not have identity documents. See: Notification of the State Counsellor Office, “What is the ICNV” (27 December 2016); 2014 Myanmar Population and Housing Census.

¹⁰⁸³ Advisory Commission on Rakhine State, Final Report, *Towards a peaceful, fair and prosperous future for the people of Rakhine* (August 2017), pp. 26-28.

¹⁰⁸⁴ K-063.36

¹⁰⁸⁵ See chapter V, section D.2: A foreseeable and planned catastrophe.

¹⁰⁸⁶ Notification of the State Counsellor Office, “What is the ICNV” (27 December 2016).

¹⁰⁸⁷ See this chapter, section B.2.b: Requirement for a temporary travel permit to travel between townships.

¹⁰⁸⁸ Video available at: <https://www.facebook.com/theirrawaddyburmese/videos/2008808825829926/> (accessed August 2018). See also Joshua Lipes, “Myanmar Lifts Travel Restrictions on Rohingyas With ‘Verification Cards’” (Radio Free Asia, 19 April 2018).

¹⁰⁸⁹ Video available at: <https://www.facebook.com/standardtimedaily/videos/1451972574914692/> (accessed August 2018). See also the video at: <https://www.facebook.com/NewsWatchJournal/videos/1669688809735580/> (accessed August 2018).

and the “NVC” are a symbol of a discriminatory citizenship regime that only serves to further entrench their status as “immigrants”.

(c) Denial of political participation

489. In the past, Rohingya have been allowed to participate in political processes. They were able to vote and stand for election in the 1990 parliamentary elections, and four Rohingya were elected as members of Parliament. In 2010, despite the Rohingya not officially being considered citizens, several laws were adopted to allow white card holders to participate in the political process. Three Rohingya were elected to Parliament and two to the Rakhine State Government.

490. However, in March 2014, Parliament amended the Political Parties Registration law to require leaders of political parties to be “full” citizens and members of parties to be “full” or “naturalized” citizens.¹⁰⁹⁰ Although, Parliament approved a bill in February 2015 which included a provision allowing white card holders to vote, on 11 February, following a public outcry, the then President Thein Sein issued an order stating that white cards would expire on 31 March 2015 and had to be returned by 31 May 2015. The Constitutional Court further ruled that the legislative provisions allowing white card holders to vote were unconstitutional, and the Parliament amended the election laws, removing white card holders from those eligible to participate in elections.¹⁰⁹¹ This disenfranchised all white card holders, the vast majority of whom were Rohingya, from participation in the 2015 general elections.

(d) Conclusion

491. 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 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. It has a profound impact on the enjoyment of all other human rights.

492. Myanmar’s legal framework pertaining to citizenship, and its application to the Rohingya in particular, is contrary to the prohibition of racial discrimination, both in the way it defines “citizens” and in its attribution of rights to distinct classes of citizens. Membership of a “national race” has been made the key criterion of citizenship. All others, including those who were born and lived in the country for generations, were gradually excluded. This extreme and narrow focus on ethnicity, and its arbitrary application in practice, has been profoundly discriminatory in intent, purpose and impact.

493. The treatment of the Rohingya constitutes an arbitrary deprivation of nationality. It is in violation of domestic laws. There was no permissible ground of revocation. The denial of nationality is based on prohibited racial grounds. It has resulted in large-scale statelessness, while it serves no discernible legitimate purpose.

494. The treatment further violates the right of every child to acquire a nationality, in particular where the child would otherwise be stateless. Where a child is born to stateless parents on the territory of a State Party to the Convention on the Rights of the Child, the State of birth is required to grant nationality. The right to a nationality as articulated in article 7 of the Convention would otherwise be meaningless.¹⁰⁹² Its practice of not issuing birth certificates to Rohingya children and not granting nationality or appropriate documentation to children born on its territory is a violation of the Convention. The practice also has rendered children extremely vulnerable to other severe human rights violations. It deprives Rohingya children of a permanent record of existence and legal identity. It negatively impacts their access to health, education and other services. It deprives them of adequate protection.

¹⁰⁹⁰ The amendments came into effect in September 2014.

¹⁰⁹¹ The Carter Center, “Preliminary Findings of the Carter Center Expert Mission to Myanmar – April-July 2015”.

¹⁰⁹² A/HRC/13/34, para. 36; A/HRC/10/34, para. 64.

495. The denial of legal status has culminated in 2015 in a complete disenfranchisement of the Rohingya from the political process. This symbolised their exclusion from the Myanmar political community and violates the right to participate in the government of the country.¹⁰⁹³

496. The complete arbitrariness with which the Rohingya population has been treated is appalling. It violates legal certainty, the rule of law and international human rights law generally. Arbitrariness is shown in the way in which citizenship was revoked, domestic laws were applied or not, cards were handed out and revoked, and people were called “illegal immigrants”, yet accepted back in repeated cycles of mass displacement and repatriation. Arbitrariness is also illustrated by the repeated temporary solutions that provide no legal certainty and remain largely unimplemented. The Rohingya have for decades wavered between different levels of participation in Myanmar’s national life –from full citizen, to non-citizen with voting rights, non-citizen without voting rights, illegal immigrant that must leave, illegal immigrant that may stay and reside, illegal immigrant whose citizenship must be verified, – each status symbolised by a different card or its revocation.

497. The Myanmar State as an institution is responsible for its actions, including for the actions of previous governments. A strict application of the 1982 Citizenship Law is not a sign of respect for the rule of law, as professed by the current Government in its insistence on a “citizenship verification process” in line with that law and implemented at all cost, including coercion. It is the continuation by the civilian government of discriminatory policies put in place by a military regime. These policies seek to implement a racist and exclusionary vision. What is required is no less than a re-examination of the link between citizenship and “national races”, and the removal of the latter concept in Myanmar politics and law. This link is particularly problematic considering Myanmar’s flawed legal framework for the protection of human rights, which is largely based on citizenship, in contravention of international human rights law.

498. The emphasis on “national races” and the ensuing discriminatory practices have come to define the question of Rohingya citizenship and statelessness, with the Rohingya, ethnic Rakhine, and the Myanmar Government arguing the question of whether Rohingya are a “national race”. This is beside the point. The issues of belonging to a “national race”, citizenship rights, and human rights should not be conflated.

2. Denial of the right to freedom of movement

(a) Overview and legal framework

499. Article 13 of the UDHR guarantees the right to freedom of movement.¹⁰⁹⁴ This includes the right of everyone lawfully within the territory of a State to liberty of movement.¹⁰⁹⁵ It is an indispensable condition for the free development of a person.¹⁰⁹⁶ Under international human rights law, once a person is lawfully within a State, no restrictions on the right to freedom of movement, as well as any treatment different from that accorded to nationals, may be imposed. The only exception is if provided by law and necessary to protect national security, public order, public health or morals or the rights and freedoms of others.¹⁰⁹⁷ In the absence of such exceptions, non-citizens should have the right to move from one place to another.¹⁰⁹⁸ The overarching principle of non-discrimination also applies to the realization of the right to freedom of movement. Importantly, the statelessness of a person resulting from the arbitrary deprivation of nationality, cannot be invoked by States as a justification for the denial of other human rights, including freedom of movement.¹⁰⁹⁹

500. Rohingya in Rakhine State face severe restrictions on their right to freedom of movement which do not fall within the permissible limitations set out above. Their ability to

¹⁰⁹³ E.g., UDHR, art. 21(1).

¹⁰⁹⁴ Also ASEAN Declaration, art. 15.

¹⁰⁹⁵ See ICCPR, art. 12.

¹⁰⁹⁶ United Nations Human Rights Committee, *General Comment 27: Freedom of movement (Art. 12)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9.

¹⁰⁹⁷ Ibid.

¹⁰⁹⁸ See also A/HRC/19/43, para. 8-10.

¹⁰⁹⁹ E.g. A/HRC/RES/32/5.

dehumanization and hate campaigns and for wrong perceptions to be engrained in the minds of each community.

Displacement camps and sites

517. The displacement camps and sites established after the 2012 violence¹¹²³ are effectively places of deprivation of liberty. They are cordoned off from the outside world, with Rohingya and Kaman unable to move outside freely.¹¹²⁴ In most cases, access is strictly controlled by checkpoints set up by the Myanmar Police Force. Moreover, many camps are surrounded by barbed wire fencing. There are further police checkpoints and military posts in the camp area, further limiting freedom of movement. A large military base is located near the Sittwe camps, where the majority of displaced people are accommodated. According to credible reports, even some local staff members of international organizations have not been able to leave the camps for the last few years.¹¹²⁵

518. Given the severe restrictions on freedom of movement imposed on the camp population, some humanitarian actors and analysts have referred to the camps as “internment camps”.¹¹²⁶

*These camps should be viewed as internment camps as the people there are not seeking refuge (at the heart of the definition of a camp for internally displaced people). Rather, they are “locked up”. To get into the camp you have to pass through a series of barbed wire fences, then an army checkpoint, and then a police checkpoint.*¹¹²⁷

*After 2012, the situation in central Rakhine changed with the establishment of the camps, and the unresolved question of whether these should be considered displaced people, or people forcibly transferred into detention centres.*¹¹²⁸

Image from 2018 showing the guarded entrance to the Sittwe displacement camps and the barbed wires all around



519. In 2015, the Government denied the existence of restrictions on the freedom of movement of the displaced population in central Rakhine. In a response to a report of the Special Rapporteur on the situation of human rights in Myanmar, the Government stated:

¹¹²³ See this chapter, section C.1: Emblematic incidents.

¹¹²⁴ Danish Refugee Council, European Commission’s Directorate-General for European Civil Protection and Humanitarian Aid Operations, United Nations High Commissioner for Refugees, CCCM Cluster, Joint IDP Profiling Service, *Sittwe Camp Profiling report* (June 2017), p. 12.

¹¹²⁵ DM-004, DM-005, V-047.

¹¹²⁶ QM-002, QM-005, V-337.

¹¹²⁷ QM-005.

¹¹²⁸ QM-002.

There is no restriction on the freedom of movement of the IDPs. Security presence in IDP camps is simply to prevent recurrence of communal violence while the level of distrust between the two communities is still high. The two communities are staying separately because they feel that they are safer that way. It will take time for both communities to heal themselves to relieve from mental trauma. It needs to wait for a reasonable time until both communities regain mutual understanding and trust. Neither the government nor others can force them to live side-by-side.¹¹²⁹

Image from 2018 showing the sign board at the entry of the Basara camps in Sittwe. It states that the area is “restricted” with “no admittance without the approval of State Government to come in and out”



Despite the statement of the Government, the existence of the restrictions on the freedom of movement of the displaced population is undeniable. It is attested by the checkpoints and sign boards at the entry of the camps, the barbed wires, the experience of those trying to leave the camps, and the simple fact that 128,000 people have not been able to go back to their place of origin, despite their desire to do so.

Aung Mingalar

520. Since June 2012, the only Muslims still living in Sittwe town are the approximately 4,000 Rohingya and Kaman remaining residents of the Aung Mingalar quarter.¹¹³⁰ This area is effectively a closed ghetto, where Muslims are trapped and have lived separately from the rest of the population since 2012. It is guarded by armed police, checkpoints and barbed wire. The Mission also received allegations that the Tatmadaw maintains a small presence in the school grounds in Aung Mingalar. People can only leave the quarter with special permission and in organized convoys with police escorts.¹¹³¹ Apart from emergency medical referrals, the only travel which Muslims can normally undertake outside Aung Mingalar is to the displacement camps and sites in rural Sittwe, where a limited number of people can sometimes access markets and buy food. This travel is strictly controlled by security forces, who only allow a shuttle escorted by the police to travel from Aung Mingalar to the camps. The shuttle requires payment to the police.¹¹³²

521. Access to the nearby medical facilities, Sittwe markets and livelihoods are largely cut off for the residents of Aung Mingalar, who live in effective isolation. Although the Sittwe

¹¹²⁹ A/HRC/25/64/Add.1, para. 15.

¹¹³⁰ It is reported that the population of Aung Mingalar was approximately 16,000 before the 2012 violence.

¹¹³¹ K-069; V-047.

¹¹³² DM-004; V-047.

General Hospital is nearby, residents have to go through the cumbersome emergency referral process to access it.¹¹³³ There is a sign board at the entrance of Aung Mingalar, similar to the one at the entrance of the Sittwe camps, restricting access (see picture above). According to credible reports, in May 2017 Rakhine nationalists wrongly claimed that the population of Aung Mingalar had grown from 4,000 to 20,000. The Rakhine State Government subsequently initiated a verification process and found that the population had remained static. Nevertheless, new restrictions were reportedly introduced after this verification process, requiring residents of Aung Mingalar wishing to travel to the Sittwe camps to buy food or access medical care, to register and have their picture taken, with the aim of ensuring that the same individuals would return after their visit to the camps.¹¹³⁴

Image from 2018 of the restricted entrance to Aung Mingalar



(e) Guest registration and household inspections

522. According to the 2012 version of the Ward or Village Tract Administration Law, people hosting overnight guests at their home – even for a single night – had to register with the ward or village tract administrator. The law was strongly criticized by civil society and the Special Rapporteur on the situation of human rights in Myanmar¹¹³⁵ as a tool for intimidation and harassment of specific individuals, groups or communities. In northern Rakhine State, the law was strictly implemented and combined with other restrictions on the right to freedom of movement.¹¹³⁶

523. Although the Ward or Village Tract Administration Law clearly states, “The ward or village tract administrator shall not collect any currency in respect of guest list information”, many Rohingya in northern Rakhine had to pay the village administrator to register overnight guests.¹¹³⁷ The amount was arbitrary and depended on the relationship between the applicant and the village administrator.¹¹³⁸ When overnight guests without permission were found during the nightly household inspections, Rohingya were arrested and had to pay another bribe to get released.¹¹³⁹

524. In 2016, the Ward or Village Tract Administration Law was amended. The requirement for mandatory guest registration was made applicable only to guests staying in

¹¹³³ See this chapter, section B.3.b: Restrictions on access to healthcare.

¹¹³⁴ DM-004.

¹¹³⁵ A/71/361, para. 19; A/HRC/31/71, Annex I; A/70/412, para. 29.

¹¹³⁶ CI-061, CI-062, CI-065, CI-069, CI-070, CI-079, CI-089, CI-090, DI-001, DI-004, DI-009, DI-013, DI-025, DI-026, DI-038.

¹¹³⁷ CI-061, CI-062, CI-089, DI-001, DI-004, DI-026.

¹¹³⁸ CI-062, DI-001.

¹¹³⁹ CI-062, CI-065, CI-069, CI-070, DI-004, DI-009, DI-026, DI-038.

somebody's house for a month or more.¹¹⁴⁰ However, additional investigation is required to confirm whether this change in the law has been followed by a change of practice on the ground in Rakhine and elsewhere.

(f) Conclusion

525. Rohingya across Rakhine State face severe movement restrictions. They need travel permits to leave their township. 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 2017.¹¹⁴¹ 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. For the last six years, 128,000 Rohingya and Kaman have been confined in displacement camps or sites and 4,000 Muslims have been confined in the Aung Mingalar ghetto in Sittwe town. These restrictions adversely impact every aspect of their life, including their access to food, livelihood, health and education – and in extreme cases leading to preventable deaths. They are compounded by arbitrary fees, extortion and the risk of arrest.

526. While their citizenship rights and status are debated in Myanmar, it is not denied that most Rohingya are residents of Myanmar. As such, they are entitled to freedom of movement. Moreover, their non-citizenship, which results from an arbitrary deprivation of their nationality, cannot be invoked to deny other human rights. No security requirement necessitates the imposition of these severe and arbitrary movement restrictions for such a long period of time, without any clear legal basis. Therefore, the restrictions violate the right to freedom of movement of the Rohingya.

527. Specifically with regard to the displacement camps and sites established in central Rakhine State after the 2012 violence, the Mission finds that – beyond a violation of their right to freedom of movement – the confinement of Rohingya and Kaman constitutes a deprivation of liberty. Deprivation of liberty involves a more severe restriction of movement within a narrower space than interference with liberty of movement.¹¹⁴² While Rohingya and Kaman enjoy some limited ability to move within the camps or sites, many of the camps are surrounded by barbed wire, military camps, security guards and checkpoints, including inside the camps. Access to the camps and sites is restricted. The situation in the Aung Mingalar ghetto is similar or even worse on certain aspects. Residents cannot freely leave the displacement camps and sites and Aung Mingalar. They have inadequate access to health care, education and livelihoods. Holding a group in such conditions for over six years amounts to a deprivation of their liberty.

528. The Government justifies their confinement on security grounds. However, the Mission fails to see the present, direct and imperative threat that would justify the security detention of 132,000 people¹¹⁴³ for over six years and that could not be addressed by alternative and less invasive means.¹¹⁴⁴ This is aggravated by the lack of known legal basis or review of the confinement. Were confinement of communities absolutely required to maintain security, the Mission does not see why it should only affect the Muslim communities of Rakhine State. The Mission has reasonable grounds to conclude that the holding of Rohingya and Kaman in these camps and sites and in the Aung Mingalar ghetto constitutes an arbitrary and discriminatory deprivation of their liberty.

529. Beyond the question of lawfulness, the Mission calls into question the effectiveness of policies of segregation to mitigate an alleged or perceived security threat, especially for long periods of time. Rather than contributing to sustainable peace in Rakhine State, they

¹¹⁴⁰ Ward or Village Tract Administration Law, Chapter IX, section 17.

¹¹⁴¹ K-076.

¹¹⁴² United Nations Human Rights Committee, *General Comment No. 35: Liberty and security of persons (Art. 9)*, 16 December 2014, CCPR/C/GC/35, para. 5.

¹¹⁴³ 128,000 Rohingya and Kaman in displacement camps and sites and 4,000 in Aung Mingalar.

¹¹⁴⁴ United Nations Human Rights Committee, *General Comment No. 35: Liberty and security of persons (Art. 9)*, 16 December 2014, CCPR/C/GC/35, para. 15.

break all relationships between communities. The Mission has concluded that they contributed directly to the events of 2016 and 2017.

530. Considering the lack of reasonable justification for these movement restrictions, in some cases amounting to deprivation of liberty, and their discriminatory implementation, the Mission concludes that they are a second building block of the system of oppression and persecution targeting the Rohingya.

3. Restrictions on access to food, livelihoods, health care and education

(a) Restrictions on access to food and livelihood

Overview and legal framework

531. The human right to adequate food is firmly entrenched in international human rights law, including article 25 of the UDHR, article 11 of the ICESCR, articles 24 and 27 of the CRC, and article 28 of the ASEAN Human Rights Declaration. To realize the right to food, States must ensure that food is available, economically and physically accessible, and adequate.¹¹⁴⁵ The right is realized when “every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.”¹¹⁴⁶ The right to food is closely linked with the right to life: “without food there is no life, and with the wrong food, life is shorter and more prone to ill-health”.¹¹⁴⁷ The right to life requires States to take measures to increase life expectancy, especially in adopting measures to eliminate malnutrition.¹¹⁴⁸

532. While the right to food is to be progressively realised, the United Nations Committee on Economic, Social and Cultural Rights has established that States have immediate core obligations, regardless of resources and/or level of development, to ensure freedom from hunger; non-discrimination; and the protection of vulnerable populations. This includes the provision of access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone.¹¹⁴⁹

533. In Rakhine State, the Rohingya have long relied on fishing, farming and trading to provide for themselves and their families. However, movement restrictions generally, as well as specific restrictions on access to fishing, agricultural lands and forests, impede their access to food and livelihoods. The fear of crossing checkpoints – due to the harassment and extortion it entails – has had a similarly negative impact.

Access to food and malnutrition

534. According to a survey by the Myanmar Government in 2015, Rakhine State had the highest rates of global acute malnutrition, at 13.9 per cent, and severe acute malnutrition, at 3.7 per cent, in the country.¹¹⁵⁰ However, in northern Rakhine, where most Rohingya live, rates were four to five times higher – for severe acute malnutrition, 19 per cent in Maungdaw Township and 15.1 per cent in Buthidaung Township – above the World Health Organization emergency threshold of 15 per cent.¹¹⁵¹ The health impacts of malnutrition may include heightened risk of preventable deaths and deterioration of pre-existing conditions, especially

¹¹⁴⁵ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The right to adequate food (Art. 11)*, 12 May 1999, E/C.12/1999/5.

¹¹⁴⁶ *Ibid.*, para. 6.

¹¹⁴⁷ A. Eide, “Adequate Standard of Living”, in *International Human Rights Law*, 2nd ed., D. Moeckli, S. Shah and S. Sivakumaran (Oxford University Press, Oxford, 2014), p. 199.

¹¹⁴⁸ United Nations Human Rights Committee, *General Comment No. 6: Right to life (Art. 6)*, 30 April 1982, HRI/GEN/1/Rev.1, para. 5.

¹¹⁴⁹ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (Art. 12)*, 11 August 2000, E/C.12/2000/4, para 43(b).

¹¹⁵⁰ Ministry of Health and Sports, *Myanmar - 2015-2016 Demographic and Health Survey - Key Findings* (2017); see also: The UN Network, “Nutrition Situation Analysis”, abridged version (June 2017).

¹¹⁵¹ K-076.44.

Restrictions on access to livelihoods

538. Rohingya have faced severe restrictions on their access to livelihoods for decades. Already in the 1990s, strict enforcement of movement restrictions against the Rohingya in northern Rakhine had reportedly led to severe impoverishment, to the extent that many people were in need of humanitarian assistance.¹¹⁵⁹ Movement has been further restricted throughout Rakhine State with each wave of violence.¹¹⁶⁰ The Rohingya in central and northern Rakhine have been restricted from accessing fishing areas (including coastal waters and inland waterways), farmlands, markets, or employment outside their immediate areas, thus severely limiting their income.¹¹⁶¹ Restrictions on access to livelihoods have been a principal contributory factor forcing Rohingya to leave Myanmar.¹¹⁶²

539. In central Rakhine, severe restrictions on freedom of movement imposed after the 2012 violence have significantly impacted upon access to livelihoods. For example, Rohingya in villages near Sittwe were reportedly forced to sell personal assets and reduce the numbers of meals in order to survive.¹¹⁶³ Similarly, in the first half of 2013 over 10,000 Muslims from isolated villages with very limited access to livelihoods reportedly moved to displacement camps and sites. They were not classified as IDPs and therefore had difficulty accessing humanitarian assistance.¹¹⁶⁴

540. Access to fishing has been severely curtailed by curfew orders since 2012.¹¹⁶⁵ These have often prevented access at the peak night and early morning periods. Fishermen are routinely required to pay a fee to the security forces operating checkpoints, and on return are often required to hand over part of their catch. According to credible reports, Rohingya found fishing during curfew hours or in the wrong area have been subjected to ill-treatment, arbitrary arrests and even killings.¹¹⁶⁶ United Nations Special Rapporteurs addressed an urgent appeal to the Government of Myanmar about the alleged torture of fishermen by BGP officers in June 2016, causing the death of one.¹¹⁶⁷ The Government denied the allegations.¹¹⁶⁸

(b) Restrictions on access to healthcare*Legal framework and overview*

541. Article 25 UDHR protects the right of everyone to a standard of living adequate for their and their family's health, including medical care. Article 12 ICESCR protects the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health". Human rights standards on the right to health are also included in article 12 CEDAW, article 24 CRC, article 25 CRPD, as well as in article 29 ASEAN.

542. The right to the highest attainable standard of health includes the right to a system of health protection that provides equality of opportunity for people to enjoy the highest attainable level of health.¹¹⁶⁹ Key elements of the right to health are non-discrimination and equal treatment. This includes the right to equality of access to health care and health services. The Committee emphasized that the ICESCR proscribes any discrimination in access to health care and underlying determinants of health, as well as means and entitlements for their

¹¹⁵⁹ Irish Centre for Human Rights, *Crimes against Humanity in Western Burma: The Situation of the Rohingya* (2010), p. 99; International Federation of Human Rights Leagues, *Burma – Repression, discrimination and ethnic cleansing in Arakan* (April 2000), p. 20.

¹¹⁶⁰ See this chapter, section B.2. Denial of the right to freedom of movement.

¹¹⁶¹ K-113.3.

¹¹⁶² CI-062, CI-079, CI-080.

¹¹⁶³ K-076

¹¹⁶⁴ K-076.

¹¹⁶⁵ See this chapter, section C.4.a: Curfews and prohibition of meetings of more than five people.

¹¹⁶⁶ K-076.

¹¹⁶⁷ UA MMR 3/2016, available at:

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=3349>

¹¹⁶⁸ Response of the Government of Myanmar to UA MMR 3/2016, 22 December 2016, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=80722>

¹¹⁶⁹ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (Art. 12)*, 8 November 2000, E/C.12/2000/4, para. 8.

procurement. Prohibited grounds of discrimination include race, colour, sex, language, religion, or social origin.¹¹⁷⁰

543. The right to health is to be progressively implemented. Yet, as a party to the ICESCR, CRC, CEDAW and CRPD, Myanmar has an immediate obligation, regardless of resources, to ensure access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups. It must also ensure equitable distribution of all health facilities, goods and services.¹¹⁷¹

544. The availability of functioning health facilities and services in Rakhine State for all communities is low, with an average of five health workers per 10,000 inhabitants. This is well below the national average of 16 health workers per 10,000 people, and the World Health Organization recommended minimum of 22.8 health workers per 10,000 people.¹¹⁷² The Mission notes that all communities in Rakhine State have inadequate access to healthcare, and that under-development and poor transportation make access to healthcare difficult for all, especially those living in remote areas. The Rohingya, however, face additional barriers due to travel restrictions, financial hurdles, cumbersome bureaucratic procedures, and overall discriminatory treatment.¹¹⁷³ Restrictions are often based on official policies and practices.

Movement restrictions on access to health

545. Movement restrictions undermine Rohingya access to health services. The Rohingya and Kaman communities face arbitrary and highly cumbersome procedures to travel to hospitals. These are particularly harmful in the case of medical emergencies as they lead to late diagnosis and delays in life-saving treatment. They can result in preventable deaths. For example, one interviewee from northern Rakhine explained that it was easier to access medical treatment by travelling to Bangladesh than to nearby Sittwe hospital.¹¹⁷⁴ Another stated:

*One of my relatives had to go to Yangon to get medical treatment. She tried to get the necessary papers to travel to Yangon but didn't get them and died at the Sittwe hospital. If Rohingya have a minor sickness it is okay, but if the sickness is serious they can't get proper treatment.*¹¹⁷⁵

546. In central Rakhine State, the restrictions on freedom of movement imposed after the 2012 violence resulted in Rohingya and Kaman being denied access to their nearest hospitals and clinics.

547. One United Nations official shared an experience about attempts to engage with township authorities and Rakhine community leaders in central Rakhine. When the official tried to challenge township authorities about their failure to ensure that Rohingya could access emergency medical care, the response was that this was a policy matter that needed to be discussed at a higher level. Rakhine community leaders on the other hand justified this approach on various grounds, including the claims that Muslim communities “do not belong to Myanmar” and that their population “needs to be controlled”.¹¹⁷⁶

548. As a mitigating measure, humanitarian actors have put in place a medical emergency referral system for Rohingya and Kaman patients. This system usually requires a humanitarian actor to liaise with the Rakhine State Health Department to take patients to the Sittwe General Hospital. The process is cumbersome, bureaucratic and slow. The patient may then require hours of travel.¹¹⁷⁷ To secure an emergency medical referral, a local township medical officer must first certify the need. The patient, supported by a humanitarian actor,

¹¹⁷⁰ Ibid., paras. 18-19.

¹¹⁷¹ Ibid., para. 43.

¹¹⁷² Ministry of Health and Sports, *Myanmar - 2015-2016 Demographic and Health Survey - Key Findings* (2017).

¹¹⁷³ See also: Advisory Commission on Rakhine State, *Towards a peaceful, fair and prosperous future for the people of Rakhine* (August 2017), p. 42.

¹¹⁷⁴ DI-004.

¹¹⁷⁵ DI-013.

¹¹⁷⁶ DM-005.

¹¹⁷⁷ V-047.

must then get permission to travel, arrange transport, organize a police escort, and pay the associated costs.¹¹⁷⁸ Even when all arrangements are in place, ambulances reportedly may refuse to go to Rohingya villages, camps or sites, and ultra-nationalist Rakhine groups sometimes prevent patients from reaching Sittwe General Hospital.¹¹⁷⁹

549. In central Rakhine, the Aung Mingalar ghetto in Sittwe town is located only a short distance away from Sittwe General Hospital. Mobile health clinics operated by international organizations visit on certain days of the week and can facilitate more rapid referrals. However, those requiring medical treatment outside those times, including those requiring emergency treatment, must first travel to a health centre at the Sittwe displacement camp to obtain a medical referral. If successful, they are then referred back to Sittwe General Hospital.¹¹⁸⁰

Adverse consequences

550. The movement restrictions and lengthy bureaucratic procedures have led to numerous undue delays in reaching medical facilities.¹¹⁸¹ 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 disabilities. In some cases, the delays caused by these restrictions have been fatal.¹¹⁸² One researcher told the Mission: “Almost every Rohingya village in Rakhine State that I have visited has a story about someone who died due to not being able to receive medical care, and not being able to get transferred out”.¹¹⁸³

Discrimination in health facilities

551. Even when they manage to access government health facilities, Rohingya in Rakhine State face discriminatory treatment, including further delays.¹¹⁸⁴ Interviewees also reported having to pay bribes or higher fees to receive treatment. One interviewee from Maungdaw stated:

*The treatment depends on the amount of money you have. If you pay more you will receive medicine and proper care. They charge more from Muslims than from the Rakhine.*¹¹⁸⁵

552. Rohingya must also pay additional costs such as a “guard fee” for medicine and for food, phone fees, as Rohingya are not allowed to use their own phones, and translator and “guardian” fees.¹¹⁸⁶

553. According to credible reports,¹¹⁸⁷ both ethnic Rakhine and Muslim (Rohingya and Kaman) patients experience unacceptable behaviour from hospital staff in Sittwe General Hospital, including requests by nurses for bribes to receive “better communication”. Patients also reported verbal abuse, inattention and, in some cases, physical abuse and medical neglect. However, according to further credible information,¹¹⁸⁸ certain discriminatory practices at Sittwe General Hospital are only faced by Muslim patients. For example, they are placed in a small segregated ward of only 20 beds, under constant surveillance by security guards, and they can only leave under supervision. To be admitted to the hospital, a patient needs an accompanying “guardian”. In the case of the Rohingya, this can only be a woman

¹¹⁷⁸ DM-005.

¹¹⁷⁹ K-076.12.

¹¹⁸⁰ K-113.1.

¹¹⁸¹ K-076.12.

¹¹⁸² DI-013, K-076.12, K-113, DM-005, QM-005. It is very difficult to quantify the number of preventable deaths. Some humanitarian actors estimate that there have been hundreds of preventable deaths in central Rakhine since 2012 (DM-005).

¹¹⁸³ K-120.

¹¹⁸⁴ CI-061, CI-064, CI-078, CI-079, CI-080, CI-173, CI-174, DI-001, DI-002, DI-004, DI-038, DI-051.

¹¹⁸⁵ CI-173.

¹¹⁸⁶ K-113.1, K-120.

¹¹⁸⁷ K-113.1.

¹¹⁸⁸ K-113.1.

(supposedly for security concerns) and she must speak Myanmar language or Rakhine. As only very few Muslim women speak these languages, families must hire female translators to do this (which is an additional financial burden) or decide not to hire anyone, meaning that the patient is left on his or her own at the hospital.

554. In some instances, delays in treating Rohingya patients in health facilities have led to preventable deaths.¹¹⁸⁹ A Rohingya NGO worker shared her experience at Buthidaung hospital:

*One day, I went to Buthidaung hospital with an eight-year-old boy who was unconscious. In the registration room they said: "We have a lot of patients, we can't do anything for this boy now. Go and sit there. Why are you coming to ask us?" The nurses prioritised a Rakhine patient. I had to wait 30 minutes and the boy died. This happened to me with three patients in total. They were all children.*¹¹⁹⁰

555. Communication and language issues fuel pervasive and damaging misinformation and rumours regarding the treatment of Rohingya in government hospitals and facilities. Many Rohingya believe that, beyond neglect and discriminatory treatment, they actually face the danger of being killed by medical staff if they go to a hospital.¹¹⁹¹ One interviewee told the Mission that, following the 2012 violence, "The hospital people started killing Rohingyas".¹¹⁹² Belief in these rumours has resulted in people limiting or delaying seeking medical treatment, including in emergency situations. One researcher explained that "in many cases people were to die of preventable disease *as a result* of not seeking healthcare, because of a steadfast belief in the veracity of these rumours".¹¹⁹³ The rumours are also fuelled by the simple fact that, given the delays in reaching medical facilities - because of restrictions on freedom of movement and other restrictions - patients often reach the hospital when they are already in critical condition.

(c) Restrictions on access to education

Legal framework and overview

556. The right to education is protected by article 26 UDHR, article 13 ICESCR and article 28 CRC. According to these provisions, primary education should be "compulsory and available free to all", secondary education should be "made generally available and accessible to all" and higher education should be "made equally accessible to all, on the basis of capacity". The right to education is an "empowerment right". It is "the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities".¹¹⁹⁴

557. One key element of the right to education is the prohibition against any form of discrimination. This prohibition "applies fully and immediately to all aspects of education and encompasses all international prohibited grounds of discrimination". The principle of non-discrimination extends to "all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status".¹¹⁹⁵

558. Through its discriminatory policies and practices, the Government of Myanmar violates the right to education of Rohingya children and youth at the primary, secondary and higher education levels. Rohingya interviewees repeatedly described to the Mission how they

¹¹⁸⁹ CI-173, DI-038.

¹¹⁹⁰ DI-038.

¹¹⁹¹ CI-073, CI-080, CI-089, CI-174, DI-009, DI-046, DI-053, DI-054.

¹¹⁹² CI-080.

¹¹⁹³ K-120.

¹¹⁹⁴ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The right to education (Art. 13)*, 8 December 1999, E/C.12/1999/10, para. 1.

¹¹⁹⁵ *Ibid.*, para. 31 and 34. See also art. 2 CRC and art. 3(e) of the UNESCO Convention against Discrimination in Education.

were denied equal access to education and the highly adverse impact this had on their lives:¹¹⁹⁶

*Because of the 2012 violence, the dream of my parents for education got shattered. My father and brother were teachers and look at me, I couldn't even study! Now when I meet educated people, I think, "Oh my God, I haven't even passed class 10". But I still have hope that one day if I can save a bit of money, I will restart my education because it is so important. The military backed Government snatched our life from us. They ruined the entire Rohingya community in the country.*¹¹⁹⁷

Discrimination at school in northern Rakhine

559. A large majority of children in northern Rakhine State have relied on government-run basic education schools for their education.¹¹⁹⁸ Rohingya have faced severe discrimination in these schools. This includes the humiliating practice of seating Rohingya children at the back of the class, while ethnic Rakhine children sat at the front, or Rohingya and Rakhine students being placed in different classrooms.¹¹⁹⁹ Many government-appointed teachers neglect Rohingya students and treat them differently from Rakhine students.¹²⁰⁰ Some actively undermine Rohingya students, with examples of them being called "Kalar", or being told that they are not Myanmar citizens or that they "do not have any country".¹²⁰¹ One young Rohingya woman from Maungdaw shared her experience at school:

*The only regret I have in my life is that no teacher ever considered me as their favourite student. You have no idea, what I was doing to try to get the attention of my teachers and learn like any other student. I obeyed. I behaved nicely. If they wrote anything on the black board, I would help to erase it afterwards. The teachers used to bring their lunch in a box. When I would see them, I would quickly offer to carry their lunch-boxes. Even after all this, they hardly checked my homework or classwork to see if I was learning properly. I always heard that teachers are nice and caring but this was not the case with me. I always completed my homework on time and wanted them to look at it but they would simply put a right or wrong sign on the paper without explaining anything. For the Rakhine students it was different, their homework was checked.*¹²⁰²

560. Another barrier consistently highlighted by interviewees is language. Depending on the grade, classes in public schools are taught in Rakhine or Myanmar language, which many Rohingya students do not understand.¹²⁰³ Rohingya interviewees stated that their classes were irregular, with a high level of absenteeism by teachers, and that often they had little to do at school.¹²⁰⁴ One interviewee explained how the Rohingya students at his school were kept in a separate room and that the teacher would only greet them in the morning before spending the rest of the day with the ethnic Rakhine students. The Rohingya students were unable to communicate properly with the teacher.¹²⁰⁵

561. After the 2012 violence, some schools closed. In 2015, it was assessed that the primary level teacher-student ratios were 83:1 in Buthidaung and 123:1 in Maungdaw, respectively more than double and triple the international benchmark and well above the reported target

¹¹⁹⁶ BI-004, BI-018, CI-019, CI-062, CI-063, CI-065, CI-069, CI-072, CI-073, CI-078, CI-079, CI-080, CI-125, CI-173, DI-003, DI-004, DI-005, DI-007, DI-010, DI-013, DI-022, DI-025, DI-026, DI-034, DI-038, DI-046, DI-047, DI-050, DI-052, DI-053, DI-073, DI-076, LI-055, LI-087, LI-092, LI-098, LI-101, LI-103, LI-116, LI-131, LI-135, QI-069.

¹¹⁹⁷ DI-047.

¹¹⁹⁸ PLAN and REACH, *Joint education sector needs assessment, north Rakhine State, Myanmar* (2015), p. 4.

¹¹⁹⁹ BI-018, CI-173, DI-005, DI-026, DI-038, DI-050, DI-053.

¹²⁰⁰ CI-062.

¹²⁰¹ CI-065, CI-069, CI-072, CI-078, CI-073.

¹²⁰² DI-026.

¹²⁰³ DI-004, DI-010, DI-026, DI-038.

¹²⁰⁴ DI-005, DI-025, DI-052, LI-116.

¹²⁰⁵ DI-005.

of 30:1 set out by the Ministry of Education of Myanmar.¹²⁰⁶ Government teachers reportedly attended schools even less frequently, especially in Maungdaw and Buthidaung, supposedly due to security concerns. As a consequence, a parallel education system staffed by volunteers was started to teach Rohingya children in northern Rakhine.¹²⁰⁷

Situation in central Rakhine

562. According to credible reports, in central Rakhine many Rohingya and Kaman children are prevented from attending the formal education system because of the combination of movement restrictions, the lack of schools, and the confinement of an estimated 60,000 displaced children. In displacement camps and sites, primary education is mainly accessible through “temporary learning centres” set up after the 2012 violence and supported by the United Nations and international organizations. These centres follow the government’s curriculum. They are open to both displaced children and children from Muslim villages who do not have access to government schools. However, these centres are only primary school level, lack support from the Government, are under-resourced and lack qualified teachers.¹²⁰⁸

563. Middle school and high school opportunities are even more limited for Muslim students in central Rakhine, and almost non-existent for those living outside Sittwe Township. There is only one high school for Rohingya and Kaman children in central Rakhine, located in Thet Kae Pyin in Sittwe Township. It provides schooling for approximately 3,500 students. At the high school level, there are reportedly only six teachers in total, with a ratio of 102 students per teacher. Out of the total of 57 teachers, it is reported that only five are government-appointed (all of whom are Kaman), with all the others being “volunteer teachers”.¹²⁰⁹

564. In 2018, the UNICEF spokesperson summarised the situation of Rohingya children with regards to access to education in central Rakhine as follows:

*While the eyes of the world are on the situation in northern Rakhine and in Cox’s Bazaar, over 60,000 Rohingya children remain almost forgotten, trapped in 23 camps in central Rakhine they were driven into by violence in 2012. (...) The movement restrictions are shrinking horizons for children in the camps – nowhere more so than in terms of education. (...) Rohingya children desperately need education if they are to have any kind of prospects for a better future. Temporary solutions need to be improved immediately and more durable arrangements providing children with access to formal education, provided by properly trained teachers and recognized by the education system, must be set in place quickly. Otherwise this generation’s future prospects will be permanently damaged.*¹²¹⁰

Discrimination at university

565. Until 2012, a limited number of Rohingya could access higher education, mostly at Sittwe University. A very small minority – students from wealthy or prominent families – could travel to Yangon to study. Travel to Sittwe or Yangon remained a challenge because of the movement restrictions.¹²¹¹ As “non-citizens”, Rohingya were not permitted to study

¹²⁰⁶ PLAN and REACH, *Joint education sector needs assessment, north Rakhine State, Myanmar* (2015), p. 5. According to UNESCO: “In the absence of a global target on pupil-teacher ratios (PTR) in primary education, the most widely used international benchmark is 40:1.” Education for All Global Monitoring Report and UNESCO Education Sector, “Policy Paper 19: The challenge of teacher shortage and quality: Have we succeeded in getting enough quality teachers into classrooms?” (April 2015).

¹²⁰⁷ PLAN and REACH, *Joint education sector needs assessment, north Rakhine State, Myanmar* (2015), p. 5, LI-116.

¹²⁰⁸ QM-002, QM-005; K-113.2; UNICEF, *Briefing on the situation of children in Rakhine State* (January 2018).

¹²⁰⁹ QM-005; K-113.2.

¹²¹⁰ UNICEF, *Briefing on the situation of children in Rakhine State* (January 2018).

¹²¹¹ CI-065, CI-069, CI-080, DI-004, LI-135.

certain “professional” subjects (including law, computer science, engineering and medicine). They were also not allowed to study beyond a bachelor’s degree level.¹²¹²

566. In some cases, Rohingya students were not given a certificate upon completion of their studies.¹²¹³ One interviewee explained that, because Sittwe University refused to issue her a certificate upon completion of three years of zoology studies, she had to work as an office cleaner.¹²¹⁴ Another interviewee said she had to bribe the university to obtain a certificate which did not correspond to the actual subject of her studies. Despite this, she explained the importance of receiving this document:

*I finally received my certificate from university. That is the only thing I was hiding in my blouse when I left Myanmar by boat. In the boat, everyone was asking me why I cared so much about this piece of paper. My whole life had been devoted to my studies. This is the only piece of paper I cared about.*¹²¹⁵

567. Since 2012, Rohingya students have been unable to enrol at Sittwe University, due to unspecified “security concerns”. In practice, this effectively denied them access to higher education.¹²¹⁶ In 2017, the authorities put in place distance learning for Rohingya and Kaman students.¹²¹⁷ However, only a small number of mainly Kaman students were reportedly enrolled in the programme, which is only limited to history and Myanmar language courses.¹²¹⁸ The Mission views this initiative as totally inadequate in meeting Myanmar’s obligations under international law, to provide access to higher education for Rohingya and Kaman students. The students need full access to all universities in Myanmar.

(d) Conclusion

568. In addition to, and often because of, the lack of legal status, severe movement restrictions, the Rohingya also face restrictions on access to food, livelihood, healthcare and education.

569. Rakhine State is one of the poorest states in Myanmar. All communities suffer from poverty, poor social services and scarcity of livelihood opportunities, despite it being fertile, relatively well-endowed with natural resources and strategically located.¹²¹⁹ The extreme levels of malnutrition in Rakhine State, and in particular in northern Rakhine, must be seen in light of the policies and practices of the authorities. They are a consequence of the authorities’ actions and omissions. The severe movement restrictions and other discriminatory policies, affecting Rohingya’s access to land, forests, fishing grounds and markets, have a direct impact on their food security and health, threatening their right to life and ability to live in dignity and free from hunger. An already difficult situation has been further compounded by the waves of violence and security operations in Rakhine State, and the Government’s strict restrictions on humanitarian assistance. The Government of Myanmar manifestly fails in its obligation to respect, protect and fulfil the right of Rohingya individuals to an adequate standard of living, including their right to food.

570. The same analysis applies in relation to access to healthcare. The Mission notes that all communities in Rakhine State suffer from low availability and quality of healthcare. However, the severe movement restrictions, the arbitrary and cumbersome procedures to access hospitals and health facilities, the additional fees and bribes they must pay, the discrimination faced in health facilities, and the language barriers, put adequate healthcare entirely out of reach for the Rohingya. They experience delays, forgo healthcare, or rely on alternative healthcare strategies, putting them at greater risk. The Government of Myanmar

¹²¹² CI-065, CI-069, CI-078, DI-003, DI-007, DI-013, DI-034, DI-073, DI-076, LI-135.

¹²¹³ CI-078, DI-050, DI-076; see also: A/HRC/28/72, para. 55.

¹²¹⁴ DI-078.

¹²¹⁵ DI-050.

¹²¹⁶ CI-080, DI-026, DI-073, LI-135.

¹²¹⁷ Ministry of Information, “Distance University students studying peacefully in Rakhine State” (12 November 2017).

¹²¹⁸ Ibid.

¹²¹⁹ Advisory Commission on Rakhine State, Final Report, *Towards a peaceful, fair and prosperous future for the people of Rakhine* (August 2017), p. 20.

fails in its obligation to ensure access to health care that is available, accessible, acceptable, and of good quality. Such failure has undermined the dignity of the Rohingya, exposed them to unnecessary suffering, immediate and long-term health risks, and preventable deaths.¹²²⁰ In such instances it also amounts to a violation of the right to life and to physical and mental integrity.

571. Rohingya are also subjected to discrimination in education. Quality education is unattainable to them. The discrimination faced in primary and secondary schools, and the denial of access to higher education, amount to violations of the right to education. However, they are also powerful tools to ensure cross-generational marginalisation. The restrictions to access to education described above contribute to the slow erosion and weakening of the Rohingya community as a whole. As one interviewee told the Mission:

*The Government didn't allow Muslims equal access to education. We were excluded, and with no education, you are side-lined. You are separated from the other citizens in a systematic way.*¹²²¹

572. What permeates all these restrictions is the blatant discrimination on ethnic or religious grounds, targeting the Rohingya in particular. It is the consequence of policies and practices established, condoned and/or left unaddressed by the State. The restrictions form part of a system of severe and institutionalised oppression, amounting to persecution, of the Rohingya, marginalising and excluding them.

4. Restrictions on humanitarian access

573. In various circumstances, the Government suspends or severely restricts humanitarian access to areas in Rakhine State that are in dire need of assistance, especially in Maungdaw, Buthidaung and Rathedaung. This happened after the 2012 violence as well as after the “clearance operations” in October 2016 and August 2017. Such restrictions have a serious adverse impact on the population, who are left without critical and lifesaving assistance, including access to food and health services.¹²²²

574. According to credible reports, restrictions on humanitarian access to northern Rakhine were tightened in June and July of 2017, even before the attacks on 25 August 2017 and subsequent “clearance operations”. Following the appointment of a new Security Minister, some organizations were denied travel authorizations. Furthermore, following the publication of a July 2017 World Food Programme (WFP) assessment on food insecurity in northern Rakhine State, the Government circulated a letter addressed to international non-governmental organizations banning such assessments.¹²²³ The alleged discovery by the authorities of WFP food assistance in a supposed ARSA training camp on 30 July was used as a further reason to justify restrictions. An official statement stated that the “terrorists” were using WFP support for IDPs.¹²²⁴ It was later reported that these biscuits had actually not been distributed directly by WFP.¹²²⁵

575. After 25 August 2017, all humanitarian access to northern Rakhine was suspended. The Government also accused some staff members of international non-governmental organizations of participating in the ARSA attacks, while repeating allegations related to the WFP food rations, which reportedly caused a large number of humanitarian aid workers to leave the area.¹²²⁶ Access then slowly resumed. The Government initially only granted access

¹²²⁰ CI-063, CI-064, CI-073, CI-080, CI-089, CI-090, CI-092, CI-173, DI-002, DI-004, DI-054, DI-073; K-076.12.

¹²²¹ DI-025.

¹²²² K-069.1, K-069.7.

¹²²³ K-069.13.

¹²²⁴ Information Committee, “Commodities found close to the suspicious huts built to shelter the extremist terrorists” (Facebook post, 31 July 2017), available at: <https://www.facebook.com/InfomationCommittee/posts/773457006160741>.

¹²²⁵ K-069.13.

¹²²⁶ Information Committee, “State Counsellor Office Information Committee’s Statement regarding Extremist Terrorists” (Facebook post, 27 August 2017), available at:

to northern Rakhine to the Red Cross Movement¹²²⁷ in September 2017, and two months later to WFP. Beyond these two organizations, the Government reportedly selected a few other international organizations to whom it granted limited access, but none of them had experience working in northern Rakhine before August 2017.¹²²⁸ One humanitarian actor told the Mission:

*Some other organizations have permission to operate in northern Rakhine, but are not provided with travel authorisations. This appears to be a deliberate attempt by the authorities to appear to be giving access, but in reality denying it.*¹²²⁹

576. As of August 2018, the majority of humanitarian organizations that were active in northern Rakhine State before August 2017 have not been allowed to resume their field activities in the area.¹²³⁰ Even when granted access, humanitarian organizations are constrained in their work by restrictive procedures, including the short validity of their travel authorisations. There has been no comprehensive assessment of humanitarian needs in northern Rakhine State. Yet, it is beyond question that the current partial access is wholly inadequate to meet all the needs.

577. In central Rakhine, humanitarian agencies need prior authorisation to visit the camps and other displacement sites. They face questions about the purpose of their visit and are required to submit detailed movement plans. Vehicles entering Sittwe rural camps are stopped at the entry of the camps and asked to provide the necessary authorisations. Access for humanitarian agencies may be restricted without notice.

578. In February 2018, the Emergency Coordination Committee¹²³¹ reportedly gave the following stringent instructions to international actors:¹²³²

- Programmatic needs assessments: A requirement to obtain permission from the Ethics Committee of the Ministry of Foreign Affairs – which can take up to six months – to carry out assessments, particularly those used in new areas or for publication. In the case of surveys or reviews, the applicable questionnaires must be shared with the relevant line Ministry in advance.
- Memorandums of understanding (MoU): A requirement to include all activities to be undertaken by the organization in the MoU, including details at the village level. Organizations may be required to prove that they deliver equal assistance to ethnic Rakhine and Muslims, regardless of the actual needs of each community. If this is not met, the organization risks expulsion.
- Travel authorisations: A requirement to submit requests two weeks in advance for any given two-week period.

579. These instructions are of serious concern. Those related to needs assessment and travel authorisations severely curtail the ability of international organizations to undertake their work effectively and may lead to self-censorship on assessments to be shared publicly. Any requirement that humanitarian assistance be delivered on the basis of ethnicity or other factors apart from humanitarian need could contravene the humanitarian principle of impartiality.

<https://www.facebook.com/InfomationCommittee/posts/state-counsellor-office-information-committees-statement-regarding-extremist-ter/786270838212691/>.

¹²²⁷ The ICRC, IFRC and Myanmar Red Cross work together on their response in northern Rakhine and collectively refer to themselves as the “Red Cross Movement”.

¹²²⁸ QM-005.

¹²²⁹ Ibid.

¹²³⁰ K-069.7.

¹²³¹ The Emergency Coordination Committee is a body comprised of government representatives, ethnic Rakhine elders, civil society and humanitarian organizations. It vets and monitors the activities of international organizations. K-069.11; V-169, V-345.

¹²³² K-113.4.

5. Restrictions affecting private life

580. Beyond the arbitrary denial of legal status, the severe movement restrictions, and the denial of access to livelihood, health and education, Rohingya face other discriminatory policies and practices, tightly controlling almost every aspect of their private lives. They include restrictions related to marriage, the number and “spacing” of children, and the building and repair of houses.

581. Most of these policies are based on administrative instructions issued by bodies such as the Border Area Immigration Control Headquarters (NaSaKa) or the Immigration and National Registration Department (INRD), and by township and district officials, primarily in northern Rakhine State. These are commonly known as “local orders”. In 2008, the NaSaKa issued an instruction called “Regional order and processes for controlling Bengali population”. It circulated regional orders first issued in 1993 and 2008 and added specific instructions to control the Rohingya, including in the following areas:

- population control
- “spot checking” related to household registration
- moving in and out of a household list
- taking family pictures for the household list
- marriage permissions
- birth and death.

582. Many restrictions appear to stem from these documents or similar instructions issued later. According to credible reports, after the disbandment of the NaSaKa in July 2013, Rohingya in northern Rakhine State described a temporary easing in their implementation. However, by early 2014, the Border Guard Police (BGP), the Committee for Prevention of Illegal Immigration of Foreigners (MaKhaPa) and township authorities had resumed many of the practices.¹²³³ On 13 August 2018, the Union Government issued an announcement abolishing eight local orders mainly targeting the Rohingya, including six issued by the NaSaKa.¹²³⁴ The Mission welcomes this positive step by the Union Government, although the extent to which this announcement will be implemented on the ground remains to be seen. The information below reflects the situation prior to August 2018.

(a) Restrictions related to household lists

583. Every household in Myanmar is required to have an up-to-date “household list” of its permanent residents. Since the expiration of TRCs on 31 March 2015,¹²³⁵ household lists have been the only form of identification for many Rohingya. The document is necessary for administrative procedures, including NVC-applications and marriage or travel permissions.

584. Household lists are issued and updated by the Ministry of Immigration and Population and the Ministry of Home Affairs.¹²³⁶ Births, deaths and marriages must be reported. Unlike in the rest of the country, the authorities in northern Rakhine State conduct yearly inspections

¹²³³ K-063.13.

¹²³⁴ Announcement 88/2018 by the Union Government of Myanmar (13 August 2018). The announcement abolished six orders issued by the NaSaKa: (a) the order to systematize the marriage permission, (b) the permission for marriage, (c) the issue on the divorce permission of Bengali people, (d) the issue of recording those who are of another race and are not ethnic people, by their father’s name in the household list, (e) the issue of trying to create a separate household for Bengali people, (f) the issue of prohibiting those with Kalar names to also have a Myanmar name. The announcement also abolished two orders issued by the Directorate of People’s militia and Border Area Units, Ministry of Defence: (a) the issue of enlisting the illegally-born Bengali babies in the household list, (b) the permission on marriage of Bengali people.

¹²³⁵ See this chapter, section B.1.c: Denial of citizenship.

¹²³⁶ Household lists are issued by the Immigration and National Identification Headquarters, which is jointly maintained by the General Administration Department, a branch under the military-controlled Ministry of Home Affairs, and the Ministry of Labour, Immigration and Population.

of Rohingya households to “update” their household list. The stated purpose is to delete the names of those who left or are deceased, and to add new-borns. Although updating the list is a civilian administrative procedure, in northern Rakhine it is jointly conducted with and overseen by security forces. Since 2015 this has been undertaken by the BGP and MaKhaPa.¹²³⁷ The annual inspections are carried out in a discriminatory manner, targeting the Rohingya in northern Rakhine and providing the authorities unfettered power to add or remove individuals from the list, with no recourse to appeal. Inspections are often accompanied by intimidation, coercion, arbitrary arrests and random deletions from the list.¹²³⁸

585. The process includes taking photographs of the permanent residents of a household. Family members often have to carry a card representing their “serial number” on the household list. According to the rules annexed to the regional order issued by the NaSaKa in 2008, if there is any suspicion of a child being “substituted” to mislead the inspectors, the mother will “be made to breastfeed the child”, or the children “will be questioned separately”.¹²³⁹ This violates the right to privacy of the mother and may constitute cruel or degrading treatment. It is certainly not in the best interest of the child.

586. The authorities often conduct checks during the night, waking up the household.¹²⁴⁰ One interviewee explained how armed NaSaKa officers would visit her house in the early hours, forcing everyone to wake up, including young children: “If there was anyone in the house that was not on the list, they would be taken away”.¹²⁴¹ During the inspections, Rohingya have to pay arbitrary amounts to get names removed or added to the list.¹²⁴² The experience of one interviewee from Maungdaw demonstrates the arbitrariness and extortion:

*When immigration officers came to update our household list, my wife had to pay 10,000 Kyat because I had left. Previously, I paid 10,000 Kyat for the inclusion of each of my first four children. For my youngest, I had to pay 30,000 Kyat. Following my departure, whenever the military or the NaSaKa came to my house, they asked for money. So my family joined me in Malaysia.*¹²⁴³

587. According to credible reports, Rohingya who are not at home during the updating exercise may be removed from the list. Additionally, punitive removal of persons allegedly associated with the 2012 violence have reportedly taken place. Once deleted, a person is extremely vulnerable. Effectively denied proof of residence, they face heightened risks of arrest and conviction for immigration offences.¹²⁴⁴

588. A household list updating exercise took place between December 2016 and January 2017, during the “area clearance operations” that followed the 9 October 2016 ARSA attacks. This was earlier in the year than usual. In southern Maungdaw, the displaced were reportedly deleted from the list. Some of those who were absent were reportedly recorded on a separate list as “on travel” or “missing”.¹²⁴⁵ Additionally, 1,900 buildings were identified as illegal and marked for demolition.

(b) Restrictions related to marriage and children

589. Rohingya in northern Rakhine have faced targeted and discriminatory restrictions related to marriage and birth for many years. These have been implemented by the General

¹²³⁷ K-063.12.

¹²³⁸ CI-061, CI-062, CI-065, CI-073, CI-080, CI-082, CI-090, CI-092, CI-094, DI-001, DI-009, DI-013, DI-025, DI-026, DI-053.

¹²³⁹ NaSaKa, *Regional Order on Processes for Controlling Bengali Population* (11 February 2008), Addendum on “Drawing maps, making a record of buildings, and reviewing household registrations”; K-076.

¹²⁴⁰ CI-090, DI-013, DI-026.

¹²⁴¹ DI-026.

¹²⁴² CI-061, CI-062, CI-065, CI-072, CI-073, CI-079, CI-080, CI-082, CI-090, CI-092, CI-094, DI-001, DI-025.

¹²⁴³ CI-073.

¹²⁴⁴ V-047.

¹²⁴⁵ K-063.12

Administration Department as well as by law enforcement officials. To officially register a marriage, Rohingya have to undergo a complex and lengthy procedure which is arbitrary and subject to extortion. They must also comply with discriminatory requirements related to the number and spacing of children. Contravention is subject to criminal penalties. These procedures have not applied elsewhere in Rakhine State. However, in 2015, the local provisions were supplemented by national legislation directed towards “non-Buddhists” generally in Myanmar.

Restrictions on marriages

590. A regional order from the Township Peace and Development Council in 2005 aimed at controlling marriages in Maungdaw Township. It referred to a “dense” population, an “extremely high” birth rate, and the risk that there is “likely to be starvation”.¹²⁴⁶ While most of the order is drafted in general terms, section 1(c) is applicable only to people who marry “as per the Islamic religion”. It requires permission to marry from the Council, following a check by the village level council and the NaSaKa Sector Command. Those who receive permission to marry must limit the number of children. Widows and widowers can only apply for permission to remarry after three years. The order states that “effective actions” will be taken against those who marry or divorce in violation of the order. In 2008, the NaSaKa outlined the application requirements in more detail, including a requirement for men to submit a photograph without a beard (except for religious persons, known as “Mawlawis”) and specific punishments under the Penal Code for contravening the order.¹²⁴⁷

591. A further NaSaKa local order from August 2009 contains similar provisions, prescribing that violation of the rules can lead to lengthy prison sentences. The order sets out similarly circuitous procedures for obtaining permission to marry, including an interview and at least three witnesses. The application forms had the word “Islam” pre-printed on it, clearly demonstrating discriminatory intent.

592. According to credible reports, harassment and humiliation were frequent during this procedure. Couples could be asked intrusive personal questions about their relationship. Some couples were reportedly forced to hold hands or make other physical displays of affection. Male applicants were sometimes requested to shave their beards and female applicants to remove their *hijab* or headscarf. Women were reportedly sometimes required to prove they were not already pregnant by taking a pregnancy test at a government clinic, showing their stomach to male officers, or having them touch their stomach.¹²⁴⁸ These practices constitute cruel, inhuman or degrading treatment. Moreover, being particularly aimed at females, they also discriminate based on sex. They violate Myanmar’s obligations under article 16(1)(a) of the Convention on the Elimination of All Forms of Discrimination against Women “to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage”.

593. The marriage authorisation procedure applicable to the Rohingya is reported to have caused delays of up to two years in obtaining permission and payment of exorbitant fees. Couples who did not obtain official marriage permission also risked criminal punishment, including fines. In addition, their children risked exclusion from the household list.¹²⁴⁹

594. Because of the delays and the costs, couples often only married religiously, without first applying for a certificate, risking the consequences. One interviewee from Buthidaung explained how his sister married and had a child before receiving official permission. She

¹²⁴⁶ Peace and Development Council of Maungdaw Township, *Regional Order 1/2005* (1 May 2005), on file with the Mission; K-076.

¹²⁴⁷ NaSaKa, *Regional Order on Processes for Controlling Bengali Population* (11 February 2008), Addendum on “Population control activities” and “Requirements for Bengalis who apply for permission to marry”, on file with the Mission; K-076.

¹²⁴⁸ K-076.15.

¹²⁴⁹ CI-061, CI-062, CI-064, CI-065, CI-070, CI-072, CI-073, CI-079, CI-082, CI-090, CI-092, CI-094, CI-173, DI-001, DI-004, DI-009; K-063.15, K-076.15.

had to hide when the police were searching for her.¹²⁵⁰ Another interviewee spoke of the bribes associated with the process, and potential consequences of not obtaining permission:

*Although my elder brother paid 100,000 Kyat to the NaSaKa for a marriage permission letter, it wasn't issued, and he proceeded to get married religiously. One day, the NaSaKa went to his house and found his wife pregnant. They asked for the official marriage document, but they didn't have one. The NaSaKa arrested my brother and he was detained in Buthidaung jail for five years.*¹²⁵¹

595. Although not uniformly enforced, credible reports indicate that the practice of restricting the marriages of Rohingya in northern Rakhine continued after the disbandment of the NaSaKa in 2013. It was enforced by the BGP, MaKaPha and the General Administration Department.¹²⁵² On 28 April 2016, the BGP in Maungdaw issued a new instruction on marriage permission. Although it is not known whether this new instruction was applied throughout northern Rakhine State, it is alleged that similar instructions were issued in various BGP sectors across Maungdaw and Buthidaung. The instruction on “marriage related matters of Bengali races” imposes additional requirements for marriage permission. The introduction states:

*The population density (...) is greater than international standard. For that reason, in our sector jurisdiction, the movement of the Bengali races and population increasing rate has been controlled through the household list updating exercise.*¹²⁵³

Restrictions on number and spacing of children

596. Regional Order 1/2005 of the Maungdaw Township Peace and Development Council states that those who have permission to marry must “limit” the number of children they have, without giving further details. However, as part of the marriage permission procedure, Rohingya couples were made to promise not to have more than two children and to use contraception.¹²⁵⁴

597. In May 2013, the authorities in Rakhine State announced the reinforcement of the rule limiting to two the permissible number of children in Maungdaw and Buthidaung.¹²⁵⁵ The spokesperson of the Rakhine State Government reportedly recognized that the two-child policy was only applicable to the Rohingya:

*Regarding family planning, they [the Rohingya] can only get two children. (...) The rule is only for certain groups (...). For Buddhist people, we don't need that rule, because Buddhist people only have one wife. It is being implemented to control the population growth, because it is becoming too crowded there.*¹²⁵⁶

598. According to credible reports, the Union Immigration Minister also confirmed the existence of this policy in 2013 but stated that it did not come from either the Union or State government. He highlighted that it would “benefit Bengali women”. At the time, Daw Aung San Suu Kyi had reportedly called the policy “discriminatory,” stating that it was “not in line with human rights”.¹²⁵⁷

Adverse consequences

599. According to credible reports, the highly cumbersome and arbitrary marriage permission process, and risks associated with it, has led many Rohingya to leave Myanmar. Women reportedly resorted to unsafe abortions for fear of contravening local orders and associated criminal penalties. Women were often afraid to seek healthcare because they feared repercussions for having had an illegal abortion, or for living with someone without

¹²⁵⁰ DI-009.

¹²⁵¹ CI-064.

¹²⁵² K-063.15.

¹²⁵³ K-076.

¹²⁵⁴ K-063.15, K-076.15.

¹²⁵⁵ K-063.16.

¹²⁵⁶ The Irrawaddy, “Govt sets two-child limit for Rohingyas in northern Arakan” (20 May 2013).

¹²⁵⁷ Reuters, “Myanmar minister backs two-child policy for Rohingya minority” (11 June 2013).

marriage permission. This has led to preventable deaths of mothers and infants and long-term health impacts for women who survive.¹²⁵⁸

“Race and religion” laws

600. In June 2013, the monk Ashin Wirathu called for a law on inter-religious marriage. This was subsequently expanded to a package of four bills to “safeguard nationality and religion”. The MaBaTha submitted a petition to President Thein Sein supporting this proposal, with more than 1.3 million signatures. Despite concerns raised about compliance with human rights standards, including by United Nations experts¹²⁵⁹, these four bills became law between May and August 2015. The laws make reference to “non-Buddhists”, not explicitly naming Rohingya or Muslims. However, given rhetoric in the lead-up to their adoption, the laws clearly had a discriminatory intent against the Rohingya. They were built on a number of prevailing stereotypes, including that Rohingya are polygamous and have a high birth rate, and that Buddhist women need protection from conversion to Islam and marriage to Muslims.

- **Buddhist Women’s Special Marriage Law:** imposes disproportionate penalties and gender discriminatory barriers on non-Buddhist men; restricts the rights of non-Buddhist husbands of Buddhist wives, including denying them custody of children in the case of dissolution of marriage or divorce; discriminates against women by placing a number of restrictions only on Buddhist women who wish to marry outside their faith; and provides protection against some forms of domestic violence only for Buddhist women marrying outside of their religion.
- **The Population Control Healthcare Law:** adopts a coercive and selective approach to realising the stated goals of poverty alleviation and improvement of living standards; lacks essential safeguards to ensure freedom from discrimination; and allows township groups to “organize”¹²⁶⁰ couples to practice 36-month birth spacing, raising concerns of coercion.
- **Religious Conversion Law:** establishes a cumbersome and state-regulated system for changing religion, requiring state approval following registration and interview; prevents children from changing their religion.
- **Monogamy Law:** bans polygamy in accordance with international human rights requirements but some provisions adopt a restrictive and discriminatory approach to marriage regulation; makes references to “non-Buddhist persons”; does not prohibit other discriminatory forms of marriage, including early and forced marriages, practised by other population groups.

601. The laws remain in force, but little information is available on their implementation. Some reports indicate that, while the first case brought under the Monogamy law was against a Muslim,¹²⁶¹ many of the following cases were predominantly against Buddhists reported for extramarital affairs.¹²⁶²

(c) **Restrictions related to repairs of houses**

602. The applicable legal framework in relation to construction and repairs of buildings is unclear. The Rohingya face many difficulties accessing administrative procedures in this regard, including applications for permits. The informal authorisation of construction and repair of buildings is facilitated by unofficial payments and bribes. These sums are paid to the General Administration Department and the Border Guard Police (and formerly the

¹²⁵⁸ K-076.15.

¹²⁵⁹ MMR 4/2014, available at:

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=22569>
and 11 May 2015; MMR 5/2015 available at

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=20241>.

¹²⁶⁰ Vague term used in the law.

¹²⁶¹ A/70/412, para. 76.

¹²⁶² V-244.

NaSaKa) to permit Rohingya to construct or repair their houses, especially in rural areas.¹²⁶³ The authorisation offers no security and is subject to demands for bribes. Those who do not comply, or who construct without authorisation, risk arrest. One interviewee stated:

*I had all the necessary permission to build a new house. On the very first day of the construction, about five police officers came to the site with the village administrator. They asked to show the documents related to the construction and we did. The police said there was no signature on the documents, although I knew the documents were 100 per cent correct. I could not protest, otherwise they would have arrested me. I offered them chickens worth 10,000 Kyat and 2kg of rice. They demanded 100,000 Kyat instead. It took me two months to gather this amount.*¹²⁶⁴

603. In addition, Rohingya face restrictions on construction and repairs related to the implementation of local orders. For example, a couple without official permission to marry cannot initiate a new household list, which is necessary to obtain permission to construct.¹²⁶⁵

604. In September 2016, the State Security Minister of Rakhine announced that buildings constructed without the required permissions would be demolished. Implementation began in November 2016, during the “clearance operation” undertaken by the Tatmadaw. As of January 2017, credible reports indicate that a total of 1,082 buildings had been demolished out of 1,984 which had been identified for demolition. This also included mosques and madrassahs.¹²⁶⁶ As a consequence, a total of 4,480 people were reportedly forcibly evicted. It is unclear how the procedure for the designation of buildings constructed without permission was conducted and if the process also assessed homes and structures belonging to and occupied by other ethnic groups.

(d) Conclusion

605. The control of the Rohingya does not stop at denial of legal status and severe restrictions on movement and access to food, health and education. It also affects their private life, including through marriage restrictions, birth spacing policies, and undue control on the building and repair of homes and religious edifices. Cumbersome and opaque procedures are put in place for every aspect of life, generally applied arbitrarily and requiring the payment of fees and bribes.

606. These policies and practices have emerged in a context of rhetoric labelling Rohingya as “illegal immigrants”, having “incontrollable birth-rates”. The presence of Rohingya is seen as a threat, not only to the local Buddhist communities, but also to the nation and its Buddhist character as a whole.¹²⁶⁷ The discriminatory and persecutory intent of such policies is apparent. They also violate a range of human rights, including the right to privacy and family life and freedom from cruel, inhuman and degrading treatment.

6. Oppression through arbitrary arrest and detention

607. The Mission further found a pattern of widespread and systematic arbitrary detention of Rohingya across Rakhine State, but particularly in the northern townships. These arrests are discriminatory, with the Rohingya systematically targeted. The arrests are perpetrated by different law enforcement agencies, including the BGP and previously the NaSaKa, as well as other security forces, including the Tatmadaw. Arrests generally occur during night raids on villages, in houses or shops, at checkpoints or during house searches or household list verifications.¹²⁶⁸

608. The levels of arbitrary arrest and detention throughout the period under review have been extremely high, with significant spikes during periods of heightened tension, such as

¹²⁶³ CI-073, CI-090, DI-010, DI-038, DI-054.

¹²⁶⁴ CI-090.

¹²⁶⁵ According to Addendum 2 of the 2008 NaSaKa regional order applicable only to the Rohingya, “action must be taken against people who fix, expand or build a house without a permit”.

¹²⁶⁶ K-063.17.

¹²⁶⁷ See Chapter III, section B.2: Place of Buddhism in society.

¹²⁶⁸ K-076.46.

the 2012 violence and the post-October 2016 security operations. Arrests were random, not based on evidence or a warrant, often with male villagers arrested during a “sweep” of the village. For example, following the June 2012 violence, credible reports suggest that more than 1,000 persons were arrested and detained in northern Rakhine State¹²⁶⁹. Such mass arrests may constitute collective punishment of the Rohingya population.

609. These patterns are fully in line with reports of the Special Rapporteurs on the situation of human rights in Myanmar, the United Nations High Commissioner for Human Rights¹²⁷⁰ and others, who have invariably expressed concern about the issue. Other reports also suggest that arbitrary arrest and detention has been a routine aspect of the life of the Rohingya throughout the period under review and prior. One detailed study published in 2010 stated, “The arbitrary detention of the Rohingyas is so prevalent as to be considered to have reached industrial levels”.¹²⁷¹ Another study of a third of village tracts in Maungdaw over a three month period in 2014 found an average of nearly 90 arrests per month.¹²⁷² A second study in 2015 in northern Rakhine State found an average of approximately 330 arrests per month¹²⁷³.

610. A primary motivating factor of perpetrators is extortion. Nearly all such incidents corroborated by the Mission involved either the payment of bribes to secure release, or continued detention due to the non-payment of bribes¹²⁷⁴. The practice was commonplace, implemented by the NaSaKa, the BGP, the Myanmar Police Force, the LaWaKa, SaYaPa (Military Intelligence) and the Tatmadaw. The amount of the bribes varied and sometimes forced villagers to borrow large sums from neighbours. The economic impact has been significant. One interviewee from Maungdaw Township stated:

*When my father was arrested, my mother used to pay the military to get him released. He would stay in detention for various lengths of time, depending on how fast my mother would pay. The amount would vary greatly, and my mother would borrow money from others to pay the bribe. Then, my father had to work to pay back this money. They would arrest him without giving any reason. When we asked why he was arrested, the response was that we were Muslims, we were “Kalar”.*¹²⁷⁵

611. In some instances the arrests were in relation to vague “offences”, including travel to Bangladesh, possessing a mobile phone or Bangladeshi SIM card, or the collection of firewood¹²⁷⁶. One interviewee informed the Mission that his brother was detained for being in possession of a mobile phone. His family could not pay the bribe asked by the police and he remained in detention for seven months.¹²⁷⁷ It has also been suggested that persons who were more affluent were targeted, as they could pay higher bribes.

612. Arbitrary arrest and detention were frequently associated with torture and ill-treatment.¹²⁷⁸ One interviewee described how he was arbitrarily detained in 2011, seemingly in relation to his involvement in an appeal against the confiscation of the village graveyard by the NaSaKa. He was repeatedly beaten with a large wooden stick.¹²⁷⁹ Deaths in custody following arbitrary detention were also reported.¹²⁸⁰

7. Other forms of oppression

613. Rohingya face several other forms of oppression at the hands of the Myanmar authorities, in particular the security forces. These include forced labour, confiscation of

¹²⁶⁹ K-076.46.

¹²⁷⁰ For example, A/HR/32/18.

¹²⁷¹ Irish Centre for Human Rights, *Crimes against Humanity in Western Burma: The Situation of the Rohingyas* (2010).

¹²⁷² V-246.

¹²⁷³ K-076.

¹²⁷⁴ CI-064, CI-065, CI-082, CI-089, DI-009, DI-013, DI-020, DI-025, DI-054, DI-056.

¹²⁷⁵ DI-009.

¹²⁷⁶ CI-064, DI-025, DI-054.

¹²⁷⁷ DI-054.

¹²⁷⁸ CI-064, CI-065, CI-082, CI-089, DI-025, DI-056.

¹²⁷⁹ CI-065.

¹²⁸⁰ K-076.46; V-245.

property, extortion and sexual and gender-based violence. These are not necessarily unique to the Rohingya. As described above, they are also faced to a large extent by the ethnic Rakhine and probably other groups as well. However, in the case of the Rohingya, these are added on to all other forms of oppression and persecution described above.

(a) Forced or compulsory labour

614. As with the ethnic Rakhine population, forced or compulsory labour has been a common experience for many Rohingya in Rakhine State. The Mission corroborated cases from Maungdaw and Buthidaung Townships in northern Rakhine State,¹²⁸¹ although it is likely that Rohingya in central and southern regions have had similar experiences. Forced labour has been prevalent for many years, with reports that more than two-thirds of Rohingya families in the two townships had to provide forced labour prior to 2011.¹²⁸² The Mission found incidents of forced labour in 2012 and 2013, although credible information indicates that the practice continued in northern Rakhine until 2016, and possibly beyond, albeit at a reduced rate.¹²⁸³ Perpetrators of forced labour have primarily been the Tatmadaw and the NaSaKa (until its disbandment in 2013).

615. The established patterns are very similar to those outlined in relation to the ethnic Rakhine, including in terms of the types of forced labour (for example, portering, construction work, farming, maintenance of security camps), the frequency of the work, the general ill-treatment suffered in the context of such labour (including beatings and verbal abuse), and the economic impact on the individual and their families. In some cases there appears to have been an option to avoid forced labour, through the payment of bribes, or through paying other villagers to perform the task on their behalf.¹²⁸⁴

(b) Confiscation and extortion

616. Like the ethnic Rakhine, the Rohingya suffer from arbitrary confiscation of livestock and goods by security forces, usually with total impunity.¹²⁸⁵ One interviewee explained:

*Looting of vegetables and domestic animals, by the military, the NaSaKa and the police was common. They used to take anything they wanted from the land, without paying. They took also commodities from the villagers whenever they thought they might need them.*¹²⁸⁶

617. Already extremely vulnerable because of their lack of legal status and other forms of systemic oppression, the Rohingya additionally suffer from extortion at the hands of security forces and other authorities. It affects many aspects of their lives.¹²⁸⁷ This includes having to pay to obtain permission to move from one place to another, stay overnight in another household, and pass checkpoints.¹²⁸⁸ They also have to make payments or pay bribes to obtain marriage permissions, have a child included on the household list, have a family member deleted from the list,¹²⁸⁹ obtain the necessary authorisations to build or repair their homes, bring back wood or bamboo from the forest,¹²⁹⁰ as well as avoid or be released from arbitrary

¹²⁸¹ CI-062, CI-072, CI-079, CI-089, CI-092, CI-093, CI-094, CI-173, DI-001, DI-002, DI-005.

¹²⁸² K-063.

¹²⁸³ K-063.

¹²⁸⁴ CI-080, CI-089, DI-047.

¹²⁸⁵ CI-062, CI-064, CI-065, CI-073, DI-013, DI-025, DI-038.

¹²⁸⁶ CI-073.

¹²⁸⁷ CI-061, CI-062, CI-063, CI-064, CI-065, CI-069, CI-070, CI-072, CI-073, CI-076, CI-079, CI-080, CI-082, CI-085, CI-089, CI-092, CI-094, CI-098, CI-100, CI-133, CI-134, CI-136, CI-144, CI-146, CI-149, CI-162, CI-173, CI-174, CI-175, CI-176, CI-179, CI-181, CI-183, CI-186, CI-189, CI-190, CI-192, CI-194, DI-001, DI-003, DI-004, DI-008, DI-010, DI-013, DI-020, DI-025, DI-026, DI-037, DI-038, DI-046, DI-047, DI-050, DI-054, DI-076, LI-105, ZI-002.

¹²⁸⁸ CI-061, CI-063, CI-064, CI-065, CI-069, CI-070, CI-072, CI-073, CI-079, CI-080, CI-082, CI-090, CI-174, DI-001, DI-003, DI-020, DI-025, LI-105.

¹²⁸⁹ CI-061, CI-062, CI-064, CI-065, CI-070, CI-072, CI-073, CI-076, CI-079, CI-082, CI-089, CI-092, CI-173, DI-001, DI-004, DI-025.

¹²⁹⁰ CI-061, CI-073, CI-079, CI-082, CI-090, DI-038, DI-10.

detention.¹²⁹¹ An interviewee from Maungdaw, explained how Tatmadaw soldiers would come to the market or village and simply arrest whomever they found, take them to the police station, and then ask money from the family for their release.¹²⁹² An interviewee from Buthidaung also shared the following account:

*If we wanted to change anything in the house, we had to pay. Our family had to change two bamboo poles in the railing of our house. When the NaSaKa officers heard the sound of repair, they came and asked for money.*¹²⁹³

618. Sometimes payments were made, but the issue remained unresolved. One interviewee explained that his brother paid 100,000 Kyat to the NaSaKa to obtain his marriage authorisation but it was not issued. He was later detained for five years for not having a permit.¹²⁹⁴ Another interviewee explained how he was detained at a police station and the police officer said he would be released if he paid a large bribe. However, although he paid, he was not released.¹²⁹⁵

619. The amounts extracted from the Rohingya are exorbitant compared to their revenue. It adversely affects their right to an adequate standard of living, including to food and livelihood, and to health and dignity. It often leads to unbreakable cycles of debt, household impoverishment and desperate coping mechanisms:

*The police said that if we couldn't give them 350,000 Kyat, I would be put in prison. My mother had to arrange the money. She sold our land to ensure my release.*¹²⁹⁶

(c) Sexual and gender-based violence

620. There are credible and consistent reports of sexual and gender-based violence against Rohingya women and girls by members of the Tatmadaw, the police and the NaSaKa.¹²⁹⁷ The experience shared by one interviewee illustrates the prevalence of such acts, even outside the periods of extreme violence in 2012, 2016 and 2017:

*I was taken to a large government building next to the high school in Maungdaw. There were many police officers. I was taken to a room where there were already about 10 other Rohingya women. Men in uniform took away women in groups of four and then I heard screaming. I think they were being raped. I heard girls saying, "Oh Allah, save me" and "please don't rape me". Other women were giving massages to men from various security forces, not just the police. It was humiliating. If a girl was not massaging, she was hit by the police. It was very weird because the place was like an office but all of this was happening there. I saw girls with bite marks on their cheeks, and one fully naked girl running away. I managed to escape through a very small hole*¹²⁹⁸.

621. This is consistent with other credible reports published throughout the years. For example, a report of the United Nations Secretary-General on conflict-related sexual violence noted in 2012 that rape was condoned by military commanders.¹²⁹⁹ Examples of reported sexual violence include the rape of 13 Rohingya girls and women by NaSaKa forces in northern Maungdaw Township on 20 February 2013; the gang rape of a 16-year old Rohingya girl by police in early 2014; 14 cases of gang rape and sexual assault between January and June 2014;¹³⁰⁰ and the rape of a 10-year old girl by the military in early 2015.¹³⁰¹

¹²⁹¹ CI-062, CI-065, CI-069, CI-072, CI-073, CI-082, CI-090, CI-092, CI-094, CI-100, CI-133, CI-134, CI-136, CI-144, CI-146, CI-149, CI-179, CI-181, CI-183, CI-186, CI-189, CI-190, DI-010, DI-020, DI-025, DI-026, DI-037, DI-038, DI-046, DI-050, ZI-002.

¹²⁹² DI-025.

¹²⁹³ DI-010.

¹²⁹⁴ CI-064.

¹²⁹⁵ DI-037.

¹²⁹⁶ DI-025.

¹²⁹⁷ CI-074, CI-077, CI-174, DI-038, DI-048, DI-050.

¹²⁹⁸ DI-048.

¹²⁹⁹ A/66/657*-S/2012/33*.

¹³⁰⁰ S/2015/203, p. 12

¹³⁰¹ K-125

8. Conclusion

622. The level of oppression faced by the Rohingya is hard to fathom. Cumulatively all the rules, regulations, orders and practices laid out in this section have made life for the Rohingya in Rakhine State slowly but steadily unbearable. Rights were eroded and removed, in a process of marginalisation, exclusion and “othering”. Layers of discrimination and ill-treatment have been added. This occurred in the context of hateful and divisive rhetoric targeting the Rohingya on the basis of their ethnicity, religion and status. The multiple elements of oppression are based on State-sanctioned policies and practices and occur in the context of State-sanctioned discriminatory rhetoric. The Mission concludes that this severe, systemic and institutionalised oppression, from birth to death, amounts to persecution.

623. This persecution has put the Rohingya population in a situation of extreme vulnerability, undermining all aspects of their lives and eroding their living conditions and their coping mechanisms. The daily attacks on human dignity have created intolerable conditions, and have weakened individuals, families and communities, pushing them further into destitution and insecurity. It is this oppressive climate, and the fear and desperation resulting from it, that forced thousands of Rohingya to leave Rakhine State by boat in the years since 2012. It is also against this backdrop that the episodes of violence in 2012, 2016 and 2017 must be examined.

C. Violence in 2012

1. Emblematic incidents

624. Two events that took place on 28 May 2012, in Ramree Township, and on 3 June 2012, in Toungup Township, played a key role in the violence that erupted in Rakhine State on 8 June 2012. While the Mission did not investigate these two events, the following is a summary based on publicly available information, including accounts in the State-run newspaper *The New Light of Myanmar*, and the report of the Myanmar Government’s “Inquiry Commission on Sectarian Violence in Rakhine State” (the Rakhine Inquiry Commission).

625. On 28 May 2012, Ma Thida Htwe, a 27-year-old Buddhist woman, was killed in the Kyauk Ni Maw village tract of Ramree Township in the south of Rakhine State. On 5 June 2012, *The New Light of Myanmar* reported the case as murder and rape. It published the names of the three suspects, along with a mention of their origin as being “Bengali/Islam”.¹³⁰² The three accused were subsequently prosecuted and sentenced to death. One of them reportedly hung himself while in custody on 9 June 2012.¹³⁰³ There appears to be no doubt about the murder of the woman but the Mission understands there are doubts about the rape allegation and the ethnic origin of the accused.¹³⁰⁴ In the following days and weeks, it was mainly the rape allegation, more than the murder, which was used to incite violence and hatred against the Rohingya. The Mission notes that other episodes of anti-Muslim violence in Myanmar followed rape allegations, some of which were later found to be untrue.¹³⁰⁵

626. Prior to the coverage of this incident in *The New Light of Myanmar*, graphic images of the woman’s dead body were disseminated, accompanied by incendiary comments blaming the incident on “Kalars”.¹³⁰⁶ The Rakhine Inquiry Commission noted the rapid

¹³⁰² *New Light of Myanmar*, “Three murderers who raped, stabbed a woman to death to be brought to trial soonest” (5 June 2012).

¹³⁰³ MNA (Myanmar News Agency), “Two who rob, rape and murder a woman from Kyauknimaw Village sentenced to death” (*The New Light of Myanmar*, 19 June 2012), available at: <http://www.burmalibrary.org/docs13/NLM2012-06-19.pdf>, p.2; DI-012.

¹³⁰⁴ DI-012, DI-077, DM-066.

¹³⁰⁵ See this chapter, section C.6.b: Pre-planning, instigation and role of security forces.

¹³⁰⁶ See, for example, the following two blog posts: <http://hlao1980.blogspot.com/2012/06/arrakan-boiling-with-anti-islamic-fever.html> (accessed August 2018) and <http://terrorist2012.blogspot.com/2012/08/blog-post.html> (accessed August 2018). Many such articles have since been deleted.

circulation of these images “together with incendiary remarks” through “anonymous channels on the internet”. It highlighted that the “pictures and news spread even to Rakhine villages and towns without internet access”.¹³⁰⁷

627. According to *The New Light of Myanmar*, on 3 June 2012 the Wunthanu Rakkhita Association distributed leaflets to the local population at crowded places in Toungup, southern Rakhine State, with the woman’s picture. They asked the population of Toungup to “take notice” that Muslims were “intentionally assaulting” Rakhine women. On the same day, a crowd of 300 people in Toungup killed a group of 10 Muslim pilgrims travelling by bus to Yangon.¹³⁰⁸ Given the circumstances described in the article, the attack appears to have been pre-planned.

628. From 8 June 2012 onwards, violence spread across Rakhine State and lasted at least until August 2012. A second wave of violence hit Rakhine State in October 2012. It affected the Rohingya, ethnic Rakhine and Kaman communities across 12 townships. Further violence took place in Thandwe in 2013. Between 2012 and 2013, security forces - sometimes acting alongside the Rakhine - committed serious human rights violations against Rohingya and Kaman across Rakhine State. This included the burning of houses,¹³⁰⁹ looting of shops, extrajudicial and indiscriminate killings, including of women, children and elderly people.¹³¹⁰ Bodies were often taken by the authorities, with the subsequent whereabouts unknown.¹³¹¹ The authorities also conducted mass arbitrary arrests of Rohingya and subjected them to torture in police stations and in Buthidaung prison.¹³¹² The security forces also willingly failed to intervene to stop the violence committed by the ethnic Rakhine or by the Rohingya. There was also a further tightening of general restrictions against the Muslim population.¹³¹³ According to the Rakhine Inquiry Commission, 192 people were killed, more than 265 were injured and 8,614 houses were destroyed. These figures are believed to be well below the actual scale of the violence.

629. While many other townships were also affected by the violence, the Mission examined in detail events in three main locations as emblematic of the broader picture: Maungdaw in June 2012, Sittwe in June 2012 and Kyaukpyu in October 2012.

(a) Maungdaw violence – June 2012

Maungdaw town - 8 June 2012

630. On Friday 8 June 2012, during the weekly Jumma prayer, the Muslim community in Maungdaw town honoured the 10 Muslim men killed in Toungup five days earlier.¹³¹⁴ The prayer gathering was planned to take place at the Munshi mosque¹³¹⁵ in the town centre. A large number of men arrived at the mosque. Muslim leaders tried to stop further people from gathering as the mosque was very crowded.¹³¹⁶ The prayer ended abruptly, including because stones were thrown towards the mosque from the nearby Myoma monastery. People left the

¹³⁰⁷ Inquiry Commission on Sectarian Violence in Rakhine State, *Final report* (July 2013), p. 8.

¹³⁰⁸ *New Light of Myanmar*, “10 Muslims killed in bus attack” (5 June 2012).

¹³⁰⁹ CI-052, CI-066, CI-068, CI-069, CI-076, CI-077, CI-078, CI-082, CI-083, CI-084, CI-085, CI-087, CI-088, CI-091, CI-094, CI-097, CI-098, CI-163, CI-165, CI-167, CI-168, CI-170, CI-171, CI-172, CI-173, CI-174, DI-004, DI-007, DI-012, DI-020, DI-021, DI-023, DI-024, DI-038, DI-051, DI-054, DI-055, DI-075, QI-076.

¹³¹⁰ CI-069, CI-074, CI-077, CI-080, CI-083, CI-085, CI-086, CI-165, CI-166, CI-167, CI-168, CI-170, CI-173, CI-192, CI-193, DI-002, DI-004, DI-007, DI-008, DI-020, DI-021, DI-022, DI-023, DI-024, DI-038, DI-047, DI-049, DI-054, DI-073, QI-076, ZI-002.

¹³¹¹ CI-061, CI-068, CI-088, CI-174, DI-002, DI-022, DI-038.

¹³¹² CI-065, CI-068, CI-072, CI-073, CI-076, CI-079, CI-080, CI-083, CI-087, CI-089, CI-091, CI-094, CI-096, CI-173, CI-175, CI-193, DI-004, DI-006, DI-012, DI-020, DI-037, DI-038, DI-054, DI-073.

¹³¹³ See this chapter, section B: Systemic oppression and persecution of the Rohingya.

¹³¹⁴ CI-173, CI-174, CI-175, CI-192, CI-193, DI-004, DI-012, DI-025, DI-073, XI-008.

¹³¹⁵ Also known as Jame mosque.

¹³¹⁶ DI-056, DI-073.

2. Kaman Muslims of Rakhine State

664. Unlike the Rohingya, Kaman Muslims are one of the 135 officially recognized ethnic groups of Myanmar, the only Muslim group to have been granted this status. The Rohingya not having been counted in the 2014 census, most of the 28,700 Muslims recorded in Rakhine State were likely Kaman. Despite being citizens of Myanmar, and not appearing to have problematic relationships with ethnic Rakhine neighbours prior to the 2012 violence,¹⁴²⁷ the Kaman have suffered serious human rights violations. This has significantly worsened since the 2012 violence, possibly attributable both to the prevailing anti-Muslim sentiment and to the frequent absence of distinction between the Kaman and the Rohingya. One Kaman refugee, who previously lived in Kyaukpyu, stated:

*In Myanmar, it is a crime to be a Muslim. The authorities are saying that the Rohingya are illegal Bengalis. Then what about us? We are nationals of Myanmar. I believe the main issue for the authorities is religion.*¹⁴²⁸

665. In March 2018, a former Minister and member of Parliament from the Union Solidarity and Development Party opposed a decision by the Government to resettle a small group of Kaman from displacement camps to Yangon. He reportedly said:

*I think it will be more appropriate if we treat the cancer that is occurring in Rakhine State within Rakhine State itself. Allowing the Kaman families to resettle in Yangon would be like allowing the cancer to spread across the country.*¹⁴²⁹

666. The Kaman were directly affected by the 2012 violence, particularly the second wave in October. Kaman were killed and injured, including by security forces. Many were displaced and moved to several displacement camps and sites in Rakhine State. The actual number of Kaman affected is unclear. The report of the Rakhine Inquiry Commission provided no information on Kaman, referring only to “Bengali Muslims” or “Muslims”.¹⁴³⁰

667. The Kaman have shared similar experiences to the Rohingya, including being insulted and called “Kalar”.¹⁴³¹ One interviewee stated that at school Kaman students were only referred to as “Kalar” and never by their names, and he was told by a teacher that he was slow in class because he was an “uneducated Kalar”.¹⁴³² Like the Rohingya, Kaman had to obtain authorisation to travel between townships (known as a “Form 4”), even though they do not fall into the category of either “foreigners” or “Bengali”.¹⁴³³ The process to obtain a travel authorisation is expensive, lengthy and involves considerable bribes.¹⁴³⁴

668. Thousands of Kaman remain in displacement camps and sites in Rakhine State, six years after the 2012 violence. Others have moved to Yangon or abroad. The Myanmar authorities appear to have taken no concrete steps towards facilitating the return of Kaman to their places of origin. Recently it was reported that, although more than 1,000 Kaman continue to live in a displacement camp close to their place of origin in Kyaukpyu, the authorities continue to deny their right to return, citing unspecified security concerns.¹⁴³⁵

3. Torture and ill-treatment at Buthidaung prison

In Buthidaung prison, the situation was terrible. They beat everybody with wooden sticks. There were restrictions on everything: going to the toilets, speaking, moving. When we went out of the cell we were beaten, and when we came back we were beaten.

¹⁴²⁷ V-355.

¹⁴²⁸ CI-165.

¹⁴²⁹ V-355.

¹⁴³⁰ A. South and M. Lall (editors), *Citizenship in Myanmar: Ways of being in and from Burma* (ISEAS – Yusof Ishak Institute/Chiang Mai University Press, 2017).

¹⁴³¹ CI-052, CI-167.

¹⁴³² CI-167.

¹⁴³³ See this chapter, section B.2.b: Requirement for a temporary travel permit to travel between townships.

¹⁴³⁴ CI-052, CI-167, CI-171.

¹⁴³⁵ V-356.

*People had to behave like robots. At night, we couldn't move or we would get kicked. Buthidaung prison was like hell.*¹⁴³⁶

669. The Mission received multiple accounts of torture and other forms of cruel, inhuman or degrading treatment or punishment against Rohingya men and boys held in Buthidaung prison following the 2012 violence.¹⁴³⁷ Similar violations were verified up until 2017, indicating that ill-treatment at Buthidaung prison is endemic. Mistreatment was particularly rife in the period after the June 2012 violence in Rakhine State. However, similar patterns were seen in the aftermath of the 9 October 2016 attacks by ARSA and the subsequent “clearance operations”, when significant numbers of Rohingya men were arrested. There are indications that similar abuse also occurred in the context of the “clearance operations” after 25 August 2017.¹⁴³⁸ Much of the abuse was perpetrated directly by the prison authorities, but also by ethnic Rakhine fellow-detainees,¹⁴³⁹ with facilitation or sanction from the prison authorities. Information received suggests that the mistreatment was particularly acute against pre-trial detainees and that conditions improved once a person had received a custodial sentence.¹⁴⁴⁰

670. Detainees frequently suffered mistreatment prior to their arrival at the prison, while being transported, or when taken from the prison to court hearings.¹⁴⁴¹ Tatmadaw soldiers usually provided transportation, with detainees transported in large, open military trucks. Detainees would be literally thrown into the back of the trucks, normally after their hands had been tied behind their backs. They were routinely covered with a large tarpaulin and then subjected to repeated beatings, with rifle butts or clubs, or kicked by soldiers. Soldiers would also sit on or walk over the detainees under the tarpaulin. Beatings and other forms of mistreatment would continue throughout the journey. One interviewee described the treatment he suffered:

*As well as hitting us with rifle butts, Tatmadaw soldiers put cigarettes out on our faces. While he forced a lit cigarette into my nose, one soldier said, “please, have a cigarette”. The hair inside my nose burned and it was very painful. The soldiers tortured us all like this throughout the 16 kilometres journey to the prison.*¹⁴⁴²

671. The mistreatment during transportation led to serious injuries among detainees, including broken bones and head injuries, sometimes with lasting consequences. One interviewee described the difficulties he had in breathing due to the impact on his chest,¹⁴⁴³ while another explained how he lost consciousness during the journey because of the beatings.¹⁴⁴⁴ Another interviewee explained that, more than five years later, he still had difficulties walking, due to the pain from his back and a broken wrist.¹⁴⁴⁵ Another interviewee remembered how a fellow detainee was beaten unconscious on a journey back from a court hearing.¹⁴⁴⁶

672. Once detainees had arrived at Buthidaung prison, they continued to suffer ill-treatment. Cells were extremely cramped, with numbers vastly exceeding capacity. There were no beds or bedding, and often not even the space to lie down. Former detainees estimate that the number of detainees in the cells was up to seven times the actual capacity, with hundreds of men held together in the same room.¹⁴⁴⁷ Food and drink was insufficient, often

¹⁴³⁶ DI-037.

¹⁴³⁷ While the Mission has not received information to suggest that detainees from other ethnic groups were treated in a similarly manner, this should not be discounted and warrants further investigation.

¹⁴³⁸ CI-176, RI-013.

¹⁴³⁹ CI-136, QI-105, QI-106, QI-107, RI-011.

¹⁴⁴⁰ K-076.3.

¹⁴⁴¹ CI-136, DI-037, QI-105, QI-106, RI-011, K-076.

¹⁴⁴² CI-136.

¹⁴⁴³ DI-037.

¹⁴⁴⁴ QI-106.

¹⁴⁴⁵ QI-105.

¹⁴⁴⁶ DI-037.

¹⁴⁴⁷ CI-130, CI-136, DI-037, QI-105, QI-106, QI-107, QI-108, RI-011.

only involving small portions of rice, with allegations of instances when the rice was thrown on the ground for them to eat by licking the floor.¹⁴⁴⁸ Fluids given to detainees appear to have deliberately included urine at times.¹⁴⁴⁹

673. Much of the mistreatment was perpetrated by ethnic Rakhine detainees, facilitated by the prison authorities.¹⁴⁵⁰ There are allegations that some Rakhine may have been brought into the prison for this specific purpose.¹⁴⁵¹ One former detainee referred to 10 ethnic Rakhine detainees who were “in charge of discipline”,¹⁴⁵² although the overall number involved may have been larger.¹⁴⁵³ The ethnic Rakhine detainees perpetrated the abuse throughout all hours of the day, particularly when they were sharing the same cells as Rohingya detainees. Mostly it involved severe, repeated and systematic beatings with wooden sticks, including while being forced to adopt a “praying position”, kneeling on the ground. Similar beatings were also carried out by prison guards. Guards used catapults to fire pellets at detainees from outside the cells and some reportedly made detainees crawl on the floor and beat them in this position.¹⁴⁵⁴

674. The beatings were accompanied by insults and references to retribution for the alleged violence.¹⁴⁵⁵ For example, one interviewee stated that the ethnic Rakhine detainee beating him said, “you burned our homes, you killed our people. Is this your country?”¹⁴⁵⁶ It appears that men with beards, often religious persons, were particularly targeted and suffered mistreatment focused on the forced removal of their beards.¹⁴⁵⁷ One Rohingya interviewee stated that he was forced to “pull out the beards” of 10 to 20 detainees, with his hand: “It was very painful for all of them. They were bleeding, and I was helpless. I did not have any other option. I felt bad.”¹⁴⁵⁸

675. For the period following the June 2012 violence, there are also credible and consistent reports of men and boys being subjected to sexual violence, including rape, sexualised torture and humiliation, either by authorities or in their presence.¹⁴⁵⁹ Rohingya boys were detained in the same cells as adult men. Detainees stated that guards anally raped Rohingya boys. At night, groups of boys and young men were subjected to penile rape, both orally and anally, by ethnic Rakhine detainees, often in the same cell as other detainees. One former detainee described how boys were taken into the latrine after dark:

*Almost every night they took these boys to the latrine in the cell. They forced them to perform oral sex and raped them. If they refused, they put their face into the latrine. We used to hear the screaming of the victims, but we were helpless and could do nothing.*¹⁴⁶⁰

¹⁴⁴⁸ CI-130, CI-136, CI-176, DI-037, QI-105, QI-107, KI-076.4.

¹⁴⁴⁹ CI-136, CI-176, QI-108.

¹⁴⁵⁰ DI-037; KI-076.2, KI-076.3, KI-076.5.

¹⁴⁵¹ In 2013, the Special Rapporteur on the situation of human rights in Myanmar said: “In Rakhine State, following violence in June 2012, Muslim men and boys were allegedly arbitrarily detained in Buthidaung prison. They were subjected to three months of systematic torture and ill-treatment by prison guards and up to 20 prison inmates, who appear to have been brought into the prison for the specific purpose of administering beatings to Muslim prisoners”, A/68/397, para. 10; KI-076.4.

¹⁴⁵² DI-037.

¹⁴⁵³ A/68/397, para. 10.

¹⁴⁵⁴ QI-105, QI-107, QI-108; KI-076.4, KI-076.5. Similar beatings continued more recently. One interviewee informed the Mission that, when he visited his relatives in the prison in early 2017, they were “hardly recognisable”, with marks on their bodies and their faces swollen and black.

¹⁴⁵⁵ CI-130, CI-136, QI-105, QI-106, QI-108.

¹⁴⁵⁶ QI-105.

¹⁴⁵⁷ CI-082, CI-176. This happened to Rohingya men detained during the post-25 August 2017 “clearance operation”, including an account of more than 30 religious leaders whose beards were burned off with gas lighters.

¹⁴⁵⁸ CI-136.

¹⁴⁵⁹ CI-136, DI-037, QI-107, QI-108.

¹⁴⁶⁰ CI-136.

676. Rohingya men and boys were also subjected to sexual humiliation, often in the presence of other inmates. Detainees experienced the degrading treatment of being forced to walk naked from their cell to the shower and showering in groups of up to 20 to 30 persons in front of one another, including family members, which was particularly uncomfortable and considered shameful.¹⁴⁶¹ Detainees reportedly had to wait outside their cells naked until they dried.¹⁴⁶² Another detainee described how guards burned the genitals of Rohingya detainees.¹⁴⁶³

677. A significant number of Rohingya detainees died because of mistreatment in Buthidaung prison. Some were beaten to death and corpses were dragged out of the cells.¹⁴⁶⁴ One former detainee described seeing four people killed in his cell: “They were beaten to death by the guards in front of me. Three others, who were beaten a lot, died a few months later.”¹⁴⁶⁵

678. Detainees also suffered serious injuries, including broken bones, infected wounds and other life-changing injuries.¹⁴⁶⁶ One former detainee described the impact of his regular beatings, for more than a month, by both ethnic Rakhine and guards:

*My back was injured, and I can no longer carry things on my back. They beat me on my toes and ankle and my little finger was broken. I have scars on my hands and feet and suffer pain on my back and waist.*¹⁴⁶⁷

679. Corruption was also prevalent within Buthidaung prison. Prison guards demanded bribes to reduce or end the beatings or to provide preferential treatment.¹⁴⁶⁸ Relatives or friends had to pay a fee to visit detainees.¹⁴⁶⁹ Large payments could also get prisoners released.¹⁴⁷⁰

4. Government response to the 2012 violence

(a) Curfews and prohibition of meetings of more than five people

680. One of the first responses of the Government to the violence in Maungdaw was the imposition by the Maungdaw Township Administrator on 8 June of a curfew and prohibition of public gatherings of more than five people.¹⁴⁷¹ Similar 2012 orders were imposed in Buthidaung, Kyaukpyu, Ramree, Sittwe and Thandwe townships.¹⁴⁷² According to the law, such orders should only remain in force for two months, unless the President directs

¹⁴⁶¹ CI-130, CI-136, DI-037, QI-105, QI-106, QI-108; KI-076.3, KI-076.4, KI-076.5.

¹⁴⁶² KI-076.3, KI-076.4.

¹⁴⁶³ DI-037.

¹⁴⁶⁴ CI-136, DI-037, QI-105, QI-106, QI-107, QI-108, RI-011; KI-076.2, KI-076.4, KI-076.5.

¹⁴⁶⁵ QI-106.

¹⁴⁶⁶ CI-136, DI-037, QI-107.

¹⁴⁶⁷ CI-136.

¹⁴⁶⁸ CI-082, CI-175, DI-037, QI-104, QI-107.

¹⁴⁶⁹ CI-082, CI-136, QI-104, QI-107.

¹⁴⁷⁰ DI-010, DI-037; K-076.4.

¹⁴⁷¹ Township General Administration Department, Curfew Order No. 1/2012 (8 June 2012), available at: <http://www.myanmargeneva.org/pressrelease/2.%20Preventive%20measures%20and%20actions%20aken%20by%20the%20government.pdf>. See page 7. The power to impose such curfew orders appears to have been increasingly used by the General Administration Department, through township administrators. It is viewed as an indirect way for the Tatmadaw to exercise control. See: M. Crouch, “The Everyday Emergency: Between the Constitution and the Code of Criminal Procedure”, in *Constitutional Change and Legal Reform in Myanmar*, A. Harding, Khin Khin Oo, eds. (Hart Publishing/Bloomsbury, 2017), p. 165.

¹⁴⁷² See presentation posted by the Permanent Mission of the Union of Myanmar to the United Nations and other international organizations in Geneva on “Preventive measures and actions taken by the Government”, p. 2, available at: <http://www.myanmargeneva.org/pressrelease/2.%20Preventive%20measures%20and%20actions%20aken%20by%20the%20government.pdf>

Generation Students Group.¹⁴⁹² The Chair of the Commission was Dr. Myo Myint, former Director-General at the Ministry of Religious Affairs; concerns were expressed to the Mission about his lack of independence.¹⁴⁹³ The Commission published its report on 8 July 2013.¹⁴⁹⁴ The Mission welcomes the fact that some parts of the report seek to reflect the perspectives of both communities on the violence. However, the report contains fundamental flaws that undermine its credibility.¹⁴⁹⁵

(d) Displacement camps and sites

689. As of July 2013, about 140,000 people (Rohingya, Rakhine, Kaman and Maramagyi) were displaced in Rakhine State as a result of the 2012 violence. They initially lived in 76 displacement camps and sites.¹⁴⁹⁶ Another 36,000 people were considered as “people in humanitarian need” having been adversely affected by the violence but without having been displaced. The displacement camps and sites were located across Rakhine State (see details in the map below).¹⁴⁹⁷ About 95 per cent of those who were displaced in 2012-13 were Muslims, the great majority of them Rohingya, and the remaining five per cent were ethnic Rakhine and Maramagyi.¹⁴⁹⁸

¹⁴⁹² See this chapter, section C.5: Spreading hate.

¹⁴⁹³ DI-077.

¹⁴⁹⁴ Inquiry Commission on Sectarian Violence in Rakhine State, *Final report* (July 2013)

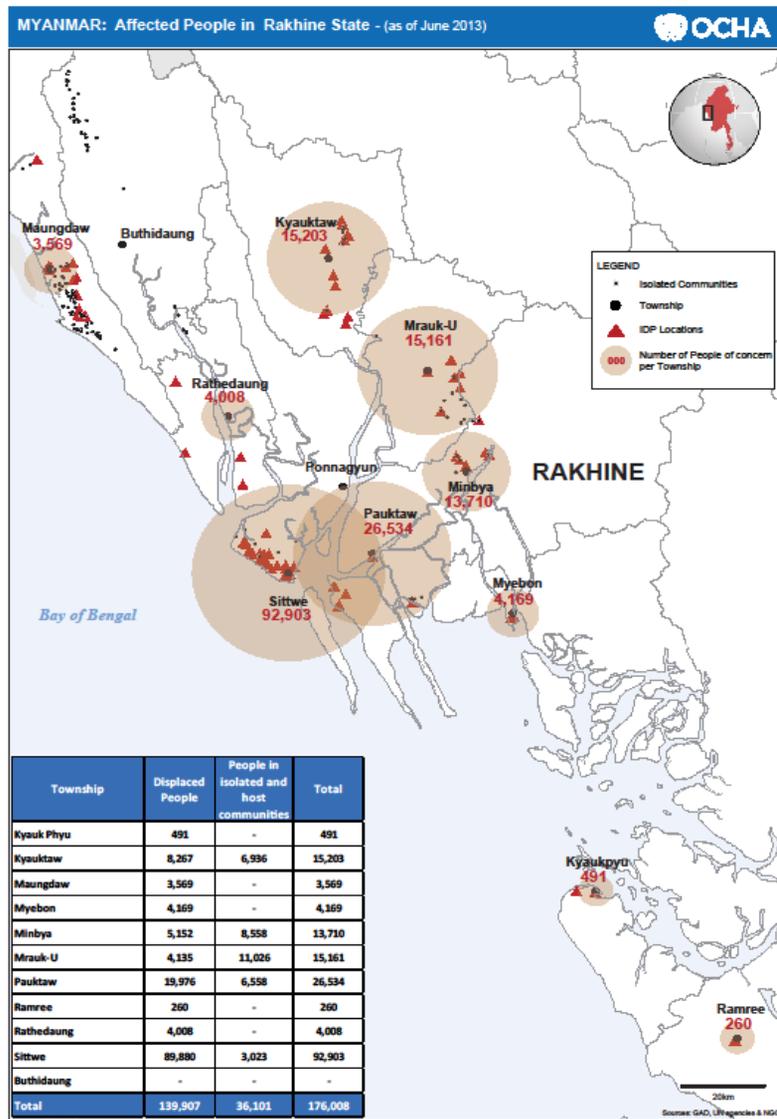
¹⁴⁹⁵ See chapter X, section B.2.b: Case study 2: violence and oppression in Rakhine State.

¹⁴⁹⁶ Approximately 100,000 people were displaced in the June 2012 violence, and the rest as a result of the October 2012 violence.

¹⁴⁹⁷ United Nations, *Rakhine Response Plan (Myanmar) – July 2012 – December 2013*, p. 4

¹⁴⁹⁸ K-069.

OCHA map of June 2013 showing the population affected by the 2012 violence in Rakhine State



690. By mid-2013, about 20 displacement sites in Sittwe and Maungdaw had closed. These were small sites, such as monasteries, where mostly ethnic Rakhine people had stayed for a short period. By the end of 2015, approximately 25,000 displaced people, including most of the Rakhine, had been assisted to return to their homes or to resettle, with individual housing assistance provided by the Rakhine State Government with support from the international community.¹⁴⁹⁹

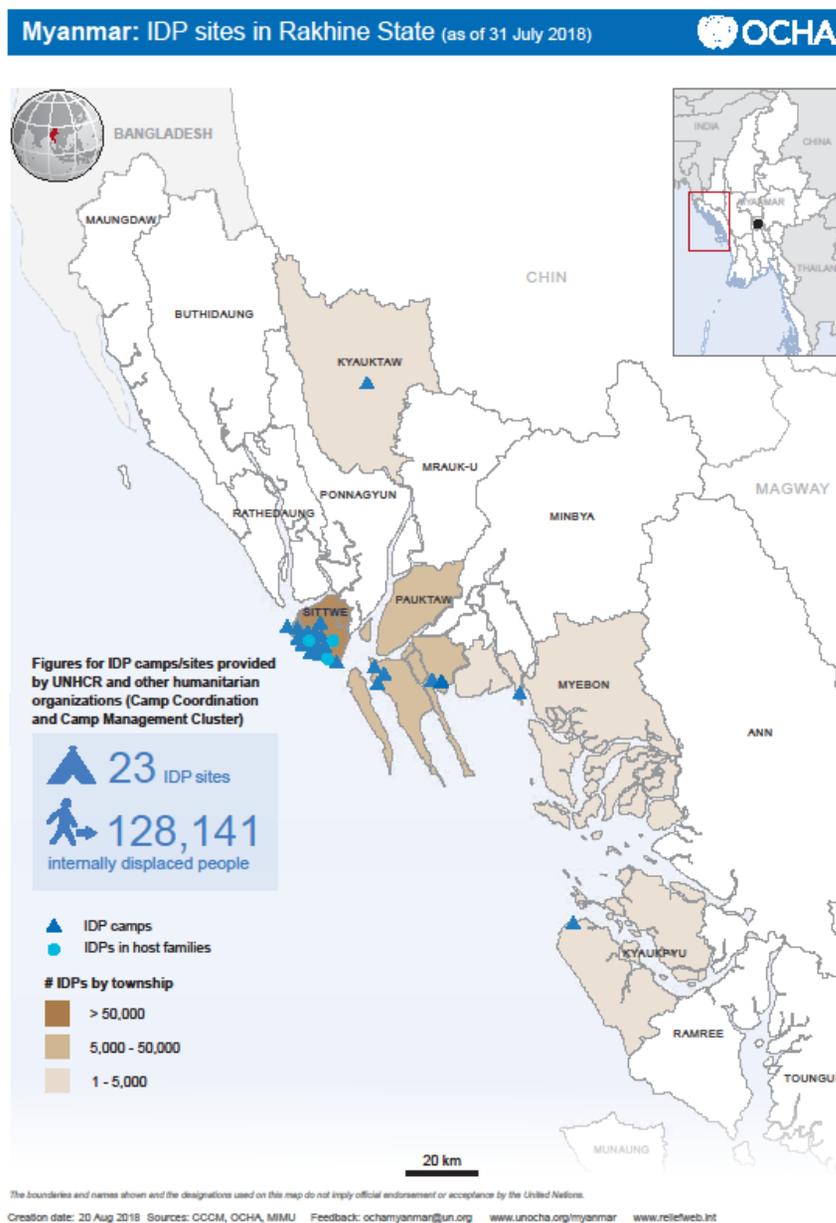
691. As of 31 July 2018, 128,000 people – mainly Rohingya along with a small number of Kaman – still remained in 23 displacement camps and sites across central Rakhine State.¹⁵⁰⁰

¹⁴⁹⁹ K-069.

¹⁵⁰⁰ OCHA, “Myanmar: IDP Sites in Rakhine State - as of 31 July 2018” (20 August 2018).

They have not been allowed to return to their places of origin, and have been confined with severe restrictions on their freedom of movement. The majority of the displaced live in a large area on the outskirts of Sittwe town (see details in the map below).

OCHA map of July 2018 showing the displaced population in Rakhine State



692. The camps in Rakhine State do not meet international standards for long-term camp populations. Moreover, as highlighted above, the Mission considers that the holding of

Rohingya and Kaman in these camps and sites since 2012 constitutes an arbitrary and discriminatory deprivation of their liberty.¹⁵⁰¹

693. According to credible reports, when the camps were established, the authorities decided on their location and stated that they would not be permanent.¹⁵⁰² However, six years later, little has changed, with no indication that the situation will be resolved in the foreseeable future. The displaced population is heavily dependent on humanitarian assistance. The humanitarian community faces multiple challenges in seeking to improve conditions in the camps. Most of the displaced live in over-crowded long-houses with inadequate privacy and restrictions on access to livelihoods, health and education. 4,000 people displaced in the Nget Chaung 2 camp in Pauktaw Township live in muddy, wet, unsanitary conditions because the camp is located on low-lying land, which is continuously flooded.¹⁵⁰³ During her visit in April 2018, the United Nations Assistant Secretary-General for Humanitarian Affairs described the conditions in the camps as “beyond the dignity of any people”.¹⁵⁰⁴

694. In its interim report of March 2017, the Advisory Commission on Rakhine State (the Advisory Commission) recommended that the Government prepares a comprehensive strategy towards the closure of all the IDP camps “through a consultation process with affected communities”.¹⁵⁰⁵ As a “first step and sign of goodwill”, the Commission called for the return and relocation of displaced people from three locations in Ramree, Pauktaw and Kyaukpyu. The Government claimed in May 2017 to have achieved this. However, while it successfully moved ethnic Rakhine from Kyaukpyu to a relocation site within Rakhine State, 55 Kaman households were relocated from Ramree to Yangon. They were told that they would not be allowed to return to their places of origin and were given small financial incentives. Furthermore, rather than returning the Rohingya from Kyein Ni Pyin camp (Pauktaw) to their places of origin, or offering them a durable solution elsewhere, the Government built individual houses on their displacement site.¹⁵⁰⁶ Similarly, the Government’s pilot project to start closing the remaining displacement camps in Rakhine State, announced on 2 January 2018, is highly unsatisfactory.¹⁵⁰⁷ According to credible reports, instead of closing the 10 camps in the pilot project, and returning the displaced to their places of origin or relocating them, the intention is to convert some of the displacement camps into villages. This goes against the wish, expressed by the majority of the displaced, to return to their places of origin, often located in urban centres.¹⁵⁰⁸ It is also contrary to the final recommendations of the Advisory Commission. Implementation of these plans, as with Kyein Ni Pyin, will further entrench marginalization, segregation and confinement.

695. The Mission is extremely concerned about the protracted confinement of Rohingya and Kaman communities in these camps and sites, which has a devastating impact on the human rights of these individuals. It urges the Myanmar authorities to resolve the situation urgently in line with the United Nations Guiding Principles on Internal Displacement. Its principle 28 underscores the primary duty and responsibility of the competent authorities to establish conditions, as well as provide the means, which allow displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily to another part of the country. It further stipulates that authorities shall endeavour to facilitate the reintegration of returnees, and that special efforts should be made to ensure the full participation of the affected persons in the planning and management of their return.

¹⁵⁰¹ See this chapter, section B.2.f. Conclusion.

¹⁵⁰² K-069.1.

¹⁵⁰³ K-069.1.

¹⁵⁰⁴ See video: <https://twitter.com/uschimuller/status/981625075953782784?lang=fr>

¹⁵⁰⁵ Advisory Commission on Rakhine State, *Interim Report and Recommendations* (March 2017), p. 12-13

¹⁵⁰⁶ Inquiry Commission on Sectarian Violence in Rakhine State, *Final report* (July 2013), p. 35; K-063

¹⁵⁰⁷ The Global New Light of Myanmar, “Meeting on IDP camps, freedom of movement matters held in Rakhine State” (3 January 2018); Statement by the Office of the State Counsellor on the Final Report of the Advisory Commission on Rakhine State (24 August 2017).

¹⁵⁰⁸ K-063, K-069.1.

5. Spreading hate

(a) Inciting anti-Rohingya sentiment

696. The Mission has examined documents, publications, statements, Facebook posts and audio-visual materials that have contributed to shaping public opinion on the Rohingya and Muslims more generally. The analysis demonstrates that a carefully crafted hate campaign has developed a negative perception of Muslims among the broad population in Myanmar. This campaign has been the work of a few key players: nationalistic political parties and politicians, leading monks, academics, prominent individuals and members of the Government. This hate campaign, which continues to the present day, portrays the Rohingya and other Muslims as an existential threat to Myanmar and to Buddhism.¹⁵⁰⁹ In the case of the Rohingya, it has gone a step further. It is accompanied by dehumanising language and the branding of the entire community as “illegal Bengali immigrants”. This discourse created a conducive environment for the 2012 and 2013 anti-Muslim violence in Rakhine State and beyond, without strong opposition from the general population. It also enabled the hardening of repressive measures against the Rohingya and Kaman in Rakhine State and subsequent waves of State-led violence in 2016 and 2017.

697. Anti-Muslim campaigns are not a recent phenomenon in Myanmar. A book published in the 1980s by an anonymous author, spells out a series of anti-Muslim concepts and admonitions that would resurface and gain traction 20 and 30 years later. Entitled “Fear of extinction of the race”, the book presents Islam as a serious threat to Buddhism and calls on people to “protect their race and religion”. It states that Buddhist women are particularly vulnerable and that children should be taught not to be friendly with people of other religions. The book also calls the readers not to do business with Muslims (referred to by the derogatory term “Kalars”¹⁵¹⁰) and states that, “it is certain that in 100 years, the glorious Buddhism along with Myanmar ethnic people will disappear completely”. It also calls for a boycott of Muslim shops (“... buying from them is like watering poisonous plants ...”) and states:

*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.*¹⁵¹¹

698. This book was published close to the adoption of the discriminatory 1982 Citizenship Law. According to credible reports, it was initially banned by the military Government but was later distributed either in full or in shorter anti-Muslim pamphlets.¹⁵¹² In 2001, violence broke out in Taungoo (Pegu division), reportedly after the distribution of these pamphlets by the Union Solidarity and Development Association, which later became the Union Solidarity and Development Party (USDP), established in 2010 by former senior military officers. The violence reportedly left around 200 Muslims dead, mosques destroyed and houses burned.¹⁵¹³ The main narrative of the book and the calls for boycotts of Muslim businesses were amplified by the 969 movement in 2012 and later by MaBaTha.¹⁵¹⁴ More generally, the idea that there is risk for one race to extinguish another can be found in the motto of the Ministry of Immigration and Population, now the Ministry of Labour, Immigration and Population:

The earth will not swallow a race to extinction but another race will.

699. The Ministry has had this motto since its establishment in 1995 but some reports trace it back to the first military dictator, General Ne Win, around 1962. Credible reports indicate

¹⁵⁰⁹ See chapter VI, section B.2: Findings on the issue of hate speech.

¹⁵¹⁰ The word “Kalar” is used as a racist slur to insult and highlight someone’s dark skin or foreign ancestry.

¹⁵¹¹ K-112. Unofficial translation of *A Myo Pyaut Mhar Soe Kyaut Sayar*

¹⁵¹² K-111.

¹⁵¹³ K-111.

¹⁵¹⁴ For a brief description of 969 and MaBaTha, see chapter III, section B.2: Place of Buddhism in society.

that until recently this motto was displayed prominently on billboards and in offices.¹⁵¹⁵ Although this motto now appears to be less prominent, it is still featured on the Ministry's website. On 26 August 2011, during a discussion in the lower house of Parliament about the issuance of white cards to the Rohingya, the then Minister of Immigration stated: "Our Ministry is trying its best to uphold the slogan 'Race is not swallowed by the earth but by another race'".¹⁵¹⁶

700. Another influential publication in relation to the hate narrative against the Rohingya is the book *Influx viruses – The illegal Muslims in Arakan* by U Shwe Zan and Dr. Aye Chan, published in the United States in August 2005.¹⁵¹⁷ The title and content of the publication refer to the Rohingya in an offensive and degrading manner, with a stark difference between the English and Myanmar language sections. The latter refer to the Rohingya as "hairy with long beards" and to "Bengali Kalars ... swallowing other races". Similar patterns are seen with the *Paccima zone* magazine, where the English content – some of which was also authored by Dr. Aye Chan – was drafted in a very different tone and style to the Myanmar language content, possibly in an attempt to project a more acceptable image to the international community.

701. Several interlocutors informed the Mission that the publication of the *Paccima zone* magazine in February 2012 marked a turning point in the targeted campaign of hate and hostility against the Rohingya in Rakhine State.¹⁵¹⁸ The first volume of the magazine includes a foreword drafted by the Maungdaw District Administrator. It also lists some of the most senior State officials and police chiefs from Maungdaw and Buthidaung Townships as "patrons" and "committee members" and includes the names and pictures of monks who were "consultants".¹⁵¹⁹

702. The magazine includes one section containing a series of anti-Rohingya articles written with provocative titles such as "Black tsunami in a pitiful disguise" or "Slow invasion". Articles 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; 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.¹⁵²⁰ Another article, "What the Rohingya is", states:

*What the Rohingya is, is the latest weapon of the religious extremist terrorists... they are trying their very best to steal the land. Current actions of the Muslim extremists are extremely frightful.*¹⁵²¹

¹⁵¹⁵ V-240.

¹⁵¹⁶ Pyithu Hluttaw, "Question from U Thein Nyunt of Thingankyun Constituency, on whether the Union Government was aware of the fact that the Township Immigration Offices incurred arbitrary delays for people of Islamic faith to go through the nationality verification process, to obtain household list and birth certificates, as answered by the Minister of Immigration and Population, U Khin Yi" (26 August 2011), available at: <https://pyithu.hluttaw.mm/question-2747>

¹⁵¹⁷ K-112. The first author used to be an immigration officer in Rakhine State, while the second author is a Rakhine historian and professor at Kanda University of International Studies in Japan. He is currently the Chair of the "Ancillary Committee for Reconstruction of Rakhine National Territory in the Western Frontier", a body set up after the 25 August 2017 attacks.

¹⁵¹⁸ *Paccima zone* magazine, volume 1. On file with the Mission (K-112). "Paccima zone" refers to the Maungdaw-Buthidaung region.

¹⁵¹⁹ Maungdaw District Administrator; Chief of Maungdaw District Police Force; Maungdaw District Planner; Buthidaung Township Administrator; Chief of Buthidaung Township Police Force; Chief of Buthidaung Township Planning Administration, and the Administrator of GAD for Buthidaung Township.

¹⁵²⁰ *Paccima zone* magazine, volume 1, "Local people's view on the so-called Rohingya" (February 2012), pp. 60-61.

¹⁵²¹ San Shwe Maung, "What the Rohingya is" (*Paccima zone* magazine, volume 1, February 2012) pp. 30-32.

703. The presence of key northern Rakhine State officials in the editorial board indicates that these articles had their backing or at least their tacit approval. It gives an indication of the attitude of State officials towards the Rohingya shortly ahead of the 2012 violence. The themes covered in the magazine were amplified and used more systematically to cultivate the hate environment against the Rohingya prior to and after the commencement of the violence.

704. On 29 May 2012, seven days before the report in the *New Light of Myanmar*, the *Narinjara* newspaper published an article about the murder of Ma Thida Htwe the previous day, and referred to it as the “worst homicide case in Myanmar”. Quoting a police officer, the article stated that the woman was raped by “Kalars”. This article was republished in the *Arakan Independent Bulletin* with a graphic picture of her dead body. The author called on all the ethnic Rakhine to be united when dealing with the Rohingya issue.¹⁵²²

705. On 1 June 2012 – three days after the murder of Ma Thida Htwe and two days before the killing of the 10 Muslims in Toungup – Zaw Htay, the spokesperson of the President of Myanmar, posted a statement on his personal Facebook account. He warned about the arrival from abroad of “Rohingya terrorists” from the Rohingya Solidarity Organization (RSO) and stated that the Myanmar troops would “completely destroy them”:

*Rohingya terrorists as members of the RSO are crossing the border into Myanmar with weapons. ... Our troops have received the news in advance so they will completely destroy them [the Rohingya]. It can be assumed that the troops are already destroying them [the Rohingya]. We don't want to hear any humanitarian or human rights excuses. We don't want to hear your moral superiority, or so-called peace and loving kindness. (Go and look at Buthidaung, Maungdaw areas in Rakhine State. Our ethnic people are in constant fear in their own land. I feel very bitter about this. This is our country. This is our land.) (I'm talking to you, national parties, MPs, civil societies, who are always opposing the President and the Government.)*¹⁵²³

706. Although this post was later deleted, the impact of a high official equating the Rohingya population with terrorism may have been significant ahead of the 2012 violence, which erupted a week later.

707. On 8 June 2012, the newspaper *Eleven Media* – one of the most widely read publications in Myanmar – reported on the violence that took place that day in Maungdaw. Under the title “Curfew imposed in Rakhine Township amidst Rohingya terrorist attacks”, it attributed the violence exclusively to “Rohingya terrorist attacks” and made no mention of the violence carried out by ethnic Rakhine and security forces against the Rohingya.¹⁵²⁴

708. Both the Rakhine Nationalities Development Party (RNDP) and the 88 Generation Students group made anti-Rohingya statements in two articles published by *Eleven Media*. These quotes went far beyond the specific events that took place in Maungdaw on 8 June 2012. The RNDP statement was reported as being made as early as 4.15 pm on 8 June, only about three hours after the beginning of the violence. It labelled the violence as “terrorist attacks” and stressed the fact that the Rohingya were not among the 135 recognised ethnic groups in Myanmar:

*Rohingyas are not the national ethnics. As successive government officials favoured and issued them national registration cards by taking bribes, they are acting as the over-indulgent persons. Due to the control of Rakhine ethnics, they could not widely spread until now. The prevailing attacks mean insulting the hosts by the guests. This is a terrorist attack.*¹⁵²⁵

¹⁵²² Arakan Independent Bulletin, Issue 4, No. 11 (May 2012), pages 3-6.

¹⁵²³ V-247.

¹⁵²⁴ *Eleven Media*, “Curfew imposed in Rakhine township amidst Rohingya terrorist attacks” (8 June 2012), available at: <http://aboutarakaneng.blogspot.com/2012/06/curfew-imposed-in-rakhine-township.html>

¹⁵²⁵ *Eleven Media*, “Curfew imposed in Rakhine township amidst Rohingya terrorist attacks” (8 June 2012), available at: <http://aboutarakaneng.blogspot.com/2012/06/curfew-imposed-in-rakhine-township.html>

709. On the same day, Eleven Media also published a statement of Dr. Aye Maung, the Chair of the RNDP, in which he drew parallels between the violence in Maungdaw on 8 June 2012 and the 1942 violence when more than 60,000 Rohingya and ethnic Rakhine are believed to have been killed in inter-communal violence during the Second World War.¹⁵²⁶ He referred to “attacks that seriously threaten the Arakanese people” and called for the establishment of paramilitary forces in Rakhine and Shan States. He went on to state that “the persons behind the curtain”, presumably alleging that Rohingya groups have instigated the violence, will be “responsible for the consequences”.¹⁵²⁷

710. The 88 Generation Students group made similar statements, with Ko Mya Aye, a prominent leader of the group and former political prisoner, quoted as describing the incident as a “terrorist attack”, referring to “infiltrations” by “illegal migrants”, and calling for a “firm and solid immigration law” in response. The article also quoted Ko Ko Gyi, another prominent member of the 88 Generation Students group and former political prisoner, as stating that the Rohingya were not a Myanmar ethnic race and that this incident might “threaten the sovereignty of the State”.¹⁵²⁸

711. On 25 June 2012, Eleven Media published an op-ed by its editor-in-chief warning about the “risk and danger of ethnic cleansing or genocide”, as a result of the threat posed by the Rohingya. It claimed that swift action had save(d) “the lives of the Rakhine nationals from being attack of genocide”.¹⁵²⁹

712. On 11 July 2012, President Thein Sein held a meeting in Naypyidaw with Mr. Antonio Guterres, then United Nations High Commissioner for Refugees. During this meeting, the President referred to “illegal migrants” who “sneaked into” Myanmar and “later took the name Rohingya”. He stated that he could not take responsibility for them and that they should either be sent to IDP camps and be supported by UNHCR, or be sent to a third country.¹⁵³⁰ A depiction of this nature by Myanmar’s highest official further stigmatised the Rohingya in an already tense climate.

713. From mid-June 2012, various groups, including the RNDP, the All Rakhine Refugee Committee, the Wunthanu Rakhita Association and Buddhist monks’ associations, such as the Arakanese Youth Monk’s Association, stepped up activities that served to incite the population in Rakhine State against the Rohingya. They included increasingly extreme calls to the Rakhine population to act, and other provocative statements, with a common theme of the perceived threat represented by the Rohingya and the need to sever ties between communities.¹⁵³¹ For example, on 26 June 2012, the RNDP warned against the threat of the “present population of Bengali” and called for a “final solution”. One of the recommendations of the RNDP was to “relocate the non-Myanmar national Bengali to a third country”.¹⁵³² The RNDP also praised Hitler and argued that inhuman acts were sometimes necessary to maintain a race. In a November 2012 publication, it identified a collective need to take “a decisive stand on the issue of Bengali Muslims”. It went on, “if we do not courageously solve these problems, which we have inherited from several previous generations, and instead hand them over to the next generation, we will go down in history as irresponsible”:

¹⁵²⁶ See for a study on the 1942 events: J. Leider, “Conflict and Mass violence in Arakan (Rakhine State) – The 1942 Events and Political Identity Formation”, in *Citizenship in Myanmar*, A. South, M. Lall (eds.), (Chiang Mai University Press, 2018), pp. 193-221, noting that “the waves of communal clashes of 1942 have been poorly documented, sparsely investigated and rarely studied” (p. 194) and that “the absence of a factual master narrative, which both Buddhists and Muslims could have agreed upon, barred the emergence of consensual interpretations of the events” (p. 211).

¹⁵²⁷ Eleven Media, “Curfew imposed in Rakhine township amidst Rohingya terrorist attacks” (8 June 2012), available at: <http://aboutarakaneng.blogspot.com/2012/06/curfew-imposed-in-rakhine-township.html>

¹⁵²⁸ *Ibid.*

¹⁵²⁹ Than Htut Aung, “I will tell the real truth” (Eleven, 25 June 2012).

¹⁵³⁰ V-243.

¹⁵³¹ K-112.

¹⁵³² V-242.

*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 Myanmar cannot be labelled as inhumane.*¹⁵³³

714. In July 2012, a group of monks published a statement calling on the ethnic Rakhine to implement a “great plan of staying away from bad Bengali (Kalar)” to prevent a “Rakhine ethnic cleaning programme”. The statement called on ethnic Rakhine not to employ Rohingya and not to trade with them. In October, a conference of monks concluded that there was a need to “expose sympathisers of Bengali Kalars as national traitors along with photos and to spread the information to every township”.¹⁵³⁴

715. In August 2012, a blog called “Terrorist 2012” published a poem called “To Thida Htwe, record written in blood, oath declared in blood”.¹⁵³⁵ In 2016, the MaBaTha released a video re-enacting the murder of Ma Thida Htwe and including a background song with similar lyrics. The video was widely circulated on CDs and other formats.¹⁵³⁶

716. Specific efforts were also made to sow fear and hatred against the Rohingya among new recruits to the Tatmadaw. In October 2012, soldiers reportedly received specific training at the Naypyidaw Divisional Military Headquarters on the “expansion of Islam” and the “extinction of Buddhism”. A presentation titled “Fear of extinction of the race” echoed some of the main anti-Muslim themes of the book published 30 years before. It concluded with the need to “protect our race and religion as much as possible”.¹⁵³⁷

(b) Inciting negative sentiments against the international community

717. Following the 2012 violence, the operating conditions for international organizations in Rakhine State deteriorated severely. Humanitarian organizations assisting Rohingya communities faced extreme hostility or even violence. This took place regardless of whether they also assisted ethnic Rakhine. Rumours were spread that the Rohingya were being unfairly prioritised for humanitarian assistance over the ethnic Rakhine. This translated into hostility against international organizations.¹⁵³⁸ This hostility was already prevalent in northern Rakhine State prior to the 2012 violence but afterwards, with the support given to displacement camps and sites in central Rakhine, it became more apparent in central Rakhine also. Again, it was fuelled by nationalist groups, political parties and monks. For example, the Group of Wunthanu Ethnic People circulated a letter accusing the United Nations and international organizations of “watering poisonous plants”, using a recurrent analogy.¹⁵³⁹ The letter labelled nine leading international organizations as “traitors” for assisting the Rohingya. The group also warned landlords against renting properties to organizations assisting the Rohingya.¹⁵⁴⁰

718. This narrative was also spread by some government officials. In late February 2014, an international organization, one of the main health care providers in northern Rakhine State, was ordered to cease operations throughout Myanmar, shortly after releasing a statement on reported killings in Du Chee Yar Tan, Maungdaw Township.¹⁵⁴¹ The Presidential

¹⁵³³ RNDP, *Toe Thet Yay* Journal, vol. 2(12) (November 2012).

¹⁵³⁴ K-112.

¹⁵³⁵ <http://terrorist2012.blogspot.com/2012/08/blog-post.html>.

¹⁵³⁶ Facebook posts with the video have since been deleted. A copy is on file with the Mission (V-234).

¹⁵³⁷ K-106.3.

¹⁵³⁸ A/69/398.

¹⁵³⁹ Analogy originally used in the book *Fear of extinction of the race* in the 1980s. See this chapter, section C.5: Spreading hate.

¹⁵⁴⁰ On file with the Mission (K-112).

¹⁵⁴¹ In January 2014, the United Nations High Commissioner for Human Rights issued a press release calling on the Government to investigate credible reports that more than 40 Rohingya had been killed in Du Chee Yar Tan between 9 and 13 January 2014. The Government strongly denied these allegations.

attacks by ethnic Rakhine against Muslims took place almost simultaneously in nine townships across Rakhine State between 21 and 25 October 2012.¹⁵⁸¹

Involvement of local officials and security forces

733. State actors, including village administrators and members of the security forces, were involved significantly in the violence. The security forces actively participated in violence or failed to stop it.¹⁵⁸² For example, on 10 June 2012, security forces stood aside and watched as an ethnic Rakhine mob burned Kaman houses in Ramree.¹⁵⁸³ The police and Tatmadaw had the capacity to intervene and halt the violence but chose not to do so. In October 2012, while Rakhine State was under a state of emergency, interviewees stated that, when they approached district and township officials to seek protection, they were refused assistance.¹⁵⁸⁴ One interviewee from Kyaukpyu received a similar response from a senior township official in October 2012 in west Paik Seik who told him that the fire engine could not be used to put out the burning houses because no permission had been given by “high officials”.¹⁵⁸⁵ A credible source reported that police and ethnic Rakhine casually stood together during the burning in areas of Kyaukpyu. While the Muslims attempted to extinguish fires, ethnic Rakhine, the security forces and a fire truck all waited idly at the other end of the road.¹⁵⁸⁶

734. The Mission also received accounts from both Sittwe and Kyaukpyu of fire brigades - which fall under the authority of the Tatmadaw - actually spreading fires instead of extinguishing them.¹⁵⁸⁷ One interviewee from Sittwe shared the following account from June 2012:

*A vehicle came to extinguish the fires. However, when the firefighters spread liquid from the vehicle, I realized that they were spreading petrol and not water. It increased the flames instead of stopping the fire.*¹⁵⁸⁸

735. In Kyaukpyu, local government officials were present when ethnic Rakhine were setting houses on fire in October 2012.¹⁵⁸⁹ Instead of intervening, one official accused Kaman and Rohingya villagers of burning the houses and told them to leave.¹⁵⁹⁰ Also in Kyaukpyu, security forces, who had been paid by Muslim villagers for weeks to ensure their protection in Paik Seik, left in the morning of 22 October 2012, just a few hours before ethnic Rakhine attacked the area.¹⁵⁹¹

Involvement of monks and political parties

736. Rakhine nationalist political parties and organizations as well as influential monks also played an important role in the violence, through either instigation or direct participation. Monks and members of the Rakhine Nationalities Development Party (RNDP) were reportedly involved in the attacks that took place in Sittwe.¹⁵⁹² More generally, influential Buddhist organizations and the 969 movement appear to have been engaged from the earliest stages in 2012, fuelling anti-Muslim sentiments, instigating ethnic Rakhine to carry out the violence, or directly participating in violence.¹⁵⁹³

¹⁵⁸¹ V-050.

¹⁵⁸² See this chapter, section C.1: Emblematic incidents.

¹⁵⁸³ CI-163, CI-171.

¹⁵⁸⁴ CI-085, CI-165, CI-168, CI-170.

¹⁵⁸⁵ CI-168.

¹⁵⁸⁶ V-050.

¹⁵⁸⁷ CI 083, CI-084, CI-166, CI-168, DI- 021, DI-022; K-109, KI-076.17.

¹⁵⁸⁸ CI-166; KI-076.17.

¹⁵⁸⁹ CI-165, CI-168, CI-170.

¹⁵⁹⁰ CI-085, CI-165, CI-168, CI-170.

¹⁵⁹¹ DI-021, DI-024; V-050.

¹⁵⁹² CI-171; K-114, K-076.9.16, K-076.9.17, K-076.9.20, K-076.9.22, K-076.9.23, K-076.9.32.

¹⁵⁹³ CI-164.

737. In Kyaukpyu, a group of ethnic Rakhine from other areas was reportedly led by a local leader of the 969 group to burn Kaman houses in October 2012.¹⁵⁹⁴ Similarly, violence that targeted Thandwe's Kaman community in 2013 was instigated and led by members of the 969 movement, with the active or passive support of security forces.¹⁵⁹⁵ One Kaman interviewee recognised the leader of the 969 group in Thandwe, who was also reportedly connected with the killing of the 10 Muslims in Toungoup on 3 June 2012.¹⁵⁹⁶ Credible reports also suggest the involvement of the RNDP in inciting ethnic Rakhine before the violence in Kyaukpyu.¹⁵⁹⁷

738. Moreover, the Mission received credible reports suggesting linkages between the leadership of 969 and MaBaTha and the Tatmadaw or some members of the Government affiliated with the Tatmadaw.¹⁵⁹⁸ One report suggests that senior officials approached former leaders of the 2007 "Saffron revolution", upon their release from prison, and encouraged them to join 969 or MaBaTha and offering financial and other incentives to do so. It is reported that some monks refused this, while others, notably Ashin Wirathu, accepted.¹⁵⁹⁹ Given the important role played by 969 and MaBaTha in fuelling anti-Muslim violence in Myanmar, these allegations are significant and warrant further investigation.

Specific events in Maungdaw

739. Various accounts by Rakhine and Rohingya witnesses suggest that men might have been brought to Maungdaw to participate in the violence¹⁶⁰⁰ or that the security forces themselves might have been responsible for some of the burning of Rakhine houses in Maungdaw.¹⁶⁰¹

President Thein Sein stating the violence was instigated

740. In a statement issued on 25 October 2012, President Thein Sein himself stated that the violence was being orchestrated by "persons and organizations who are conducting manipulations in the incidents in Rakhine State behind the scene". He promised that perpetrators would be "exposed" and legal action taken against them.¹⁶⁰² However, no legal action was taken and the President never clarified who were the alleged perpetrators of the instigation. Echoing the above statement, a credible report quoted an anonymous military source in the central government stating that the October 2012 attacks were carefully organized. The military source reportedly accused "Rakhine nationalists with ties to the Rakhine Nationalities Development Party" of leading the mobs, who were "fuelled by Buddhist monks spreading anti-Muslim rhetoric".¹⁶⁰³ A year later, on 3 October 2013, the President once again claimed the violence was being instigated, this time referring to "outsiders" responsible for the violence in Thandwe:

*Ethnic Rakhine and ethnic Kaman have been living here in peaceful coexistence for many years. External motives instigated violence and conflicts. According to the evidence in hand, rioters who set fire to the villages are outsiders. Participation of all is needed to expose and arrest those who got involved in the incident and those instigating the conflict behind the scene. Only then can root cause of the problem be addressed.*¹⁶⁰⁴

¹⁵⁹⁴ CI-167.

¹⁵⁹⁵ CI-164, CI-169.

¹⁵⁹⁶ CI-164, CI-169.

¹⁵⁹⁷ CI-165; V-050, V-051.

¹⁵⁹⁸ DI-011; K-101, K-106; See also C4ADS, *Sticks and Stones - Hate Speech Narratives and Facilitators in Myanmar* (2016).

¹⁵⁹⁹ DI-011, K-106, DM-002.

¹⁶⁰⁰ DI-038, DI-045, QI-106.

¹⁶⁰¹ CI-153.

¹⁶⁰² The New Light of Myanmar (26 October 2012).

¹⁶⁰³ V-051.

¹⁶⁰⁴ The New Light of Myanmar, "No winner in Myanmar's 60-year old armed conflict – Government to use all ways and means vested by the Constitution for restoring peace and stability, ensuring rule of

impose segregation in central Rakhine and confine Muslims to displacement camps and sites for more than six years.

746. Both Rakhine and Rohingya leaders told the Mission that they believed the violence was instigated to divert the attention of the ethnic Rakhine from the Kyaukyu development project that started in 2009 and was met with strong resistance and protests. They also indicated that it might have been a way for some elements in the Tatmadaw to derail the democratic transition and claim back additional power.¹⁶¹³

747. The Mission has reasonable grounds to conclude that the 2012 and 2013 violence in Rakhine State was pre-planned and instigated and that the Myanmar security forces were actively involved and complicit. They participated in acts of violence. They refused to fulfil their duty to provide protection, especially to Rohingya and Kaman in need and their properties. Local authorities, ultranationalist Rakhine organizations and politicians, as well as radical monks instigated and/or assisted in acts of violence, to varying degrees. Given the role of the Tatmadaw in the area at the time, allegations that it had a “hidden hand” in instigating the violence merit further investigation.

748. The extreme levels of violence perpetrated against the Rohingya in northern Rakhine State in 2016 and 2017, and their mass expulsion – as discussed in the next sections – can only be understood against this backdrop:

- Years of concerted hate campaigns against the Rohingya portraying them as “illegal immigrants” constituting a threat to the nation and the Buddhist character of the country, using dehumanising language – with the involvement of and condoning by State authorities and influential figures of authority;
- Decades of gradual marginalisation and eroding of rights, resulting in a State-sanctioned and institutionalised system of oppression affecting the lives of Rohingya from birth to death;
- Denial of legal identity, restrictions on movement, access to food, livelihood, health and education significantly weakening the Rohingya population for years;
- Actively instigated violence between the ethnic Rakhine and the Rohingya, with the involvement of State institutions and other figures of authority, resulting in mass arrests of Rohingya, policies of segregation and the mass displacement and confinement of Rohingya into squalid and barb-wired “displacement” sites and camps in central Rakhine, where they have been arbitrarily detained for more than six years; and
- A Government response that has consistently failed to attribute responsibilities, giving the perpetrators a stamp of approval.

D. 25 August 2017 and the “clearance operations”

*That day felt like the last day of this world, as if the whole world was collapsing. I thought judgment day had arrived.*¹⁶¹⁴

749. What happened in northern Rakhine State on 25 August 2017 and the following days and weeks was the realisation of a disaster long in the making. It resulted from the systemic oppression of the Rohingya, the 2012 violence, and the Government’s subsequent actions and omissions. It caused the disintegration of a community and resulted in a human rights catastrophe, the effects of which will span generations.

750. In the early hours of 25 August, ARSA launched coordinated attacks on a military base and up to 30 security force outposts across northern Rakhine State, in an apparent response to increased pressure on Rohingya communities and with the goal of gaining global attention. A small number of minimally-trained leaders had some arms, and a significant

¹⁶¹³ DM-002, DM-006, DM-007, DM-008, DI-012.

¹⁶¹⁴ LI-120.

number of untrained villagers wielded sticks and knives. Some had improvised explosive devices. Twelve security personnel were killed.

751. The security forces' response was immediate, within hours, brutal and grossly disproportionate. Ostensibly to eliminate the "terrorist threat" posed by ARSA, in the days and weeks that followed it encompassed hundreds of villages across Maungdaw, Buthidaung and Rathedaung Townships. The operations targeted and terrorised the entire Rohingya population; the authorities called them "clearance operations". They continued for more than two months, and for a considerable period after the Government claimed their completion on 5 September 2017.¹⁶¹⁵ During the course of the operation more than 40 per cent of all villages in northern Rakhine State were partially or totally destroyed. The most intense phase was the first three weeks when more than 80 per cent of the destruction was perpetrated. As a result, over 725,000 Rohingyas had fled to Bangladesh by September 2018.¹⁶¹⁶

752. Despite the operations covering a broad geographic area, they were strikingly similar. Tatmadaw soldiers would attack a village in the early hours, frequently joined by other security forces, often by ethnic Rakhine men and sometimes men from other ethnic minorities. Elements of the Tatmadaw's 33rd and 99th Light Infantry Divisions had been deployed to Rakhine State earlier in August. The operations were designed to instil immediate terror, with people woken by intense rapid weapons fire, explosions, or the shouts and screams of villagers. Structures were set ablaze and Tatmadaw soldiers fired their guns indiscriminately into houses and fields, and at villagers.

753. The nature, scale and organization of the operations suggests 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, who stated at the height of the operations, "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."¹⁶¹⁷

1. A human rights catastrophe

754. The Mission obtained a wealth of information on these events, including over 600 interviews with victims and eyewitnesses, satellite imagery, documents, photographs and videos. It examined many incidents in detail. It found consistent patterns of the most serious human rights violations and abuses.

(a) Most serious incidents

755. The events in six villages or areas are set out in detail below, as verified by the Mission. Based on the information collected by the Mission, these are among the gravest incidents in the course of the "clearance operations".

Min Gyi (Tula Toli)

756. Min Gyi (known in Rohingya as Tula Toli) is a village tract located in Maungdaw Township in northern Rakhine State. With a population of approximately 4,300 Rohingyas and 400 ethnic Rakhine¹⁶¹⁸, it is surrounded by a river on three sides. Across this river on the eastern side are two other village tracts, Wet Kyein (known in Rohingya as Wed Kayaung) and Pa Da Kar Ywar Thit (known in Rohingya as Diyal Toli).

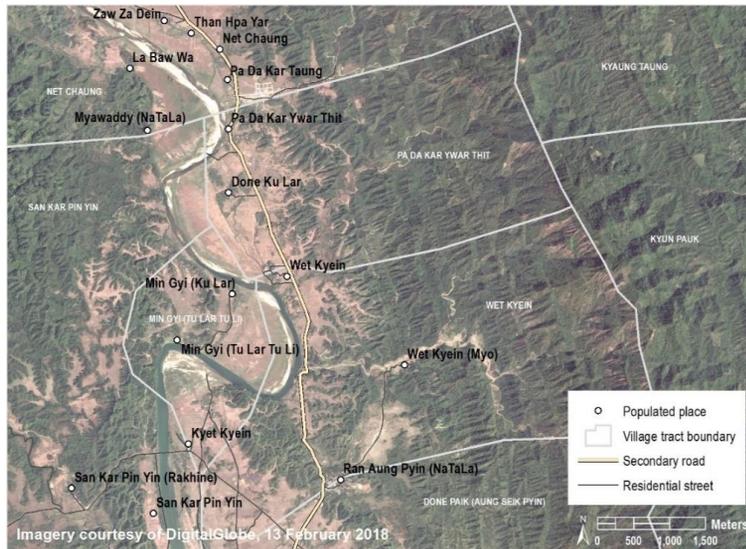
¹⁶¹⁵ "Speech delivered by Her Excellency Daw Aung San Suu Kyi, State Counsellor of the Republic of the Union of Myanmar on Government's efforts with regard to National Reconciliation and Peace" (Facebook post, 19 September 2017), <https://www.facebook.com/state.counsellor/posts/speech-delivered-by-her-excellency-daw-aung-san-suu-kyi-state-counsellor-of-the-/1121130291354519>.

¹⁶¹⁶ https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/iscg_situation_report_05_september_2018.pdf

¹⁶¹⁷ Senior-General Min Aung Hlaing, "Entire government institutions and people must defend the country with strong patriotism" (Facebook post, 2 September 2017), now defunct, post on file with the Mission.

¹⁶¹⁸ V-064, V-065, V-066, V-067.

Image from 13 February 2018 showing the village tracts in the vicinity of Min Gyi village tract



757. On 25 and 26 August 2017, two ARSA attacks took place near Min Gyi.¹⁶¹⁹ Witnesses reported hearing gunshots close to Min Gyi on the same dates.¹⁶²⁰ The Government further reported that ARSA burned down 30 houses and set off a handmade mine in Wet Kyein on 29 August.¹⁶²¹ On the same day, the Government also reported that ARSA burned ethnic Mro homes in Khu Daing (Myo) village in Pa Da Kar Ywar Thit village tract and was responsible for violent acts against Mro villagers during this attack.¹⁶²²

758. Between 26 and 29 August 2017, Tatmadaw soldiers carried out two “clearance operations” in the Rohingya villages in Wet Kyein and Pa Da Kar Ywar Thit village tracts, east of Min Gyi.¹⁶²³ As they entered Wet Kyein, they used “launchers”¹⁶²⁴ to set houses on fire¹⁶²⁵ while shooting villagers escaping towards the hills.¹⁶²⁶ Then they moved to Pa Da Kar Ywar Thit and continued shooting towards villagers and setting houses on fire.¹⁶²⁷ Many were

¹⁶¹⁹ According to the Government, on 25 August “at around 3.35am”, ARSA attacked a police checkpoint in Net Chaung village, a few kilometres north of Min Gyi. A second Government statement issued a day later reported that, on 26 August 2017, another ARSA attack took place in Wet Kyein at around 7.16pm at a deserted police checkpoint. Information Committee, “Breaking News 8: Extremist terrorists continue carrying out violent attacks” (Facebook post, 26 August 2017), <https://www.facebook.com/InfomationCommittee/posts/786222098217565>; K-154.2.

¹⁶²⁰ CI-041, CI-042, CI-046, CI-144, CI-189, EI-066, QI-030.

¹⁶²¹ Information Committee, “Breaking News 12: Extremist terrorists continue carrying out violent attacks” (Facebook post, 29 August 2017), <https://www.facebook.com/InfomationCommittee/posts/787636841409424>

¹⁶²² Information Committee, “Breaking News 17: Extremist terrorists continue setting houses on fire” (Facebook post 30 August 2017), <https://www.facebook.com/InfomationCommittee/posts/788328661340242>; EI-098, RI-008, V-067, V-068, Satellite imagery confirms that ethnic Mro homes in Khu Daing were burned down, and while the Mission believes this information to be credible, it has not been able to verify these allegations. See this chapter, section D.1.c: Arakan Rohingya Salvation Army.

¹⁶²³ CI-040, CI-041, CI-042, LI-073, QI-058, QI-071, QI-114, V-064, V-065.

¹⁶²⁴ Tatmadaw soldiers used weapons referred to by many victims as “launchers”. They were described as making loud explosive sounds, after which a whole building or set of buildings rapidly caught fire. “Launcher” likely refers to a weapon that fires a munition that explodes upon impact.

¹⁶²⁵ CI-042, LI-073.

¹⁶²⁶ CI-040, LI-073.

¹⁶²⁷ CI-040, CI-041, CI-144, LI-105, LI-128, QI-058, QI-114, XI-006.

injured. One villager who escaped from Wet Kyein recalled that the military were firing at the village from a bridge, using “launchers” and guns. As he tried to flee, carrying his 3-year-old son, he was shot in the thigh. The bullet went through his leg and entered his son’s chest, who died on the spot.¹⁶²⁸ Another interviewee, a medical shop owner, said he treated at least 20 people wounded by gunshots, and estimated that at least 100 people were shot and injured while fleeing.¹⁶²⁹ Similar accounts suggest that many others were also shot and killed in both Wet Kyein and Pa Da Kar Ywar Thit.¹⁶³⁰

759. The first-hand accounts of homes burning are corroborated by satellite images analysed by UNOSAT showing the destruction of approximately 900 structures in Wet Kyein and Pa Da Kar Ywar Thit village tracts.¹⁶³¹

760. Some villagers who escaped from Wet Kyein and Pa Da Kar Ywar Thit, fled towards Min Gyi.¹⁶³² The ethnic Rakhine chairperson of Min Gyi had reassured villagers, including those who had fled from Pa Da Kar Ywar Thit and Wet Kyein, that it was safe to remain in Min Gyi.¹⁶³³ He told them that the soldiers would come but reassured the villagers not to flee, as they would not be harmed.¹⁶³⁴

761. On the morning of 30 August 2017, between 8 and 9am, Tatmadaw soldiers entered Min Gyi, across the river and west of Pa Da Kar Ywar Thit,¹⁶³⁵ accompanied by armed ethnic Rakhine, members of other ethnic groups and police security forces.¹⁶³⁶ They entered the village from the north,¹⁶³⁷ opened fire and began burning houses using “launchers” from the village outskirts.¹⁶³⁸ As the soldiers advanced, villagers fled. Some were able to flee to the hills,¹⁶³⁹ others fled towards a large sandbank area beside the river, known as the shore.¹⁶⁴⁰ The soldiers then opened fire directly at the large number of people fleeing towards the shore.¹⁶⁴¹ Many people were shot. One man reported:

When I came out of my house that morning on hearing gunshots and seeing the village burning, I could see the military about half a kilometre away. They were firing their weapons. I immediately ran from my house in the other direction, towards the river and the shore. I think that everybody 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. By this point many houses in the village were burning.¹⁶⁴²

762. A helicopter was observed flying over the village during the morning.¹⁶⁴³ Some described seeing a helicopter landing in the nearby ethnic Rakhine village¹⁶⁴⁴ and unloading containers of petrol.¹⁶⁴⁵

¹⁶²⁸ LI-073.

¹⁶²⁹ QI-114.

¹⁶³⁰ CI-189, LI-105, LI-106, LI-128, RI-008, XI-006.

¹⁶³¹ Satellite imagery analysis prepared for the Mission by UNOSAT.

¹⁶³² CI-040, CI-042, CI-144, CI-197, LI-097, QI-059, QI-071, QI-114.

¹⁶³³ CI-040, CI-041, CI-042, EI-066, LI-078, LI-095, QI-058, QI-059, QI-071, WI-037, WI-038, YI-025, V-064, V-065, V-066, V-069, V-072.

¹⁶³⁴ CI-197, LI-078, LI-095, QI-71, WI-038.

¹⁶³⁵ CI-046, CI-144, QI-066, QI-067, QI-068, WI-004, WI-037, WI-039, YI-025, V-064, V-065, V-066.

¹⁶³⁶ CI-197, CI-198, EI-066, LI-075, LI-078, LI-098, QI-030, QI-058, QI-059, QI-067, QI-071, YI-008, YI-025.

¹⁶³⁷ CI-041, CI-197, QI-030, QI-058, QI-114, WI-037, YI-025.

¹⁶³⁸ CI-042, CI-046, CI-198, EI-102, QI-058, QI-059, QI-060, QI-067, QI-068, WI-039.

¹⁶³⁹ WI-038, WI-039, YI-025.

¹⁶⁴⁰ CI-046, CI-197, EI-066, EI-102, LI-075, QI-030, QI-058, QI-066, QI-067, QI-068, QI-071, WI-037.

¹⁶⁴¹ CI-041, EI-102, LI-078, QI-066, QI-067, WI-037.

¹⁶⁴² QI-067.

¹⁶⁴³ CI-041, CI-046, CI-197, EI-066, LI-078, LI-095, LI-098, LI-128, QI-058, QI-068, WI-037, YI-008, YI-025.

¹⁶⁴⁴ CI-197, LI-078, LI-098, QI-058, YI-008, V-067.

¹⁶⁴⁵ CI-144, EI-066, LI-095, YI-025.

763. The villagers who made it to the shore were then effectively trapped, on one side by the river, and on the other side by soldiers. “We were running to the sandy field as we didn’t know where to go. There was nowhere to flee”, reported an elderly woman.¹⁶⁴⁶

764. Some attempted to swim across the river eastward to Wet Kyein and Pa Da Kar Ywar Thit on the far side. Some made it across.¹⁶⁴⁷ Numerous persons, especially elderly and children, drowned.¹⁶⁴⁸ Others were shot by the military while trying to cross the river.¹⁶⁴⁹

765. One interviewee recounted that he was shot by soldiers but managed to get away by jumping into the river, where he saw another man shot just in front of him. He then swam across the river and saw bodies floating. He could also hear shooting and screaming from the shore.¹⁶⁵⁰ Several accounts described bodies of men, women and children floating in the river.¹⁶⁵¹ Dozens of bodies were recovered by a group of men at the other side of the river.¹⁶⁵²

766. Those who remained on the shore, who numbered in the hundreds, were then rounded up. The soldiers separated women and children from the men.¹⁶⁵³ Soldiers then systematically killed the men.¹⁶⁵⁴ As one witness described:

*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.*¹⁶⁵⁵

767. Soldiers then killed those who had survived gunshot wounds with long knives, including children.¹⁶⁵⁶ One woman described how she saw her husband shot, after which his throat was slit,¹⁶⁵⁷ and another woman, who lost seven children, reported that:

*Soldiers separated the groups into men and women. The men were all in one group, and were killed. Men who were not shot dead, who were struggling or severely injured, were killed with a knife.*¹⁶⁵⁸

768. The dead bodies were then thrown into pits dug by the military and ethnic Rakhine, covered with tarpaulin, and set on fire with gasoline.¹⁶⁵⁹

*They put all dead bodies into those three pits and then set them on fire. I think that the military used petrol to burn the dead bodies because flames from the fire rose up very high and fast.*¹⁶⁶⁰

769. Soldiers also removed jewellery and other valuable items from the dead bodies before setting them on fire.¹⁶⁶¹

770. Soldiers 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,¹⁶⁶² some thrown into the river,¹⁶⁶³ and others thrown onto a fire.¹⁶⁶⁴ One witness said that, after

¹⁶⁴⁶ LI-078.

¹⁶⁴⁷ CI-198, LI-095, WI-037.

¹⁶⁴⁸ CI-197, LI-097.

¹⁶⁴⁹ QI-066, QI-067, QI-068, YI-025.

¹⁶⁵⁰ QI-067.

¹⁶⁵¹ CI-040, CI-042, EI-066, LM-018, QI-058, QI-066, QI-067, YI-025.

¹⁶⁵² CI-040, CI-042, CI-197, LI-097, LM-018.

¹⁶⁵³ CI-197, CI-198, EI-066, LI-078, LI-095, QI-058, QI-059, QI-060, QI-067, QI-071.

¹⁶⁵⁴ CI-042, CI-046, CI-197, CI-198, EI-066, EI-081, LI-075, LI-078, QI-030, QI-058, QI-059, QI-060, QI-071.

¹⁶⁵⁵ CI-046.

¹⁶⁵⁶ CI-197, LI-078, QI-68, QI-071, WI-037.

¹⁶⁵⁷ EI-102.

¹⁶⁵⁸ LI-078.

¹⁶⁵⁹ CI-041, CI-042, CI-046, CI-144, CI-197, CI-198, EI-066, EI-102, LI-075, LI-095, LI-097, QI-030, QI-058, QI-059, QI-067, QI-068, QI-071, WI-038, YI-008, YI-025, V-064, V-065.

¹⁶⁶⁰ CI-046.

¹⁶⁶¹ CI-046, CI-197, LI-098, QI-068.

¹⁶⁶² LI-078.

¹⁶⁶³ CI-046, CI-144, CI-197, EI-102, LI-078, V-064, V-065.

¹⁶⁶⁴ EI-102, LI-097.

the departure of the helicopter, the soldiers took infants from their mothers' laps and threw them into the river. She described seeing children's bodies "floating away".¹⁶⁶⁵ Another witness described seeing soldiers stabbing a 10-year-old boy who was trying to run away with a knife. She described her body turning numb with fear.¹⁶⁶⁶

771. The soldiers then took women and girls in groups of between five and seven to some larger houses in the village.¹⁶⁶⁷ Many women had their young children and infants with them. One mother said that she was with her daughter when the soldiers took her, her two sisters-in-law, an elderly woman and three of her younger brothers-in-law aged between seven and ten years old. On the way to the houses, they were taken past the large pits in which bodies were being put. A soldier grabbed the woman's daughter from her, and threw her into one of the pits. She did not want to leave her daughter and just stood there. A soldier then beat her repeatedly and she was forced to move on towards the houses.¹⁶⁶⁸

772. Women and girls were taken into rooms where their jewellery and money was taken from them.¹⁶⁶⁹ They were beaten,¹⁶⁷⁰ brutally raped¹⁶⁷¹ and frequently stabbed. Children or infants who were with them in the room were also killed or severely injured, often by stabbing.¹⁶⁷² The houses were then locked and set on fire.¹⁶⁷³ The few women who survived, and who spoke with the Mission, displayed both serious burn marks and stab wounds, which were consistent with their accounts,¹⁶⁷⁴ and were deeply traumatised.¹⁶⁷⁵ They also described seeing dead bodies of men, women and children in the houses.¹⁶⁷⁶ A survivor described how she was taken together with her sister, her mother, two neighbours and her young daughter and son to one of the houses. When she entered the house she saw women being raped. Then they were taken to an empty room where they were robbed, undressed and raped. Her sister, mother and son were killed: "My daughter woke me up saying she was getting burned. They had locked the house and set it on fire. I managed to break down the door, and my daughter and I managed to escape. I had no clothes on and my skin was very badly burned."¹⁶⁷⁷ Another survivor recounted a similar experience:

*I entered the house with four of my neighbours, and three of us had babies. I knew the house. There were dead bodies on the floor, young boys and older men from our village. After we entered the house, the soldiers locked the door. 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. The other women who were there were also raped. It was late in the afternoon when I became conscious. I awoke because small flames were dropping from the roof onto my body. I was the only one who survived in that room. I could barely move but I realised I was going to burn to death. Although my baby was dead, I held him close to my heart, but I could not bring his body with me. I escaped through a small door in the kitchen, which was unlocked.*¹⁶⁷⁸

773. 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. Satellite imagery analysis confirms that Min Gyi was destroyed by 16 September 2017 and that

¹⁶⁶⁵ CI-046.

¹⁶⁶⁶ LI-078.

¹⁶⁶⁷ CI-042, CI-046, CI-197, EI-066, EI-080, EI-081, LI-075, LI-078, QI-030, QI-058, QI-059, QI-060, QI-068, QI-071, WI-037, WI-038 YI-025, YI-0081.

¹⁶⁶⁸ QI-071.

¹⁶⁶⁹ EI-080, QI-071.

¹⁶⁷⁰ EI-080, EI-081, QI-071, LI-075, LI-078.

¹⁶⁷¹ CI-046, EI-080, EI-081, LI-075, QI-071, QI-114, K-150, K-151.

¹⁶⁷² EI-080, EI-081, LI-078, QI-071, WI-004.

¹⁶⁷³ CI-042, CI-046, CI-197, CI-198, EI-066, LI-075, LI-078, QI-030, QI-058, QI-059, QI-060, QI-068, QI-071, WI-037, WI-038, YI-008, YI-025.

¹⁶⁷⁴ EI-081, EI-102.

¹⁶⁷⁵ EI-081, EI-102.

¹⁶⁷⁶ EI-081, EI-102.

¹⁶⁷⁷ EI-102.

¹⁶⁷⁸ EI-081.

approximately 440 structures were burned. The ethnic Rakhine village to the south remains intact (referred to in the image as “Min Gyi (Tu Lar Tu Li”).¹⁶⁷⁹

Image from 25 May 2017 shows intact settlements in Min Gyi



Image from 16 September 2017 shows destroyed Rohingya settlements and intact Rakhine settlement (in bottom left corner) in Min Gyi



774. Credible information collected by Rohingya community volunteers in the refugee camps in southern Bangladesh indicates that at least 750 people died in Min Gyi on 30 August 2017, including at least 400 who had been residents of Min Gyi.¹⁶⁸⁰ The total number includes villagers from Wet Kyein, Pa Da Kar Ywar Thit and elsewhere who had sought safety in Min Gyi.¹⁶⁸¹ People died from being shot, stabbed, slit across the throat by a knife, beaten to death, drowned and burned. Many more were injured, and others remain unaccounted.

¹⁶⁷⁹ Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT.

¹⁶⁸⁰ K-153.1.

¹⁶⁸¹ K-153.1, V-070.

775. While the Mission has not been able to verify the accuracy of the full list, the Mission interviewed dozens of victims who had lost many family members in Min Gyi. One 25-year old man interviewed had lost his entire family: his father and his three younger brothers of 13, nine and seven years old were shot and killed and he believes his mother, wife and sisters were killed by soldiers inside the houses.¹⁶⁸² A 27-year old woman saw 11 family members killed that day on the shore, including her 20-day old baby who she said was slaughtered with a knife and thrown on the ground.¹⁶⁸³ A 22-year old man reported returning to the village to collect the dead bodies of his family though he found only burned bodies.¹⁶⁸⁴ A 25-year old female survivor of rape reported that she lost eight members of her family, including her 28-day old baby.¹⁶⁸⁵

776. All interviewees identified Tatmadaw soldiers as the main perpetrators.¹⁶⁸⁶ A number recognised the insignia of the Western Command on the shoulder patch.¹⁶⁸⁷ Many accounts also described helmeted soldiers in camouflage uniform that were distinguishable from other regular uniformed soldiers.¹⁶⁸⁸ The Mission believes these soldiers to be from the 99th LID.¹⁶⁸⁹ Credible sources have identified the 99th LID as being present in Min Gyi during the attack.¹⁶⁹⁰

777. Ethnic Rakhine and members of other ethnic minorities participated. Several interviewees identified ethnic Rakhine, as well as Mro (Murong), Chakma and Kui from nearby villages.¹⁶⁹¹ They were equipped with long knives, machetes and other type of local weapons.¹⁶⁹² Some saw them also use knives to kill, including children.¹⁶⁹³

778. Survivors of rape in Min Gyi also identified members of the Tatmadaw and soldiers in camouflage as the perpetrators of rape and killing of women and children in the houses. It is likely that this indicates the involvement of the 99th LID as perpetrators of these rapes.¹⁶⁹⁴

Chut Pyin

779. Chut Pyin (known in Rohingya as Shuap Parung) is in northern Rathedaung, at the intersection of the three townships of northern Rakhine State. Chut Pyin includes a Rohingya village, with an original population estimated as approximately 1,200 inhabitants, and an ethnic Rakhine hamlet, Thet (known in Rohingya as Chak Para), inhabited by approximately 400 ethnic Rakhine, located a short distance away. Within the village tract there was another Rohingya village, Chin (Pyaing Taung). There was one security forces' camp to the north of the Rohingya hamlet located close to Thet, where Tatmadaw, Police and BGP had been stationed.¹⁶⁹⁵

780. A number of events, occurring throughout July and August 2017 in and around Chut Pyin village tract, had heightened tensions in the north of Rathedaung Township.¹⁶⁹⁶ An increased military presence led to severely restricted freedom of movement for villagers in

¹⁶⁸² YI-025.

¹⁶⁸³ EI-066.

¹⁶⁸⁴ CI-041.

¹⁶⁸⁵ EI-082.

¹⁶⁸⁶ CI-041, CI-046, CI-197, CI-198, EI-065, EI-066, EI-081, EI-102, LI-021, LI-075, LI-078, LI-095, LI-098, QI-030, QI-058, QI-059, QI-60, QI-066, QI-067, QI-068, QI-071, WI-034, WI-037, WI-038, WI-039, YI-008, YI-025.

¹⁶⁸⁷ QI-060, QI-114.

¹⁶⁸⁸ CI-197, CI-198, EI-066, EI-102, QI-059, QI-071, WI-004.

¹⁶⁸⁹ CI-197, CI-198, LI-098, XM-008, YM-008.

¹⁶⁹⁰ LM-014, XM-008, V-067, V-071.

¹⁶⁹¹ CI-197, CI-198, EI-066, LI-075, LI-078, LI-098, QI-030, QI-058, QI-059, QI-067, QI-071, YI-008, YI-025.

¹⁶⁹² CI-197, EI-066, LI-075, LI-078, QI-030, QI-058, QI-059, QI-067, QI-071, YI-008, YI-025.

¹⁶⁹³ CI-197, LI-098, EI-066, LI-075, LI-078.

¹⁶⁹⁴ CI-046, EI-080, EI-081, LI-075, QI-071, QI-114, WI-004.

¹⁶⁹⁵ BI-007, BI-009, CI-185, WI-003, WI-006, V-072, V-073.

¹⁶⁹⁶ See this chapter, section D.2.b. The build-up to 25 August 2017.

the weeks prior to the “clearance operation”, and a meeting was convened for village leaders at which Tatmadaw soldiers of the 33rd LID made death threats.¹⁶⁹⁷

781. Myanmar authorities reported that the “Chopyin outpost in Region-11” was attacked by ARSA on 27 August 2017 “with homemade bombs” but that the attack was “repulsed by security personnel”. No casualties were reported.¹⁶⁹⁸ The Mission was unable to verify this attack.¹⁶⁹⁹ However, plans for a “clearance operation” in Chut Pyin appear to have been made prior to this. Different groups of people fleeing from the “clearance operation” in nearby Zay Di Pyin the previous day were instructed by soldiers present not to enter Chut Pyin. One Rohingya village elder stated that he received a phone call from the village administrator of Chin (Pyaing Taung) to this effect.¹⁷⁰⁰ Consequently, villagers fleeing Zay Di Pyin sought refuge in Chin (Pyaing Taung) instead.¹⁷⁰¹

782. On 27 August 2017, Chut Pyin was subject to a particularly brutal “clearance operation”. At around 2pm,¹⁷⁰² a large group of hundreds of Tatmadaw soldiers,¹⁷⁰³ including members of the 33rd LID¹⁷⁰⁴ as well as other security forces,¹⁷⁰⁵ came out of the Rakhine hamlet¹⁷⁰⁶ and surrounded Chut Pyin.¹⁷⁰⁷ They were accompanied by a smaller number of ethnic Rakhine from neighbouring villages.¹⁷⁰⁸

783. The security forces then opened fire, shooting at villagers, including those who were fleeing.¹⁷⁰⁹ Soldiers also dragged people from houses and shot some of them at point blank range.¹⁷¹⁰ Others were killed by having their throats slit with large knives.¹⁷¹¹ “If people were not killed by the gunshots, they were slaughtered to make sure they were really dead”, reported one survivor.¹⁷¹² Killing with knives was frequently perpetrated by ethnic Rakhine.¹⁷¹³

784. During the course of the operation, structures in Chut Pyin were burned and destroyed. The security forces used “launchers” to set houses on fire, including those still occupied.¹⁷¹⁴ A number of people were forced inside houses, which were then intentionally set alight.¹⁷¹⁵ In one house, a group of between six and seven men were forced inside; some escaped, others were burned alive.¹⁷¹⁶

785. One elderly woman described how she was pulled out of her house, together with her 70-years old brother:

¹⁶⁹⁷ RI-001, RI-004; See this chapter, section D.2.b. The build-up to 25 August 2017.

¹⁶⁹⁸ Information Committee, “Breaking News 10: Terrorists trying to destroy Maungtaw” (Facebook post, 27 August 2017), <https://www.facebook.com/InfomationCommittee/posts/786691611503947>

¹⁶⁹⁹ K-154.1.

¹⁷⁰⁰ CI-145, LI-118, LI-129, QI-115, K-155.1.

¹⁷⁰¹ CI-145, CI-184, LI-118, LI-129, QI-115, K-155.1.

¹⁷⁰² BI-007, BI-008, BI-009, BI-010, CI-019, CI-177, CI-185, CI-191, LI-008, QI-050, QI-052, RI-001, WI-003, WI-005, WI-006, WI-027, V-067.

¹⁷⁰³ BI-007, BI-008, BI-009, CI-019, CI-177, CI-191, EI-003, EI-004, EI-005, LI-008, LI-009, LI-010, QI-050, QI-052, WI-003, WI-005, WI-006, WI-024, WI-027, LM-006, LM-012, LM-018, K-151, K-155.1, V-075.

¹⁷⁰⁴ CI-191, LM-014, XM-008, V-067, V-071.

¹⁷⁰⁵ BI-007, BI-008, BI-009, BI-010, CI-019, WI-003, WI-006, WI-024, LM-012, V-073, V-067.

¹⁷⁰⁶ CI-177, WI-003.

¹⁷⁰⁷ BI-007, BI-008, BI-009, BI-010, CI-185, CI-191, LI-010, QI-052, WI-005, LM-006.

¹⁷⁰⁸ BI-008, BI-009, CI-019, CI-177, CI-185, CI-191, EI-003, EI-004, EI-005, LI-042, QI-031, QI-052, RI-001, RI-004, WI-005, WI-006, WI-027.

¹⁷⁰⁹ BI-008, BI-009, BI-010, CI-019, EI-003, EI-004, EI-005, LI-009, LI-010, QI-050, WI-003, WI-005, WI-006, WI-024, WI-027.

¹⁷¹⁰ BI-008, LI-008, WI-024, LM-006.

¹⁷¹¹ CI-191, LI-008, LI-009, WI-002, WI-005, WI-027.

¹⁷¹² WI-005.

¹⁷¹³ BI-009, CI-191, LI-042, QI-050, WI-024, WI-027, K-155.2, V-073, V-075.

¹⁷¹⁴ BI-008, BI-009, BI-010, EI-003, EI-004, LI-008, LI-009, LI-010, QI-050, RI-001, WI-003, WI-005, WI-024, WI-027.

¹⁷¹⁵ WI-003, WI-005.

¹⁷¹⁶ WI-003, WI 005, V-075.

*Soldiers used rifle butts to beat my brother on the head and I saw his brains come out. I saw people being killed with long knives. The soldiers were also spraying bullets and many people were injured and killed. Our village was full of dead bodies. I saw dozens of people killed. First, they shot the people and then if they were still alive and the body was moving they used a machete to slaughter across the throat.*¹⁷¹⁷

786. She managed to escape with her 10-year old granddaughter who was shot in the leg. As the child recalled in shock: “They were shooting at us so we were just crawling through the bodies”.¹⁷¹⁸ The child said that she saw her father, mother, sister and brother killed.¹⁷¹⁹ The girl and her grandmother told the Mission that they lost seven members of their family that day.¹⁷²⁰

787. The chaos of the situation was described vividly by one woman who was shot in her arm while trying to escape:

*They began to set fire to the houses so I ran. That is when I was shot. It wasn't easy to get away, as I had to hide behind whatever I could find to avoid bullets. As I was running, I saw others running to save their lives too. People were being shot, slaughtered and beaten, forcing us to move from one place to another. Everyone was desperate as we didn't know where to flee.*¹⁷²¹

788. The operations in Chut Pyin lasted until about 7pm.¹⁷²² Rohingya from nearby villages confirmed seeing smoke rising from Chut Pyin from 2pm until the evening, when it started to rain, and hearing the sound of bullets until around 7pm.¹⁷²³ Satellite imagery analysis from 16 September 2017 shows the extent of the destruction in Chut Pyin. The entire Rohingya village of Chut Pyin was destroyed, while the nearby non-Rohingya village of Thet remains intact.

Image of Chut Pyin from 16 September 2017 showing burned structures



¹⁷¹⁷ LI-008.

¹⁷¹⁸ LI-009.

¹⁷¹⁹ LI-009.

¹⁷²⁰ LI-008, LI-009.

¹⁷²¹ WI-003, V-075.

¹⁷²² CI-177, RI-001, WI-005, V-075.

¹⁷²³ LI-118, LI-129, QI-031, QI-115.

789. A large number of women and children were victims of the attacks.¹⁷²⁴ Children, including infants and babies, were specifically targeted; some were wrenched from their mothers' arms and thrown to the ground, others were thrown into fires and burned alive.¹⁷²⁵ As one woman explained, women were sometimes slower to flee and therefore easier targets, particularly if they were carrying their infants and children.¹⁷²⁶ One woman was inside her house with a group of children when the house was set on fire. She ran to escape, carrying her 20-month old baby, and dragging along her eight-year old child. She was then shot. The bullet hit both her and her baby, who died immediately. Her eight year old was also shot, and died later that night in the paddy field where they were hiding.¹⁷²⁷ Another mother recalled the death of her young son who was two and a half years old and who was shot in the side of his upper torso. His last words were, "I need water, mother, I am very thirsty." She held his dead body in her arms all night.¹⁷²⁸

790. Women and girls were also subjected to rape, gang rape, sexual mutilation and sexual humiliation during the "clearance operations" in Chut Pyin.¹⁷²⁹ Credible and consistent reports describe how members of the Tatmadaw separated women and girls. They selected some of them, taking them to a school, which was being used as a military base, where mass gang rape took place.¹⁷³⁰ Women and girls were subjected to serious physical injuries either before being raped or after being killed, including the mutilation of their breasts.¹⁷³¹ An interviewee described how he saw two groups of five Tatmadaw soldiers arrive in Chut Pyin from the nearby military compound. From his hiding place, he saw them "grabbing" women and heard the women screaming. He saw the military cutting off the breast of a woman who later died.¹⁷³² The Tatmadaw also assaulted and humiliated women and girls while stealing from them.¹⁷³³

791. A large group of 57 men, mostly teachers and other educated people, were taken away by soldiers during the "clearance operation". There has been no further information regarding their whereabouts.¹⁷³⁴

792. Some persons who managed to survive did so by hiding in the long grass of the paddy fields or in ponds.¹⁷³⁵ From their hiding places, some of these saw many dead bodies.¹⁷³⁶ Others who returned to the village later that evening reported seeing bodies strewn across the village, including inside houses and outside compounds.¹⁷³⁷ Another man who passed through Chut Pyin a few days later noted, "There were dead bodies everywhere, and many children's bodies were floating in the river. We were terrified, and had to cover our mouths because of the bad smell."¹⁷³⁸

793. Rohingya villagers who survived fled to neighbouring villages, with a large number finding refuge in Ah Htet Nan Yar village (known in Rohingya as Razar Bil), where local Rohingya provided them with basic medical care, food and shelter.¹⁷³⁹ One woman described the situation:

¹⁷²⁴ EI-003, EI-004, EI-005, LI-009, QI-050, WI-003, WI-005, WI-006, K-155.1.

¹⁷²⁵ QI-052, WI-003, WI-005, LM-018.

¹⁷²⁶ WI-006.

¹⁷²⁷ WI-003.

¹⁷²⁸ QI-050.

¹⁷²⁹ CI-177, LI-009, QI-052, WI-005, WI-006, WI-027, K-151, K-155.1.

¹⁷³⁰ CI-191, EI-093, QI-052, K-151, K-155.1.

¹⁷³¹ WI-005, WI-006, WI-027, LM-018.

¹⁷³² WI-005.

¹⁷³³ BI-010, WI-003, WI-005.

¹⁷³⁴ CI-185, CI-191, RI-001, K-153.3.

¹⁷³⁵ BI-009, BI-010, CI-185, RI-001, WI-003, WI-027, LM-006.

¹⁷³⁶ BI-007, BI-008, BI-010, QI-050, QI-052, WI-003.

¹⁷³⁷ CI-019, CI-177, LI-042, QI-031.

¹⁷³⁸ LI-118.

¹⁷³⁹ BI-007, BI-009, BI-010, CI-019, CI-177, CI-185, CI-191, LI-008, LI-042, RI-001, WI-003, WI-006, WI-027, LM-006, LM-018.

uniforms and equipped with guns.¹⁷⁵⁷ This may indicate the involvement of the ethnic Rakhine militia, who are sometimes referred to as *Pyi Thu Sit*.

Maung Nu

799. Maung Nu (known in Rohingya as Monu Para) is a village in the Chin Tha Mar village tract of Buthidaung Township with approximately 400 Rohingya households.¹⁷⁵⁸ Less than one kilometre north, Hpaung Taw Pyin village (known in Rohingya as Ponda Prang) has approximately 350 Rohingya households¹⁷⁵⁹ and a BGP outpost.

800. There are two military bases near Maung Nu, both under the Western Command. Light Infantry Battalion 564 is just south of Maung Nu and Light Infantry Battalion 552 is approximately 10 to 12 kilometres north, in Nga Yant Chaung village tract (also known as Taung Bazar).

801. Early on 25 August 2017, ARSA attacked the BGP outpost in Hpaung Taw Pyin.¹⁷⁶⁰ Villagers in Maung Nu and Hpaung Taw Pyin heard gunshots coming from this direction in the early morning.¹⁷⁶¹ The Government stated that two police officers and two assailants were killed.¹⁷⁶²

802. There were two additional ARSA attacks near Maung Nu early that morning; the first at the military base occupied by the Light Infantry Battalion 552, and the second shortly afterwards at the BGP outpost, both in Nga Yant Chaung village tract. The Government said it recovered seven bodies of assailants involved.¹⁷⁶³ One interviewee reported that at approximately 8am that day, after the shooting had ended, he came out of his house and saw security forces dragging seven bodies onto a boat.¹⁷⁶⁴

803. Later that morning, Tatmadaw soldiers entered Hpaung Taw Pyin in their vehicles and stopped near the BGP outpost. They opened fire and people started to flee.¹⁷⁶⁵ Interviewees reported that soldiers and other security forces that morning arrested four young boys, including the 15-year old son of a Rohingya village leader and a 22-year old religious scholar. Both were believed to have been killed.¹⁷⁶⁶

804. Many people from Hpaung Taw Pyin and surrounding areas fled south to Maung Nu.¹⁷⁶⁷ Some families sought shelter in relatives' homes, and some in a large compound owned by two Rohingya relatives, who were known to have good relations with the security forces in the area.¹⁷⁶⁸ Within the compound were a large two-story house and other smaller houses.¹⁷⁶⁹ Most of the men hid upstairs in the main house, while most of the women and children sought shelter downstairs. Eventually approximately 200 people had sought shelter inside the compound.¹⁷⁷⁰

¹⁷⁵⁷ EI-003, EI-004, EI-005, QI-052, RI-004, WI-005, WI-027, LM-006, K-155.2.

¹⁷⁵⁸ CI-196, LI-055, V-076.

¹⁷⁵⁹ CI-026, CI-109, LI-055.

¹⁷⁶⁰ K-154.1, K-154.2.

¹⁷⁶¹ CI-026, CI-044, CI-109, CI-110, CI-195, CI-196, EI-019, LI-055, LI-084, WI-017, YI-032, YI-033.

¹⁷⁶² Information Committee, "Breaking News 2" (Facebook post, 25 August 2017), <https://www.facebook.com/InfomationCommittee/posts/785202504986191>

¹⁷⁶³ Information Committee, "Breaking News 1: Many police outposts and police stations in Maungtaw attacked by extremist terrorists" (Facebook post, 25 August 2017), <https://www.facebook.com/InfomationCommittee/photos/a.639477959558647.1073741828.639456206227489/785096194996822/?type=3>

¹⁷⁶⁴ LI-055, V-077, V-078.

¹⁷⁶⁵ EI-019, WI-017.

¹⁷⁶⁶ CI-195, LI-084, V-067, V-076.

¹⁷⁶⁷ CI-109, CI-110, CI-026, CI-196, EI-019, LI-055, WI-017, YI-032.

¹⁷⁶⁸ CI-026, CI-110, CI-195, CI-196, LI-081, LI-084, LI-094, QI-042, WI-017, YI-032.

¹⁷⁶⁹ CI-026, CI-194, CI-195, LI-094.

¹⁷⁷⁰ CI-026, CI-196, LI-079, QI-042, YI-032.

805. A large group of Tatmadaw soldiers entered Maung Nu on 27 August 2017, between 10 and 11am.¹⁷⁷¹ They arrived in military trucks and spread out in small groups on foot making their way towards the compound, while firing in the air.¹⁷⁷²

806. Once in the compound, the soldiers ordered people to come out of the houses,¹⁷⁷³ with the threat that otherwise the houses would be set on fire.¹⁷⁷⁴ Soldiers then broke down a door of the main house, and a number of them entered and continued to fire sporadically once inside.¹⁷⁷⁵ A child was hit in the head by a bullet and died shortly afterwards.¹⁷⁷⁶

*The soldiers broke down a door and started firing inside. I saw my brother's 10-year old son shot in the head. His head was split open and his brain splattered on the wall.*¹⁷⁷⁷

807. As people started to come out from the houses, the soldiers separated women and children from men. Soldiers ordered the women at gunpoint to remove their headscarves, with some soldiers pulling them off. They also searched the women repeatedly for valuable items, ripping open their clothes.¹⁷⁷⁸ One interviewee had an earring ripped from her ear by a soldier, leaving her wounded.¹⁷⁷⁹ Soldiers then separated the women and children into different groups and locked them inside smaller houses within the compound.¹⁷⁸⁰

808. One of the men who owned the compound was among the first to be killed. While two soldiers held him, a third stabbed him with a knife. Two of his sons were shot dead while trying to intervene.¹⁷⁸¹ The killings then became more organized. In the courtyard, men and boys were rounded up, most having their hands bound with rope, and made to kneel face down, pointing eastwards. Soldiers also used some of the women's headscarves to blindfold the men and boys, and to tie their hands behind their back.¹⁷⁸² They then opened fire on the men and boys. Soldiers also slit their throats with knives.¹⁷⁸³ A small group of men and boys were taken from the courtyard to an area of scrubland a few minutes walking distance away, where they were killed.¹⁷⁸⁴ One interviewee who managed to hide within the compound 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. Some of them were shot first and then their throats were slit with a knife. Others just had their throats slit.*¹⁷⁸⁵

809. Soldiers killed a number of children in the courtyard.¹⁷⁸⁶ One interviewee saw a young child stabbed by soldiers while crying.¹⁷⁸⁷ Another woman saw soldiers kill her two nephews through a crack in a door of one of the compound houses:

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-

¹⁷⁷¹ CI-026, CI-110, CI-196, LI-079, LI-084, QI-042, WI-017.

¹⁷⁷² CI-026, CI-110, CI-195, CI-196, LI-055, YI-033.

¹⁷⁷³ CI-026, CI-109, CI-110, EI-019, LI-081, QI-042, WI-017, YI-032.

¹⁷⁷⁴ CI-195, LI-079, QI-042, WI-017, YI-032, V-076.

¹⁷⁷⁵ CI-195, EI-019, YI-032, YI-033.

¹⁷⁷⁶ QI-042, YI-032, YI-033, V-076. K-156.

¹⁷⁷⁷ QI-042.

¹⁷⁷⁸ LI-079, LI-084, QI-042, WI-017, YI-032, YI-033.

¹⁷⁷⁹ LI-084.

¹⁷⁸⁰ LI-079, QI-042, YI-032, YI-033.

¹⁷⁸¹ CI-026, CI-109, CI-110, CI-196, WI-017.

¹⁷⁸² CI-026, CI-109, EI-019, QI-042, WI-017, YI-032, YI-033.

¹⁷⁸³ CI-026, CI-109, CI-110, CI-194, CI-196, EI-018, LI-079, LI-094, QI-042, WI-017.

¹⁷⁸⁴ CI-194, CI-196, V-067.

¹⁷⁸⁵ CI-196.

¹⁷⁸⁶ LM-018, V-077.

¹⁷⁸⁷ CI-109.

*in-law and my two nephews of 15 and eight years old. They even killed the child in the same way.*¹⁷⁸⁸

810. Women and girls were also gang raped, killed and mutilated.¹⁷⁸⁹ One interviewee saw two women being raped by two or three members of the Tatmadaw. The screams he heard led the interviewee to conclude that the two women were then killed.¹⁷⁹⁰ Another witness who was hiding nearby described one woman being killed by being knifed in her vagina.¹⁷⁹¹

811. A female survivor from Maung Nu described how soldiers caught her and other women while trying to flee the village:

*I ran to the hills to escape the shooting. My husband and I were caught by the military. My husband was badly beaten and could not move. Three members of the military took me. One man held me down and pushed me to the ground. They tore of my clothes. Two men raped me. My husband could still see me. They took many other women – maybe around 10-20 women. I saw them being raped. They took women at different times. I knew some of the women – they were from my village.*¹⁷⁹²

812. The incident lasted until sunset. After the killings, soldiers loaded a number of bodies, wrapped in tarpaulin, onto military trucks.¹⁷⁹³ One interviewee who had been hiding nearby saw soldiers leaving the village in the early evening in three military trucks.¹⁷⁹⁴ Another witness in hiding saw military trucks leave and later return to the village several times. He believed that soldiers were transporting bodies to the military base.¹⁷⁹⁵

813. Later that evening, after the soldiers had left, villagers returned and rescued women and children. Witnesses described seeing blood and the ground feeling “sticky”.¹⁷⁹⁶ Others described seeing bodies, including of children, and body parts scattered on the ground.¹⁷⁹⁷ One interviewee described stepping on peoples’ clothes and headscarves that were covered with blood, and then finding a dead body, with a slit throat. He returned the following day and found a pit where the soil was disturbed and where he presumed bodies had been buried.¹⁷⁹⁸

814. Credible reports suggest that soldiers buried some bodies in shallow pits in a nearby field.¹⁷⁹⁹ The Mission analysed video footage and photos that show patches of blood in a scrubland area said to be near the compound.¹⁸⁰⁰ It has also reviewed footage of tarpaulin bags buried just below the surface in an area similar to the one previously described. A human leg, already in an advanced stage of decomposition, is visibly protruding from one of the bags. The Mission was not able to independently verify the geo-location or date of the video footage; however, the details shown, such as patches of blood, women’s headscarves and other elements, are consistent with eyewitness accounts of the events in Maung Nu.

815. Information indicates that up to 100 people, mostly men and boys, were executed in Maung Nu.¹⁸⁰¹ The Mission has received a non-exhaustive list of the dead compiled by Rohingya community volunteers in the refugee camps of southern Bangladesh. It details the names, ages and professions of 82 people killed (48 people from Maung Nu and 34 from Hpaung Taw Pyin). Aside from one woman, they are all men and boys, with 28 under 18 years old, the youngest six years old. While the Mission cannot confirm the accuracy of the

¹⁷⁸⁸ LI-079.

¹⁷⁸⁹ EI-019, EI-027, LI-081, LI-094.

¹⁷⁹⁰ LI-094.

¹⁷⁹¹ LI-081.

¹⁷⁹² EI-027.

¹⁷⁹³ CI-026, CI-194, CI-195, CI-196, LI-094, QI-042, WI-017, YI-033.

¹⁷⁹⁴ LI-055.

¹⁷⁹⁵ CI-196.

¹⁷⁹⁶ LI-084, LI-094, YI-033.

¹⁷⁹⁷ CI-026, CI-044, CI-194, LI-055, LI-079, LI-094.

¹⁷⁹⁸ LI-055, V-067.

¹⁷⁹⁹ VI-067.

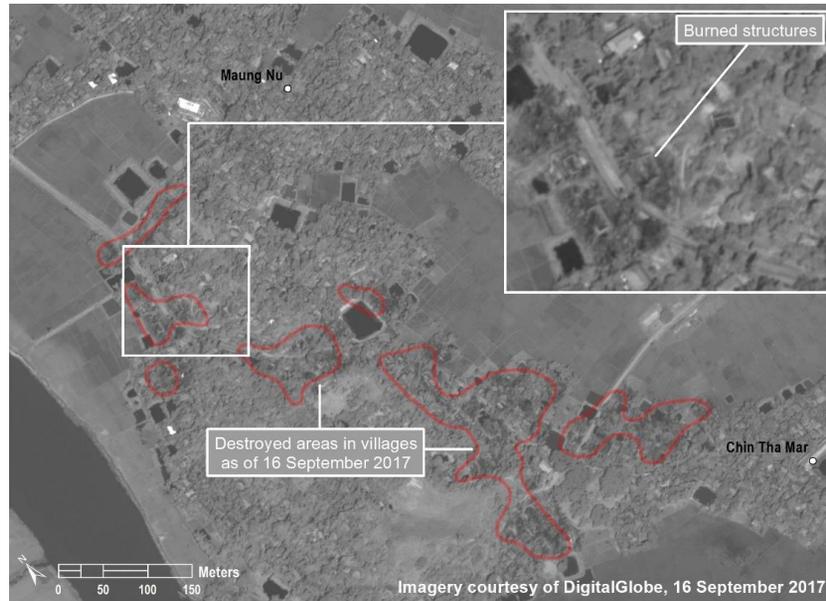
¹⁸⁰⁰ K-157.1.

¹⁸⁰¹ EI-019, LI-055, V-076, V-079.

full list, it is consistent with information received, and names of persons documented by the Mission as killed appear on the list.¹⁸⁰²

816. Maung Nu and Hpaung Taw Pyin were burned over a period of several days. Satellite imagery shows the burning and destruction of structures in Maung Nu and Hpaung Taw Pyin by 16 September 2017. The images show that more than 320 structures were destroyed by fire in both locations.¹⁸⁰³

Image of Maung Nu from 16 September 2017 showing areas of burned structures



817. Tatmadaw soldiers led the operation in Maung Nu,¹⁸⁰⁴ with witnesses recognising soldiers from Light Infantry Battalion 564.¹⁸⁰⁵ Many accounts identified by name one of the soldiers, who appeared to have directly led and participated in the killings of men and boys in the courtyard of the compound.¹⁸⁰⁶

Gu Dar Pyin

818. Gu Dar Pyin is a village tract in southern Buthidaung Township, approximately 15 kilometres south of Buthidaung town. There are three ethnic Rakhine settlements, and two larger Rohingya villages. Gu Dar Pyin is the main settlement of the Rohingya population, who know it as Gudam Para. There is one police camp in the village tract, which is located in Kyauk Sar Taing, about a mile from Gu Dar Pyin.¹⁸⁰⁷

819. Although the Government did not initially report an ARSA attack in Gu Dar Pyin on or after 25 August 2017,¹⁸⁰⁸ there are unverified reports of an incident, including a possible

¹⁸⁰² CI-026, CI-109, EI-019, LI-055, LI-079, LI-084, QI-042, WI-019.

¹⁸⁰³ Satellite image analysis prepared for the mission by UNITAR-UNOSAT.

¹⁸⁰⁴ CI-026, LI-079, LI-084, QI-042, WI-017.

¹⁸⁰⁵ EI-019, LI-094, WI-007.

¹⁸⁰⁶ CI-026, CI-109, CI-195, LI-094, LM-018, V-076, V-077.

¹⁸⁰⁷ CI-103.

¹⁸⁰⁸ Although no mention was made of an attack on Gu Dar Pyin at the time, on 3 February 2018, in a response to a media article providing details of the “clearance operation” in Gu Dar Pyin, the Government claimed that an ARSA attack did take place. See Global New Light of Myanmar, “Authorities refute AP’s report on mass graves in Buthidaung” (3 February 2018), stating that in Gu Dar Pyin, “security forces were attacked by a combined group of ARSA terrorists, and some 500 villagers had attacked the security forces on 28 August 2017.”

explosion on or near a bridge in the vicinity.¹⁸⁰⁹ The following days saw a significant build-up of security force personnel at the police camp. A large number of Tatmadaw soldiers were seen arriving at the camp, some on motorcycles.¹⁸¹⁰ One interviewee saw white sacks being transported to the camp on the motorcycles.¹⁸¹¹ There may also have been a meeting at around this time between the soldiers and Rohingya village leaders.¹⁸¹² Information suggests that some local ethnic Rakhine villagers warned Rohingya neighbours that something would happen, urging them to leave.¹⁸¹³

820. The Tatmadaw and police conducted an initial operation on around 28 August 2017. Security forces entered the main village of Gu Dar Pyin in the early morning and opened fire from the side of the main road.¹⁸¹⁴ It is unclear whether people were killed; one interviewee mentioned that two people might have sustained bullet injuries.¹⁸¹⁵ The gunfire caused panic among village residents, who fled. For many, this meant crossing the river running down the eastern edge of the village. One interviewee described how she fled with her children into the forest and then had to cross the river: “Some children died trying to cross the river, as it was raining and the water level was so high.”¹⁸¹⁶ The operation ended in the early hours of the morning, with the security forces returning to the police camp. A number of villagers returned to their homes.

821. The main “clearance operation” took place the following day, in the early afternoon.¹⁸¹⁷ The Tatmadaw led the operation, accompanied by armed police and non-uniformed individuals, identified as ethnic Rakhine. According to one interviewee, the security forces first gathered on a hill above the village. They then surrounded the village and entered from multiple directions. The soldiers and armed police opened fire as they entered, including at people who ran to escape. A large number of Rohingya villagers were shot and killed or injured as they tried to flee, including children. One interviewee described how his cousin, a 15-year old boy, was shot dead while trying to untether his family’s cows.¹⁸¹⁸ Ethnic Rakhine men, armed with local swords known as “da”, then killed captured or injured persons by slitting their throats.¹⁸¹⁹ The soldiers and armed police also used knives to kill people captured or injured.

822. During the operation, buildings were set on fire by the security forces and ethnic Rakhine men. The Tatmadaw used “launchers” and the ethnic Rakhine used petrol.¹⁸²⁰ Burning the entire village took two to three days.

823. One woman watching from a neighbouring village on the other side of the river described what she saw:

*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.*¹⁸²¹

824. As the security forces had entered the village from three sides, villagers able to flee were forced to head east and attempt to cross the river. Rohingya villagers were shot as they crossed. One interviewee, watching from a hamlet on the other side of the river, described seeing many bodies floating in the water.¹⁸²² Some drowned in the river, including women

¹⁸⁰⁹ LM-004, V-067.

¹⁸¹⁰ CI-103, LI-062, LI-063.

¹⁸¹¹ LI-063.

¹⁸¹² CI-103, YI-013.

¹⁸¹³ LI-065.

¹⁸¹⁴ CI-103, LI-062, LI-063, LI-088, YI-013, YI-014, YI-015, YI-016, YI-018.

¹⁸¹⁵ LI-062.

¹⁸¹⁶ YI-015.

¹⁸¹⁷ LI-062, LI-063, LI-064, LI-065, LI-088, YI-014, YI-017.

¹⁸¹⁸ YI-015.

¹⁸¹⁹ LI-065, LI-062, YI-014, V-080.

¹⁸²⁰ LI-062, LI-063, YI-014, YI-015, YI-016, YI-018.

¹⁸²¹ WI-014.

¹⁸²² LI-088.

and children. Another interviewee helped four men on the other side of the river, each with gunshot wounds.¹⁸²³

825. One mother described how she had to choose which of her children to save. The security forces had entered her house and grabbed her young daughter. Her son tried to save his sister and was attacked by the security forces. The mother watched from the other end of the house and made the split second decision that that these two children would not live, but that she could perhaps still save her two younger children. Her husband returned the next morning to the village and dug through pits of bodies until he found the corpse of their son. They never found the body of their daughter. The mother told the Mission with haunted eyes: “How can I continue with my life having made this choice?”¹⁸²⁴

826. Women and girls were subjected to sexual and gender-based violence, including rape, gang rape and abductions.¹⁸²⁵ They were gang raped by members of the Tatmadaw in bushy and forested areas as they fled.¹⁸²⁶ They were also abducted from their homes, sometimes prior to the main “clearance operation” commencing.¹⁸²⁷ Based on credible reports received, and in light of similar patterns established in other locations, it is likely that abducted women and girls were raped or gang raped. A 50-year old mother said:

*The soldiers came to my house and took my daughter away. I do not know what happened to her. I saw soldiers taking quite a lot of beautiful girls when we were fleeing.*¹⁸²⁸

827. Some of those who participated in the operation were recognised as locals from the nearby NaTaLa¹⁸²⁹ village, Kyauk Sar Taing. A short time before the operation was conducted, a new group of men had arrived in Kyak Sar Taing¹⁸³⁰ and it appears they may also have been brought to the village by the Tatmadaw.

828. Satellite imagery analysis confirms that all structures in Gu Dar Pyin were burned by 16 September.¹⁸³¹

¹⁸²³ YI-017.

¹⁸²⁴ EI-079.

¹⁸²⁵ EI-078, EI-079, EI-080, K-151.

¹⁸²⁶ EI-078, EI-079, EI-080.

¹⁸²⁷ EI-078, EI-079, EI-080, K-151.

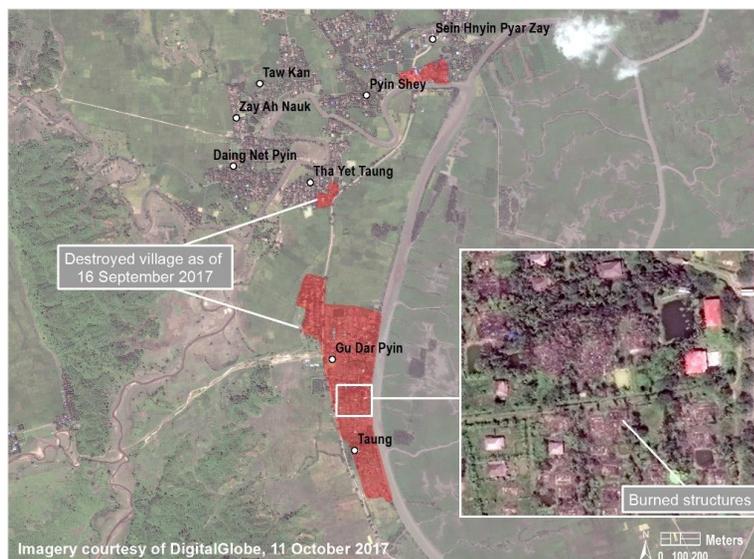
¹⁸²⁸ EI-079.

¹⁸²⁹ The Myanmar authorities have engaged in the policy of building “model villages” since the 1990s taking the name of “NaTaLa” from the Ministry for Development of Border Areas and National Races that designates and establishes them. Farmland was appropriated, and individuals and families were resettled from urban areas to border regions. In northern Rakhine State, “model villages” were largely intended to allow for the resettlement of ethnic Rakhine from other parts of Myanmar, or to encourage persons of ethnic Rakhine origin (and possibly other ethnicities) to move from Bangladesh. The apparent purpose appears to have been, at least in part, to transform the demographic profile of northern Rakhine State through increasing the ethnic Rakhine or Buddhist population; K-063.20, K-160.1, K-160.2.

¹⁸³⁰ LI-062, LI-063, LI-065.

¹⁸³¹ Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT.

Satellite imagery analysis from 10 October 2017 showed burning detected on 16 September



829. In the aftermath of the operation, numerous corpses were strewn throughout the village. Witnesses saw bodies and in some instances separated heads, showing signs of both gunshot and knife or sword wounds, including in the compounds of houses and a large number in paddy fields.¹⁸³²

830. Efforts were made by the Tatmadaw, police and the ethnic Rakhine men to dispose of bodies. A series of pits were dug in different locations and the bodies put in them.¹⁸³³ A number of villagers who returned to Gu Dar Pyin some days after the operation described seeing bodies, uncovered in shallow graves, that were blackened and swollen. Video footage reviewed by the Mission shows blackened and swollen human heads demonstrating putrefactive change (decomposition).¹⁸³⁴

831. One interviewee, who returned to the village about three days after the operation, described moving some soil away from one of the pits, and seeing many black corpses, with faces looking as though they had been burned. The sight and smell made him nauseous.¹⁸³⁵ Another interviewee described that, when he returned to the village 12 days after the “clearance operation”, he saw a big pit of bodies:

*They were not properly covered so I could see that the bodies were swollen and the faces were black. I could not perform any funerals because the bodies were so rotten. I saw many heads separated from bodies. There were bodies in a number of different places, scattered around. Some were piled together and some were buried in the pits. There were the bodies of women and children. I only stayed in the village for an hour, but it was so horrific that I was crying on the entire journey to Bangladesh.*¹⁸³⁶

832. Rohingya who escaped took shelter in neighbouring Rohingya settlements across the river, or hid in forest areas.¹⁸³⁷ Some days later, men from the village returned to collect food

¹⁸³² CI-103, LI-065, YI-016.

¹⁸³³ CI-103, LI-062, LI-063, LI-088, YI-016.

¹⁸³⁴ LI-062, LI-063.

¹⁸³⁵ LI-063.

¹⁸³⁶ LI-062.

¹⁸³⁷ LI-062, YI-013, YI-014, YI-018.

and other items. However, they again encountered the Tatmadaw and a number were shot and killed as they tried to flee.¹⁸³⁸

833. Despite the difficulties in calculating the exact number of Rohingya villagers killed during the “clearance operation” in Gu Dar Pyin, Rohingya community volunteers have compiled lists from discussions with villagers who managed to escape the violence. They estimate that 243 persons were killed in the course of the operation.¹⁸³⁹ While the Mission cannot confirm the accuracy of the list, it is consistent with information received that large numbers of people died.

Koe Tan Kauk

834. Koe Tan Kauk (known in Rohingya as Ko Tan Kaung) is a village tract in Rathedaung Township, with a shoreline along the Bay of Bengal, bordering the southernmost tip of Maungdaw. The village tract contained four villages, two Rohingya and two ethnic Rakhine. The largest Rohingya village of Koe Tan Kauk (known in Rohingya as Dun Say Para) had approximately 1,000 households.¹⁸⁴⁰ The village tract contained two IDP settlements, both of which housed Rohingya who were internally displaced from elsewhere in Rathedaung in 2012.¹⁸⁴¹ Within the village tract there was a military compound and a BGP post.¹⁸⁴²

835. As the location of one of the 9 October 2016 ARSA attacks,¹⁸⁴³ Koe Tan Kauk had been under constant surveillance. This included an increased military presence, resulting in continued and increased oppression of villagers.¹⁸⁴⁴ In November 2016, torture and mass arrests were carried out as a reprisal for the community engaging with the United Nations Resident Coordinator.¹⁸⁴⁵ Tensions increased further in August 2017, with threatening meetings demanding that villagers accept the National Verification Card.¹⁸⁴⁶ Credible reports indicate that the 33rd LID arrived in the village tract around this time,¹⁸⁴⁷ and may have been responsible for beating one man, who died a few days later.¹⁸⁴⁸ By mid-August 2017, two navy boats were also stationed off the shore of Koe Tan Kauk.¹⁸⁴⁹

836. On 25 August 2017, around 4am, the Tatmadaw alleged that two ARSA attacks took place in Koe Tan Kauk village tract.¹⁸⁵⁰ Gunshots were heard by residents of both Koe Tan Kauk¹⁸⁵¹ and nearby Chein Khar Li.¹⁸⁵² The Government did not report any casualties; however, it noted that seven ARSA members were killed.¹⁸⁵³

¹⁸³⁸ CI-103, YI-015.

¹⁸³⁹ K-154.2.

¹⁸⁴⁰ QI-113, K-158.3, K-158.4.

¹⁸⁴¹ RI-002, RI-003.

¹⁸⁴² CI-116, CI-137, LI-100, YI-007.

¹⁸⁴³ See this chapter, section D.1.c: Arakan Rohingya Salvation Army.

¹⁸⁴⁴ CI-118, CI-119, CI-181, CI-182, LI-045, LI-053, LI-118.

¹⁸⁴⁵ See this chapter, section D.1.c: Arakan Rohingya Salvation Army.

¹⁸⁴⁶ CI-181, CI-182, CI-183.

¹⁸⁴⁷ CI-181, CI-182, LM-014, V-067.

¹⁸⁴⁸ CI-181, CI-182.

¹⁸⁴⁹ LI-045, LI-052, LI-053, LI-100, QI-113.

¹⁸⁵⁰ Information Committee reported that ARSA attacked the Koe Tan Kauk police station at 4:50 a.m.; “[t]he military columns arrived... at 5:15 a.m. and returned fires [sic],” killing six attackers. Information Committee, “Breaking News 2,” (Facebook post, 25 August 2017), <https://www.facebook.com/InformationCommittee/posts/785202504986191>

¹⁸⁵¹ CI-116, LI-100.

¹⁸⁵² CI-014, CI-030, CI-031, CI-137, CI-181, QI-003.

¹⁸⁵³ Information Committee, “Breaking News 2” (Facebook post, 25 August 2017), <https://www.facebook.com/InformationCommittee/posts/785202504986191>

837. Early on 25 August 2017, Tatmadaw soldiers,¹⁸⁵⁴ accompanied by other security forces¹⁸⁵⁵ and ethnic Rakhine,¹⁸⁵⁶ entered Chein Khar Li from the south,¹⁸⁵⁷ shooting at villagers.¹⁸⁵⁸ Some Rohingya ran towards the forested hills¹⁸⁵⁹ and many people were shot when fleeing.¹⁸⁶⁰ Others died in more targeted killings by having their throats slit or other stabbings.¹⁸⁶¹ Those who returned to the village after the attack found bodies with throats cut and decapitated heads, including those of children.¹⁸⁶² One survivor who returned to the village recalled:

*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. When I took his small body into my lap, I was showered with his blood.*¹⁸⁶³

838. Soldiers then started to burn houses in a systematic fashion, from the south and moving north.¹⁸⁶⁴ "Launchers" were used,¹⁸⁶⁵ as well as petrol and matches.¹⁸⁶⁶ One villager commented: "They burned everything. Not one tree was left."¹⁸⁶⁷ A number of persons unable to escape, including disabled persons, children and the elderly, were burned inside their houses.¹⁸⁶⁸ A number of corpses were thrown into burning houses.¹⁸⁶⁹

839. On 28 August 2017, the Tatmadaw undertook a further "clearance operation" in Koe Tan Kauk village, one and a half kilometres to the north.¹⁸⁷⁰ Early that morning, a group of Tatmadaw soldiers, accompanied by other security forces¹⁸⁷¹ and ethnic Rakhine,¹⁸⁷² entered the village from both sides.¹⁸⁷³ The Tatmadaw led the operation, shooting into the village and towards people fleeing.

840. Weapons were also fired towards the village from naval ships that had been stationed just off the shore.¹⁸⁷⁴ The military also fired "launchers" towards homes.¹⁸⁷⁵ A number of elderly¹⁸⁷⁶ and disabled persons¹⁸⁷⁷ were burned in their houses, with their bodies found by relatives who returned to the village in subsequent days to search for survivors or recover food and belongings.¹⁸⁷⁸

841. Rape and sexual violence also occurred in both locations. In Koe Tan Kauk village, one man found a young girl naked and bleeding, who told him she had been raped by the military. She died.¹⁸⁷⁹ The Mission received a report of a man from Chein Khar Li who saw

¹⁸⁵⁴ CI-014, CI-030, CI-031, CI-137, LI-045, LI-052, LI-053, LI-100, YI-006, YI-007, WI-029, WI-030, V-067.

¹⁸⁵⁵ CI-137, LI-053, QI-002.

¹⁸⁵⁶ CI-137, LI-052, LI-053, YI-006, LI-045, K-076.22.

¹⁸⁵⁷ CI-014, CI-030, LI-052, LI-053, QI-002.

¹⁸⁵⁸ CI-014, CI-137.

¹⁸⁵⁹ CI-014, CI-030, CI-031, CI-137, LI-053, WI-029, WI-030, YI-007, V-067.

¹⁸⁶⁰ CI-030, CI-137, LI-053.

¹⁸⁶¹ CI-030, CI-137, LI-045.

¹⁸⁶² CI-030, CI-137, LI-052, WI-030, YI-006.

¹⁸⁶³ CI-030.

¹⁸⁶⁴ CI-014, LI-052, LI-053, WI-029.

¹⁸⁶⁵ CI-014, C-030, CI-137, YI-006, YI-007.

¹⁸⁶⁶ CI-030.

¹⁸⁶⁷ LI-045.

¹⁸⁶⁸ CI-030, CI-137, LI-045, LI-052, LI-053.

¹⁸⁶⁹ CI-137, LI-053, WI-029.

¹⁸⁷⁰ CI-116, V-067.

¹⁸⁷¹ CI-116, CI-118, LI-100.

¹⁸⁷² CI-116, LI-100, QI-003, QI-33.

¹⁸⁷³ CI-116, CI-118, LI-100, QI-113, XI-001, K-076.21.

¹⁸⁷⁴ CI-183, LI-100, QI-113, V-081.

¹⁸⁷⁵ CI-118, LI-100, QI-33, QI-034.

¹⁸⁷⁶ QI-113.

¹⁸⁷⁷ CI-116, CI-119, LI-100, QI-113.

¹⁸⁷⁸ LI-100, QI-034, QI-113.

¹⁸⁷⁹ XI-001.

Tatmadaw soldiers rape and kill his wife by slitting her throat, as well as kill his three children, all aged under five.¹⁸⁸⁰

842. Satellite imagery analysis from 16 September 2017 confirms that all the Rohingya hamlets and two IDP camps inside the village tract were burned and destroyed. The two ethnic Rakhine hamlets remained intact.¹⁸⁸¹

843. While total numbers of persons killed remain unknown, the number of casualties, as compiled by Rohingya community volunteers in the refugee camps of southern Bangladesh, suggest that 94 Rohingya died in Chein Khar Li and 94 Rohingya died in Koe Tan Kauk, resulting in a total number of more than 180 deaths within the village tract.¹⁸⁸² While the Mission was not able to verify the number of casualties, it notes that almost every person interviewed reported losing at least one family member in the “clearance operation”, with many having lost multiple family members and other credible sources further note significant casualties sustained in this village tract.¹⁸⁸³

844. The Tatmadaw led the operation, with credible independent sources identifying the presence of the 33rd LID.¹⁸⁸⁴ Ethnic Rakhine were also involved with neighbours identified, including current and former village chairmen.¹⁸⁸⁵ Most ethnic Rakhine wore civilian clothes and were armed with swords,¹⁸⁸⁶ in Chein Khar Li, some wore uniforms and carried guns.¹⁸⁸⁷ Members of the local ethnic Rakhine militia, active since 2012, were also identified as participating in Chein Khar Li.¹⁸⁸⁸ In Koe Tan Kauk, ethnic Rakhine were involved in burning houses and looting.¹⁸⁸⁹

Southern Maungdaw

845. Southern Maungdaw Township was one of the main targets of the Tatmadaw’s “clearance operations” in the initial phase from 25 August 2017. A number of these operations commenced in the early morning on 25 August. In a matter of days, operations were implemented across a vast swathe of territory encompassing dozens of Rohingya villages stretching along the fertile plains between the Bay of Bengal and the forested hills separating Maungdaw and Buthidaung Townships. This was also a region where a number of ARSA attacks took place. The Mission has collected detailed information on the operations in four village tracts, although these are reflective of patterns seen across this area.

Kyauk Pan Du

846. Kyauk Pan Du village tract, known in Rohingya as Shitar Fawrikka, has two Rohingya hamlets and one ethnic Rakhine NaTaLa village. A BGP camp is located in the NaTaLa village.¹⁸⁹⁰ ARSA attacked the BGP camp in Kyauk Pan Du on 25 August,¹⁸⁹¹ and there is official reference to ARSA destroying a small bridge nearby.¹⁸⁹² Rohingya villagers heard gunfire from approximately 3am on 25 August.¹⁸⁹³

¹⁸⁸⁰ CI-181, CI-182, LI-052.

¹⁸⁸¹ K-158.4. Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT.

¹⁸⁸² K-153.2.

¹⁸⁸³ See for example, Amnesty International, *We Will Destroy Everything: Military Responsibility for Crimes Against Humanity in Rakhine State* (2018), pp. 76-69.

¹⁸⁸⁴ K-153.3, V-067.

¹⁸⁸⁵ CI-030, CI-137, LI-052.

¹⁸⁸⁶ LI-052, LI-053, YI-006, K-076.22.

¹⁸⁸⁷ YI-006

¹⁸⁸⁸ CI-181, CI-183, LI-052.

¹⁸⁸⁹ CI-016, CI-183, LI-100, QI-002, XI-001.

¹⁸⁹⁰ LI-130.

¹⁸⁹¹ K-154.2, Information Committee, “Breaking News 2” (Facebook post, 25 August 2017), <https://www.facebook.com/InfomationCommittee/posts/785202504986191>.

¹⁸⁹² “Kyaut pandu: At 8:5 am, extremist terrorists blew out a small old-concrete bridge near Kyautpandu Village.” Information Committee, “Breaking News 2”, (Facebook post, 25 August 2017), <https://www.facebook.com/InfomationCommittee/posts/785202504986191>

¹⁸⁹³ CI-138, WI-016.

847. The Tatmadaw immediately commenced a “clearance operation” in the two neighbouring Rohingya hamlets, arriving from the direction of the BGP camp. They were accompanied by armed BGP officers and some non-uniformed individuals believed to be ethnic Rakhine villagers, carrying knives.¹⁸⁹⁴ Members of the 99th LID participated in the operation.¹⁸⁹⁵ The “clearance operation” lasted for at least two days, resulting in a large number of people killed or injured, and the burning of both hamlets and ultimately nearly all Rohingya property¹⁸⁹⁶ in the village tract.¹⁸⁹⁷ On the second day, it is reported that additional Tatmadaw soldiers arrived on foot from the direction of the neighbouring Thin Baw Kwe village tract to the south.¹⁸⁹⁸

848. During the operation, as people left their houses, the security forces opened fire with automatic weapons. Fleeing people were shot, injured or killed.¹⁸⁹⁹ One elderly woman stayed in her house after her family members fled. Her son came back to get her; he was shot in the head and killed.¹⁹⁰⁰

849. Knives were used to kill some Rohingya villagers who had been captured or injured.¹⁹⁰¹ One witness’ brother-in-law was killed after being shot in the thigh and unable to run. He was surrounded by approximately 12 soldiers, two of whom held him, one pulling his head back, while a third slit his throat.¹⁹⁰² Another witness described how he and his family hid next to a river and watched as four elderly men, who were unable to run fast, were captured and beaten. He later heard they were killed.¹⁹⁰³ A number of people took shelter in paddy fields and ditches between the hamlets and the forested hills; some were killed.¹⁹⁰⁴ One villager who later returned to the village saw 12 bodies in a ditch, including his father and his niece. He had seen people taking cover there, and believed soldiers found and killed them.¹⁹⁰⁵ Captured or injured people were also seen being pushed into burning houses by the security forces.¹⁹⁰⁶ It appears that other persons unable to flee were also burned in their houses.

850. The destruction of the village took at least two days, and involved the use of “launchers”.¹⁹⁰⁷ The whole village was destroyed by fire, including the mosque and school.¹⁹⁰⁸

851. Villagers who were able to flee took shelter in the forested hills to the west,¹⁹⁰⁹ and hid for days in difficult conditions. Some villagers were able to return to their hamlets at night, after the security forces had returned to the camp in the north.¹⁹¹⁰ They found a large number of corpses and performed funerals for some. One villager who returned recalled burying around 25 of the dead, whose ages varied from 1 month to 80 years old, both male and female. He also saw 10 elderly people who had been burned in their houses.¹⁹¹¹

852. Ethnic Rakhine villagers looted belongings from Rohingya houses before they were burned, piling items outside which were then removed on vehicles.¹⁹¹²

¹⁸⁹⁴ CI-138, LI-039, LI-120, QI-013, WI-016, YI-010.

¹⁸⁹⁵ RI-012, ZI-001, K-153.3.

¹⁸⁹⁶ Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT.

¹⁸⁹⁷ CI-138, LI-020, WI-016.

¹⁸⁹⁸ LI-120.

¹⁸⁹⁹ CI-014, CI-138, LI-005, LI-028, LI-039, RI-012, WI-016, ZI-001.

¹⁹⁰⁰ LI-039.

¹⁹⁰¹ LI-039, WI-016.

¹⁹⁰² WI-016.

¹⁹⁰³ LI-120.

¹⁹⁰⁴ CI-138, QI-013.

¹⁹⁰⁵ QI-013.

¹⁹⁰⁶ LI-005, LI-039.

¹⁹⁰⁷ CI-138, LI-039, LI-120, QI-013, YI-010.

¹⁹⁰⁸ LI-039, WI-016.

¹⁹⁰⁹ LI-120, WI-016.

¹⁹¹⁰ LI-028, LI-039, WI-016.

¹⁹¹¹ WI-016.

¹⁹¹² CI-138, LI-120, QI-013.

853. After days in hiding, and unable to return home, many villagers left for Bangladesh. One person described walking north to Myin Hlut, known in Rohingya as May Rulla, and spending a night there before it too was attacked, forcing them to flee from a “clearance operation” for a second time.¹⁹¹³

854. During the “clearance operation” in Kyauk Pan Du, women and girls were gang raped and subjected to serious physical injuries by members of the Tatmadaw and ethnic Rakhine men. This included mass gang rapes.¹⁹¹⁴ A young woman, 20-years old, described her experience:

My husband was shot and then he had his throat cut. I was raped. It is so difficult to say what happened. They tore off my clothes, then six soldiers raped me, and after that two ethnic Rakhine men, whom I recognised, raped me. They pressed my breasts and face continuously. My face almost turned blue. I knew the ethnic Rakhine who lived nearby.¹⁹¹⁵

855. A list of casualties developed by by Rohingya community volunteers in the refugee camps of southern Bangladesh put an estimate of deaths at 38. While the Mission has not been able to verify this number, it is consistent with testimony received.

Myin Hlut

People were running in different directions, and I wasn't even able to carry my children. Everyone was just running for their lives.¹⁹¹⁶

856. Myin Hlut, known in Rohingya as May Rulla, is a village tract to the north of Kyauk Pan Du. There are 10 hamlets spread along fertile land near the coast, the majority of which were Rohingya, and with a police post in the western part of the village tract.

857. On 25 August 2017, an ARSA attack took place in Myin Hlut, and the Tatmadaw alleged that two police officers were killed.¹⁹¹⁷ Continuous gunfire was heard in the early hours.¹⁹¹⁸ One villager described how his family gathered out of fear. Bullets entered their compound. One of his cousins was hit and killed inside his uncle's house.¹⁹¹⁹

858. An initial “clearance operation” in the village started in the early morning of 25 August, with Tatmadaw soldiers and members of the BGP entering from the west and firing weapons at people fleeing and burning properties.¹⁹²⁰ A number of people were shot and died, some while trying to escape.¹⁹²¹ The security forces also killed people by cutting their throats with knives.¹⁹²²

859. One witness, who hid in a dumping site, recognized BGP members involved in the operation. He knew them from playing football together.¹⁹²³ A large number of properties in Myin Hlut West and South were burned by “launchers”.¹⁹²⁴ A witness saw the security forces first burning the market buildings and madrassa to the west, then moving through the first hamlet, burning houses as they proceeded. As he ran with family members, he was shot in the leg:

¹⁹¹³ LI-120.

¹⁹¹⁴ EI-007, EI-072, LI-020, LI-039, WI-016.

¹⁹¹⁵ EI-072.

¹⁹¹⁶ QI-111.

¹⁹¹⁷ K-154.2, V-082; Information Committee, “Breaking News 2: Extremist terrorists launch series of attacks on police stations and police outposts in Maungtaw Township” (Facebook post, 25 August 2017).

¹⁹¹⁸ BI-002, QI-111, QI-112, YI-010.

¹⁹¹⁹ QI-111.

¹⁹²⁰ BI-002, YI-010.

¹⁹²¹ EI-035, QI-112, WI-022, YI-010.

¹⁹²² WI-020, WI-022.

¹⁹²³ YI-010.

¹⁹²⁴ BI-014, WI-022, YI-010.

*Everyone was running for their lives. I was helping my younger sisters to flee. I was shot in the leg and the bullet fractured my leg. I fell down, but my father and uncle carried me to the hamlet next to the forest. There they tried to stop the bleeding.*¹⁹²⁵

860. The “clearance operation” took several days.¹⁹²⁶ It appears that the security forces first launched operations in the more south-westerly hamlets, closest to the police camp, later moving east and north. They burned buildings as they proceeded. A witness described leaving his house when he saw the security forces approaching:

*I left my house and ran, but as I was running through a paddy field, I was hit by a bullet in my mouth. I fell down and lay there unconscious. When I regained consciousness, I realised that my mother, brother and sister had come to rescue me and had carried me to the forest. I could see that our house was completely burned, as well as many other houses.*¹⁹²⁷

861. Some people ran towards Shee Dar, the most northern hamlet, and then towards the forested hills. People, including the injured, women and children, hid in the forest for some days. Persons with serious injuries, received treatment in the forest from a villager with some medical knowledge.¹⁹²⁸

862. Women and girls were subjected to sexual violence, including rape by members of the Tatmadaw and the police both in their homes and in the forest when trying to escape.¹⁹²⁹ One survivor recalled:

*The military came to our village. I hid in the toilet outhouse, some distance from our house. I saw that our house was surrounded by 10 soldiers and some police. I was able to see what happened. First they tied up my parents. Then they shot my father and raped my mother; later they killed her too. After this, they burned our house. The toilet was far from the house, so I was able to escape.*¹⁹³⁰

863. Satellite imagery analysis demonstrates that the Rohingya hamlets of Myin Hlut village tract were burned and destroyed by 16 September 2017. Further satellite imagery analysis shows that the area was bulldozed and cleared of all buildings and vegetation by 13 February 2018.¹⁹³¹

864. A list of casualties developed by Rohingya community volunteers in the refugee camps of southern Bangladesh indicate that up to 70 persons were killed in Min Hlut. While the Mission has not been able to verify this number, it is consistent with testimony received.

Ah Lel Than Kyaw

865. Ah Lel Than Kyaw (known in Rohingya as Hassu Rata) is a village tract with approximately six kilometres of coastline. It has seven main hamlets and a large majority Rohingya population. There is a small ethnic Rakhine population in the northeast of the tract. There is also a BGP checkpoint and camp, where Tatmadaw soldiers were based too. It appears that the presence of security forces increased significantly at these locations from October 2016 onwards.¹⁹³²

866. At around 4am on 25 August 2017, ARSA launched attacks on the two BGP locations. According to the Government, the Deputy Township Immigration Officer was killed. One police official reportedly stated that 17 participants in the ARSA attack were killed during a three-hour encounter.¹⁹³³ The same police official reportedly also stated that he had been

¹⁹²⁵ BI-002.

¹⁹²⁶ EI-017, LI-120.

¹⁹²⁷ BI-014.

¹⁹²⁸ BI-014.

¹⁹²⁹ BI-002, WI-020, V-085, V-127.

¹⁹³⁰ WI-020.

¹⁹³¹ Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT.

¹⁹³² CI-129, CI-192, LI-111, LI-112, ZI-006.

¹⁹³³ XI-008, V-083; Information Committee, “Breaking News 2: Extremist terrorists launch series of attacks on police stations and police outposts in Maungtaw Township” (Facebook post, 25 August

given advance warning and had taken the non-Muslim population into the camp for protection.¹⁹³⁴ The sound of gunfire was heard by residents of the village tract, and from neighbouring Chein Khar Li village tract to the north.¹⁹³⁵

867. A “clearance operation” was launched shortly afterwards¹⁹³⁶ from the BGP camp, with continuous shooting from BGP officers and Tatmadaw soldiers. The security forces moved to various locations, including a football field, and continued shooting towards people’s houses and at people fleeing.¹⁹³⁷ One witness stated that he later saw seven or eight people who had been shot dead inside their homes.¹⁹³⁸ The operation caused people to run towards the forested hills, a few kilometres northeast. Later that day, the security forces went to the market area of the village in Zay Kone Tan. Shooting continued there.¹⁹³⁹ According to one witness, these shootings happened after ethnic Rakhine villagers started to loot market stalls, causing a confrontation with local Rohingya stall-owners.¹⁹⁴⁰ Up to 15 corpses were later found at the bottom of a well in the market area.¹⁹⁴¹

868. The “clearance operation” lasted for at least three days, and led to the burning and destruction of most Rohingya property. One villager described how he returned to his home after the security forces had left and found the burned bodies of his two nephews, two and three years old.¹⁹⁴² Buildings in the village were still smouldering as late as 6 September 2017, indicating that burnings may have taken place for up to 12 days.¹⁹⁴³ Members of the security forces used “launchers” to burn properties.¹⁹⁴⁴ Ethnic Rakhine were involved in killings and looting.¹⁹⁴⁵ One witness stated that Tatmadaw Special Forces reinforcements arrived in the village in the evening of 26 August and that he saw three trucks of soldiers arrive. He believed them to be from the 99th LID. The more intense phase of the operation started the following day, causing those remaining to flee.¹⁹⁴⁶

869. While assessing the numbers killed or injured in the village tract is challenging, there are indications that the numbers are high. A list of casualties developed by Rohingya villagers indicate that up to 77 persons were killed in Ah Lel Than Kyaw. While the Mission has not been able to verify this number, it is consistent with testimony received.

870. Villagers from further south observed dead bodies in the village when *en route* to Bangladesh.¹⁹⁴⁷ One villager from Inn Din stated the following:

*When we passed though Hassu Rata, I saw 15 dead bodies in different houses, all with bullet wounds. We had planned to sleep there, but decided not to sleep alongside dead bodies.*¹⁹⁴⁸

Inn Din

871. Inn Din is a village tract of up to six separate Rohingya settlements, and two small ethnic Rakhine hamlets, one of which is a NaTaLa village. Before the ‘clearance operations’

2018), <https://www.facebook.com/InfomationCommittee/posts/785202504986191>, where they state: “Alel Than Kyaw: At 4:50 am, an unidentified number of extremist terrorists attacked Ale Thankyaw police station in Region-8, leaving Deputy Township Immigration Officer Zar Mound dead. The policemen repulsed the terrorists who retreated from the scene.”

¹⁹³⁴ V-083.

¹⁹³⁵ BI-012, CI-013, CI-038, CI-039, CI-065, CI-129, LI-111, LI-112.

¹⁹³⁶ CI-013, CI-039, CI-129, CI-187, LI-112, ZI-006.

¹⁹³⁷ LI-068.

¹⁹³⁸ LI-112.

¹⁹³⁹ CI-129, LI-112.

¹⁹⁴⁰ LI-112.

¹⁹⁴¹ CI-129, LI-112.

¹⁹⁴² CI-035.

¹⁹⁴³ V-083.

¹⁹⁴⁴ CI-035, CI-129, LI-111, LI-112.

¹⁹⁴⁵ CI-013.

¹⁹⁴⁶ LI-112.

¹⁹⁴⁷ LI-112, QI-116, YI-010.

¹⁹⁴⁸ QI-116.

the population of Inn Din was approximately 7,000, 90 per cent of whom were Rohingya.¹⁹⁴⁹ Although there were no ARSA attacks in Inn Din on 25 August 2017, there were attacks on BGP posts in village tracts directly to the north and to the south, in Thin Baw Kwe and Tha Win Chaung.

872. Tensions were heightened in the immediate aftermath of 25 August, with villagers reporting the presence of Tatmadaw soldiers and ethnic Rakhine and a number of shootings which caused injuries to Rohingya villagers.¹⁹⁵⁰ An ethnic Rakhine man, who had taken his cattle to a forested area, also went missing, and this appears to have further increased tensions.¹⁹⁵¹ Other credible reports suggest that many of the ethnic Rakhine residents of Inn Din took shelter in the local monastery, where there were also Tatmadaw soldiers and BGP officers present.¹⁹⁵²

873. A “clearance operation” was launched across Inn Din in a similar manner to neighbouring village tracts. It was led by the Tatmadaw, with the active engagement of ethnic Rakhine. Over the course of up to a week, the Rohingya settlements of Inn Din were targeted, with the rapid arrival of soldiers and ethnic Rakhine, often in the early morning. Their arrival was accompanied by gunfire and the burning of houses and other Rohingya property, including through the extensive use of “launchers”. Men, women and children were killed and wounded. They were shot. They were stabbed or slashed with large knives and swords, including by persons in civilian clothes, believed to be ethnic Rakhine.¹⁹⁵³

874. Many interviewees saw Rohingya villagers shot or stabbed. One elderly woman, interviewed in a Bangladeshi hospital in mid-September 2017, had seen soldiers setting houses on fire and shooting people, including her elderly neighbour.¹⁹⁵⁴ A young mother gave a sense of the surprise nature of the operations. She was at home in the early hours of the morning when she heard gunfire. She saw her neighbour’s house ignite in flames. Bullets then entered her house and her three-year old son was killed. She ran to the forest with her other children and could see houses across the village burning. She also saw the bodies of her uncle and her brother-in-law, with slit throats.¹⁹⁵⁵ In another incident, three members of the same family were executed by Tatmadaw soldiers and ethnic Rakhine. A witness, who hid with one of his sons in a latrine, later found the bodies of his other son, his father-in-law and uncle, who had been stabbed and had their throats slit.¹⁹⁵⁶

875. At one point there appears to have been an attempt by a large group of Rohingya men to offer some resistance in one of the hamlets, known to the Rohingya residents as Bor Para. Men gathered with the aim of preventing the soldiers and ethnic Rakhine from entering the hamlet. The soldiers opened fire on the group, which then dispersed, with at least one man killed.¹⁹⁵⁷

876. Many villagers who were able to escape took shelter in the forested hills to the eastern side of the village tract. Some reported spending up to a week in the hills in difficult conditions under makeshift shelters.¹⁹⁵⁸ Tatmadaw soldiers also shot into forests where people were sheltering, causing further injuries and possibly deaths.¹⁹⁵⁹

877. Other villagers congregated on the beach. Reports suggest that some felt forced to leave the forested hills due to the difficult conditions and lack of food and water, moving to the beach with the aim of continuing on to Bangladesh.¹⁹⁶⁰ Reuters journalists investigated

¹⁹⁴⁹ V-084.

¹⁹⁵⁰ CI-146, LI-006, LI-130, QI-116.

¹⁹⁵¹ LI-130, V-067; Wa Lone, Kyaw Soe Oo, S. Lewis, A. Slodkowski, “Massacre in Myanmar” (Reuters, 8 February 2018).

¹⁹⁵² V-067.

¹⁹⁵³ CI-029, CI-146, EI-006, EI-008, EI-057, LI-006, LI-027, LI-130, QI-006, QI-051, QI-116.

¹⁹⁵⁴ EI-006.

¹⁹⁵⁵ LI-027.

¹⁹⁵⁶ QI-051.

¹⁹⁵⁷ CI-146, LI-130.

¹⁹⁵⁸ CI-146, QI-051.

¹⁹⁵⁹ CI-029, LI-027, QI-116.

¹⁹⁶⁰ V-067, V-084.

the separation of 10 men from a group of several hundreds gathered on the beach on 1 September 2017, who were executed the following day.¹⁹⁶¹ This account is consistent with information verified by the Mission,¹⁹⁶² including the account of the wife of one of the men, given shortly after she had arrived in Bangladesh in September 2017. She explained how she and family members had gathered on the beach. Then the men were separated and made to sit in rows with their hands tied behind their backs, including her husband and brother. She had not seen them since and had been told that they were killed.¹⁹⁶³

878. The “clearance operations” in Inn Din were led and largely undertaken by Tatmadaw soldiers, supported by local BGP officers and ethnic Rakhine. Locally-based soldiers from the Western Command were joined by members of the 33rd LID during the course of the operation.¹⁹⁶⁴ Some of the ethnic Rakhine who participated were from local villages; they were recognised by Rohingya witnesses.¹⁹⁶⁵ However, some soldiers and police may also have worn civilian clothes alongside ethnic Rakhine villagers, in an attempt to avoid being recognised as members of the security forces.¹⁹⁶⁶

879. Satellite imagery analysis indicates that, by 16 September 2017, the majority and possibly all Rohingya houses and buildings inside Inn Din were burned and destroyed.¹⁹⁶⁷ The neighbouring NaTaLa village of Pae Youne was untouched. Further satellite imagery analysis shows that, by 16 February 2018, most of the burned Rohingya properties, along with trees and other vegetation, were bulldozed and cleared.¹⁹⁶⁸

Other verified incidents

880. “Clearance operations” following the same *modus operandi* took place in numerous other Rohingya villages across northern Rakhine State. The Mission verified, through multiple interviews and other information, “clearance operations” similar to those detailed above in a total of 54 separate locations, and it received first-hand accounts of additional “clearance operations” in a further 22 locations.

881. For example, in northern Maungdaw Township, the Mission verified additional “clearance operations”, which saw serious human rights violations against Rohingya, in the village tracts of Kun Thee Pyin,¹⁹⁶⁹ Tha Man Thar,¹⁹⁷⁰ Kha Maung Seik,¹⁹⁷¹ Pa Da Ga Day Wa Na Li / Net Chaung¹⁹⁷² and Kyein Chaung.¹⁹⁷³ Similarly, in Buthidaung Township, the Mission verified “clearance operations” in Tin May¹⁹⁷⁴, as well as in a large cluster of villages, known collectively in Rohingya as Taung Bazar. Multiple Rohingya villages in this region were subjected to a wave of “clearance operations” as soldiers moved from one village to the next over a period of days. These included operations in the village tracts of Mee Chaung Zay,¹⁹⁷⁵ Nga Yant Chaung,¹⁹⁷⁶ and Thin Gar Net.¹⁹⁷⁷

¹⁹⁶¹ Wa Lone, Kyaw Soe Oo, S. Lewis, A. Slodkowski, “Massacre in Myanmar” (Reuters, 8 February 2018).

¹⁹⁶² CI-146, LI-006, LI-130, QI-051, RI-012.

¹⁹⁶³ LI-006.

¹⁹⁶⁴ LI-112, ZI-001, V-067, V-084.

¹⁹⁶⁵ LI-006, LI-027.

¹⁹⁶⁶ Wa Lone, Kyaw Soe Oo, S. Lewis, A. Slodkowski, “Massacre in Myanmar” (Reuters, 8 February 2018).

¹⁹⁶⁷ Satellite imagery of Inn Din is reproduced below.

¹⁹⁶⁸ Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT.

¹⁹⁶⁹ LI-015, LI-017, LI-032.

¹⁹⁷⁰ BI-006, CI-049, CI-050, CI-124, LI-014, LI-103, LI-104, QI-070, WI-048.

¹⁹⁷¹ CI-002, CI-004, CI-048, CI-104, CI-121, CI-122, EI-014, EI-049, EI-064, EI-089, EI-090, LI-101, LI-102, QI-069, WI-047.

¹⁹⁷² CI-131, LI-076, LI-113, LI-119, QI-114, XI-003.

¹⁹⁷³ CI-114, CI-123, CI-125, EI-023, EI-028, EI-045, EI-096, EI-097, EI-098, EI-104, LI-031, LI-107, LI-109, LI-110, QI-114, WI-004, YI-023.

¹⁹⁷⁴ CI-021, CI-115, EI-001, EI-067, EI-068, EI-069, EI-071, LI-056, LI-116, YI-029.

¹⁹⁷⁵ CI-112, CI-135, EI-021, EI-107, LI-044, QI-024, XI-005.

¹⁹⁷⁶ EI-093, WI-007, YI-030.

¹⁹⁷⁷ BI-013, LI-081, YI-031.

882. Each of these incidents saw a similar pattern of conduct on the part of the Myanmar military and security forces. There was an attack on the village by Tatmadaw soldiers, and often other perpetrators, the burning of Rohingya property, and the killing and injuring of civilians through indiscriminate shooting or targeted killing, leading to multiple deaths. In many cases, women and girls were subjected to rape and other forms of sexual violence.

(b) Patterns of serious human rights violations by the Myanmar security forces

883. The “clearance operations” constituted a human rights catastrophe. The Myanmar military and other security forces committed human rights violations on a colossal scale, in violation of all basic tenets of international law. The operations had a devastating impact on the Rohingya civilian population, which was targeted, brutalised and terrorised. Thousands of Rohingya villagers were killed and injured. Women and girls were subjected to rape and other forms of sexual violence, and frequently then killed. Children were attacked deliberately and callously and subjected to grave violations. Men and boys were disappeared, probably killed. The arduous journey to Bangladesh caused further death and injury. Rohingya-populated areas across the three townships of northern Rakhine State were deliberately destroyed, in a targeted manner.

Unlawful killings and other forms of excessive and indiscriminate use of force

884. 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 BGP, the Myanmar Police Force and riot police (known as *lon htein*), and frequently by ethnic Rakhine civilians. Members of the security forces, primarily Tatmadaw soldiers of the Western Command and the 33rd and 99th LIDs, 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.¹⁹⁷⁸ Many victims referred to the volume of gunfire, with some describing it as “raining bullets”.¹⁹⁷⁹ Many were shot and killed or injured while attempting to flee.

885. Witnesses saw relatives, friends, neighbours or fellow villagers shot and fall down while they themselves were running away, and saw people lying on the ground, shot dead or wounded. One young girl described the operation in Maungdaw Township:

¹⁹⁷⁸ CI-001, CI-002, CI-005, CI-006, CI-007, CI-008, CI-013, CI-014, CI-015, CI-017, CI-019, CI-020, CI-021, CI-024, CI-029, CI-030, CI-033, CI-034, CI-035, CI-040, CI-050, CI-103, CI-105, CI-106, CI-108, CI-118, CI-109, CI-110, CI-111, 112, CI-113, CI-114, CI-115, CI-116, CI-118, CI-120, CI-121, CI-122, CI-123, CI-124, CI-126, CI-127, CI-128, CI-129, CI-131, CI-132, CI-133, CI-134, CI-135, CI-137, CI-138, CI-139, CI-140, CI-142, CI-143, CI-144, CI-146, CI-147, CI-148, CI-149, CI-150, CI-177, CI-178, CI-179, CI-180, CI-181, CI-184, CI-185, CI-186, CI-187, CI-188, CI-189, CI-191, CI-192, CI-193, CI-195, CI-196, CI-197, CI-198, CI-199, EI-001, EI-003, EI-004, EI-005, EI-006, EI-008, EI-009, EI-010, EI-011, EI-013, EI-015, EI-018, EI-019, EI-020, EI-024, EI-027, EI-029, EI-030, EI-035, EI-039, EI-040, EI-041, EI-044, EI-045, EI-047, EI-048, EI-049, EI-050, EI-051, EI-053, EI-061, EI-062, EI-064, EI-065, EI-066, EI-071, EI-076, EI-078, EI-080, EI-081, EI-082, EI-083, EI-097, EI-098, EI-102, LI-005, LI-008, LI-010, LI-011, LI-012, LI-013, LI-015, LI-016, LI-017, LI-018, LI-020, LI-021, LI-022, LI-027, LI-028, LI-030, LI-031, LI-032, LI-036, LI-039, LI-041, LI-042, LI-044, LI-045, LI-046, LI-047, LI-054, LI-062, LI-064, LI-065, LI-067, LI-069, LI-070, LI-072, LI-073, LI-074, LI-076, LI-080, LI-081, LI-102, LI-103, LI-104, LI-105, LI-109, LI-111, LI-112, LI-114, LI-117, LI-119, LI-120, LI-124, LI-128, LI-130, LI-131, LI-132, QI-001, QI-003, QI-004, QI-008, QI-009, QI-011, QI-012, QI-014, QI-016, QI-023, QI-025, QI-028, QI-029, QI-048, QI-070, QI-106, QI-107, QI-112, QI-113, QI-114, QI-116, RI-002, RI-003, RI-004, RI-005, RI-007, RI-008, RI-010, RI-012, RI-013, RI-016, RI-018, WI-001, WI-002, WI-009, WI-015, WI-017, WI-024, WI-039, XI-001, XI-002, XI-003, XI-004, XI-006, YI-006, YI-007, YI-009, YI-010, YI-011, YI-013, YI-014, YI-018, YI-025, YI-030, YI-031, YI-032, YI-033. V-128, K-061, V-128; See also XChange.org, *The Rohingya Survey* (15 December 2017), where 40 per cent of respondents reported indiscriminate shooting.

¹⁹⁷⁹ CI-033, CI-112, CI-150, LI-120, QI-036, QI-116, RI-012.

*When the soldiers came to my village, we all ran, and they shot at us. We were around 50 people, and maybe half of us were shot. The people shot fell down while they were running. Some died and some escaped. Somehow, I escaped.*¹⁹⁸⁰

886. Another man described how his wife was shot as they were fleeing their village in Thit Tone Nar Gwa Son Village Tract, Maungdaw Township:

*I was in my house with my family, and my wife had just finished cooking the rice. We heard shooting and so we ran out of our house. My wife followed me, but she was hit by a bullet in her chest just outside the house. I tried to hold her. Then I realized she was dead. I couldn't carry her body because the shooting did not stop. There was shooting everywhere and I had to run to save my life. I could have been hit by the same bullet but I was lucky.*¹⁹⁸¹

887. Others who had found shelter, such as in nearby forested hills, witnessed fellow villagers being shot. Some who were able to return to their villages in the following days, often at night, saw many dead bodies with bullet injuries.¹⁹⁸²

888. Many villagers who sustained non-fatal bullet wounds had to be left behind by fleeing relatives, and are presumed dead. The intensity of the “clearance operations” made their rescue impossible. One man from Kyein Chaung village tract, known in Rohingya as Boli Bazar, in northern Maungdaw Township explained the circumstances in which his daughter was killed:

*I don't know how many people died that day. 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 care for those who were shot. As people were running, they were shooting at them. That is how my daughter died. She was hit fleeing. I couldn't go back and carry her.*¹⁹⁸³

889. Some people risked their lives to carry injured or otherwise stranded relatives to safety, or to try to recover possessions. One elderly woman stranded in Kyauk Pan Du, Maungdaw Township, was rescued by her son who was subsequently killed. She described what happened:

*It was complete chaos. All we could hear were the sounds of bullets. All the other family members ran away, but I was an old woman, so I stayed behind. Then my son came back to get me. He helped me and I joined my family. But then he went back to the house to get our belongings and some rice. My son was shot inside our house. The bullet went into the house and hit my son in the head. Later that night, after the military left, I went back to see my son's dead body. He was 30 years old.*¹⁹⁸⁴

890. The indiscriminate shooting disproportionately affected those unable to move quickly, often children, pregnant women or those with young children, the elderly and disabled persons.¹⁹⁸⁵ Their dead bodies were often discovered later, with bullet wounds. One man explained what happened to an elderly woman in his village in Kha Maung Seik, northern Maungdaw Township:

*There was a very old woman in my hamlet, and she was left behind by her family when the military came, as they couldn't help her escape. When I went back to my village a few days later, I saw that she had been shot dead. I saw the bullet wound.*¹⁹⁸⁶

891. Some Rohingya villagers who could not flee, or who sought shelter inside their houses, were also shot and killed or injured, when bullets penetrated thatched roofs and

¹⁹⁸⁰ LI-011.

¹⁹⁸¹ YI-009.

¹⁹⁸² CI-030, LI-028, LI-029, LI-042, LI-074, LI-093, LI-114, QI-002, QI-027.

¹⁹⁸³ LI-107.

¹⁹⁸⁴ LI-029.

¹⁹⁸⁵ LI-039, LI-093, QI-014, QI-071, WI-032, YI-018, YI-019.

¹⁹⁸⁶ LI-102.

bamboo walls.¹⁹⁸⁷ Villagers were shot in other locations where they had found shelter, including through rapid arms fire into forested hills where they had fled.¹⁹⁸⁸

892. Many Rohingya were killed in targeted attacks too. The Mission has provided detailed accounts above of corroborated mass killings perpetrated in the villages of Min Gyi, Maung Nu, Chut Pyin, Gu Dar Pyin, the villages of Koe Tan Kauk. Dozens, and in some cases hundreds, of men, women and children were killed. Additional organized mass killings are likely to have taken place. Witnesses reported seeing bodies of large numbers of Rohingya, including those with gunshot and machete wounds, as well as decapitated heads, in burned villages *en route* to Bangladesh.¹⁹⁸⁹ The Mission is concerned that other such mass killings remain undocumented. Moreover, other “clearance operations” in the villages of northern Rakhine State verified by the Mission resulted in a significant numbers of casualties, with numbers of killed often in the dozens. These incidents also constitute mass killings, although seemingly implemented in a less organized manner.

893. In addition to these instances of mass targeted killings, members of the security forces shot individual persons, including at point blank range,¹⁹⁹⁰ and executed people, including those injured, by slitting their throats using long knives. In some cases, 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.¹⁹⁹¹ Ethnic Rakhine, working alongside the Tatmadaw and other security forces, also targeted and killed victims with long knives.

894. A woman from Kyein Chaung village tract, northern Maungdaw Township, saw many family members executed. Her mother-in-law was shot and killed and her husband was shot while fleeing. Two of her children were also killed, while a third child sustained multiple stab wounds to the head, but survived:

*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. After they killed him, the soldiers washed the knife.*¹⁹⁹²

895. Another man described the killings of a group of women and children inside a house in Kyet Yoe Pyin village tract, Maungdaw Township:

*A pregnant woman in labour was being assisted by a midwife as well as a number of other female relatives. I saw approximately five soldiers enter the house and heard a few gunshots. Later I went back and saw the dead bodies of an elderly woman, the mother, a two-year old girl, and another girl who was 16 to 18 years old and the newborn baby.*¹⁹⁹³

896. Tatmadaw soldiers and the ethnic Rakhine used swords, knives or machetes, known locally as “da”, to injure and kill, most notably through the intentional slitting of throats of Rohingya villagers. Numerous interviewees shared accounts of such killings that they had witnessed.¹⁹⁹⁴ One man, who was hiding in a paddy field, watched as a group of soldiers took his 70-year old mother from their house. One soldier slit her throat with a large knife, leaving her dead on the ground.¹⁹⁹⁵ Another young woman from a village in northern Maungdaw also

¹⁹⁸⁷ LI-025, LI-027, LI-029, LI-039, LI-041, LI-099, LI-107, QI-111, YI-011.

¹⁹⁸⁸ WI-007.

¹⁹⁸⁹ BI-013, CI-014, CI-016, CI-023, CI-183, QI-063, QI-065, QI-116.

¹⁹⁹⁰ EI-024, LI-011, LI-027, LI-030, QI-035, QI-038, WI-039, WI-007, WI-010, XI-006; See this chapter, section D.1.a: Most serious incidents.

¹⁹⁹¹ EI-024, LI-011, LI-027, QI-038, WI-039, XI-006.

¹⁹⁹² WI-004.

¹⁹⁹³ CI-111.

¹⁹⁹⁴ CI-029, CI-045, EI-029, EI-034, LI-003, LI-008, LI-010, LI-011, LI-012, LI-013, LI-063, LI-072, QI-028, WI-001, WI-002, WI-009.

¹⁹⁹⁵ QI-028.

witnessed her mother's murder: "I was inside our house to get my baby, but just at that moment a soldier took out a big knife and cut my mother's throat. I saw her body fall to the ground."¹⁹⁹⁶

897. In some instances, ethnic Rakhine appeared to have a specific role of killing Rohingya villagers who had been shot and injured.¹⁹⁹⁷ They mostly used the same kind of swords or large knives.¹⁹⁹⁸ One woman from Maung Ghi Taung (known in Rohingya as Shab Bazar) in Buthidaung Township recalled seeing six people, who had been shot and injured, having their throats slit by ethnic Rakhine using knives.¹⁹⁹⁹

898. In some villages, people identified as ethnic Rakhine, who in some instances wore uniforms, were carrying firearms, shooting and killing Rohingya.²⁰⁰⁰ At times, they used homemade guns with a single-load function, known locally as "thela" or "jaitani",²⁰⁰¹ while in other cases they used military-grade weapons.²⁰⁰² Military-grade guns were also seen being distributed to ethnic Rakhine by the Tatmadaw, in some cases immediately in advance of the "clearance operation" itself.²⁰⁰³

899. Other Rohingya were summarily executed while trying to help family members and neighbours, including those being subjected to sexual violence. One woman from Kun Thee Pin, northern Maungdaw, described the following incident:

*I was inside my house, together with my mother-in-law, my three children, my husband and some other relatives. It was early in the morning when soldiers approached our village and were shooting their weapons. Bullets hit the trees in our yard. I could see that some houses were burning. Then they came straight into our house. They were touching my body and pulling my hair. They pulled off my scarf and tried to undo my dress and to lie on top of me on the ground. My husband tried to stop them and protect me. They shot him straight in the face and then used a big knife and slit his throat. He was 35 years old.*²⁰⁰⁴

900. Rohingya fleeing the "clearance operations" also faced violent attacks at border crossing points, resulting in loss of life and serious injuries. Soldiers opened fire on groups of Rohingya at or close to border crossing points, including large numbers gathered on the shores of the Bay of Bengal or Naf River, while waiting to cross into Bangladesh.²⁰⁰⁵ A man from Nga Yant Chaung village tract, Buthidaung Township, described arriving at the Naf River in mid-September 2017 and being fired upon by soldiers. Some of the people ran; others, like him, lay on the ground. He said that 25 people were killed, including three of his relatives.²⁰⁰⁶

901. Soldiers also shot at boats carrying Rohingya to Bangladesh, resulting in further casualties.²⁰⁰⁷ One witness explained how the boat she was in was shot at by soldiers as it

¹⁹⁹⁶ EI-029.

¹⁹⁹⁷ EI-030, LI-073, LI-027, LI-065, WI-016, WI-024, YI-014; See this chapter, section D.1.a: Most serious incidents.

¹⁹⁹⁸ CI-001, CI-029, CI-114, CI-124, EI-030, EI-049, EI-057, EI-066, EI-073 EI-102, LI-003, LI-027, LI-039, LI-062, LI-063, LI-065, LI-071, LI-073, LI-081, LI-104, LI-118, LI-129, QI-004, QI-011, QI-029, QI-066, WI-004, WI-005, WI-016, WI-024, WI-027, WI-036, WI-037, WI-038, WI-041, WI-042, WI-044, WI-048, XI-003, YI-004, YI-014, YI-027.

¹⁹⁹⁸ CI-001, CI-029, CI-114, CI-124, EI-030, EI-049, LI-003, LI-027, LI-039, LI-062, LI-063, LI-065, LI-071, LI-073, LI-081, LI-104, LI-118, LI-129, QI-004, QI-011, QI-029, QI-066, WI-016, WI-048, YI-014, YI-027.

¹⁹⁹⁹ EI-030.

²⁰⁰⁰ CI-120, EI 003, EI 004, EI-005, LI-052, QI-052, WI-005, WI-027, YI-006, YI-031.

²⁰⁰¹ CI-124, LI-062, LI-065, LI-069, WI-048.

²⁰⁰² CI-120, LI-052, LI-054, LI-120, YI-031.

²⁰⁰³ LI-052, LI-103, YI-031.

²⁰⁰⁴ LI-032

²⁰⁰⁵ CI-050, EI-065, LI-030, LI-070, LI-076, LI-077, LI-127, LI-131, QI-069, QI-109, WI-007, XI-006.

²⁰⁰⁶ QI-109.

²⁰⁰⁷ BI-017, EI-034, EI-065, LI-107, LI-127, QI-026, QI-099, QI-109, WI-007, XI-001.

crossed the Naf River, killing three men and two women.²⁰⁰⁸ Another witness described her experience while waiting for a boat:

*Soldiers started shooting, so we crawled away and lay down behind the plants in the mud. I saw many people being shot at. Dead bodies of men, women and children were floating in the river.*²⁰⁰⁹

902. Soldiers also used large knives to kill or attempt to kill Rohingya individuals crossing the border.²⁰¹⁰ A 13-year old boy explained that he was part of a large group waiting to cross the Naf River when they were attacked by soldiers. The boy was struck with a large knife and his arm was cut, but he managed to escape in the water. He saw the bodies of seven people who had been killed.²⁰¹¹ The Mission viewed the wound on the boy's arm and found it consistent with wounds from a large knife or other sharp implement.

903. Tatmadaw soldiers also opened fire at groups of Rohingya gathered at the border, causing fear and panic but apparently no casualties.²⁰¹² This gunfire seemed intended to instil fear and ensure Rohingya left Myanmar. Other groups of Rohingya who encountered the military en route were not subject to violence, but were threatened.²⁰¹³ One victim explained that he was part of a large group of approximately 200 Rohingya walking towards the border. They encountered a group of soldiers who surrounded them and said that, if they went to Bangladesh and promised never to come back, then they would allow them to go free. If they did not, the soldiers said they would be killed.²⁰¹⁴ Another victim was also approached by a group of armed Tatmadaw soldiers and told explicitly to leave or be killed:

*We were heading towards one of the main crossing point across the Naf River. We saw armed Tatmadaw soldiers there, who told us: "Go quickly to Bangladesh, otherwise we will kill you."*²⁰¹⁵

904. Other Rohingya were killed and injured through beatings,²⁰¹⁶ which sometimes targeted the most vulnerable, including children, women and the elderly.²⁰¹⁷ A witness from Chut Pyin, Rathedaung Township, saw soldiers using their rifle butts to repeatedly beat her 70-year old brother in the head until he died. The beating was so severe that part of his brain came out of his head.²⁰¹⁸ A survey estimated that 18.4 per cent of deaths during the "clearance operations" were as a result of beatings, the second highest reported cause of death after bullet wounds.²⁰¹⁹

905. 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.²⁰²⁰ This latter method in particular meant that victims were often caught by surprise and had little time to escape. Death by burning in this manner disproportionately affected vulnerable persons less able to run and escape from the "clearance operations", including the elderly, disabled, young children and pregnant women. Numerous witnesses reported that family members and others were left behind when they fled the fires. Information indicates that the number of people killed in this manner is high and likely underreported.

²⁰⁰⁸ EI-034.

²⁰⁰⁹ EI-034.

²⁰¹⁰ LI-019, LI-068.

²⁰¹¹ LI-019.

²⁰¹² LI-099, LI-028.

²⁰¹³ LI-099, LI-028.

²⁰¹⁴ LI-048.

²⁰¹⁵ LI-099.

²⁰¹⁶ CI-006, CI-146, EI-024, LI-008, LI-022, QI-018, YI-001.

²⁰¹⁷ EI-052, LI-008, LI-022, LI-061.

²⁰¹⁸ LI-008.

²⁰¹⁹ Médecins Sans Frontiers, "Retrospective mortality, nutrition and measles vaccination coverage survey in Balukhali 2 & Tasnimarkhola camps" (Bangladesh, 2017).

²⁰²⁰ Details regarding the methods used to burn houses are set out later in this section.

906. Those who were able to return to their villages reported seeing burned corpses in houses. A man who returned to Kyauk Pan Du in southern Maungdaw saw the burned corpses of 10 elderly people and one younger person inside their houses.²⁰²¹ A man from a village in Buthidaung Township was able to return to his hamlet after dark and found around 12 bodies of elderly people who had been burned in their homes.²⁰²² Another victim from Ta Man Thar in northern Maungdaw Township returned to find the charred bodies of a disabled man and two elderly people in their houses.²⁰²³ A female victim from a village in Maungdaw that was subjected to a “clearance operation” in early September 2017 described her experience:

*My house was in the west of the hamlet and the military entered from the east. They started burning houses and I could see the flames. My disabled brother had a house in the east. His wife and children fled, but she told me that he was not able to. He burned inside his house, as he was unable to get out. After two days of hiding and watching the village burn, we left for Bangladesh.*²⁰²⁴

907. One interviewee described fleeing when soldiers entered his village, Zone Kar Yar in Tha Pyay Taw village tract, southern Maungdaw, and set fire to houses from one end of the village. His 80-year old mother was unable to run. Shortly afterwards, he could see his house burning from where he was hiding. The following day, when he returned to his village, he found the charred body of his mother.²⁰²⁵ Another witness reported seeing the bodies of his grandmother and his two infant nephews, who had been burned to death in his grandmother’s house in Ah Lel Than Kyaw, southern Maungdaw Township.²⁰²⁶

908. 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.²⁰²⁷ One victim from Ngan Chuang in northern Maungdaw recounted:

*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. The house was burning, but I was able to break down a bamboo wall and then rescued my children one by one. However, my 11-year old daughter was severely burned.*²⁰²⁸

909. During the operations 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. Most victims, including young children who had accompanied their mothers, were unable to escape and burned to death. Similarly, in Chut Pyin, a number of people were forced inside houses, which were then intentionally set alight by soldiers.²⁰²⁹

910. Multiple accounts were received of people, including babies and children, being pushed or thrown into burning houses by soldiers.²⁰³⁰ One interviewee reported seeing two young children, six or seven years old, running out of a burning house, only to be pushed back in by soldiers during the operation in Myin Hlut, Maungdaw Township.²⁰³¹ An interviewee from Kyauk Pan Du, Maungdaw, also described a group of approximately 10 women, children and elderly persons trying to escape a burning house, but being pushed back inside by soldiers. He saw one soldier stabbing a child, and then pushing the child inside the burning house. The entire group were burned alive in the house.²⁰³²

²⁰²¹ WI-016.

²⁰²² QI-007.

²⁰²³ QI-070.

²⁰²⁴ QI-025.

²⁰²⁵ QI-012.

²⁰²⁶ CI-025.

²⁰²⁷ BI-006, CI-023, EI-007, EI-058, EI-066, LI-005, LI-012, LI-059, LI-071, LI-075, LI-078, QI-049, QI-059, QI-111, WI-003, WI-004, WI-005, WI-016, WI-029, XI-001, YI-008.

²⁰²⁸ LI-071.

²⁰²⁹ See this chapter, section D.1.a: Most serious incidents.

²⁰³⁰ EI-007, EI-058, LI-005, LI-059, QI-111, WI-005.

²⁰³¹ QI-011.

²⁰³² EI-007, LI-005.

911. In a similar incident, a woman from Ku Lar Bil in Thu U Law village tract, Maungdaw Township, described fleeing with her husband and their nine-year old daughter from their burning house. Her husband was holding their daughter's hand but was shot in his leg by a bullet. Their daughter stopped to help him and soldiers dragged them both into their burning house. They were both burned alive. "I wish it had been me holding my daughter's hand, rather than my husband."²⁰³³

912. Landmines, planted by the Tatmadaw in and around Rohingya villages as part of the "clearance operations" also caused death and injury.²⁰³⁴ On or around 26 August 2017, a group of Tatmadaw soldiers approached Sin Oe Pyin (Ywar Gyi) hamlet, in Maung Gyi Taung village tract, Buthidaung Township. They systematically planted mines along the main road to the village,²⁰³⁵ with one villager describing them as being placed "15 feet apart".²⁰³⁶ Once the operations began, the landmines killed and injured many who tried to flee.²⁰³⁷ As one villager described, "The mines were put at the entrance of the village, that is the only way out so when people were running they stepped on them and died".²⁰³⁸ Another recalled:

*Some people were running and were killed by the mines, as they didn't know that they were planted there. Others were hit by the mines as they were coming back from the field. My 18-year old relative died from an explosion coming back from the paddy field just in front of my house.*²⁰³⁹

913. Mines laid on pedestrian routes or roads inside northern Rakhine State detonated as villagers fled.²⁰⁴⁰ One 18-year old man, who was severely injured in a mine blast, including broken legs and serious burns on both legs and hands, described his experience:

*When I heard the sound of shooting, I started running towards my village to find my family. As there were checkpoints on the main road, I chose to run along a smaller path so I could reach my family quickly. When I was about 15 minutes away from my village, I was blown up from the ground. It sounded like a huge bomb exploding. Then I fainted. I took this path to school often, but had never seen or heard of an explosion on that route before.*²⁰⁴¹

914. The Government reportedly claimed that only ARSA planted mines in the region.²⁰⁴² Although ARSA did use improvised explosive devices (IEDs) in their 25 August attacks, there is no information to support a claim that ARSA had access to, or used, landmines.²⁰⁴³ The Tatmadaw claimed to have recovered IEDs used by ARSA, but they have made no such claim in relation to landmines.²⁰⁴⁴

915. *Médecins Sans Frontiers* reported that between 25 August and 3 December 2017, its clinic in Kutupalong refugee camp treated 224 people with violence-related injuries, and the number of people presenting with gunshot wounds started to decrease only after 25 September 2017.²⁰⁴⁵ This confirms the Mission's conclusion that violent "clearance operations" continued well beyond the Government's declared end date of 5 September 2017.

916. The Mission met with a large number of victims who sustained injuries during the "clearance operations". It should be noted that, for the most part, it is the "walking wounded",

²⁰³³ EI-058.

²⁰³⁴ CI-006, CI-007, CI-016, YI-029, V-087.

²⁰³⁵ CI-132, CI-133, LI-046, LI-114, LI-117, QI-107, XI-004.

²⁰³⁶ LI-114.

²⁰³⁷ CI-132, CI-133, LI-046, LI-114, LI-117, QI-107, XI-004, YI-001.

²⁰³⁸ LI-046.

²⁰³⁹ LI-114.

²⁰⁴⁰ BI-004, CI-001, WI-009, V-087.

²⁰⁴¹ BI-004.

²⁰⁴² V-088.

²⁰⁴³ See this chapter, section D.1.c: Arakan Rohingya Salvation Army.

²⁰⁴⁴ Global New Light of Myanmar, "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 Maungdaw region, Rakhine State" (14 November 2017).

²⁰⁴⁵ Médecins Sans Frontiers, Retrospective mortality, nutrition and measles vaccination coverage survey in Balukhali 2 & Tasnimarkhola camps (Bangladesh, 2017).

those who have sustained less serious injuries and survived the journey to Bangladesh, who were able to meet Mission members, and from whom forensic information could be gathered. The Mission conducted forensic analysis of photo-documented injuries, and in some cases the medical records, of more than 50 victims whom the Mission also interviewed. This has allowed for an objective assessment as to whether the injuries corroborate specific allegations, and as such contributes to the overall assessment of the credibility and reliability of witnesses. In general, the forensic assessment of the documented injuries has provided additional corroboration of allegations, sometimes strong corroboration. In a small number of cases, the information was neutral, because of lack of detail or non-specificity of injuries, and in only one case has the information undermined the credibility of the allegation made. In general, where the injured victim is a child, the very presence of an injury such as a gunshot wound is itself of great concern.

917. Illustrative examples of additional corroboration that forensic analysis has provided include: (1) a schoolboy from Tha Yet Oke, Maungdaw Township, who was the victim of a land-mine explosion and sustained extensive burns to all four limbs and a fracture of the right lower leg²⁰⁴⁶; (2) a 10-year old girl from Chut Pyin, Rathedaung Township, who was shot twice while crawling on the ground and had two untreated gunshot wounds in her legs²⁰⁴⁷; (3) an 11-year old girl from Ngan Chaung, Maungdaw Township, who suffered an extensive burn injury when her home was hit by a “launcher” and set on fire²⁰⁴⁸; and (4) a 10-year old girl from Kyein Chaung, Maungdaw Township, who suffered multiple sharp force head wounds from repeated blows from a large knife inflicted by a Tatmadaw soldier.²⁰⁴⁹; and (5) a 45-year old woman from Myo Thu Gyi, Maungdaw Township, who was shot in both feet while attempting to flee.²⁰⁵⁰

918. Clinics, including the Sadar Hospital in Cox’s Bazar and Chittagong Medical College Hospital, both in Bangladesh, also treated patients with violence-related injuries. Many private hospitals and clinics in southern Bangladesh also treated Rohingya patients. Other medical reports from clinics and medical professionals who treated gunshot victims in Bangladesh have confirmed that many patients, including women, children and the elderly, had bullet entry points from behind, consistent with being shot while fleeing.²⁰⁵¹

919. No consolidated data is available on the numbers who received treatment or the nature of their injuries. Moreover, many Rohingya in Bangladesh did not seek treatment for their injuries, due to difficulties accessing services in the camps in Bangladesh, particularly in the initial weeks and months when demand greatly exceeded available services. The Mission observed that a number of its interviewees in Bangladesh, with serious bullet or stabbing-related wounds, had not sought medical treatment. It appears that, for many Rohingya, the practice of not seeking professional medical care, even for serious injuries, has been normalised by the lack of access to professional medical services in northern Rakhine State.²⁰⁵²

Rape, gang rape, and other forms of sexual violence

920. Rape and other sexual and gender-based violence were perpetrated on a massive scale during the “clearance operations” from 25 August 2017. This includes mass gang rapes, sexually humiliating acts, sexual slavery and sexual mutilations.²⁰⁵³ Rohingya women and girls were the main victims, although there were some instances involving men and boys. Young women and girls were particularly targeted for sexual violence and were disproportionately affected. The main perpetrators were the Tatmadaw, although other security forces, and sometimes ethnic Rakhine men, were also involved.

²⁰⁴⁶ BI-004.

²⁰⁴⁷ LI-009.

²⁰⁴⁸ LI-071.

²⁰⁴⁹ WI-004.

²⁰⁵⁰ WI-011.

²⁰⁵¹ K-155, V-085.

²⁰⁵² See chapter V.B.3: Restrictions on access to food, livelihoods, health care and education.

²⁰⁵³ Women and girls were also subjected to sexual assault during body searches for jewellery and money.

921. Mass gang rape, involving multiple perpetrators and multiple victims in the same incident, was a notable pattern,²⁰⁵⁴ and occurred in at least ten village tracts between 25 August and mid-September.²⁰⁵⁵ The Mission received further credible reports of mass gang rapes in a number of other locations. Mass gang rapes were commonly perpetrated in open public spaces, in front of family and neighbours, within forested areas near the village,²⁰⁵⁶ in large houses within the village,²⁰⁵⁷ and during detention in military and police compounds.²⁰⁵⁸ In some incidents, up to 40 women and girls were raped or gang raped together.²⁰⁵⁹ Women and girls were commonly raped by more than one perpetrator, frequently by many perpetrators, sometimes as many as ten.²⁰⁶⁰ In Kyein Chaung, north Maungdaw Township, a 35-year old woman spoke of being brutally gang raped by nine men near her house:

*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.*²⁰⁶¹

Another female survivor told the Mission, “I was lucky, I was only raped by three men”.²⁰⁶²

922. Often, mass gang rape took place after the separation of women and girls from men and boys.²⁰⁶³ In some instances, women and girls were brought to houses where Tatmadaw soldiers were waiting, including men in camouflage and with helmets.²⁰⁶⁴ After entering the houses, women and girls were beaten, stripped and brutally raped or gang raped in common spaces or in separate rooms, toilets or other areas.²⁰⁶⁵

923. For example, a young woman, from a village in Kyet Yoe Pyin, Maungdaw Township, explained how she was taken by members of the Tatmadaw, together with 20 to 30 other women and girls, to a large house in the village. The women were then taken to different rooms to be raped.²⁰⁶⁶ An 18-year old woman from Maung Gyn Hanut, Buthidaung Township, described how she and a group of 12 women and girls were gang raped in a forest area. She was raped by two soldiers and she saw the other women and girls being taken away by soldiers and heard screaming. Later, these women told her that they were also raped.²⁰⁶⁷ In nearby Nga Yant Chaung, Buthidaung Township, a 23-year old woman described how villagers were first gathered in the centre of the village, and then soldiers took her and other women to forested areas in groups of four and five. She was raped by two soldiers, whom she recognised from the local military compound, and saw many other women being raped.²⁰⁶⁸

²⁰⁵⁴ EI-001, EI-030, EI-038, EI-039, EI-065, EI-067, EI-073, EI-075, EI-080, EI-081, EI-089, EI-094, EI-097, EI-098, LI-105, K-128.

²⁰⁵⁵ In Maungdaw: Kha Maung Seik (Fwair Bazar), (Min Gyi) (Tula Toli), Kyein Chaung (Boli Bazar), Kyauk Pan Du (Shitar Fawrikka); in Buthidaung: Ba Da Kar (Fati Yaar), Nga Yant Chaung (a) Taung Bazar (Nga Yant Chaung), Chin Tha Mar (Hang Sar Para), Gu Dar Pyin (Gudam Para), Maung Gyi Taung (Shab Bazar) and in Rathedaung: Chut Pyin (Shuap Praung).

²⁰⁵⁶ EI-021, EI-027, EI-030, EI-064, YI-030.

²⁰⁵⁷ CI-042, CI-046, EI-021, EI-080, EI-081, QI-052, QI-060, QI-071, WI-038, K-128.

²⁰⁵⁸ EI-023, EI-028, EI-064, EI-066, EI-086, EI-094, EI-097, K-151, K-127.

²⁰⁵⁹ EI-007, EI-055, LI-037.

²⁰⁶⁰ EI-007, EI-014, EI-057, EI-096, EI-102.

²⁰⁶¹ EI-096.

²⁰⁶² EI-075.

²⁰⁶³ CI-034, CI-042, CI-046, EI-021, EI-080, EI-081, EI-097, QI-052, QI-60, QI-072, WI-038, K-151.

²⁰⁶⁴ EI-057, EI-065, EI-080, EI-081.

²⁰⁶⁵ CI-042, CI-046, EI-080, EI-081, EI-097, QI-052, QI-060, QI-072, WI-038, K-151.

²⁰⁶⁶ EI-097.

²⁰⁶⁷ EI-030.

²⁰⁶⁸ EI-021.

924. One of the most brutal scenes took place in Min Gyi, Maungdaw Township.²⁰⁶⁹ Tatmadaw soldiers took dozens of women and girls to large houses. Upon arrival, each group was taken to a different room. Once in the room, women and girls were stripped and beaten with sticks, punched or stabbed. They were then raped in groups of up to seven victims at a time.²⁰⁷⁰ Many of the women and girls had infants and children with them, who were killed or severely injured, while their mothers were raped.²⁰⁷¹ The houses were then often locked and set on fire and most victims who were still alive were burned to death.²⁰⁷² A few women survivors described how they regained consciousness when the houses were being burned, and saw dead women and children in the rooms.²⁰⁷³ Survivors who escaped from the burning houses exhibited serious burn marks and knife wounds to the head and neck.²⁰⁷⁴ The Mission conducted forensic analysis of the injuries to one woman with extensive burning to her right side, including her outer right leg, hand and wrist and right forehead and cheek. The burn-scarring pattern is additional corroboration of her account of being awoken in a burning house while lying on the floor and as burning material fell upon her with her right side uppermost. This awoke her, and she was able to escape.²⁰⁷⁵

925. The rapes of Rohingya women and girls were particularly brutal, often accompanied by acts of sexual humiliation and physical and mental torture. Many victims were injured before the rapes began - beaten with guns, sticks, wire and fists, and kicked in the stomach or the head.²⁰⁷⁶ Injuries included broken bones.²⁰⁷⁷ Once the women and girls were subdued, their clothes were torn off.²⁰⁷⁸ One survivor stated that the soldiers had brought scissors with them, "in case they could not tear off my clothes".²⁰⁷⁹ Many women and girls were seen running naked in forested areas in visible distress and eyewitnesses believed that they had been raped.²⁰⁸⁰ Blindfolds were commonly used.²⁰⁸¹ Often, one member of the Tatmadaw would hold the victim down, often gripping her wrists, while another would rape her. They would then change places.²⁰⁸² In some instances, women and girls had their legs tied to doors.²⁰⁸³ Others were strung up naked to trees in the forested areas, either by their hands or by their hair.²⁰⁸⁴

926. During rapes, women and girls were frequently bitten on the cheeks, neck, breast and thigh.²⁰⁸⁵ The bite marks were still visible months afterwards to members of the Mission, United Nations doctors and counsellors. The bite-marks and other mutilations have left permanent scars on the survivors and serve as a constant reminder to them, their husbands, family and community of the violations and humiliations they have been subjected to. Due to the substantial portion of women and girls affected, it is difficult to believe that this was not an intentional act and akin to a form of branding. The Mission conducted forensic analysis of such injuries. For example, it was able to additionally corroborate the information of a 15-year old girl from Maungdaw who was mass gang raped with three other girls by Tatmadaw

²⁰⁶⁹ See this chapter, section D.1.a: Most serious incidents.

²⁰⁷⁰ CI-042, CI-046, EI-080, EI-081, QI-60, QI-071, WI-038, K-150, K-151.

²⁰⁷¹ CI-042, CI-046, EI-080, EI-81, QI-060, QI-071, WI-038, K-150, K-151; See this chapter, section D.1.a: Most serious incidents.

²⁰⁷² CI-042, CI-046, EI-080, EI-81, QI-060, QI-071, WI-038, K-150, K-151; See this chapter, section D.1.a: Most serious incidents.

²⁰⁷³ EI-80, EI-081.

²⁰⁷⁴ EI-80, EI-081.

²⁰⁷⁵ EI-102.

²⁰⁷⁶ EI-007, EI-029, EI-057, EI-083.

²⁰⁷⁷ EI-029, EI-057, EI-083.

²⁰⁷⁸ EI-083, EI-089, XI-001.

²⁰⁷⁹ EI-089.

²⁰⁸⁰ EI-011, EI-014, EI-022, EI-076, EI-094, LI-105, XI-001.

²⁰⁸¹ EI-069, EI-086, EI-089, EI-096, EI-098.

²⁰⁸² EI-027, EI-089.

²⁰⁸³ EI-034, EI-057, EI-078, EI-102.

²⁰⁸⁴ EI-096, EI-098, LI-105.

²⁰⁸⁵ EI-011, EI-014, EI-022, EI-076, EI-094, XI-001.

soldiers. Forensic analysis confirms two violent bite marks, one on each cheek, sustained during the rape.²⁰⁸⁶

927. Many victims were killed after being raped. Most had their throats slit, or were burned to death.²⁰⁸⁷ 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 naked and large amounts of blood were visible between their legs.²⁰⁸⁸ A number of interviewees said that girls had been “raped to death”,²⁰⁸⁹ because of unusual amounts of blood in the genital area. In some instances, the genital area, or their breasts, appeared mutilated.²⁰⁹⁰ Death may have been caused by genital trauma,²⁰⁹¹ 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.²⁰⁹²

928. Frequently, rapes took place in front of family members, including husbands, parents and young children.²⁰⁹³ A mother from Inn Din described how her adult daughter’s legs were tied to different doors and she was raped by 10 male perpetrators. Her daughter’s throat was then slit and the house set on fire.²⁰⁹⁴ Mothers were often gang raped in front of their young children,²⁰⁹⁵ who were often ill-treated, and sometimes killed.²⁰⁹⁶ A mother from Nga Yant Chaung saw her seven-year old son killed with a large knife while she was being gang raped by five men in police uniform.²⁰⁹⁷ Many women and girls stated that the rape itself was only one aspect of their suffering. The loss of family members, particularly children or unborn children, was described by mothers to the Mission as “unbearable”.²⁰⁹⁸

929. The “clearance operations” also involved the systematic abduction and detention of women in military and police compounds and bases, where they were then raped or, more commonly, gang raped.²⁰⁹⁹ Parents, relatives and neighbours reported that they saw women and girls being forcibly taken by the Tatmadaw who were not seen again. A large number of Rohingya women and girls remain missing, presumed dead. The Mission received examples of the Tatmadaw demanding a number of women or girls to be brought to their compounds.²¹⁰⁰ A young woman from Dar Gyi Zar, Maungdaw Township, described how she and 20 other women and girls went to the local military compound when such a demand was issued in late August 2017. They were locked in a room for three days, and the two youngest girls, aged around 13 or 14 years old, were taken to the next room. Ten Tatmadaw soldiers entered the room and she heard screaming. A few hours later, the girls’ dead bodies were carried out. They were naked from the waist up, had blood in their genital area, and bite marks on their faces or scratches on them.²¹⁰¹

930. In and around Buthidaung town, women and girls were systematically abducted, detained, gang raped and killed in military and police compounds during the “clearance operations.” An 18-year old woman from a village near Buthidaung town was detained and gang raped for five days in a military compound. She could hear women in other rooms screaming during her detention. She believed that there were up to 20 other women detained

²⁰⁸⁶ CI-045.

²⁰⁸⁷ EI-014, EI-064, EI-065, EI-067, EI-075, EI-076, EI-080, EI-081, EI-088, EI-094, EI-098.

²⁰⁸⁸ EI-067, EI-077, EI-078, EI-095, XI-001.

²⁰⁸⁹ EI-064, EI-067, EI-092, LI-081, LI-105, WI-006, WI-027.

²⁰⁹⁰ EI-064, EI-067, EI-092, LI-081, LI-105, WI-006, WI-027, XI-001.

²⁰⁹¹ K-124.

²⁰⁹² K-124.

²⁰⁹³ EI-027, EI-029, EI-057, EI-071, EI-083. See below in this section, Attacks on and grave violations against children.

²⁰⁹⁴ EI-057.

²⁰⁹⁵ EI-025, EI-029, EI-083; See below in this section, Attacks on and grave violations against children.

²⁰⁹⁶ EI-044, EI-071, EI-083; See below in this section, Attacks on and grave violations against children.

²⁰⁹⁷ EI-083.

²⁰⁹⁸ EI-083, EI-096.

²⁰⁹⁹ EI-022, EI-064, EI-078, EI-079, EI-080, EI-083, EI-086, XI-001.

²¹⁰⁰ EI-022, EI-083.

²¹⁰¹ EI-022.

and raped.²¹⁰² In the third week of September 2017, a 40-year old female eyewitness saw military vehicles arrive at the military compound in Buthidaung town and unload a group of approximately 10 girls aged between 12 and 18. She saw them being stripped naked by the soldiers before she ran away.²¹⁰³

931. The abduction and gang rape of women and girls also took place at the military compound next to Gu Dar Pyin village, Buthidaung Township, on the day of the “clearance operations” in that village.²¹⁰⁴ A woman described watching her 15-year old daughter being forcibly taken by soldiers to the compound, along with other girls: “My daughter cried out to me to save her. I watched her taken away until I couldn’t see her anymore. There is not a day that I do not cry.”²¹⁰⁵ On the same day, another woman saw her 15-year old daughter being taken away by soldiers from their house, while her elder son tried to intervene. She and her husband escaped with their younger children. Her husband returned the next day and found the body of their son. They do not know what happened to their daughter.²¹⁰⁶

932. Tatmadaw was the main perpetrator of sexual violence. A total of 80 per cent of incidents of rape corroborated by the Mission were of gang rape, and 82 per cent of these gang rapes were perpetrated by the Tatmadaw. Incidents of rape and sexual violence were also carried out by members of the BGP, the Myanmar Police Force and ethnic Rakhine, although considerably less so.²¹⁰⁷ Although the majority of Rohingya women and girls do not understand Myanmar language, those who did described the use of derogatory language during rapes. One woman, gang raped with her sister, reported 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.”²¹⁰⁸ Another woman from Kha Maung Seik, Maungdaw Township, reported a soldier saying, “We will rape you and kill you” and using insulting terms such as “Kalar”.²¹⁰⁹

933. Women and girls of reproductive age were targeted. A review of interviews conducted by the Mission, together with other information received, shows that the most common age range for rape and gang rape was approximately 13 to 25 years old. Soldiers would commonly select unmarried women or girls.²¹¹⁰ It is unclear whether pregnant women were specifically targeted but many were raped, and many suffered miscarriages or their babies died following rape, including one woman who was eight months pregnant.²¹¹¹ Older women were also victims of sexual and gender-based violence, as were very young girls.²¹¹²

934. Victims frequently complained of severe pain in their genital area, severe blood loss, pain in their abdomens and severe pain on urination.²¹¹³ Women and girls often had to be carried to Bangladesh by husbands, brothers, sons or neighbours because they could not walk.²¹¹⁴ Months after being raped, victims still suffered from severe injuries that prevented them from having sexual intercourse with their husbands, and women voiced concerns that their husbands would leave them and that they would no longer be able to have children.²¹¹⁵ A woman from Laung Don, Maungdaw Township, underwent a hysterectomy in Bangladesh

²¹⁰² EI-086.

²¹⁰³ EI-064.

²¹⁰⁴ EI-078, EI-079, EI-080, K-151.

²¹⁰⁵ EI-078.

²¹⁰⁶ EI-079.

²¹⁰⁷ EI-075, EI-083, EI-084, EI-088, EI-098, EI-093.

²¹⁰⁸ EI-084.

²¹⁰⁹ EI-090.

²¹¹⁰ EI-014, QI-052, WI-004.

²¹¹¹ EI-014, EI-073, EI-083, EI-096.

²¹¹² EI-067, EI-068, EI-048, V-138.

²¹¹³ EI-029, EI-025, EI-030, EI-071, EI-083, EI-089.

²¹¹⁴ EI-074, EI-081, EI-083, EI-090.

²¹¹⁵ EI-025, EI-029, EI-030, EI-083, EI-089.

due to injuries sustained because of gang rape.²¹¹⁶ Injuries were exacerbated by lack of access to healthcare *en route* to Bangladesh and on arrival. The Mission received information of women and girls who died *en route* due to the severity of injuries and lack of medical care.²¹¹⁷ There was also limited or no access to medication to prevent pregnancy or to treat sexually transmitted diseases or genital trauma. Many did not realise that they could seek medical care in Bangladesh, or feared it, due to their discriminatory experiences and the effective denial of health care to them in Myanmar or their fear of family and community shaming.

935. Many women and girls became pregnant from rape but the number is unknown. In May-June 2018, the United Nations and other organizations noted a spike in the number of pregnant women and girls in the refugee camps in Bangladesh.²¹¹⁸ In spite of its public dismissal of “fake rapes” following the 2016 violence,²¹¹⁹ the Government of Myanmar has implicitly accepted that large numbers of rapes occurred and many babies were born as a result of the rapes. The repatriation agreement it signed with Bangladesh has a clause, section 6(v), that appears to specifically address the issue of babies born of rape: “Children born out of unwarranted incidents are to be certified by a court of Bangladesh.”²¹²⁰

936. Medical clinics reported an increased request for late term pregnancy terminations in March and April 2018, and girls aged 13 to 17 requested terminations from clinics stating that they had been raped by the Tatmadaw.²¹²¹ Health clinics have performed terminations when requested, consistent with the laws of Bangladesh (“menstrual regulation”). Doctors and counsellors reported that, if they were unable to obtain medical terminations, women and girls have resorted to unsafe terminations. Women and girls have used locally-derived abortifacient potions or abortifacients obtained in Bangladesh, which are toxic to both the woman and the foetus.²¹²²

937. Babies born of rape are a constant reminder to their mothers of the events endured and may be resented. Cases of infanticide and the killing of pregnant adolescent girls were reported to the Mission by counsellors in Bangladesh.²¹²³ Rape survivors also face stigmatisation. Many women and girls who have survived sexual violence live in fear of their husbands, family or community finding out.²¹²⁴ For unmarried women, this is heightened. In general, if it is known that a girl has been subject to sexual violence, it is unlikely that she will marry.

938. The circumstances in the vast overcrowded refugee camps in southern Bangladesh mean that women and girls continue to be at risk of sexual violence and, in particular, sexual exploitation and abuse. The Mission is concerned about reports of human trafficking for the purpose of sexual exploitation and abuse. Women are also reportedly facing increased levels of family violence in the camps.²¹²⁵

939. Women and girls were not the sole victims and survivors of sexual violence during the “clearance operations”. The Mission received credible reports of sexual violence against

²¹¹⁶ K-151.

²¹¹⁷ CI-034, QI-061.

²¹¹⁸ V-139, “More than 60 Rohingya babies born in Bangladesh refugee camps every day”– UNICEF, 17 May 2018. Available at: <https://www.unicef.org/press-releases/more-60-rohingya-babies-born-bangladesh-refugee-camps-every-day%E2%80%93unicef>.

²¹¹⁹ V-254, V-255. The “fake rape” charge appeared as a banner on the Facebook page of the State Counsellor’s Office (screenshot on file with the Mission). It is discussed in detail in chapter X, section B.2.a: Case study 1: the use of rape and other forms of sexual violence by the military. See also: <http://www.statecounsellor.gov.mm/en/node/545>.

²¹²⁰ “Arrangement on return of displaced persons from Rakhine” between the Government of the People’s Republic of Bangladesh and the Government of the Republic of the Union of Myanmar (Naypyidaw, 23 November 2017).

²¹²¹ KI-129.

²¹²² K-124.

²¹²³ K-124.

²¹²⁴ K-124.

²¹²⁵ K-124.

men and boys, including rape,²¹²⁶ genital mutilation²¹²⁷ and sexualised torture, sometimes leading to death.²¹²⁸ The scale of this sexual violence remains unknown. The patriarchal nature of the Rohingya community, combined with the centrality of religious leaders in the community, make it extremely difficult for men and boys to discuss sexual violence against them. Isolation, attachment to cultural references and low levels of education further prevent an accurate assessment of the extent of sexual violence against men and boys.

940. During detention, which was prevalent during the “clearance operations”, there are consistent credible reports of men and boys being subjected to sexual violence, including rape, sexualised torture and humiliation by authorities or in their presence.²¹²⁹ The extent of sexual violence against men and boys in northern Rakhine throughout this period warrants further investigation.

941. Individuals, families and the wider Rohingya community have been highly traumatised by the brutal sexual violence, which they suffered or witnessed. Rape was used as a form of torture, to terrorise the community and as a tactic of war. It continues to have a devastating and lasting impact on the individuals who suffered from it, their families and the wider Rohingya community, both physically and mentally. The Mission has concluded 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.²¹³⁰

Attacks on and grave violations against children

942. During the “clearance operations”, infants and children were indiscriminately killed and in some instances targeted for killing.²¹³¹ Infants and children were frequently killed by gunfire, stabbed or burned to death.²¹³² A health survey produced by *Médecins Sans Frontiers* observed that, after 25 August 2017, 57.5 per cent of child deaths under the age of five resulted from violence and, of those deaths, 56.5 per cent of children died from gunshot wounds.²¹³³

943. In some instances, children were targeted for killing and their parents were left alive.²¹³⁴ A 23-year old woman from Chin Tha Mar, Buthidaung Township, described:

*I was able to see the killings through the door crack to the yard. When the soldiers started shooting, all women were screaming. They even killed an eight-year old child. During the night, I escaped and I saw so many dead bodies including children. Most of the children were boys, but there were girls too.*²¹³⁵

944. A father from Kyauk Chaung village tract, Maungdaw Township, recalled:

*A son and daughter of mine were taking a bath in a pond. I was about to call them in to have some food. They were six and four years old. My son was shot in the head. My daughter then fell to the floor and was screaming. Then there was a second shot. They shot my daughter in the chest. The ricochet of the bullet hit me in the foot. I saw that the shots had come from the soldiers standing about 20 feet away from us.*²¹³⁶

²¹²⁶ K-130, V-134.

²¹²⁷ EI-092, EI-096, LI-022.

²¹²⁸ EI-092, EI-096.

²¹²⁹ K-151, V-134; See this chapter, section D.2.b: The build-up to 25 August 2017.

²¹³⁰ K-122, K-124.

²¹³¹ CI-045, CI-131, CI-136, CI-137, LI-024, LI-025, LI-026, LI-094, LI-099, LI-105, LI-112, LI-115, LI-119, LI-148

²¹³² CI-013, CI-019, CI-035, CI-045, CI-131, CI-136, CI-137, EI-080, LI-024, LI-025, LI-026, LI-054, LI-073, LI-094, LI-099, LI-105, LI-112, LI-115, LI-119, QI-036, WI-004, YI-009; YI-028, YI-030, V-138.

²¹³³ V-086.

²¹³⁴ EI-038, EI-075, LI-085, WI-004, K-076.25, K.076.26.

²¹³⁵ LI-079.

²¹³⁶ QI-026.

945. In Kyet Yoe Pyin, Maungdaw Township, one witness described finding the bodies of a two-year old girl, a baby and a teenage girl in a yard,²¹³⁷ while another described how he saw two young children, who were searching for their mother, being killed by soldiers. One six-year old boy had his throat cut, while a four-year old was stamped to death, before the body was thrown into a nearby burning house.²¹³⁸

946. Children and infants were disproportionately impacted by destruction of villages by fire. Large numbers burned to death in houses, unable to escape.²¹³⁹ Infants and young children were often sleeping when houses were set on fire, were the slowest to leave, or were too frightened to leave. They were also forced back into the burning houses by Tatmadaw soldiers or others.²¹⁴⁰ A 14-year old boy from Kyauk Pan Du, Maungdaw Township, described how he saw around 10 people, mainly children, but also some women and elderly, being pushed back into a house by members of the Tatmadaw during the “clearance operations”. One of the children was stabbed when the group tried to leave the house. The soldiers then set the house on fire and the witness believed that all inside died.²¹⁴¹

947. Children and infants were also killed while their mothers were being raped or gang raped.²¹⁴² While a woman was gang raped, her 10-year old son was killed with a knife in Tin May, Buthidaung Township.²¹⁴³ Another mother from Zay Di Pyin, Rathedaung Township, recounted:

*I don't know how many policemen raped me, it was not my priority. The only thing I can remember is that they were trying to take my children. They dragged my son from under the bed. I was screaming to protect my children. I have not seen my son again.*²¹⁴⁴

948. Children were also disproportionately affected by the conditions in which they fled, having to sleep in the open in the forested hill areas and needing to cross rivers and the sea to reach Bangladesh. Many children and infants drowned, as they could not swim, particularly with the high water levels of monsoon season. Others drowned when boats capsized.²¹⁴⁵ An 18-year old woman from Kyein Chaung, Maungdaw Township, described seeing four children drown when their boat capsized.²¹⁴⁶ Parents also often became separated from their children en route.²¹⁴⁷ A mother fleeing the “clearance operations” in Gu Dar Pyin, Buthidaung Township, lost her six-year old daughter in the crowd of people fleeing. She never saw her again.²¹⁴⁸ A large number of children fled from Myanmar alone or with only their siblings.

949. A 12-year old boy from Gaw Du Thar Ra (Ywar Thit Kay), Maungdaw Township, told the Mission how he left Myanmar after his parents were killed. He is now living in a refugee camp in Bangladesh, looking after five younger siblings:²¹⁴⁹

I saw smoke rising from my village. Later, when 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 my mother's lap. I saw many dead bodies in my village. Bodies were both inside the houses and outside. They had been shot,

²¹³⁷ CI-111.

²¹³⁸ CI-137.

²¹³⁹ EI-001, EI-007.

²¹⁴⁰ CI-049, CI-137, LI-042, LI-135.

²¹⁴¹ EI-007.

²¹⁴² EI-071, EI-075, EI-081, EI-083, EI-102.

²¹⁴³ EI-071.

²¹⁴⁴ EI-075.

²¹⁴⁵ CI-123, CI-137, EI-084, LI-097, LI-114, LI-115, LI-118.

²¹⁴⁶ CI-023.

²¹⁴⁷ CI-148, EI-078, LI-097, LI-119, LI-122.

²¹⁴⁸ EI-078.

²¹⁴⁹ WI-033.

*stabbed and burned. I couldn't bear it. I couldn't even take any of my clothes with me, everything was burned.*²¹⁵⁰

950. The Mission met a large number of children in the Bangladesh refugee camps in September and October 2017 who exhibited visible injuries corresponding with accounts of being shot with live ammunition, stabbed with a sharp implement, or burned. For example, the medical records of a 15-year old girl from Chut Pyin confirmed that she had been shot by live ammunition, consistent with the account she had given of being shot by a soldier. A 12-year old girl from Nga Yant Chaung, Buthidaung Township, showed injuries to her leg which she said occurred when she was shot by soldiers, and her Bangladesh hospital medical records showed that she had spent 30 days in hospital for two gunshot wounds. She was unable to walk when the Mission met her.²¹⁵¹

951. Children were also victims of sexual violence. Girls and young women were targeted for rape, mass gang rape, sexual slavery and forced nudity. They were selected by members of the Tatmadaw for sexual violence, including girls of 11 or younger, some as young as seven. The Tatmadaw used schools as military camps during the “clearance operations”,²¹⁵² where civilians were subject to sexual violence, beatings and tortured, and in some instances women and girls were raped and mass gang raped. Girls were also abducted from their homes by the Tatmadaw and police in the lead up to the 2017 “clearance operation” and were frequently raped, mass gang raped and killed following their abduction and detention.

Disappearances of men and boys

952. The clearance operations also resulted in the arbitrary arrest and detention, as well as the disappearance, of many Rohingya men and boys, perpetrated by the Tatmadaw, often amounting to enforced disappearances. Their removal was usually violent, with victims beaten and rounded up into groups, with their hands tied together and sometimes blindfolded, before being taken away.²¹⁵³

953. One mother described Tatmadaw soldiers tying up her son and other male villagers, using rope that they had cut from cows. They were then made to lie on the ground.²¹⁵⁴ Another female witness described how male members of her family were rounded up in Maung Gyi Taung village tract, in Buthidaung Township:

*The military tied their hands behind their back with a rope. There were 25 men tied in line to the same rope, including my 18-year old son and my husband. They were badly beaten and forced to lie down on the ground.*²¹⁵⁵

954. Another villager described the experience in Nga Yant Chaung, also in Buthidaung Township:

*They were going into different houses and taking some of the men. They gathered the men and told them to line up. They tied them up together by the hands. While they were tying them up, they hit the men with guns, and kicked them injuring some of them, while continuing to round men up.*²¹⁵⁶

955. Information suggests that mostly young men were targeted and detained, together with persons considered as respected or influential,²¹⁵⁷ including religious leaders, teachers and village administrators. In most instances, the men were taken away from the village, either on foot or in military trucks or vehicles.

956. This pattern of the targeting and disappearing of men also appears to have continued during the flight to Bangladesh. One woman described how the group she was travelling with

²¹⁵⁰ WI-033.

²¹⁵¹ EI-040

²¹⁵² EI-077.

²¹⁵³ EI-030, LI-048, QI-115, WI-007, WI-017, YI-001.

²¹⁵⁴ EI-030.

²¹⁵⁵ YI-001.

²¹⁵⁶ WI-007.

²¹⁵⁷ LI-001, LI-004, QI-051, XI-009, YI-001.

encountered Tatmadaw soldiers. She said that some of the men were shot, while others were tied up, taken away and not seen again.²¹⁵⁸ A woman provided information of her two sons being captured in a village in Ah Lel Than Kyaw, Maungdaw Township, where they had sought refuge during their journey to Bangladesh:

*We were trying to cook some rice under a tree when soldiers came and we all gathered. The soldiers picked out the males, including my two sons. They were forced onto the ground, with their hands tied behind their heads. The soldiers put their boots on the sides of my sons' faces. Thirteen men were then taken away, including my sons.*²¹⁵⁹

957. The men and boys detained have not been seen since and their whereabouts are unknown.²¹⁶⁰ The circumstances in which men were detained during the “clearance operations” have not afforded family members the opportunity to seek information from the authorities, with many relatives now in Bangladesh. In any event, the Tatmadaw is unlikely to assist them with information. The Tatmadaw publicly referred to the detention of 114 “Bengalis” in October 2017, although no further details were provided regarding their identity or whereabouts, or whether any charges had been laid or judicial process initiated.²¹⁶¹ Even a conservative estimate of those disappeared far exceeds this figure. Although relatives hope that those taken away are detained, many presume that they have been killed. Some of these fears are based on indications given at the time men and boys were taken away. For example, a woman who saw her son and other men taken away by soldiers was told, “We will do nothing to you, but we will slaughter them”.²¹⁶² Another interviewee saw men being tied up and taken into a house, after which he heard the sound of gunfire. He could not see what happened but believes that they were killed.²¹⁶³ Similarly, in a well-documented incident, 10 men who had their hands tied and were taken away in Inn Din, southern Maungdaw Township, were subsequently killed by the security forces and local villagers.²¹⁶⁴

958. The anguish of not knowing what happened to those disappeared remains overwhelming within the Rohingya community. One man made a specific request to the Mission:

*Please help us find out about the people who were taken away, those who died are gone, but please try to find information about these people.*²¹⁶⁵

Destruction and looting of civilian homes, property and other protected objects

Burning of property

959. Through analysing satellite imagery and witness accounts, the Mission has established widespread, systematic, deliberate, organized and targeted destruction, mainly by fire, of Rohingya-populated area across the three townships of northern Rakhine State. Maungdaw, Buthidaung and Rathedaung Townships are comprised of approximately 993 villages. Satellite imagery from August 2017 to March 2018²¹⁶⁶ shows that, following 25 August 2017, approximately 392 of these villages²¹⁶⁷ across the three townships were partially (214

²¹⁵⁸ XI-001.

²¹⁵⁹ EI-030.

²¹⁶⁰ BI-016, XI-006.

²¹⁶¹ This was stated in the Tatmadaw initial investigation in November, with the same figure reiterated in its more recent publication, “Myanmar Politics and the Tatmadaw: Part 1” (2018).

²¹⁶² EI-030.

²¹⁶³ QI-115.

²¹⁶⁴ CI-146, LI-006, LI-130, QI-051; See this chapter, section D.1.a. Most serious incidents; Wa Lone, Kyaw Soe Oo, S. Lewis, A. Slodkowski, “Massacre in Myanmar” (Reuters, 8 February 2018). Commander-in-Chief, “Tatmadaw investigation team statement on findings of discovery of unidentified bodies in Inn Din Village Cemetery in Maungdaw Township” (Facebook post, 10 January 2018), post on file with Mission.

²¹⁶⁵ RI-001.

²¹⁶⁶ This is the period covered by the UNITAR-UNOSAT data analysis provided to the Mission, a summary of which is accessible at https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/UNOSATReportMyanmar_20180912.pdf

²¹⁶⁷ 277 villages in Maungdaw, 96 villages in Buthidaung, and 19 villages in Rathedaung.

villages) or totally (178 villages) destroyed during this period. This represents the destruction of approximately 40 per cent of villages in northern Rakhine State. More than 70 per cent of the destroyed villages, or 277, were located in Maungdaw Township, where the majority of Rohingya population in northern Rakhine State resided. Fire was the main means of destruction.

Another man, from Myaung Nar in southern Buthidaung Township, recalled, “There were babies’ bodies floating in the water”.²²³⁴

994. Drownings were prevalent in those villages where crossing large bodies of water were the only way to escape. Many drowned in Min Gyi, Maungdaw Township, when trying to escape from the shore, located on the long bend of a wide river.²²³⁵ One man recalled that the river was so high that elderly people and children were not able to cross, with many of them drowning. His young son probably drowned: “He was trying to swim with us, but he was young, only 7 years old. The rest of the family could cross by swimming, but we don’t know what happened to him.”²²³⁶ Similarly, in Gu Dar Pyin, Buthidaung Township, many people tried to cross a nearby river to escape the violence, but this also led to drownings. One villager described seeing 10 to 12 people drown in the river, mostly women.²²³⁷

995. People also drowned after being shot at and forced to jump into the water. An elderly man recalled the military shooting at a group trying to cross the river, some of whom jumped in the water and drowned:

*My grandson, who was three-years old, died when my daughter-in-law jumped into the river, while crossing the canal. The military started shooting at people who were about to cross the river. She was afraid and jumped into the river with her son. The child drowned and we found his body later on.*²²³⁸

996. In certain locations, babies were thrown into the river by security forces and intentionally drowned.²²³⁹ One woman described seeing soldiers throwing a number of infants and babies, taken from their mothers, into the river at Maung Gyi Taung in Buthidaung Township. Some of their parents protested and were killed, while others managed to rescue their children from the river. She said that other mothers lost their children as they were trying to cross the river: “The children could not hold on properly and they were lost in the water”.²²⁴⁰

997. A large number of people died when boats capsized on the journey to Bangladesh, across the Naf River or in the treacherous open waters of the Bay of Bengal. The Bangladesh Border Guard Police recovered more than 100 bodies from the Bangladesh side of the border. Many people saw boats capsize, people drown, and dead bodies floating in the water.²²⁴¹ One witness saw a boat capsize as she was crossing a river, and all passengers drowned, including children.²²⁴² Another man recalled the large number of dead bodies he saw in the water when he reached the Bangladesh side of the border: “There were many people crying there, mourning their drowned family members”.²²⁴³

998. Members of the Mission witnessed the aftermath of a boat that had capsized in the Bay of Bengal on the coast of southern Bangladesh, in Imani, approximately 12 kilometres north of Shamlapur, on 31 October 2017. The boat capsized in waves not far from the shore and 10 people drowned, including elderly women and children.

Disposal of bodies

999. The “clearance operations” resulted in a large number of corpses, strewn across villages, inside houses, along roads, in paddy fields or floating in ponds or rivers. Many also saw dead bodies on their journey to Bangladesh, often in or near burned villages. Witnesses able to return to their villages after “clearance operations”, normally after nightfall, saw large numbers of dead bodies of their neighbours and relatives. However, others who returned to

²²³⁴ LI-107.

²²³⁵ See this chapter, section D.1.a: Most serious incidents.

²²³⁶ LI-097.

²²³⁷ LI-063.

²²³⁸ CI-023.

²²³⁹ CI-046, EI-030, EI-050, WI-021.

²²⁴⁰ EI-030.

²²⁴¹ EI-045, WI-016.

²²⁴² CI-123.

²²⁴³ QI-111.

their villages were unable to find the bodies of relatives who they had witnessed being killed.²²⁴⁴

1000. In a number of locations, the security forces burned the bodies of Rohingya who had been killed.²²⁴⁵ One person from Koe Tan Kauk village, Rathedaung Township, saw Tatmadaw soldiers carrying bodies and putting them in a boat, which was then burned.²²⁴⁶ Another witness saw a large number of burned bodies in Kha Maung Seik, Maungdaw Township, which he said had been collected in one location.²²⁴⁷ Another villager from Yae Khat Chaung Gwa Son village tract, Maungdaw Township, observed soldiers collecting dead bodies and putting them inside houses before setting the houses on fire.²²⁴⁸ Similarly, in Chut Pyin, bodies were burned in a house.²²⁴⁹ One witness watched for two hours as soldiers collected dead bodies and threw them into a burning house.²²⁵⁰ Following the mass killing in Min Gyi, bodies were burned in three large pits dug for this purpose, while the bodies of multiple women were burned in the houses where they were subjected to mass gang rapes.²²⁵¹

1001. In other locations, the Tatmadaw buried bodies in mass graves. Gravesites have been documented in a number of the locations where mass killings took place, including Maung Nu, Gu Dar Pyin, and Inn Din.²²⁵² The Mission has received further reports of soldiers and security forces digging graves and burying multiple bodies in other locations.²²⁵³ One man saw in a house the bodies of women and girls who had been shot, but was forced to flee the shooting. When he returned some hours later, he found that the bodies had been moved into a pit.²²⁵⁴ Another man returned to his village in Ah Lel Than Kyaw to find a number of bodies of men who had been shot thrown into a well.²²⁵⁵ The Mission also heard repeated reports of bodies thrown into rivers, ponds and paddy fields.²²⁵⁶

1002. The information points to a concerted effort by the Tatmadaw to dispose of Rohingya corpses following the “clearance operations” in villages. The manner in which the bodies were disposed of, including through 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. This has been consolidated by subsequent terrain clearance through bulldozing, removing evidence of burned bodies and graves. It is likely that hundreds, and possibly thousands, of bodies have been burned, buried or subsequently destroyed.

1003. The Tatmadaw were also witnessed collecting dead bodies in military vehicles, and removing them.²²⁵⁷ In particular, in central Buthidaung Township, bodies were wrapped in plastic sheets by soldiers and then removed in military vehicles from the village tract of Chin Tha Mar, the location of the Maung Nu mass killing.²²⁵⁸ Bodies were then removed in military vehicles and trucks. One villager from Chin Tha Mar, reported seeing a number of large trucks being driven away, each containing bodies.²²⁵⁹ Another witness saw military trucks leave and later return to the village several times. He believed that soldiers were transporting bodies to the military base.²²⁶⁰

²²⁴⁴ CI-079, LI-055, LI-083 LI-099, WI-002, WI-003.

²²⁴⁵ CI-030, LI-020, LI-048, LI-059, LI-072, LI-088, QI-002, QI-003, QI-004, QI-035, RI-004, V-075.

²²⁴⁶ XI-001.

²²⁴⁷ QI-029.

²²⁴⁸ LI-020.

²²⁴⁹ CI-177, CI-186, CI-191.

²²⁵⁰ CI-186

²²⁵¹ See this chapter, section D.1.a: Most serious incidents.

²²⁵² See this chapter, section D.1.a: Most serious incidents.

²²⁵³ EI-047, CI-111, CI-187, CI-195, WI-011.

²²⁵⁴ CI-111.

²²⁵⁵ CI-129, LI-112.

²²⁵⁶ CI-004, CI-014, CI-015, CI-021, CI-146, CI-183, LI-046, LI-055, LI-063, LI-080, LI-094.

²²⁵⁷ CI-016, CI-035, EI-017, LI-055.

²²⁵⁸ CI-027, CI-109, CI-195, LI-020, LI-046, LI-055, LI-080, QI-042, WI-017, V-067, V-75, V-077.

²²⁵⁹ LI-020.

²²⁶⁰ CI-196.

1004. The Mission notes the considerable efforts of some Rohingya victims to return to their villages, normally after nightfall, and perform funerals, a significant cultural and religious practice. These funerals were often done hurriedly, with a number of bodies placed in one makeshift grave.²²⁶¹

Death toll of the 2017 “clearance operations”

1005. Quantifying the number of people killed or injured during the “clearance operations” is challenging. This is due in part to the nature of the “clearance operations”. Large numbers of people were killed without witnesses, and their bodies were subsequently systematically disposed of, including through burnings, terrain clearance and bulldozing vast areas of northern Rakhine. These difficulties are compounded by the lack of accurate available demographic data on the Rohingya population of Rakhine State. While the Myanmar authorities have maintained detailed lists of Rohingya villagers in northern Rakhine State, obtained through the annual compilation of “household lists”, this information is not available. Further, Rohingya people were not included in the Myanmar national census in 2014 and so there is no public record of their numbers at that time. No comprehensive casualty recording process has been undertaken by any actor to date. On 14 November 2017 the Tatmadaw’s Investigation Team presented results of its investigation into the “terrorist attacks” and subsequent “military operation” in which it only makes reference to 520 people killed, almost none of whom were Rohingya civilians. This is patently at odds with the facts as established and assessed by the Mission.²²⁶²

1006. Rohingya community volunteers in the refugee camps in southern Bangladesh have been developing detailed casualty lists, compiling information directly from family members. These listed the names, ages and villages of people killed, or presumed killed. The assessment lists 9,208 Rohingya as killed and an additional 1,358 whose whereabouts are unknown, presumed disappeared or killed, 2,157 people in detention and up to 1,834 victims of rape.²²⁶³ These figures do not include non-violent deaths, such as those who drowned *en route*, or otherwise perished. This list was incomplete and at the time of reporting remains a work in progress. The Mission is unable to verify this list. It notes that the numbers are in the range of other statistical studies.

1007. For example, a series of six health surveys have provided quantitative data on casualties, providing estimates that between 9,425 and 13,759 Rohingya lost their lives in Myanmar between 25 August and 24 September 2017, of whom between 6,759 and 9,867 died from violence. At least 730 of these were Rohingya children under the age of five.²²⁶⁴ While informative, these figures only record the deaths of family members witnessed by respondents to the survey, and should be considered conservative estimates.²²⁶⁵ In addition, it should be noted that these estimates only relate to the first month of the “clearance operations”. Other statistically based estimates have indicated significantly higher numbers.²²⁶⁶

²²⁶¹ CI-006, CI-023, CI-030, CI-039, CI-114, CI-115, CI-122, CI-127, CI-128, CI-131, CI-194, EI-014, LI-029, LI-041, LI-077, LI-114, LI-119, LI-131, QI-004, QI-005, QI-011, QI-026, WI-016, WI-032, ZI-001.

²²⁶² The reported findings of the Investigation Team refer to 376 “ARSA Bengali Terrorists” killed, 131 “ethnic/Hindu/Bengali people” and 13 “members of security force”. Global New Light of Myanmar, “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 Maungtaung region, Rakhine State” (14 November 2017).

²²⁶³ K-153.1.

²²⁶⁴ Médecins Sans Frontiers, *Rohingya crisis - a summary of findings from six pooled surveys* (9 December 2017).

²²⁶⁵ *Ibid.*

²²⁶⁶ For example, the report of International-State Crime Initiative (ISCI) have provided an estimate of a final death toll of 22,000 to 25,000, see ISCI, *Genocide Achieved, Genocide Continues: Myanmar’s Annihilation of the Rohingya* (Queen Mary University, 19 May 2018), p.14. See also: ASEAN Parliamentarians for Human Rights, “The Rohingya Crisis: Past, Present and Future” (Summary of findings, 21-24 January 2018), which noted that out of approximately 688,000 new arrivals since 25

1008. Information collected by the Mission through the course of its fact-finding into the 2017 “clearance operations” broadly corresponds with the numbers indicated in these efforts to date, and suggests that the estimate of up to 10,000 deaths is conservative.

(c) **Arakan Rohingya Salvation Army**

Organization, structure and resources

1009. The Arakan Rohingya Salvation Army (ARSA) emerged following the violence in 2012. The 2012 events, including the participation of the authorities in the violence and widespread human rights violations against the Rohingya, combined with increasing oppression affecting all aspects of Rohingya life, served as a trigger for many of the founding and early members.²²⁶⁷ It first came to public attention in October 2016, when it launched three coordinated attacks on security posts in Rakhine State. It became more visible following its subsequent attacks of August 2017.

1010. In its early stages, the organization did not have a name or clearly defined goals.²²⁶⁸ It was loosely organized around the principle of seeking justice for the Rohingya Muslim community. Initially, the movement may have been open to engagement with the authorities and to finding a political solution, particularly in view of the democratic opening in Myanmar during this period.²²⁶⁹ The group appears to have waited for the 2016 transfer of power to the civilian government, hoping it would bring positive change in the promotion and protection of Rohingya rights. However, in the absence of any visible improvements for the Rohingya in the months after the NLD took office, the group prepared its military strategy.²²⁷⁰

1011. On 9 October 2016, the group launched its first offensive action against government targets, carrying out three attacks on BGP posts in Maungdaw Township. It adopted an official name, Harakah-al-Yaqin (Faith Movement), only after these attacks.²²⁷¹

1012. In March 2017, the organization opened a Twitter account, and issued its first public statements, using the English name Arakan Rohingya Salvation Army.²²⁷² ARSA issued a series of public statements in English about its objectives and intentions, reiterating its goal to “defend” the Rohingya and their rights. ARSA noted in its first press statement, released on Twitter on 10 March 2017:

*...our sole objective is to defend, salvage and protect the innocent Rohingya indigenous native ethnic community of Arakan State with our best capacities as we have the legitimate right under international law to defend ourselves in line with the principle of self-defense. In doing so, our defensive attacks have been aimed only at the Burmese terrorist government and its terrorist military regime in accordance with international norms and principles until our demands are filled.*²²⁷³

1013. In the same press release, ARSA elaborated a 20-point list of demands, asking for a range of political, economic, social and cultural rights for Rohingya, as well as requesting independent investigation of all allegations, including by the United Nations,²²⁷⁴ and accountability for past abuses.²²⁷⁵

August at the time of APHR’s visit, over 36,000 children were reported to have lost at least one parent and over 7,700 were reported to have lost both parents,
²²⁶⁷ LI-121, LI-122, QI-099, XI-007, XI-008, BM-024, BM-025, V-094; See chapter V.B: Systemic oppression and persecution of the Rohingya.

²²⁶⁸ QI-099.

²²⁶⁹ LI-122, BM-024, BM-025.

²²⁷⁰ BM-024, BM-025, V-129, ARSA/PR/01/2017.

²²⁷¹ @ARSA_Official in its biography on Twitter describes itself as “formerly called Faith Movement or Harakah Al Yaqeen”.

²²⁷² See: https://twitter.com/ARSA_Official

²²⁷³ BM-025. See ARSA Press Release, ARSA/PR/01/2017, 10 March 2017.

²²⁷⁴ ARSA, Press Release, ARSA/PR/08/2017 on 6 September 2017.

²²⁷⁵ ARSA, Press Release, ARSA/PR/01/2017, 10 March 2017.

Government allegations regarding the burning of Rohingya villages by ARSA

1066. The Government has alleged that ARSA set fire to multiple Rohingya villages, and that the widespread fires that led to the destruction of Rohingya villages in northern Rakhine State were a result of ARSA's own actions.²⁴⁰⁷ Indeed, in its own internal investigation of the 2017 crisis, the Tatmadaw stated that ARSA was responsible for the burning of Rohingya houses and that the hundreds of thousands of Rohingya who fled Myanmar did so on instruction, and because they feared ARSA.²⁴⁰⁸ ARSA denies these allegations.²⁴⁰⁹

1067. The Government has provided no credible evidence to support its version of events. To the contrary, the Mission has established that the burning of Rohingya villages was systematically undertaken by Tatmadaw soldiers, together with other security forces and ethnic Rakhines, as well as other ethnic and religious minorities, through the use of "launchers" and other means.²⁴¹⁰

2. A foreseeable and planned catastrophe

1068. The 2017 ARSA attacks and ensuing "clearance operations" did not occur in a vacuum. They were foreseeable and planned.

(a) The 2016 violence

Overview

1069. On 9 October 2016, ARSA launched a small first offensive against three Border Guard Police posts in northern Rakhine State. Nine police officers were killed. Security forces, led by the Tatmadaw, responded by conducting "clearance operations" across an "area clearance zone" between Taungpyoletwa and Maungdaw, in central Maungdaw Township.

1070. In the weeks that followed, Rohingya victims who fled to Bangladesh revealed that these operations had been characterised by serious human rights violations, including torture, rape and sexual assault, killings, and the destruction of homes and mosques. The same tactics and violations were seen in this operation as later in 2017, albeit on a smaller scale. The means and methods of attack, which would later form the *modus operandi* of the August 2017 operations, were already present. By December 2016, satellite imagery analysis undertaken by Human Rights Watch estimated that 1,500 structures had been burned in eleven separate locations in Maungdaw Township.²⁴¹¹ Active military operations continued for at least two months, and the Myanmar Government declared an end to the operation on 16 February 2017.²⁴¹² Ultimately, some 87,000 Rohingya fled to Bangladesh.

1071. A Government Investigation Commission, led by the Vice-President, and the security forces' own inquiries cleared the security forces of wrongdoing, endorsing the "lawfulness and appropriateness of the response".²⁴¹³

Verified incidents of the 2016 "area clearance operations"

1072. The 2016 "area clearance operations" took place across a large area of northern Maungdaw, with at least 11 different locations affected. The Mission focused its fact-finding

²⁴⁰⁷ Information Committee, "Breaking News 7: After being declared as terrorist group, extremist terrorists continue making violent attacks" (Facebook post, 28 August 2018), <https://www.facebook.com/InfomationCommittee/posts/786695324836909>; Multiple Facebook posts, now defunct, of the Commander-in-Chief, on file with the Mission.

²⁴⁰⁸ Facebook posts, now defunct, of the Commander-in-Chief, on file with the Mission.

²⁴⁰⁹ ARSA, Statement, ARSA/PR/06/2017, on 28 August 2017.

²⁴¹⁰ See this chapter, section D.I.a: Patterns of serious human rights violations by the Myanmar security forces.

²⁴¹¹ Human Rights Watch, "Burma: Military Burned Villages in Rakhine State" (13 December 2016), <https://www.hrw.org/news/2016/12/13/burma-military-burned-villages-rakhine-state>.

²⁴¹² The Republic of the Union of Myanmar - President's Office, "Tatmataw ends area clearance operations in northern Rakhine", <http://www.president-office.gov.mm/en/?q=print/7288>.

²⁴¹³ See chapter X: Impunity and accountability.

work on two key incidents, which are considered to be among the most grave. This focus should in no way detract from the scale or significance of the 2016 violence, which warrants further investigation and documentation.

Pwint Hpyu Chaung

1073. Pwint Hpyu Chaung village tract yai khutis in northern Maungdaw Township, approximately 12 kilometres north of Maungdaw town. It is made up of three Rohingya hamlets. The Tatmadaw led “area clearance operations” in Pwint Hpyu Chaung on 11 and 12 November 2016.²⁴¹⁴

1074. Following the 9 October 2016 ARSA attacks, soldiers had increased visits, held regular meetings with the village elders and came to the village twice a week to look for “bad people”.²⁴¹⁵

1075. The situation deteriorated early on 11 November 2016, when soldiers detained a large number of men attending prayers at the local mosques. Between 60 and 80 men were detained and held for two or more hours before being released. Some were subjected to beatings and other ill-treatment.²⁴¹⁶ One man described being taken from a mosque to the school building and tied together with ropes. As well as being kicked and beaten with rifle butts, the soldiers burned his beard and chin with matches. The detainees were called “Bengali” and “Kalar”.²⁴¹⁷

1076. After their release, the men who had originally been detained were told by the Tatmadaw commander to return at 12pm to the village meeting place. Word spread that other men from the village should attend also. Approximately 60 men came to the meeting place as instructed at around 12pm on 11 November. They were taken away to Buthidaung prison in two military trucks and detained for at least one year. At least one individual, an elderly man, died on the way to prison.²⁴¹⁸ One man who later visited relatives in the group believed from their appearance that they were ill-treated.²⁴¹⁹

1077. From 3am the following morning, 12 November 2016, a large number of Tatmadaw soldiers and police arrived in the village tract in military vehicles and commenced an “area clearance operation”, moving through the three hamlets. Weapons were fired, followed by the burning of houses, starting from the southern end of the village. Villagers fled, many running for nearby forested areas or neighbouring villages. Petrol was used to burn houses, as were weapons described as “launchers”. The burning continued all day, with dozens of houses set alight.²⁴²⁰

1078. Although the number of people killed or wounded is unknown, up to nine died from bullet wounds.²⁴²¹ One interviewee saw four of his male relatives, between the ages of 13 and 77, having their hands tied and being put inside a house that he later saw on fire. He has not seen any of them since, and believes that they were killed.²⁴²² A group of village elders who were able to return a few days later discovered the bodies of four or five people burned in a house.²⁴²³

1079. There are strong indications that a number of women and girls were subjected to sexual and gender-based violence during the operation.²⁴²⁴ One witness reported how he hid and watched his niece being gang raped and then shot and killed by soldiers.²⁴²⁵

²⁴¹⁴ LI-133.

²⁴¹⁵ CI-142, LI-133, QI-104.

²⁴¹⁶ CI-142, CI-143, LI-127, LI-133, QI-104.

²⁴¹⁷ LI-127.

²⁴¹⁸ CI-142, CI-143, LI-096, LI-127, QI-104.

²⁴¹⁹ QI-104.

²⁴²⁰ CI-142, CI-143, CI-150, LI-127, LI-133, QI-104.

²⁴²¹ CI-142, CI-143, CI-150, LI-127, LI-133, QI-104, QI-100, XI-009.

²⁴²² LI-133.

²⁴²³ CI-143, LI-127, LI-133, QI-104.

²⁴²⁴ CI-150, LI-127, QI-100.

²⁴²⁵ LI-127.

1080. The group of village elders recorded the impact of the “area clearance operation” on their village tract. They listed approximately 170 houses as burned and destroyed, together with two mosques, two or three madrassas and 16 shops. The shops were also looted and more than 1,000 animals and dozens of motorcycles were stolen.²⁴²⁶ Credible satellite imagery analysis confirms that at least 65 structures were burned and destroyed in the village tract between 10 and 17 November 2017.²⁴²⁷

1081. The perpetrators of the violations were Tatmadaw soldiers, accompanied by police.²⁴²⁸

1082. While the majority of villagers from Pwint Hpyu Chaung eventually fled to Bangladesh, a number returned in late 2016 or early 2017 and lived in tents and makeshift shelters, receiving international humanitarian assistance. Since the 2017 “clearance operations”, it appears that the majority of the villagers, if not all, have relocated to Bangladesh.²⁴²⁹

Dar Gyi Zar

1083. Dar Gyi Zar village tract, known to the Rohingya as Choto Go Zi Bil, is made up of a series of hamlets, located three to four kilometres south of Pwint Hpyu Chaung in northern Maungdaw Township. The Tatmadaw launched “area clearance operations” in Dar Gyi Zar on 12 November 2016 and in Yae Khat Chaung Gwa Son village tract, directly to the north. The operation in Dar Gyi Zar continued for two days.

1084. The “area clearance operation” commenced in Dar Gyi Zar with the arrival of two or three helicopters, from which soldiers opened fire using automatic weapons. This caused panic, with villagers running to seek shelter. People were shot and killed or injured, both outside and inside houses. Shooting from the helicopters continued for up to two hours. At least one woman was shot and killed inside her house and witnesses saw up to 15 other bodies of people killed by gunfire from the helicopters.²⁴³⁰ A number of villagers, particularly women and children, headed to the Kula Bil area in the south of the village tract.

1085. The following morning, a group of up to 200 soldiers entered Dar Gyi Zar along the main road. They opened fire in an indiscriminate manner and started to burn houses, including by using “launchers”. People again fled; some were shot as they ran.²⁴³¹ One witness estimated that he saw 16 people shot.²⁴³² People ran and hid in the paddy fields. From there they watched as the village was systematically burned.²⁴³³ Through the course of the day, nearly all of the houses in the village were burned.²⁴³⁴

1086. Tatmadaw soldiers captured a group of up to 200 men, women and children, and took them to a paddy field, where they were told to kneel. People were beaten, following which the men and boys of approximately 12 years or older were separated from the group. The men were told to take off their shirts and the women were searched and robbed of jewellery, being touched inappropriately in the process. The women and younger children were then taken and held in a mud-walled house, while the men and boys were kept outside. The women then heard repeated gunfire and the screams of the men and boys outside.²⁴³⁵

1087. At sunset, the soldiers left and the women, girls and young children were able to leave the house. The bodies of the men and boys had been put in a pile, or series of piles, and burned using hay, harvested rice and the removed shirts. A number of other witnesses saw

²⁴²⁶ CI-142, CI-143, LI-133.

²⁴²⁷ Human Rights Watch, *Updated Damage Assessment of Affected Villages in Maungdaw District*, 18 November 2016.

²⁴²⁸ CI-142, LI-127, LI-133, QI-100.

²⁴²⁹ LI-127, QI-104.

²⁴³⁰ CI-139, LI-123, LI-125, LI-135, QI-101, XI-009.

²⁴³¹ CI-139, LI-123, LI-135.

²⁴³² LI-123.

²⁴³³ CI-139, LI-135.

²⁴³⁴ CI-139, LI-123, LI-135.

²⁴³⁵ LI-125, LI-126.

the pile of burned bodies. Two weeks later piles of bones were also seen.²⁴³⁶ The total number of bodies is unclear, although it appears that there were up to 40 men and boys burned, possibly more.²⁴³⁷ One victim who had been held inside the mud-walled house informed the Mission that her husband and two young sons, aged 10 and 13 years old, had been killed and burned.²⁴³⁸ Other families were burned in their houses, with the corpses found later by fellow villagers.²⁴³⁹

1088. The total number of people killed in Dar Gyi Zar on 12 and 13 November is estimated to be 75, according to a list developed by Rohingya community organizations in the refugee camps of southern Bangladesh.²⁴⁴⁰ While the Mission is not able to verify the accuracy of this number, it is consistent with other information received by the Mission of a high number of casualties.

1089. The situation in the surrounding area after the burning of Dar Gyi Zar was very difficult, with large numbers of villagers sleeping in the open and further visits from Tatmadaw soldiers. The local ethnic Rakhine village administrator appears to have negotiated with the Tatmadaw regarding the return of the displaced Rohingya. Eventually some were able to return. They lived in constructed tents and temporary shelters on the sites of their former homes, with intermittent international aid distributions. Others made the journey to the refugee camps in Bangladesh.²⁴⁴¹

1090. Credible satellite imagery analysis shows that 265 structures were burned and destroyed in the village between 10 and 17 November 2017.²⁴⁴² Rohingya community organizations have stated that a total of 400 structures were burned in Dar Gyi Zar, as well as five mosques and 38 shops, which were also looted.²⁴⁴³

Sexual and gender-based violence

1091. Rape, gang rape, and other forms of sexual violence were widely perpetrated in the course of the 2016 “area clearance operations”. Mass gang rapes, led by the Tatmadaw,²⁴⁴⁴ were a significant pattern of the violence from October to December 2016. According to information verified by the Mission, they were perpetrated in Yae Khst Chaung Gwa Son, Kyein Chaung and Kyet Yoe Pyin, amongst other locations. A 14-year old girl from Maungdaw described her experience:

*We were hiding in the forest and the soldiers took my sister, who was 12-year 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.*²⁴⁴⁵

1092. The Kyet Yoe Pyin “area clearance operation” in Maungdaw Township saw a particularly brutal level of sexual violence. Women and girls were subjected to mass gang rape, forced nudity, sexual humiliation and sexual assault.²⁴⁴⁶ One 30-year old survivor, who was pregnant, described how a large group of soldiers arrived in a military truck. They then went house-to-house, taking jewellery, money and other belongings, before raping the

²⁴³⁶ LI-135.

²⁴³⁷ LI-123, LI-126, LI-135.

²⁴³⁸ LI-125.

²⁴³⁹ CI-139, LI-123, LI-135.

²⁴⁴⁰ K-153.3.

²⁴⁴¹ CI-139, LI-123, LI-125, LI-126, LI-135.

²⁴⁴² V-150.

²⁴⁴³ K-153.3.

²⁴⁴⁴ CI-106, EI-055, EI-091, EI-093, EI-094, EI-095, LI-105, K-127, K-128.

²⁴⁴⁵ EI-055.

²⁴⁴⁶ CI-106, K-076.25, K-076.27, K-076.28, K-076.29, K-076.30, K-076.31, K-076.33, K-076.34, K-076.35, K-076.36.

women. She said that six members of her family were raped, including her two nieces aged 10 and 15.²⁴⁴⁷

1093. Some of the women and girls who were raped in Kyet Yoe Pyin, were then killed.²⁴⁴⁸ One survivor described eight to ten Tatmadaw soldiers entering the house she was in and taking two young girls to the toilet. She held a child in her lap so that the Tatmadaw would realise that she was a mother and would not rape her. The soldiers threw the child aside; five to six men raped her. She said that she had pain everywhere afterwards and bled until she reached Bangladesh. She heard that the two girls who were taken to the toilet died.²⁴⁴⁹ Another female survivor, aged 25, from Kyet Yoe Pyin explained that she was gang raped by four Tatmadaw soldiers in her house during this time.²⁴⁵⁰

1094. Despite the “area clearance operations” being focused on an area of central Maungdaw Township, rapes and gang rapes were also perpetrated in Buthidaung Township.²⁴⁵¹ A 25-year old female interviewee from Maung Gyi Taung described how she was gang raped in her house after her village chairman failed to take girls to the local military compound as instructed. She was severely bitten on her forehead, cheeks and left breast. Having lost consciousness, she does not know how many men raped her. She was pregnant at the time of the rape and miscarried shortly afterwards.²⁴⁵²

1095. Women and girls were also sexually assaulted and humiliated during intrusive body searches by Tatmadaw soldiers.²⁴⁵³ A 30-years old woman from U Shey Key, Maungdaw Township stated that the military did the “most embarrassing body checks ever – they would put hands inside our tops, press our breasts and pinch our nipples in front of everyone.”²⁴⁵⁴ Another woman, aged 20 year from Doe Tan, Maungdaw Township described how the military arrived and surrounded her village and invasively searched the women for jewellery and money. Women were made to sit in a field with their heads down and many women had their headscarves taken off.²⁴⁵⁵

(b) The build-up to 25 August 2017

*Since October 2016, life had become so difficult. We were not even allowed to put the light on in our house at night, or buy anything at the bazar. We could not pray. The military did not allow our men to sit in a tea stall or in a coffee shop. We could not go to the hospital, even those who were really ill. Because the lights were off in our house, we could not eat anything at night, so we had to go to bed so early. The military also robbed us and our shops in the market.*²⁴⁵⁶

1096. While systematic discrimination and restrictions had long been part of Rohingya life in Rakhine State, the period following the 9 October 2016 attacks saw an intensification of restrictive measures targeting the Rohingya, particularly in northern Rakhine State. These measures, coupled with the increased presence of security forces on the ground, resulted in a wide spectrum of human rights violations against the Rohingya in the period between October 2016 and August 2017.

²⁴⁴⁷ CI-106.

²⁴⁴⁸ CI-105, CI-106, EI-054.

²⁴⁴⁹ K-076.28.

²⁴⁵⁰ CI-105.

²⁴⁵¹ EI-094, EI-095, EI-107.

²⁴⁵² EI-094.

²⁴⁵³ CI-105, EI-091, EI-106, K-076.41.

²⁴⁵⁴ K-127.

²⁴⁵⁵ EI-091.

²⁴⁵⁶ LI-084.

*Campaign of increased intimidation by the Myanmar security forces**Increased presence of security forces*

1097. The presence of security forces near Rohingya villages increased following October 2016. New military camps and checkpoints were established inside villages,²⁴⁵⁷ for example, a new BGP checkpoint near Tin May, Buthidaung Township;²⁴⁵⁸ a temporary military camp in Nan Yar Kone, near Buthidaung town;²⁴⁵⁹ and a new police checkpoint in Pa Da Kar Ywar Thit, northern Maungdaw Township.²⁴⁶⁰

1098. Additional troops were stationed inside existing military or BGP compounds²⁴⁶¹ or occupied community structures such as schools and religious buildings.²⁴⁶² Following the 9 October 2016 attack on Koe Tan Kauk BGP base, additional Tatmadaw soldiers were stationed in the Chein Khar Li village military compound, located in Koe Tan Kauk village tract, providing additional support.²⁴⁶³

1099. In Myin Hlut, Maungdaw Township, early August saw increased foot patrols of 50 to 100 personnel from security forces, and greater movement of military vehicles. Previously, Tatmadaw soldiers were rarely seen in the area.²⁴⁶⁴

1100. This build up became particularly pronounced after 10 August 2017, when elements of the 33rd and 99th LIDs arrived in northern Rakhine State.²⁴⁶⁵

Arbitrary arrest, detention, torture and ill-treatment

1101. The increased presence of security forces resulted in more frequent patrols, during which villagers were often beaten, particularly targeting young men.²⁴⁶⁶ These patrols led to a range of other violations against Rohingya, including an increase in arbitrary arrests and looting.

1102. Wealthy, educated and influential men were often targeted for arbitrary arrests, purportedly in an effort to locate ARSA members or gather information about their activities. Those arrested were often beaten or tortured, and accused of being ARSA members, with security forces often saying they were looking for “bad people” or “anti-government people”.²⁴⁶⁷ Release usually required the payment of bribes.²⁴⁶⁸ This practice was widespread across the three townships. One Rohingya man from Pwint Hpyu Chaung, Maungdaw Township, described his experience following the October 2016 attacks:

They broke the door to my shop open, tied me up and beat me for five hours. Then I was taken to the military camp. They 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,

²⁴⁵⁷ CI-112, CI-115, CI-144, CI-145, LI-053, LI-054, LI-057, LI-073, LI-074, LI-103, LI-105, WI-010.

²⁴⁵⁸ CI-115.

²⁴⁵⁹ LI-057.

²⁴⁶⁰ LI-074.

²⁴⁶¹ CI-119, LI-100, WI-010.

²⁴⁶² CI-183, LI-046, QI-101, YI-021, K-063.35.

²⁴⁶³ CI-119, LI-100.

²⁴⁶⁴ QI-111, QI-112.

²⁴⁶⁵ V-213, V-231

²⁴⁶⁶ CI-181, CI-182, LI-053, XI-001, YI-006, YI-007.

²⁴⁶⁷ CI-007, CI-016, CI-021, CI-028, CI-032, CI-034, CI-048, CI-071, CI-104, CI-105, CI-106, CI-111, CI-112, CI-118, CI-119, CI-133, CI-134, CI-140, CI-144, LI-002, LI-030, LI-051, LI-053, LI-066, LI-069, LI-073, LI-074, LI-076, QI-002, QI-014, QI-015, QI-022, QI-038, QI-040, QI-062, QI-102, QI-111, WI-006, WI-044, YI-001, YI-002, YI-003, YI-007, YI-012, YI-021, BM-025, V-073.

²⁴⁶⁸ CI-118, CI-145, LI-066, LI-073, LI-074, LI-076, XI-005, YI-003.

*and dripped hot wax onto our penises. Five men died from the torture. Of the remaining 20 men, 18 were able to pay a huge amount to be released.*²⁴⁶⁹

1103. Villagers from Pa Da Kar Ywarmin gyi Thit, Maungdaw Township, described how, after 9 October 2016, the police would visit their village regularly and arrest men at night. Police accused the men of being part of ARSA and demanded payment for their release.²⁴⁷⁰

1104. Given that those “arrested”, apparently for having collaborated with ARSA, were regularly released on payment of bribes, the Mission considers that in many cases the arrests were without legal or factual basis. Rather, it was a tactic employed by Myanmar security forces to oppress, abuse and extort from Rohingya. As one Rohingya witness commented: “To the authorities you are a bad person unless you can pay, then you are good”.²⁴⁷¹ It may explain why the wealthiest were often targeted. However, this extortion had a disproportionate impact on poorer members of the community and others who could not pay.

1105. In some cases, detainees have not been seen again.²⁴⁷² In May or June 2017, a large group of Tatmadaw soldiers detained six or seven men from Gudar Pyin, Buthidaung Township. The group included an Imam and religious scholars. According to one interviewee, the soldiers brought a list of names of men they were looking for, and sought the assistance of the ethnic Rakhine village chairperson to identify them.²⁴⁷³ The whereabouts of the men remains unknown.²⁴⁷⁴ The number of people who have disappeared in this manner is difficult to estimate. Some think their family members may have been transferred to Sittwe or Buthidaung prison and may have been charged or sentenced for alleged involvement with ARSA. Others suspect they were killed.²⁴⁷⁵

1106. Some people do appear to have been charged and sentenced for the ARSA attacks of 2016, and Rohingya villagers provided information on relatives having been arrested and charged for such acts.²⁴⁷⁶ However, reliable or accurate information remains scarce. One interviewee from Myin Hlut, Maungdaw Township, said that, on or around 14 October 2016, the police and military came to his village and searched houses. He ran into the hills with other villagers, but a businessperson and a teacher were detained. According to the interviewee, they were later sentenced to 10 and seven years imprisonment respectively, although he had no information about the charges or trials.²⁴⁷⁷

1107. The government initially reported that 575 persons were detained and charged in connection with the attacks.²⁴⁷⁸ No information was provided on the charges applied against those detained and if all had been formally charged with an offence. A judgment issued by Buthidaung Township’s court, dated 8 February 2018, listed 416 people tried in relation to the October and November 2016 events under sections 17/1 and 17/2 of the Unlawful Associations Act. Of the 416 people, the judgment indicates that 392 were convicted and 24 acquitted.²⁴⁷⁹

²⁴⁶⁹ QI-103.

²⁴⁷⁰ CI-144, LI-074.

²⁴⁷¹ QI-114.

²⁴⁷² CI-111, LI-002; United Nations Office of the High Commissioner for Human Rights, “FLASH REPORT: Report of OHCHR mission to Bangladesh Interviews with Rohingyas fleeing from Myanmar since 9 October 2016”, 3 February 2017.

²⁴⁷³ YI-014.

²⁴⁷⁴ LI-063, YI-013, YI-015, YI-016.

²⁴⁷⁵ LI-002, LI-116.

²⁴⁷⁶ CI-189, LI-104, QI-111, RI-008.

²⁴⁷⁷ QI-111.

²⁴⁷⁸ State Counsellor’s Office, “470 suspects still under investigation in northern Maungdaw attacks. <http://www.statecounsellor.gov.mm/en/node/481>. According to the report, of the 575 detained on suspicion of their participation in the 9 October 2016 attacks and subsequent violence, 88 were sentenced, 11 were released, and six died in detention. It further noted that 470 suspects remained under investigation.

²⁴⁷⁹ K-166.

Visit of Ashin Wirathu to northern Rakhine State

1160. In May and July 2017, the monk Ashin Wirathu visited northern Rakhine State. In early May, Wirathu reportedly visited the locations of the 9 October 2016 attacks, among other villages, with an armed escort from the BGP.²⁶¹⁷ 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. The Arakan National Party (ANP) welcomed the visit publicly and reportedly made donations for his entourage.²⁶¹⁸

1161. Wirathu returned to Rakhine State on 11 July 2017.²⁶¹⁹ He travelled from Sittwe to northern Rathedaung, where he visited both Zay Di Pyin and Chut Pyin village tracts. Both are majority ethnic Rakhine areas but with a significant Rohingya population, and both were locations of “clearance operations” encompassing serious human rights violations some weeks later.²⁶²⁰ Wirathu first convened a meeting and delivered a sermon at the Zay Di Pyin monastery, reportedly attended by a large number of people,²⁶²¹ and travelled to nearby Chut Pyin the following day for a similar meeting.²⁶²² As one Rohingya man commented:

I myself saw Wirathu in Zay Di Pyin. When Wirathu came, all the villagers were welcoming him using their Buddhist flags. Rakhine villagers announced with a megaphone the arrival of the “Honourable Monk Wirathu”. After the meeting, I also learned from some Rakhine friends that Wirathu was there.²⁶²³

Given the incendiary nature of Wirathu’s public statements towards Muslims and the Rohingya, this visit is likely to have heightened tensions in the area. A few days after the visit of Wirathu to Zay Di Pyin, the Rakhine village administrator reportedly called the Rohingya elders to a meeting. One person who attended was told: “This is not your land. This is not your country. Go away from here.”²⁶²⁴ Another villager in Chut Pyin noted that, after the visit, harassment of Rohingya villagers, by both Tatmadaw soldiers and ethnic Rakhine, increased.²⁶²⁵

Arrest, detention and torture of Rohingya from Chut Pyin

1162. On approximately 14 July 2017,²⁶²⁶ a group of Tatmadaw soldiers and BGP entered the village of Chin (Pyaing Taung), Chut Pyin village tract, Rathedaung Township, in the middle of the night. They rounded up and arrested eight men. The men were severely beaten, handcuffed, tied up together to a metal chain and marched to the BGP base in Zay Di Pyin.²⁶²⁷ For four or five days, the men were tortured, including through continuous beatings and burning of their genitals with candles.²⁶²⁸ Four men were then released, following payment of a significant bribe by their village elders.²⁶²⁹ The other four were reportedly sent to Sittwe prison to be charged with terrorism offences. There is no information about their whereabouts, charges laid against them or any judicial process.²⁶³⁰

²⁶¹⁷ V-223, V-224, V-225, V-226. See also Wirathu’s own website noting his “West Gate Security Tour of May and July”, <https://www.eng.wirathu.com/2017/07/25/west-gate-security-trips-1/> (accessed August 2018).

²⁶¹⁸ V-227, V-228.

²⁶¹⁹ V-223, V-224.

²⁶²⁰ CI-177, LI-129, QI-115, LM-012.

²⁶²¹ LI-129, QI-115, LM-012.

²⁶²² LI-129, LM-012.

²⁶²³ LI-129.

²⁶²⁴ LI-129.

²⁶²⁵ CI-177.

²⁶²⁶ V-067, V-218.

²⁶²⁷ CI-186, CI-190, RI-005, RI-009, V-067.

²⁶²⁸ CI-190, RI-009, V-067.

²⁶²⁹ CI-186, CI-190, RI-009.

²⁶³⁰ CI-186, CI-190.

Minister for Social Welfare, Relief and Resettlement, Dr Win Myat Aye, stated that the “redevelopment of Maungdaw region” would be implemented according to the Natural Disaster Management Law (NDML):²⁷⁷³

*There is a need to follow a law in managing the redevelopment works for terrorist acts that had occurred. In some places, it became a burnt land. According to the law, burnt lands become government-managed lands. The law that governs burnt land is national disaster management law.*²⁷⁷⁴

1218. Article 2 of the NDML defines natural disaster as the destruction of property, livelihood infrastructure, “... due to natural or man-made accidents or negligence such as fire ... or violence and armed insurgencies.”²⁷⁷⁵ The National Natural Disaster Management Committee, formed by the Government to implement this law, is responsible for leading the implementation of projects for the “rehabilitation and reconstruction activities after the natural disaster”.²⁷⁷⁶ The law precludes criminal liability against responsible parties, such as the Government or the national disaster management committee, where disaster management “is done in good faith”.²⁷⁷⁷

1219. In the view of the Mission, this is a misapplication of the law in the present context. The Tatmadaw is responsible for the intentional burning and destruction of Rohingya villages and property. Reference to this law in this context further demonstrates the failure of the Government of Myanmar to take responsibility for its actions, and further leads to the conclusion that a safe, voluntary and dignified return from Bangladesh is impossible.

Demolition and other forms of terrain clearance

Image of Chein Khar Li and Thaug Paing Nyar villages in southern Maungdaw, taken on 20 February 2018, showing extensive terrain clearance through bulldozing



²⁷⁷³ Natural Disaster Management Law (Pyidaungsu Hluttaw Law No. 21, 2013).

²⁷⁷⁴ Ministry of Information, “Redevelopment of Maungdaw region as per Disaster Management Law” (26 September 2017), www.moi.gov.mm/moi:eng/?q=news/27/09/2017/id-11604

²⁷⁷⁵ Natural Disaster Management Law, art 2.

²⁷⁷⁶ Natural Disaster Management Law, art 5.

²⁷⁷⁷ Natural Disaster Management Law, art 35.

1220. The Mission has analysed satellite imagery and aerial photographs showing large areas of cleared terrain across Maungdaw, Buthidaung and Rathedaung Townships, in villages where the Rohingya lived prior to the “clearance operations”. Through this analysis, the Mission has identified at least 78 villages across the three townships which, by March 2018, presented signs of demolition or other forms of terrain clearance.²⁷⁷⁸ Of these 78 villages, 50 were totally destroyed, and 28 partially destroyed, by fire during the “clearance operations”.

1221. Terrain clearance was visible from November 2017 in Maungdaw town and in the Rohingya villages of Ho Kay Day Kone Nar and Zay Di in Kyauk Pan Du village tract, Maungdaw Township.²⁷⁷⁹ It also took place in numerous villages in northern Maungdaw, mainly around Laung Don and Kyein Chaung village tracts, from late 2017 and intensified in January 2018 along the coast of southern Maungdaw. Terrain clearance was also visible during this period in seven villages in Rathedaung Township and two in Buthidaung Township, including in areas where the most serious incidents highlighted in this report took place.²⁷⁸⁰ Terrain clearance activities across all three townships continued from January until at least March 2018.²⁷⁸¹

1222. While this large-scale terrain clearance occurred predominantly in areas that had previously been burned, some structures that survived the earlier burning were also cleared. This pattern was observed in settlements in the village tracts Chein Khar Li, War Char, Gaw Du Thar Ra (Ywar Thit Kay), (Du) Chee Yar Tan, and Myin Hlut, all in Maungdaw Township.²⁷⁸²

1223. Satellite image analysis of Myin Hlut and Gaw Du Tha Ra village tracts, Maungdaw Township, shows widespread destruction through burning of structures by 16 September 2017. Further imagery analysis shows some structures remaining on 9 January 2018. However, terrain clearance has removed all structures and vegetation from both locations by 13 February 2018.²⁷⁸³

²⁷⁷⁸ Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT.

²⁷⁷⁹ Ibid.

²⁷⁸⁰ For example in Maung Nu (Buthidaung Township), Chut Pyin and Ah Htet Nan Yar (Rathedaung Township).

²⁷⁸¹ After March 2018, the availability of clear satellite imagery diminished due to the increased presence of thick haze and clouds. Nonetheless, a partially cloudy image collected on 9 April 2018 and analysed by the Mission showed new signs of scorching affecting trees, vegetation and houses in northern Maungdaw Township. The image shows 8 kilometres of damaged area from north-west to south-east, between the villages of Kyaung Toe (Bauk Shu Hpweit/Aung Zan village tract) and Mi Kyaung Chaung (Min Ga Lar Gi village tract). This is an area that was only slightly affected by destruction at the beginning of September 2017 and it is now completely destroyed.

²⁷⁸² Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT; V-067.

²⁷⁸³ Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT; V-194, V-195.

Image of Myin Hlut village tract, taken on 9 January 2018 showing the destruction of structures, through burning, inside the red lines. This damage was first detected on 16 September 2017. Structures outside of the red lines remained intact as of 9 January 2018, including in the magnified area.

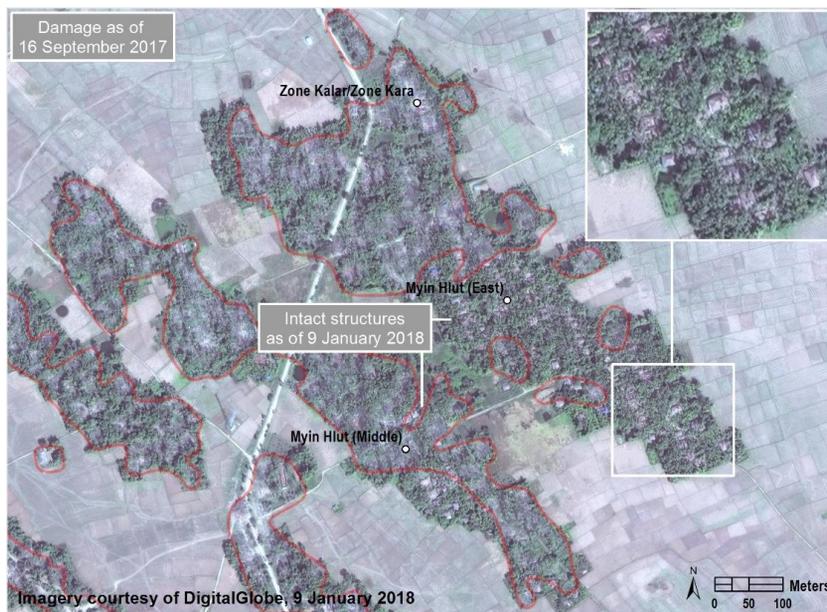


Image of Myin Hlut village tract, taken on 13 February 2018, five weeks later, showing terrain clearance across the entire area removing all burned and intact structures, and vegetation, including in the magnified area. All signs of the village are erased.

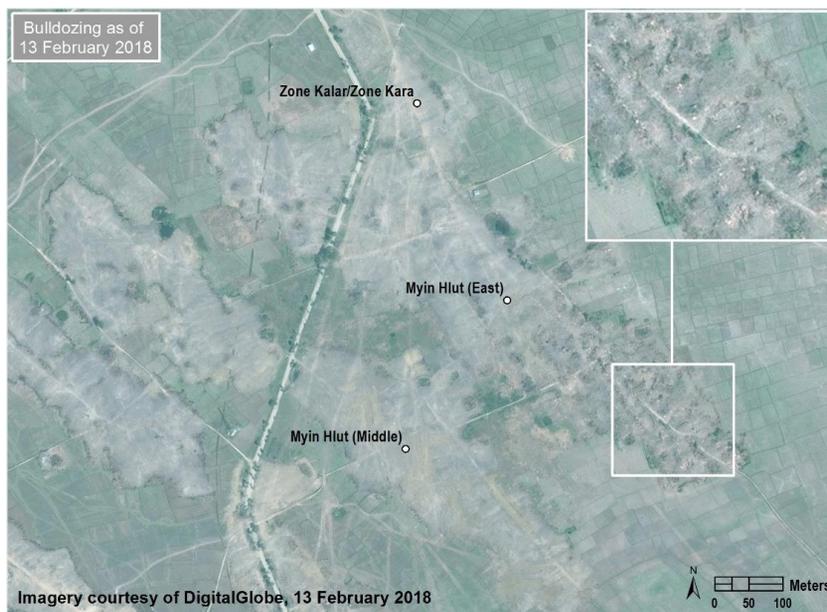


Image of Gaw Du Tha Ra village tract, taken on 9 January 2018 showing the destruction of structures, through burning, inside the red lines. This damage was first detected on 16 September 2017. Structures outside the red lines remained intact as of 9 January 2018, including most structures in the magnified area.

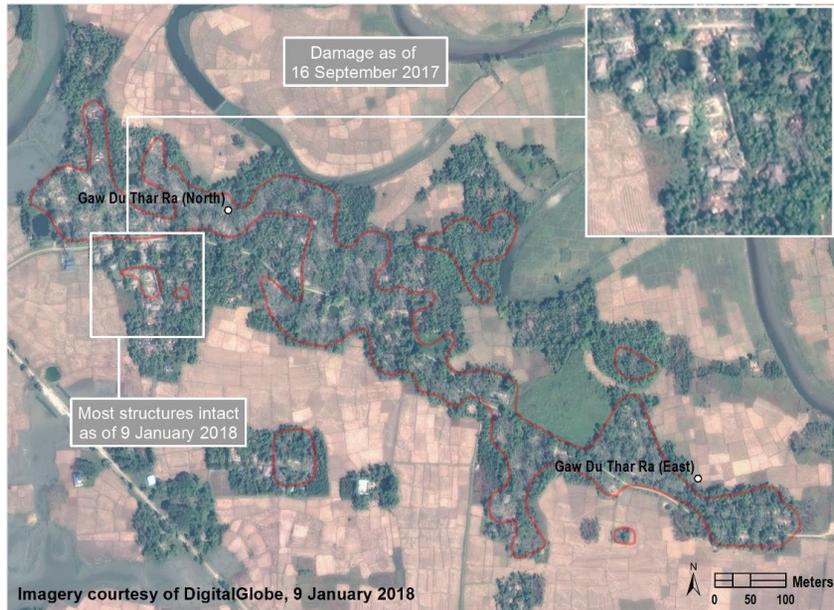
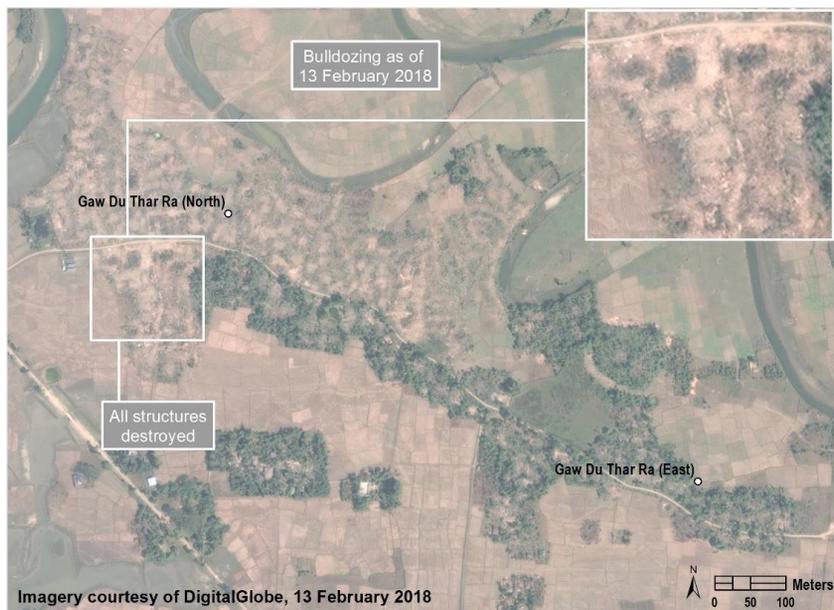


Image of Gaw Du Tha Ra village tract, taken on 13 February 2018, five weeks later, showing terrain clearance across the entire area removing all burned and intact structures, including in the magnified area. All signs of the village are erased.



New construction

1224. Terrain clearing has been followed by rapid construction and development of new buildings and infrastructure. The Mission analysed satellite images of 36 villages that show new construction, a majority in Maungdaw Township. In 23 villages, construction has taken

place near destroyed or partially destroyed villages, mainly in the surrounding fields. In 13 villages, new structures have been constructed in areas burned during the “clearance operations” and subsequently cleared. Satellite imagery analysis indicates that the new construction is mostly security structures as well as new villages and houses, resettlement camps, and other type of civilian infrastructure.

New villages and houses

1225. On 6 December 2017, the Union Enterprise for Humanitarian Assistance, Resettlement and Development in Rakhine²⁷⁸⁴ announced a plan for the construction of nearly 800 houses in approximately 26 villages in Maungdaw Township destroyed after 25 August 2017.²⁷⁸⁵ On 11 January 2018, the Office of the President announced the commencement of these construction works, including “three repatriation and assessment camps”, with a view to “accepting and resettling ethnic nationals, Hindus and Muslims” who were displaced by “terrorist activities”.²⁷⁸⁶

1226. While satellite imagery analysis confirms that construction is continuing in the majority of these 26 locations, the Mission notes that the plan foresees the construction of only 22 houses, approximately three per cent of the total, for displaced Rohingya (referred to as “Bengali”). These 22 houses are being built in Ywa Thit village in Pan Taw Pyin village tract, which was almost totally destroyed by fire during the “clearance operations”.²⁷⁸⁷ The remaining 97 per cent of the nearly 800 houses listed in the plan are to be allocated to other ethnic communities.

1227. For instance, the original plan foresaw the construction of 73 houses for ethnic Rakhine in Min Gyi, the location of one of the largest and most egregious mass killings.²⁷⁸⁸ On 14 May 2018, the authorities announced that this construction in Min Gyi would include more than 80 houses, a school and a monastery for “displaced ethnic people of Rakhine State”.²⁷⁸⁹ Rohingya are not considered as one of Myanmar’s ethnic nationalities and so are not potential beneficiaries.

1228. As of 26 July 2018, satellite imagery analysis did not show signs of terrain clearance or reconstruction in Min Gyi village. However, the construction of a new “model village” is visible in the south of Min Gyi village tract, close to Kyet Kyein village in Done Paik village tract. It was further reported in the media that houses will be built in the “new” Min Gyi village which “has been relocated (beside the) Maungdaw-Taung Pyo road”.²⁷⁹⁰ As of June 2018, approximately 72 new structures were visible in this location (50 fully completed and foundations for the remaining structures).²⁷⁹¹

²⁷⁸⁴ The Union Enterprise for Humanitarian Assistance, Resettlement and Development (UEHRD) in Rakhine is a public-private enterprise with three stated goals: providing humanitarian assistance, carrying out resettlement and rehabilitation and working for development in Rakhine State. State Counsellor Daw Aung San Suu Kyi acts as Chairperson and Dr. Win Myat Aye the Union Minister for Social Welfare, Relief and Resettlement, acts as Vice Chairman.
<http://rakhine.unionenterprise.org/>

²⁷⁸⁵ Union Enterprise for Humanitarian Assistance, Resettlement and Development in Rakhine State, “Nearly 800 houses under construction for displaced villagers in Maungdaw” (News Release, 6 December 2017), <http://rakhine.unionenterprise.org/latest-news-en/235-nearly-800-houses-under-construction-for-displaced-villagers-in-maungdaw>.

²⁷⁸⁶ The Republic of the Union of Myanmar – Presidents Office, “UEHRD leads preparation to receive displaced persons in Rakhine State” (11 January 2018), <http://www.president-office.gov.mm/en/?q=issues/rakhine-state-affairs/id-8308>

²⁷⁸⁷ Satellite imagery analysis by UNITAR-UNOSAT for the Mission confirms the construction of likely 22 buildings in the northern part of the village, on ground cleared of the ruins of over 100 destroyed Rohingya homes.

²⁷⁸⁸ See this chapter, section D.1.a: Most serious incidents.

²⁷⁸⁹ The Republic of the Union of Myanmar – Presidents Office, “More than 80 houses built for ethnic people in Rakhine” (13 May 2018), <http://www.president-office.gov.mm/en/?q=issues/rakhine-state-affairs/id-8761>

²⁷⁹⁰ V-196.

²⁷⁹¹ Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT.

1229. Building “new villages” close to the sites of previous Rohingya villages appears to be an attempt to change the demographic landscape of northern Rakhine State. Tin Maung Swe, Rakhine state secretary and a senior official with the military-controlled General Administration Department, has publicly stated that government departments, led by the Ministry of Home Affairs, would reclassify or re-zone land previously occupied by Rohingya villages, for purposes such as agriculture or forestry, with new villages being built close-by for settlers. He also said that returning refugees would not be entitled to return to their original villages.²⁷⁹² This cannot be reconciled with Principle 28 of the Guiding Principles to return “in safety and with dignity to their homes or places of habitual residence”.

1230. Satellite imagery analysis has identified large-scale construction of organized permanent structures, which appear to be new “model villages”, in nine locations:

- Pa Da Kar Taung (Net Chaung/Pa Da Kar Day War Nar Li village tract); Thit Tone Nar Gwa Son (Thit Tone Nar Gwa Son village tract); Du Than Dar (Than Dar village tract); Pa Da Kar Ywar Thit (Pa Da Kar Ywar Thit village tract); Kyet Kyein (Kyet Kyein village tract); Ah Htet Pyu Ma (Ah Htet Pyu Ma village tract); and Maungdaw town in Maungdaw Township;
- Yin Ma Zay (Nga Yant Chuang village tract) in Buthidaung Township; and
- Koe Tan Kauk in Rathedaung Township.

1231. The four images below are of Thit Tone Nar Gwa Son village tract in northern Maungdaw Township, the site of one of the new “model” villages. The images show the evolution of the area from 25 May 2017, prior to the “clearance operation”, when there was no damage, to 13 February 2018, when there have been extensive terrain clearance and new construction of houses with metal roofs in an organized layout. Thit Tone Nar Gwa Son is one of the 26 locations in the Union Enterprise for Humanitarian Assistance, Resettlement and Development in Rakhine’s house reconstruction plan mentioned above. The plan lists four ethnic Mro villages where 86 houses will be built “near Thittonena Gwa Sone village”, in “Thittonena Gwa Sone” village tract.²⁷⁹³

²⁷⁹² V-198; see also The Republic of the Union of Myanmar – Ministry of Information, “Redevelopment of Maungdaw region as per Disaster Management Law 26 September 2017” (26 September 2017), www.moi.gov.mm/moi:eng/?q=news/27/09/2017/id-11604

²⁷⁹³ Information published by the Myanmar Government’s Union Enterprise for Humanitarian Assistance, Resettlement and Development in Rakhine State lists the names of four new ethnic Mro villages where 86 houses will be built for 559 people, “near Thittonena Gwa Sone village”, in “Thittonena Gwa Sone” village tract. See: <http://rakhine.unionenterprise.org/latest-news-en/235-nearly-800-houses-under-construction-for-displaced-villagers-in-maungdaw>; Global New Light of Myanmar, “New homes for residents in Maungdaw, Rakhine State” (24 February 2018).

Image of Thit Tone Nar Gwa Son dated 25 May 2017 showing no damage



Image of Thit Tone Nar Gwa Son dated 16 September 2017 showing structures damaged by fire

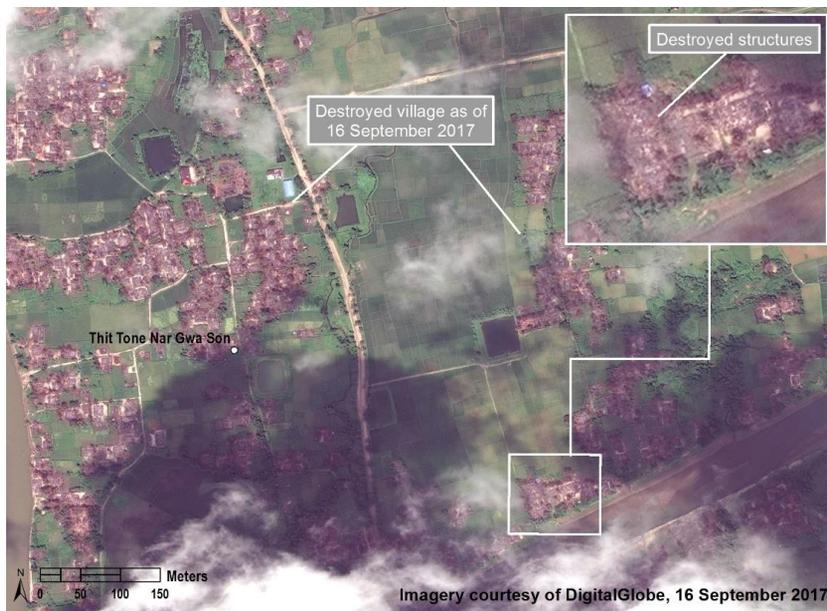


Image of Thit Tone Nar Gwa Son dated 16 December 2017: showing terrain clearance and new construction on previously burned land



Image of Thit Tone Nar Gwa Son dated 13 February 2018 showing further extensive terrain clearance and additional new construction



1232. Similarly, the four images below show the evolution of part of Pa Da Kar Ywar Thit village tract between 25 May 2017 and 13 February 2018, and the subsequent construction of new well-organized houses with metal roofs on the same previously damaged area. Pa Da Kar Ywar Thit (known in Rohingya as Diyal Toli) was burned during the “clearance operations” a few days before the events in Min Gyi. It used to be home to Rohingya and

Mro communities.²⁷⁹⁴ More than 600 structures were burned and destroyed.²⁷⁹⁵ The Government's construction plan foresees the reconstruction of 140 houses in Pa Da Kar Ywar Thit, although only for displaced ethnic Mro.²⁷⁹⁶

Image of Pa Da Kar Ywar Thit dated 25 May 2017 showing no damage



²⁷⁹⁴ See this chapter, section D.1.a: Most serious incidents.

²⁷⁹⁵ Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT.

²⁷⁹⁶ Information published by the Myanmar Government's Union Enterprise for Humanitarian Assistance, Resettlement and Development in Rakhine, dated 6 December 2017, lists the names of five ethnic Mro villages where 132 houses will be built for 763 people, in "Padaka Ywathit group", in "Padaka Ywathit" village tract. See: <http://rakhine.unionenterprise.org/latest-news-en/235-nearly-800-houses-under-construction-for-displaced-villagers-in-maungta>

Image of Pa Da Kar Ywar Thit dated 16 September 2017 showing structures damaged by fire



Image of Pa Da Kar Ywar Thit dated 26 November 2017 showing new construction, including road construction



Image of Pa Da Kar Ywar Thit dated 13 February 2018 showing extensive new construction



Security-related construction

1233. In other locations, satellite imagery indicates that new construction has a security or military purpose. Images show the construction of new security outposts and military bases, and the enlargement or reinforcement of previously existing security and military posts.

1234. Maung Nu village was burned over several days from 27 August 2017. The four images below show the evolution of Maung Nu from 25 May 2017 to 18 March 2018 and the construction of a new security or military facility. Satellite imagery analysis confirms the destruction of additional structures between 9 January and 18 March 2018. An open source report referred to the burning, by security forces, of 13 houses on the evening of 5 March 2018. The same report states that a new BGP post is being constructed to replace the BGP post attacked by ARSA on 25 August 2017 in Hpaung Taw Pyin.²⁷⁹⁷

²⁷⁹⁷ V-197. See this chapter, section D.1.a: Most serious incidents, for details of the “clearance operation” in Maung Nu.

Image of Maung Nu dated 26 May 2017 showing no damage



Image of Maung Nu dated 25 October 2017 showing structures damaged by fire, and an area prior to terrain clearance



Image of Maung Nu dated 9 January 2018 showing structures damaged by fire, and an area with terrain clearance, further damaged structures and on-going construction of a new military or security facility



Image of Maung Nu taken on 18 March 2018 showing an additional 13 structures damaged by fire (red areas), further terrain clearance, and further construction of a new military or security facility



1235. Satellite imagery analysis shows the presence of new structures surrounded by a perimeter fence in Kan Kya, Maungdaw Township. A similar pattern is observed in the

southern part of Inn Din in southern Maungdaw,²⁷⁹⁸ where satellite imagery analysis shows new large structures built on sites where Rohingya structures had previously been located. Credible reports indicate that construction activities in both locations are for new BGP bases.²⁷⁹⁹

Image of Kan Kya taken on 27 February 2018 showing the construction of extensive new security structures and a perimeter fence.



²⁷⁹⁸ Inn Din was the location of the only mass killing during the “clearance operations” that the Government has acknowledged. See this chapter, section D.1.a: Most serious incidents, for details of the “clearance operation” in Inn Din.

²⁷⁹⁹ LM-019, V-067, V-192.

Image of Inn Din taken on 16 February 2018 showing new security structures constructed on land where Rohingya structures had previously stood, and the intact NaTaLa village to the west (with pagoda shown)

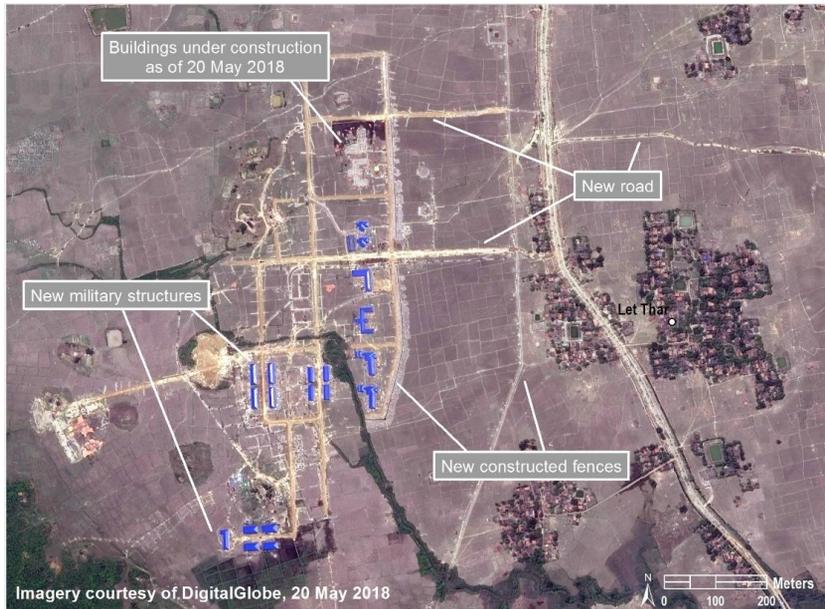


1236. The Mission received reports that between January and February 2018 the Myanmar authorities confiscated hundreds of acres of Rohingya farmland in Ah Lel Chaung village tract, Buthidaung Township. According to the reports, this area had remained intact during the “clearance operations” and was still inhabited and used by Rohingya until the time of the land confiscation.²⁸⁰⁰ Further reports indicate that the Rohingya were forced to leave the village as a consequence of subsequent terrain clearance and new constructions on their land.²⁸⁰¹ Satellite imagery analysis from March 2018 shows new construction near Let Thar village in Ah Lel Chaung. The image below shows new roads, large structures and a perimeter fence under construction, indicating the likely establishment of a new security force base.

²⁸⁰⁰ V-199.

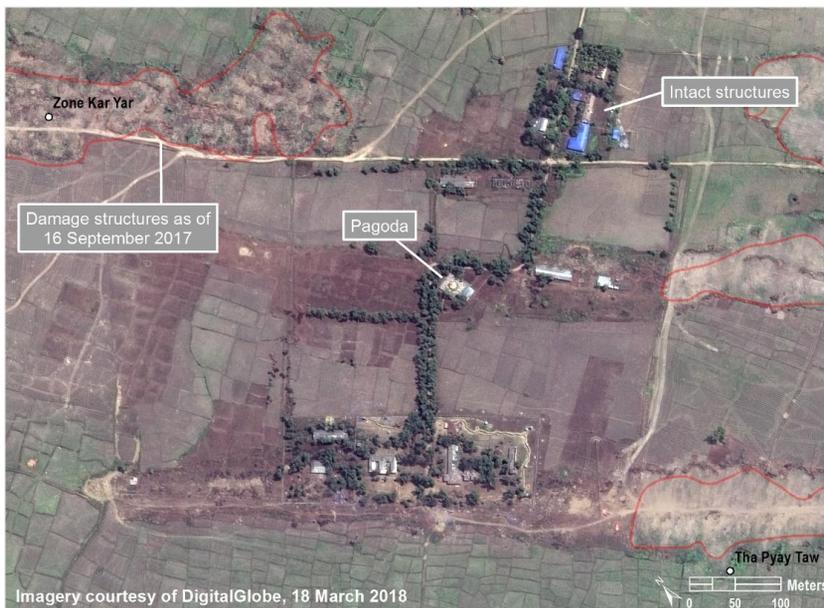
²⁸⁰¹ V-067, V-200.

Image of Let Thar village, Ah Lel Chaung village tract, below taken on 20 May 2018 showing terrain clearance, and extensive new construction of military structures on former Rohingya farmland

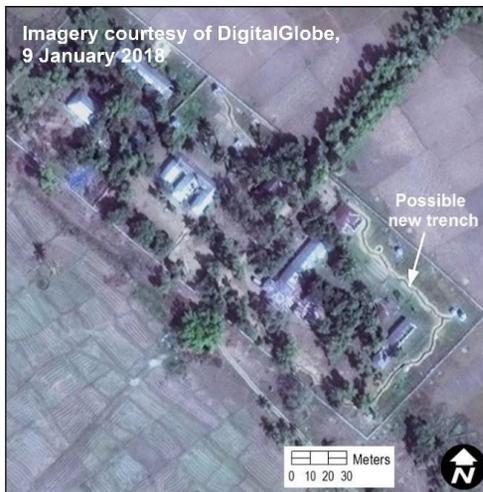
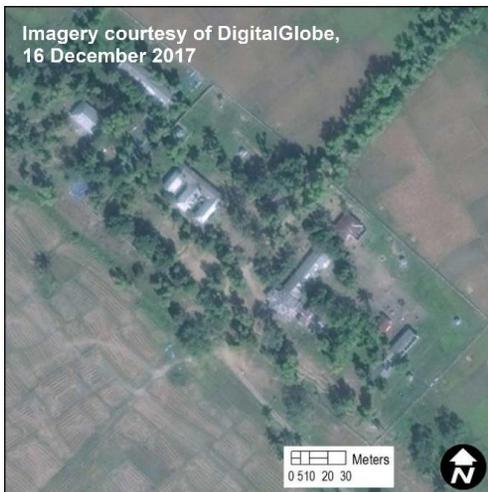


1237. Construction was also observed in pre-existing security facilities across the three townships. New secondary defensive fences, covering a larger perimeter, have been built around security facilities in Inn Din and Zay Di Pyin in Rathedaung Township. A similar pattern has been observed in two smaller security outposts in Maungdaw Township, and Ta Man Thar Bo Hmu Gyi, Ta Man Thar village tract, Buthidaung Township. Reinforcement measures, in the form of possible new fences or trenches within the limits of the compound, can be seen in the security facilities in Tha Pyay Taw, Tha Pyay Taw village tract, Maungdaw Township, and Pale Taung, Chin Tha Mar, Buthidaung Township.

Image of a security / military facility in Tha Pyay Taw, taken on 18 March 2018, showing a possible new trench constructed inside the compound



Close-up images of the security facility in Tha Pyay Taw taken on 16 December 2017 (left), and 9 January 2018 (right), showing the presence of new reinforcements, possibly a trench.



Close-up images of the security facility in Kyauk Hlay Kar village tract, Maungdaw, taken on 9 January 2018 (left) and 20 February 2018 (right), showing a possible new defensive wall constructed inside the compound



1238. In addition, at least six new large buildings have been built at the military bases in Let Wea Det Pyin Shey village tract, Buthidaung Township, and further expansion is visible in a security facility one kilometre west of Buthidaung town. Signs of expansion have also been detected in a small military camp in Yin Ma Zay, Buthidaung Township.

Construction of other infrastructure

1239. The Mission analysed images showing the construction of new roads across previously destroyed areas. Satellite imagery analysis and aerial photos of Kyauk Pan Du village tract, Maungdaw Township, from February and March 2018, indicate that, following the terrain clearance, a new road has been built across the burned villages of Ho Kay Day Kone Nar and Zay Di, and across land where Rohingya houses and compounds previously stood.²⁸⁰²

²⁸⁰² The first signs of terrain clearance were visible as early as November 2017 in Kyauk Pan Du; See this chapter, section D.1.a: Most serious incidents, for details of the “clearance operation” in Kyauk Pan Du.

Images taken in February and March 2018 showing new road construction in northern Rakhine State



1240. These roads have been built over areas of at least eight villages across the three townships (five in Maungdaw, two in Rathedaung and one in Buthidaung). Two large roads are being constructed across the May Yu mountain range, with one connecting the town of Goke Pi, Buthidaung Township, with Kyein Chaung, Maungdaw Township, where a large area of land has been cleared and appears to have been prepared for new construction. The second road connects Ah Htet Nan Yar in Rathedaung Township with Ho Kay Day Kone Nar in Maungdaw Township. The construction of new houses and terrain clearance is also visible in this latter location. In some instances, these new roads are constructed across previously destroyed villages, like in Ah Htet Nan Yar in Rathedaung Township and Zay Di in Maungdaw Township.



1241. Other new infrastructure in the area includes new telecommunications antennae and a new electricity or gas line between Rathedaung and southern Buthidaung Townships. New helipads built after the beginning of violence in northern Rakhine were observed in eight locations in Maungdaw and two locations in Buthidaung townships.

The destruction of evidence

1242. The mass demolition and terrain clearance throughout northern Rakhine State raise serious concerns about the potential destruction of evidence and its effect on future investigation into crimes, including the gravest crimes under international law.²⁸⁰³ Many of these villages were the location of serious crimes, including Min Gyi, Myin Hlut, Kyauk Pan Du and Inn Din.

1243. Terrain clearance on this scale, without prior on site information gathering and investigation, will inevitably make it more difficult to locate crime scenes and burial sites, collect evidence for forensic analysis, and for investigators to piece together exactly what happened. The destruction of evidence also makes it more difficult for the Rohingya to bring legal claims. Moreover, the Rohingya have not been consulted, offered compensation for destroyed houses and seized lands, or given any indication they can rebuild their homes and livelihoods.

1244. This 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.²⁸⁰⁴ Since it first became apparent that villages were being bulldozed and cleared, concerns have been raised. On 13 February 2018, in a meeting at the United Nations Security Council on the situation in Myanmar, the representatives of Bangladesh referred to "reports of the bulldozing and clearing of villages" and raised concerns that this will, "not only eliminate features of recognition to establish ownership rights, but would also seek to wipe out any remaining proof or evidence of alleged atrocities committed against the forcibly displaced people."²⁸⁰⁵

²⁸⁰³ V-067, V-194.

²⁸⁰⁴ See chapter X: Impunity and accountability.

²⁸⁰⁵ S/PV.8179

1. Legal toolbox for restricting fundamental freedoms

1291. The interrelated rights to freedom of opinion and expression, association, and peaceful assembly are fundamental freedoms, critical to the functioning of a democracy and necessary for the realization of all other rights. They are firmly protected under international human rights law.²⁸⁴⁴ Although Myanmar has not yet ratified the International Covenant on Civil and Political Rights (ICCPR), the ICCPR's provisions regarding the rights to freedom of opinion and expression, association, and peaceful assembly, as well as the interpretation and application of these provisions in international jurisprudence, remain relevant. Myanmar has ratified other treaties with comparable provisions, most notably the Convention on the Rights of the Child.

1292. Under international human rights law, the rights to freedom of expression, association and peaceful assembly are not absolute. The exercise of the right to freedom of expression (which includes the freedom to seek, receive and impart information and ideas of all kinds) may be subject to restrictions. However, such restrictions must be provided by law and be necessary in a democratic society for the respect of the rights or reputations of others, or for the protection of national security or public order, or of public health or morals.²⁸⁴⁵ Necessary restrictions must be proportionate and formulated with sufficient precision. Where restrictions seek to protect national security, they are permissible only in serious cases of political or military threat to the entire nation. The right to freedom of expression embraces even expression that may be regarded as deeply offensive. All public figures, including those exercising the highest political authority, are legitimately subject to criticism and political opposition. Criticism of such officials, even where considered insulting, is insufficient to justify the imposition of penalties.²⁸⁴⁶ The exercise of the rights to freedom of association and of peaceful assembly can be limited under similarly strict conditions only.

1293. The problem with the Myanmar domestic legal framework is twofold. First, the constitutional human rights guarantees with respect to the rights to freedom of opinion and expression, association and peaceful assembly are weak and ambiguous. Section 354 of the 2008 Constitution protects these rights for "citizens", if "not contrary to the laws, enacted for Union security, prevalence of law and order, community peace and tranquillity or public order and morality". Apart from the fact that, under international law, these rights should not be limited to citizens only, the concept of "community peace and tranquillity" is impermissibly vague and broad. In addition, the key requirement that the restriction be "necessary" to achieve the stated goals is missing. Second, multiple domestic laws contain imprecise or overly broad restrictions on the exercise of fundamental freedoms, including through the criminalisation of the peaceful exercise of such rights.

1294. Problematic laws that are frequently used to arrest, prosecute and convict civil society actors, journalists, lawyers and human rights defenders, with a view to intimidate and silence them, include:

- Sections 143-147 of the Penal Code, penalising unlawful assemblies: these provisions contain an overly broad definition of unlawful assemblies, which may encompass peaceful assemblies. Importantly, section 147 stipulates that, when force or violence is used by an unlawful assembly, or by any member thereof, *every* member of such assembly is guilty of the offence of rioting. However, the right to peaceful assembly is an individual right: therefore, an assembly cannot be considered violent because a few people in the assembly take violent action. Individuals who do not engage in violence or incitement to violence should not be held responsible for the actions of others.²⁸⁴⁷ Such provisions allow for treating entire public protests as "unlawful" and for resorting to mass arrests of participants.

²⁸⁴⁴ UDHR, arts. 19-20; ICCPR, arts. 19-22; CRC, arts. 13, 15; CPRD, art. 21; ASEAN Declaration, arts. 23-24.

²⁸⁴⁵ ICCPR, art. 19(3); CRC, art. 13.

²⁸⁴⁶ United Nations Human Rights Committee, General Comment no. 34 (CCPR/C/GC/34).

²⁸⁴⁷ A/HRC/31/66, para. 20.

- Sections 499-502 of the Penal Code, criminalising defamation²⁸⁴⁸: under international human rights norms and standards, imposing criminal penalties for defamation is an unjustifiable restriction on the freedom of expression. Criminalising defamation dissuades individuals from criticizing officials or government policy. Civil liability proceedings should be the sole form of redress for complaints of damage to reputation.²⁸⁴⁹ In Myanmar, defamation laws are frequently used against journalists and other media workers for articles critical of the government or of security forces.
- Section 505(b) of the Penal Code criminalising whoever makes, publishes or circulates any statement, rumour or report with intent to cause, or which is likely to cause, “fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity”. This provision is too broad and imprecise, according to international human rights norms and standards. Criminally restricting speech because it is “likely to cause alarm” that “may” lead a person to commit an offence against “public tranquillity” cannot be justified as a necessary measure in a democracy. The terminology used is also too vague for an individual to know what is impermissible, and opens the door for abuse by law enforcement officials, notably to silence critical voices. This provision has been used regularly against critics of the Myanmar government or military, for example, in relation to public protests. After the Arakan Liberation Party (AKP) published a statement in April 2016 alleging that the Tatmadaw had committed violations against civilians in Rakhine State, including forced labour and ill-treatment, Khaing Myo Htun, who was at the time the AKP’s deputy information officer, was convicted under sections 505(b) and (c) and sentenced to 18 months in prison, despite having provided evidence to substantiate the allegations.²⁸⁵⁰
- The Official Secrets Act, penalising the receipt or dissemination of a broad range of documents and information, particularly government documents. Several provisions, in particular sections 3 and 5, are contrary to international norms and standards because they are too broad to be “necessary” in a democratic society. In essence, they cover any type of information, including what may be in the public interest. Restrictions on freedom of expression (including the freedom to seek, receive and impart information and ideas of all kinds) are permissible for the protection of national security but only in serious cases of political or military threat to the entire nation.²⁸⁵¹ Article 5, however, criminalises the disclosure, possession or receipt of documents or information without the requirement of demonstrating that its disclosure threatens national security or public order. The Act can easily be used to deny information to the public and to conceal government wrongdoing. Article 3(1)(c) further includes a particularly broad definition of “spying”, including the making, receiving or communication of any document that is “calculated to be”, “might be” or is “intended to be” “directly or indirectly useful to a foreign country”. The penalty for such forms of spying is imprisonment up to 14 years. The Act does not require actual harm to national security, or even a real risk of such harm. However, the potential usefulness of the information to another country does not necessarily equal a threat to national security. As the case against the two Reuters journalists shows, as detailed below, the Official Secrets Act can be abused to intimidate journalists from undertaking legitimate journalistic work.
- Article 66(d) of the 2013 Telecommunications Act, criminalising defamation using a telecommunication network. This provision made seven online acts punishable: blackmailing, bullying, making wrongful restraint on, defaming, disturbing, exerting undue influence on or threatening a person. An amendment adopted in 2017 limited these offenses to extorting, defaming, disturbing or threatening a person using a

²⁸⁴⁸ Other domestic laws also criminalize defamation, including the Telecommunications Law, the Electronic Transactions Act, and the News Media Law.

²⁸⁴⁹ See A/HRC/14/23, para. 83-84. See also United Nations Human Rights Committee, General Comment No. 34 (CCPR/C/GC/34), para. 47.

²⁸⁵⁰ K-104; A/HRC/34/67; MMR 2/2016.

²⁸⁵¹ United Nations Human Rights Committee, General Comment No. 34 (CCPR/C/GC/34).

telecommunications network, and reduced the maximum sentence to two years imprisonment (from three). None of these punishable acts are defined, and some of the concepts are subjective, opening the door to abuse. Some of the acts, such as “disturbing” a person, would also not constitute a legitimate aim necessitating restriction in a democratic society. As mentioned in relation to sections 499-502 of the Penal Code, defamation should also not be criminalised. Article 66(d) has been described as “the most notorious symbol of the unsuitability of the legal framework, regularly appearing in the media and online as a tool to repress and punish those speaking truth to power”.²⁸⁵²

- Other similarly problematic laws include the Emergency Provisions Act (1950)²⁸⁵³, the State Protection Act (1975)²⁸⁵⁴, the Electronic Transactions Act, the News Media Law, the Printing and Publishing Enterprise Law, the Law Protecting the Privacy and Security of Citizens, the Unlawful Associations Act (section 17.1), the Peaceful Assembly and Peaceful Procession Act, and several other provisions of the Penal Code (e.g. section 124a regarding sedition). These have all been used in cases against human rights defenders and journalists.²⁸⁵⁵

1295. These problematic laws constitute a veritable toolbox for State officials and representatives wishing to stifle dissent and evade legitimate scrutiny of their actions. It provides them with various options to curtail and punish the legitimate exercise of the rights to freedom of expression, association and peaceful assembly.²⁸⁵⁶ The use of these laws to silence critical voices has been a regular, and increasing, occurrence throughout the period under review. Individuals who are critical of the government or security forces, and who expose or speak out against human rights violations, are particularly vulnerable.²⁸⁵⁷ Persons targeted include those who have taken a public stance in relation to land confiscation, large-scale development projects, environmental degradation, constitutional reform, and on military and security operations across the country. The use of such laws has curbed the democratic space in Myanmar.

1296. One notable example has been the case of the two Reuters journalists, Wa Lone and Kyaw Soe Oo, who were arrested and detained in December 2017, ostensibly for alleged violations of the Official Secrets Act, but in reality in an attempt to prevent or punish them from publishing a story about serious human rights violations committed by the Myanmar security forces. In July 2018, they were charged with offences under the Act with a maximum sentence of 14 years imprisonment. On 3 September 2018 they were convicted and sentenced to seven years imprisonment.²⁸⁵⁸ The prosecution of acts of investigative journalism into allegations of human rights violations in Rakhine State, which are issues of the highest public interest, is of grave concern.²⁸⁵⁹ The Mission considers that the two journalists have been convicted and are now being punished severely for carrying out their responsibilities as journalists relating to the exposure of serious human rights violations. This high-profile case sends a chilling message to other journalists and human rights defenders, not only

²⁸⁵² Free Expression Myanmar, “66(d): No real change” (December 2017).

²⁸⁵³ Repealed in 2016.

²⁸⁵⁴ Repealed in 2016.

²⁸⁵⁵ E.g. A/HRC/32/71, para. 19.

²⁸⁵⁶ For example, in 2017, the Special Rapporteur on the human rights situation in Myanmar stated to have received information on approximately 170 individuals imprisoned for peacefully exercising their rights to freedom of opinion and expression, and of association and assembly (A/HRC/34/67, para. 26).

²⁸⁵⁷ E.g. BM-007, BM-008, BM-039, PI-037, PI-038, PI-106, QM-006.

²⁸⁵⁸ Reuters, “Statement from Stephen J. Adler, President and Editor-in-Chief, Reuters, on reporters Wa Lone and Kyaw Soe Oo, Sep 3, 2018” (3 September 2018); OHCHR, “Comment by UN High Commissioner for Human Rights Michelle Bachelet on the conviction of two Reuters journalists in Myanmar” (3 September 2018).

²⁸⁵⁹ See also Y. Lee, D. Kaye, “Myanmar: UN experts gravely concerned by court charges against Reuters journalists” (press release, 11 July 2018), (<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23357&LangID=E>).

undermining freedom of expression and access to information but also deterring the protection and promotion of human rights.

2. Intimidation and reprisal for engagement with the United Nations

1297. There have been numerous allegations of intimidation and reprisals against individuals who have engaged with United Nations officials in the country or abroad, including the Special Rapporteur on the situation of human rights in Myanmar during her visits to the country. The Special Rapporteur and other mandate holders, as well as the United Nations Secretary-General, have raised concern about such allegations.²⁸⁶⁰ The Human Rights Council emphasized in its resolution 34/22 on the human rights situation in Myanmar that no one should face reprisals, monitoring, surveillance, threats, harassment or intimidation for cooperating or speaking with special procedures, including the Special Rapporteur, the Fact-Finding Mission or the United Nations.

1298. The Mission received many reports of such intimidation or reprisals for actual or perceived engagement with the United Nations or other international actors, including members of the diplomatic community. For example, the Mission corroborated an incident in Koe Tan Kauk Village Tract, Rathedaung Township, Rakhine State, in November 2016, following a high-level visit including the then United Nations Resident Coordinator and several ambassadors. During the visit, Rohingya villagers shared information about their situation with the delegation.²⁸⁶¹ Officials took photos and videos of persons interacting with the delegation.²⁸⁶² A few days later, security forces came to the village, rounding up men and boys, subjecting them to ill-treatment and verbal abuse. One of the security officers filmed the incident, footage that was later circulated on the Internet.²⁸⁶³ While the women and children were abused for a few hours, the men and boys were detained for two days. In the course of their ill-treatment, references to the United Nations were made, asking villagers why they explained their problems to the United Nations²⁸⁶⁴, or accusing them of “eating food provided by UNHCR or WFP”.²⁸⁶⁵ A number of men were subsequently taken to Sittwe prison.²⁸⁶⁶ The Mission received credible information suggesting that one detainee may have been killed while in custody.²⁸⁶⁷ After the video entered the public domain, the Government issued a public statement claiming that a police operation had been launched in relation to an ARSA attack, the perpetrators of which were supposedly hiding in Koe Tan Kauk. However, it was also acknowledged that the security forces were looking for a man who “distributed documents and placards enclosing fake information to villagers while a team of foreign diplomats arrived in this village”.²⁸⁶⁸ The Mission is satisfied that this incident is linked to the visit of foreign dignitaries and constitutes a reprisal.²⁸⁶⁹

1299. Numerous interlocutors of the Mission expressed fear that their possible engagement or sharing of information with the Mission might lead to intimidation, harassment and other forms of reprisals from the Myanmar government and security forces. Civil society actors and human rights defenders in particular spoke of the constant threat of punishment for the exercise of their rights and for being in contact with United Nations officials. The Mission

²⁸⁶⁰ E.g. A/HRC/34/75, para. 10; A/HRC/36/31, paras. 43-45.

²⁸⁶¹ EI-070, QI-113, XI-001.

²⁸⁶² CI-116, CI-118, CI-119.

²⁸⁶³ BBC News, “Myanmar police officers detained over Rohingya beatings video”, 2 January 2017 (<https://www.youtube.com/watch?v=vJLAZKTPQgE>).

²⁸⁶⁴ XI-001.

²⁸⁶⁵ RI-003.

²⁸⁶⁶ CI-116, CI-118, CI-119, CI-179, XI-001.

²⁸⁶⁷ CI-116, CI-118, CI-119, XI-001.

²⁸⁶⁸ Information Committee, “Press Release on a video clip which members of Police Forces took during area clearance operation in Kotankauk Village, Maungdaw”, 2 January 2017 (<https://www.facebook.com/InformationCommittee/posts/663761827130260>).

²⁸⁶⁹ Several of the Mission’s interlocutors stated that the incident took place in relation to a visit of the UN Special Rapporteur on the human rights situation in Myanmar, Yanghee Lee. The Mission believes that these individuals witnessed the same incident, but confused the United Nations officials visiting.

considers that the anti-United Nations climate actively fostered by the Myanmar authorities has contributed to this situation.

3. Curtailment of peaceful protests

1300. The Mission corroborated cases of excessive use of force in the management of protests and demonstrations, and prosecution of participants in protests and demonstrations, curtailing the right to peaceful assembly. A notable case is the shooting of protesters by the police in Mrauk-U in January 2018.²⁸⁷⁰ In another recent example, individuals holding peace protests in late April and May 2018, in several cities including Myitkyina, Bago, Mandalay and Yangon, in solidarity with internally displaced persons trapped in Kachin State, have been charged under the Peaceful Assembly and Peaceful Procession Act.²⁸⁷¹ In Yangon, protestors were also beaten. One participant told the Mission:

*On 12 May 2018, we started to march and sing songs but police with water cannons blocked our way. The police said they had an order to block the march. We had decided to end the march when the police started to beat up protestors. There were also plainclothes individuals present who were not police but working alongside them. The police arrested nine people, including some protestors and some passers-by. Now, 17 people have been charged.*²⁸⁷²

1301. Considering these, together with other credible reports of similar instances²⁸⁷³, the Mission concludes that there is a pattern of using excessive force in the management of protests and demonstrations and prosecuting participants, with the purpose or effect of silencing critical voices.

B. The issue of “hate speech”

1302. Anti-Rohingya and broader anti-Muslim sentiment, including “hate speech”, is widely prevalent in Myanmar, even in the most progressive pro-democracy circles. As discussed above²⁸⁷⁴, in relation to the 2012 violence in Rakhine State, a campaign of hate and dehumanisation of the Rohingya had been underway for months prior to the violence. This campaign was led by the Rakhine Nationalities Development Party (RNDP), various ethnic Rakhine organizations, radical Buddhist monk organizations (including the 969 group), several officials and influential figures.

1303. Virulent hate speech against the Rohingya, and Muslims in general, has not stopped since then.²⁸⁷⁵ On the contrary, it has intensified. While messages of hatred are propagated by a multitude of actors, it is commonly recognised that ultranationalist elements within the Buddhist monkhood are the most active, well-resourced and effective in this regard. This includes the 969 movement, created in 2012, and the Organization for the Protection of Race and Religion (known as MaBaTha), which emerged in 2014. High-profile monks, including Wirathu, Parmaukha and Sitagu Sayadaw, have openly and actively espoused and promoted anti-Muslim narratives for many years.

²⁸⁷⁰ See chapter V, section A.5: Emblematic incident: shooting in Mrauk-U on 16 January 2018.

²⁸⁷¹ See also Progressive Voice, “Time to Hear Our Voices – Freedom of Assembly and the Youth Peace Movement in Myanmar”, July 2018.

²⁸⁷² PI-102.

²⁸⁷³ E.g. A/HRC/22/58, para. 30; A/HRC/25/64, para. 28; A/HRC/28/72, paras. 19, 50; A/61/311, para. 35. Also PI-048.

²⁸⁷⁴ See chapter V, section C.5: Violence in 2012, Spreading hate.

²⁸⁷⁵ Several reports have also drawn attention to “hate speech” targeting other segments of the population, such as other ethnic or religious minority groups, women, and politicians. See e.g. Pen Myanmar, “Hate Speech: A Study of Print, Movies, Songs and Social Media in Myanmar” (2015); Institute for War and Peace Reporting, “No Hate Speech Project” (2017): <https://www.facebook.com/NoHateSpeechProject/>; see also A/72/382, para. 56. However, in light of the particular scale and intensity of the hate campaigns against Muslims, and Rohingya in particular, the Mission focused its attention on this phenomenon.

1304. The Mission undertook an in-depth examination of the types of messages and narratives that are spread in such hate campaigns, as well as the Myanmar authorities' role and response. It considered such assessment critical in light of the alleged role of "hate speech" in the outbreaks of violence across Myanmar, but also because some observers have suggested a link between "hate speech" and the opening of democratic space in Myanmar, including increased levels of freedom of expression, a freer publishing and media environment, and easier access to the Internet and social media.

1. Legal framework

1305. The issue of "hate speech" should be considered in light of both the right to freedom of opinion and expression, and the rights to equality and non-discrimination. In principle, the right to freedom of opinion and expression embraces even expression that may be deeply offensive.²⁸⁷⁶ However, under international human rights law, the exercise of human rights must not violate the rights and freedoms of others. Manifestations and expressions of deep-rooted hatred can undermine the rights of others under certain circumstances.²⁸⁷⁷ With this in mind, international law distinguishes between expressions of hate that *must* be prohibited, those that *may* be prohibited, and those that *should* be protected from restriction.

1306. Expressions of hate that *must* be prohibited under international law include the direct and public incitement to commit genocide²⁸⁷⁸; any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence²⁸⁷⁹; and all dissemination of ideas based on racial superiority or hatred, and on incitement to racial discrimination.²⁸⁸⁰ In contrast, the exercise of freedom of expression *may* be restricted where it presents a serious danger for others and for their enjoyment of human rights. Such restrictions must be provided by law in a clear and precise manner; be necessary in a democratic society for the respect of the rights or reputations of others or for the protection of national security or public order; and be proportionate.²⁸⁸¹ Forms of expression that do not fall under these categories, even where they are deeply offensive, are lawful and should be protected from restriction. This does not mean, however, that such speech should be considered acceptable. It may still pose a problem in terms of tolerance and may require a critical response from the State, in particular to address the underlying prejudices of which the speech is a symptom.

1307. While there is no definition of the term "hate speech" under international human rights law, this report uses it to refer to any expression of violent or discriminatory hatred towards people. In this sense, it encompasses expressions from each of the above mentioned categories (those that must be prohibited, those that may be prohibited, and those that must not be prohibited but may require a critical response).

1308. In resolution 34/22, the Human Rights Council calls on the Government of Myanmar to take further action to address the issue of hate speech in accordance with its resolution 16/18 and the Rabat Plan of Action. Human Rights Council resolution 16/18 on "intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence, and violence against persons based on religion or belief" sets out an action plan for addressing intolerance based on religion and belief. It rests on the rationale that the promotion of inclusion, diversity and pluralism is the best antidote to intolerant expression, coupled with polices and laws to tackle the root causes of discrimination. The Rabat Plan of Action, adopted by experts following a consultative process under the auspices of OHCHR, provides authoritative guidance to States on the prohibition of "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".²⁸⁸² The

²⁸⁷⁶ United Nations Human Rights Committee, General Comment No. 34 (CCPR/C/GC/34).

²⁸⁷⁷ A/67/357, para. 37.

²⁸⁷⁸ Genocide Convention, art. III (c).

²⁸⁷⁹ ICCPR, art. 20 (2).

²⁸⁸⁰ International Convention on the Elimination of All Forms of Racial Discrimination, art. 4.

²⁸⁸¹ See this chapter, section A.1: Legal toolbox for restricting fundamental freedoms.

²⁸⁸² A/HRC/22/17/Add.4. See also:

<https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/RabatPlanOfAction.aspx>.

Mission considered these instruments in its assessment of the Myanmar Government's response to the issue of hate speech.

2. Findings

1309. The Mission received a substantial amount of information regarding instances of hate speech, as well as analytical reports examining patterns of hate speech in Myanmar.²⁸⁸³ It also undertook its own research and verification. It actively monitored and consulted a wide range of publications and broadcasts, as well as a large number of online accounts, groups and pages that appeared to be regular disseminators of hate speech.

(a) Prevalence of hate speech targeting Muslims, Rohingya in particular

1310. There is no doubt that hate speech against Muslims in general, and Rohingya in particular, is extremely widespread in Myanmar. This includes prohibited advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The Mission has seen a vast amount of hate speech across all types of platforms, including the print media, broadcasts, pamphlets, CD/DVDs, songs, webpages and social media accounts. For example, the Mission encountered over 150 online public social media accounts, pages and groups that have regularly spread messages amounting to hate speech against Muslims in general or Rohingya in particular. Given Facebook's dominance in Myanmar, the Mission paid specific attention to a number of Facebook accounts that appear to be particularly influential considering the number of followers (all over 10,000, but some over 1 million), the high levels of engagement of the followers with the posts (commenting and sharing), and the frequency of new posts (often daily, if not hourly). In addition to those accounts, this chapter also draws from randomly encountered instances of hate speech.

1311. The examples presented here are but a small sample of the kinds of messages that have circulated in Myanmar in recent years. As posts can be shared by followers and then by their followers without limit, it has not been possible for the Mission to trace the full extent of the exposure they received. Subtleties in the Myanmar language and the use of fables and allegories make some potentially dangerous posts difficult to detect. Many messages are reportedly also shared through private communications means, such as Viber and Messenger, which are not accessible to the Mission.

1312. There is a great variety of derogatory terms used to refer to the Rohingya, or to Muslims in general. Typical descriptors for Rohingya are the terms "Bengali" (implying foreign origins) or "Kalar". The latter word is commonly attributed to people of South Asian descent. While 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. There is a range of other terms being used as well, some more subtle than others:²⁸⁸⁴

- **Mout Kalar** ("Muslim Kalar"): a term combining *mout*, short for Muslim, with *kalar*. The term was regularly used by the monk Wirathu, generally for all Muslims, sometimes specifically for Rohingya. For example, the late U Ko Ni, a well-known Muslim and legal advisor of the NLD, was frequently targeted on Facebook with insults such as "*Mout Kalar MP*" and "*Mout Kalar Nga Ni*", "*Nga Ni*" being a rude name usually attributed to dogs.²⁸⁸⁵ In one post from March 2016, a photo of U Ko Ni next to President Htin Kyaw was captioned "this Mout Kalar getting his foot in the door in Myanmar politics is not something we should sit by and watch. We need to do something right away."²⁸⁸⁶ The post received over 800 reactions, 450 shares and 60 comments. Several comments called for U Ko Ni to be "removed":

²⁸⁸³ B-001, B-002, B-003, B-004, K-070, K-093, K-098, K-101.

²⁸⁸⁴ The examples in the following paragraphs have all been seen by the Mission. Some have subsequently been deleted; screenshots of the examples are on file with the Mission.

²⁸⁸⁵ V-023, V-030.

²⁸⁸⁶ V-023.

*Dear NLD and Htin Kyaw, you need to eradicate this Nga Ni. [...] Mout Kalar and the President should not be together. We don't want a Nga Ni. [...] There is no time to sit and wait. This is the time to stand up and kick him out.*²⁸⁸⁷

*There is still time. Take action! [...] If not the 135 will have to cry. [...] Don't let a dog in the parliament.*²⁸⁸⁸

The Mission has seen multiple other posts with a similar message and threats towards U Ko Ni dating from between March and October 2016.²⁸⁸⁹ On 29 January 2017, U Ko Ni was assassinated at Yangon International Airport.²⁸⁹⁰

- **Kway Kalar** (“Muslim dog”): *kway* means dog. In Myanmar, “dog” is extremely insulting when used in relation to a person or population, as dogs are considered part of the lowest categories of animals. In October 2017, a Facebook post by one influential and active disseminator of hate messages against Rohingya stated: “Now that the Sarong-covered Government is in power [the NLD Government led by the State Counsellor], Pa Khote Khu’s history gets desecrated”. This was in response to an interfaith event held in the town of Pa Khote Khu. The user talked about how in the past, the local “*Kway Kalar*” never dared to raise their heads while walking outside in Pa Khote Khu, a town close to the so-called Muslim-free Kyauk Pa Daung city. “I want to see when they will hold this kind of interfaith event in Kyauk Pa Daung. I’ll be waiting”, the author declared in a profanity-filled text, using the term “*Kway Kalar*” nine times in a short paragraph.²⁸⁹¹ The post was still active in July 2018, with over 200 reactions, 380 shares and 65 comments. Comments under the post used various expletives, accompanied by insulting pictures of dogs, criticizing the NLD government for organizing interfaith events and catering to the “Muslim dogs”.²⁸⁹² Highly publicized interfaith “praying ceremonies” conducted in every state and region in Myanmar in October and November 2017 have attracted similarly negative and derogatory online commentary. The term “Muslim dog” has also been used by the Myanmar security forces during the post-August 2017 “clearance operations”.
- **Ro-lein-nyar** (“Ro-liars”/“Rohingya are liars”): 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”. Often, the term is used in response to images and reports of abuses against the Rohingya. The term is also used when sharing or commenting on international media reports about the Rohingya to dispute the coverage. For example, on 11 February 2018 (two days after Reuters published its special report on the killing of 10 Rohingya in Inn Din), Shwewiki.com, a self-proclaimed “Media/News Company in Yangon” with over 1.3 million followers on Facebook, posted a link to an article titled, “The lies of the Ro-lein-nyars are exposed”.²⁸⁹³ It stated that the photos featured in the Reuters article were from “Boko Haram in Pakistan”, where the “Huti insurgents” were killing the soldiers.²⁸⁹⁴ The post called the Reuters article “fake news” promoting the “Ro-liars”. The article refers to several ASEAN leaders supposedly condemning this “fake news”. At the end, there is a “#Asia News Media Council Press Release” tag, claiming this is an official piece of news from a trusted source. The post had received over 4,000 reactions, 1,000 shares and 65 comments when last seen by the Mission. It has

²⁸⁸⁷ V-024.

²⁸⁸⁸ V-025.

²⁸⁸⁹ V-027, V-028, V-029.

²⁸⁹⁰ The Republic of the Union of Myanmar – President Office, “Press release regarding assassination of U Ko Ni”, 30 January 2017.

²⁸⁹¹ V-031.

²⁸⁹² V-032, V-033, V-034.

²⁸⁹³ V-035.

²⁸⁹⁴ Boko Haram is operating in Nigeria, not Pakistan. ‘Huti’ presumably refers to the Houthi who are active in Yemen, again not in Pakistan.

since been removed from the original Facebook and blog, but was still available on other online blogs.²⁸⁹⁵

- **Ro-gein-nya** (“Rohingya are lying dogs”): the term combines the sound “gein” – a sound that is attributed to dogs in Myanmar language – with Ro-lein-nyar mentioned above. Usually in cartoons, when a dog is hit, it makes the sound “gein”. This dehumanizing term is used to depict the Rohingya as “lying dogs that need to be hit”. One example of this usage is a June 2016 post from a monk, advertising the upcoming anti-Rohingya protests in Magwe Division and Karen State. The posts stated that “Magwe Division and Karen State are holding events to drive out the “Ro-gein-nya”. The text in the photo said, “as the government did not issue an official objection to deny the request of the lying race (Rohingya), the people (in various regions) have organized protests”.²⁸⁹⁶ As of August 2018, the post was still on Facebook.
- **Anout Ta Kha** (“west gate”): a term connoting the western “entrance” to the country, namely Rakhine State and the western border with Bangladesh. The term is often used to raise fear among the public in relation to immigration and “foreign invasion”. For example, on 12 October 2016, a few days after the first ARSA attacks, Dr. Tun Lwin, a well-known meteorologist with over 1.5 million followers on Facebook, called on the Myanmar people to be united to secure the “west gate” and to be alert “now that there is a common enemy”. He further stated that Myanmar does not tolerate invaders. As of August 2018, the post had 47,000 reactions, over 830 comments, and nearly 10,000 shares.²⁸⁹⁷ Several comments called for immediate “uprooting” and “eradication” of the Rohingya, citing the situation in Rakhine State as a “Muslim invasion”.²⁸⁹⁸
- **Yay Myaw Kan Tin** (“unwanted person”): referring to “trash that is floating along a river reaches the shore, but no one knows its origins”. In the Rohingya context, it has been commonly used to refer to “boat people”, in particular during the 2015 Andaman Sea crisis when thousands of Rohingya fled Myanmar on boats. For example, in January 2017, a self-described pro-Myanmar patriot with more than 17,000 followers on Facebook posted a graphic video of police violence against civilians in another country. He captioned the post as follows: “Watch this video. The kicks and the beatings are very brutal. I watch the video and feel that it is not enough. In the future, ‘Yay Myaw Kan Tin’ 786 Bengali disgusting race of Kalar terrorists who sneaked into our country by boat, need to be beaten like that. We need to beat them until we are satisfied.” One comment under the post reads: “It is very satisfying to watch this. [...] It’s sad that Myanmar security forces are not as skilful in their beating”. In July 2018, the post had over 23,000 views, 830 reactions and 517 shares.²⁸⁹⁹
- **Ae Soe** (“bad guest”): a term connoting the non-indigenous status of the Rohingya in Myanmar, referring to them as guests from another country and as “bad”. This term is used to imply that Rohingya are “bad guests” because they “insult the host”. For example, one account holder, supposedly a monk, posted a poem with graphic photos allegedly showing Buddhist Mros killed by the “Bengali” on 3 August 2017, along with photos of damage to a pagoda allegedly done by “Bengali”. The poem goes “the bad guests destroyed a pagoda, killed and tortured our people – this we must not tolerate”. The pictures from the post were still available on Facebook as of August 2018.²⁹⁰⁰ The poem has been removed.
- **Kalar-Oak** (“camel”): Kalar-Oak as one word means camel, but also a “group of Kalar” (*oak* means group). The use of this derogatory term is linked to a Myanmar parable about a camel which gradually takes more and more space in his merchant’s

²⁸⁹⁵ E.g. <https://www.apyolay.com/archives/9670> (accessed July 2018).

²⁸⁹⁶ <https://www.facebook.com/photo.php?fbid=1601058356872424&set=a.1381500878828174.1073741828.100009048252137&type=3>; V-036.

²⁸⁹⁷ <https://www.facebook.com/tunlwin48/posts/1424521840895717>; V-037.

²⁸⁹⁸ V-040, V-041, V-042.

²⁸⁹⁹ On file with the Mission.

²⁹⁰⁰ <https://www.facebook.com/photo.php?fbid=276331909519563&set=pb.100014282670913.-2207520000.1523636460.&type=3&size=607%2C873>; V-043.

tent, until eventually the merchant is forced out. The parable implies that, if a few “Kalar” are let into the country, they will slowly take over and will force the original inhabitants out. In a post from the official Facebook page of the Office of the Tatmadaw Commander-in-Chief, Senior-General Min Aung Hlaing, this parable was explained in detail in connection with the issue of the Rohingya in Rakhine State. The post is one of a series of excerpts from the event “Talk on Rakhine Issue and Security Outlook”, organized by the Myawaddy Media Group on 8 September 2017, and live-streamed on the Myawaddy Media and the Facebook pages of the Office of the Commander-in-Chief. After describing the merchant and camel parable, the moderator stated that “Islam is a disease spreading globally” and that “Muslims were attempting to islamise the whole world”. Prior to its deletion by Facebook in August 2018, the post had almost 10,000 reactions, over 6,000 shares and 146 comments.²⁹⁰¹

- **Khoe Win Bengali** (“Bengali that sneaked in”): in the Myanmar language, the term suggests that the Rohingya have illegally entered the country by stealth and that there is a plan to launch an invasion. For example, a post published on 26 August 2017 used the term numerous times interchangeably with the word “terrorists” to refer to ARSA and the Rohingya population together. Titled “a just war has started”, the post wrote: “Even the UN that supports the Bengali... the US and British embassies... and the international community all condemned the actions of the *Khoe Win Bengali* terrorists. So, in this just war, to avenge the deaths of the ethnic people who got beheaded, and the policemen who got hacked into pieces, we are asking the Tatmadaw to turn these terrorists into powder and not leave any piece of them behind.” The post, which included no examples in relation to the alleged killing of “ethnic people” and policemen, had 20,000 reactions, over 11,000 shares and 4,100 comments by July 2018.²⁹⁰²
- **Kalaso** (“Bad Kalar”): the term precedes the emergence of ARSA and implies that Rohingya are violent. It has been prominently used after the 2012 violence in Rakhine State. For example, in June 2014, an excerpt of an article from the journal Myanmar Express was posted on an online blog. The excerpt featured an interview with a former military officer, Khin Nyunt, on the question of Rohingya.²⁹⁰³ Khin Nyunt stated: “There is no Rohingya, because Rohingya are insurgents. There is RSO. We call them Kalaso. Kalaso insurgents are the RSO group, short for Rohingya Solidarity Organization. Rohingya is the name of insurgents”.²⁹⁰⁴

1313. Expressions using these derogatory terms are found frequently and in very large numbers, both offline and online. They are often accompanied by cartoons, memes or graphic content, amplifying the impact of the message. Below are two examples of widely shared cartoons. The first one is by Harn Lay, a famous Myanmar cartoonist.

²⁹⁰¹ On file with the Mission.

²⁹⁰² On file with the Mission.

²⁹⁰³ From 1997 to 2003 Khin Nyunt, then a General, was First Secretary (de facto Prime Minister) of the State Peace and Development Council, the military junta, and then he was formally Prime Minister from 2003 to 2004, when he was purged by the junta,

²⁹⁰⁴ <http://theimageofpeople.blogspot.com/2014/06/rso.html>.



1314. An in-depth content analysis of these and similar messages shows that they are all linked to the core theme of a “Muslim threat” endangering the Buddhist character of the nation. Underlying this theme are multiple narratives, including of Muslims/Rohingya as an existential threat to the country, of Muslims/Rohingya as a threat to Burmese racial purity, and of Islam as a threat to Buddhist religious sanctity and its status in Myanmar.²⁹⁰⁵ Such narratives latch onto long-standing anti-Muslim prejudices and stereotypes; they are designed to stoke fear.

1315. First, Muslims, and Rohingya in particular, are represented as an existential threat to the country. Messages under this narrative revolve around mass illegal immigration and an invasion of the country (for example, “Bengali illegal immigrants”, “illegal Bengali”, “they will swallow us”, “they sneak into the country”, “boat people”, “need to protect the Western Gate against a Muslim invasion”, “they want to take away northern Rakhine as their independent state”), terrorism (for example, “Bengali extremist terrorists”, “jihadists”) and insecurity (for example, “criminals and rapists”). Such messages are frequently accompanied by news stories and graphic imagery pertaining to crimes committed by foreign terrorist groups such as ISIS, drawing also from pro-Rohingya statements made by such groups. The overall narrative is that Myanmar “ethnic” people should not tolerate mass illegal Muslim immigration, because “Bengali immigrants” or “terrorists” will violently alter the Buddhist character of the country and cause its demise. This is often made explicit with references to Afghanistan or Indonesia, underscoring how these countries were once Buddhist and are now majority Muslim. The following examples are illustrative:

- Thaki Thway, a MaBaTha’s periodical, No 22 Issue 3, published on 6 May 2016, carried an article with a picture of Win Ko Ko Latt²⁹⁰⁶ and others in an anti-Rohingya protest. Entitled “Let’s oppose the Bengali trying to be Rohingya”, the article stated that “the Bengali issue has been challenging successive governments and is growing bigger as a result. The Bengali are posing as refugees in the eyes of the world, while trying to create an independent Islamic state within Myanmar”.²⁹⁰⁷ The author went on to describe the connection between the Rohingya and other Islamic terrorist groups, such as ISIS, and how they have been trying to take over parts of other south-east Asian countries.
- Another MaBaTha magazine, *Aung Zeyathu*, No 149, published on 18 November 2016, featured an article entitled “the Myanmar race can go extinct due to the

²⁹⁰⁵ See also C4ADS, *Sticks and Stones - Hate Speech Narratives and Facilitators in Myanmar*, February 2016.

²⁹⁰⁶ Win Ko Ko Latt is the chairman of Myanmar National Network, a nationalist organization closely related to MaBaTha. In 2017, he was arrested along with the monk Parmaukkha for their protest in front of the United States Embassy (in a protest against the use of the word “Rohingya”).

²⁹⁰⁷ Photo available here: <https://www.facebook.com/1448332835475983/photos/a.1449306808711919.1073741829.1448332835475983/1535200873455845/?type=3&theater> (accessed July 2018).

Bengali”. Written by a monk, it warns that, because of the ARSA “terrorist” attacks, Muslims in Rakhine State are not to be trusted and are using various means to swallow and overpower Buddhism in Myanmar, especially by demanding citizenship, which will, one day, lead to there being Muslim members in the Parliament. “At the new Parliament held on 1 February 2016, there was no Muslim. This is a surprise the Myanmar people should be proud of. In the future, we need to be careful and make sure that there is still no Muslim in the Parliament. If we do not succeed, we will need to issue laws to protect our country”.²⁹⁰⁸

- *Aung Zeyathu* on 26 May 2017 also carried an article entitled “Our country, race and religion can only survive, if we defend them”. The text warned that, if the people of Myanmar gave too much attention to human rights, Myanmar would “turn into a Muslim country”.²⁹⁰⁹
- On his personal blog, Wirathu had posted a series of videos entitled “Defend against the dangers of Jihad”; “Jihad and the future”; and “Jihad war and future Myanmar”²⁹¹⁰, all calling for action against the “immediate” Islamic threat facing the country.
- The screenshot on the left below is an official statement issued by MaBaTha Baho (nationwide) on 1 June 2015. It reads: “There were instances when the race and religion were lost in Afghanistan, Pakistan, Bangladesh, Indonesia, Malaysia, south Philippines, south Thailand, and the Rakhine region in Myanmar. The 200 Bengali that were recently accepted into Rakhine State could not be sent back, and they were harming the locals. Because we felt sorry for the boat people... we lost our homes in our own land. MaBaTha hereby declares that immediate action is needed to make sure those (Rohingya) who are already in Myanmar leave as soon as possible, and future boat people never enter Myanmar's border.”²⁹¹¹
- The second screenshot below is of the cover of the 13 September 2017 issue of *Atumashi*, another MaBaTha periodical. The cover photo shows Wirathu preaching at a rally in September 2017, with the title “Will you surrender the great Maungdaw city (to an invasion)?” Articles from this issue, as well as from other issues, are regularly posted as images on Facebook.

²⁹⁰⁸ See also No Hate Speech project, <https://www.facebook.com/NoHateSpeechMyanmar/posts/1699017717077839> (accessed July 2018).

²⁹⁰⁹ See also No Hate Speech project, <https://www.facebook.com/NoHateSpeechMyanmar/photos/a.1547581885554757.1073741828.1547579185555027/1795167930796150/?type=3&theater> (accessed July 2018).

²⁹¹⁰ <https://wirathu.blogspot.com> (the website was no longer accessible in August 2018). Posts on file with the Mission.

²⁹¹¹ This statement was still available on Facebook in July 2018. V-044.



- The extent to which such discourse has become normalised is illustrated by parliamentary discussions on the Rakhine State crisis, in the course of which several members of parliament (mostly notably in the *Amyotha Hluttaw* (the upper house) but also in the *Pyithu Hluttaw* (the lower house) and *Pyidaungsu Hluttaw* repeatedly stressed the need to control illegal immigration and prevent the “Jihad” threat by the “Islamic terrorists”²⁹¹².

1316. The second common narrative is of Muslims, and the Rohingya in particular, as a threat to Burmese racial purity. This theme becomes apparent in messages on population growth among Rohingya, negatively affecting the demographic balance (“incontrollable birth rates”, “they breed like rabbits”, “extremely large families”), the practice of polygamy and the negative consequences of inter-faith marriage. Many such messages and expressions of hatred focus on the alleged “out-breeding” of Buddhists by Muslims and the dangers of marrying Muslim men, linking it to forcible conversion to Islam and physical abuse. The following examples are typical of these comments:

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. [Wirathu, in a July 2013 interview with the *Global Post*]²⁹¹³

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. [...] 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. [Article by another monk in the 9 June 2017 issue of MaBaTha publication *Aung Zeyathu*]²⁹¹⁴

²⁹¹² E.g. the meeting notes from 44th day of the 5th Regular Session at the 2nd Amyotha Hluttaw, on 16 August 2017, Agenda 10: <http://www.amyotha.hluttaw.mm/meetings/%E1%81%84%E1%81%84-%E1%80%9B%E1%80%80%E1%80%BA%E1%80%99%E1%80%BC%E1%80%B1%E1%80%AC%E1%80%80%E1%80%BA%E1%80%94%E1%80%B1%E1%80%B7%E1%80%99%E1%80%BE%E1%80%90%E1%80%BA%E1%80%90%E1%80%99%E1%80%BA%E1%80%B8-%E1%81%81%E1%81%86%E1%81%88%E1%81%82%E1%81%80%E1%81%81%E1%81%87>, p. 42.

²⁹¹³ Tin Aung Kyaw, “Buddhist monk Wirathu leads violent national campaign against Myanmar’s Muslims” (*Global Post*, 21 June 2013).

²⁹¹⁴ See “No Hate Speech Project”: <https://www.facebook.com/NoHateSpeechMyanmar/posts/1797471910565752>.

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. [Sitagu Sayadaw]²⁹¹⁵

1317. A third narrative represents Muslims, and Rohingya in particular, as a threat to Buddhist religious sanctity. It is often spread through generally disparaging comments on Muslim traditions. Such messages frequently revolve around the idea that Muslim traditions and values are incompatible with, or offensive to, Buddhism. A major example is the vitriol against the slaughtering of cows, suggesting that Muslims are inherently violent because they kill and eat cows. In 2015, the MaBaTha released a statement calling on the government to ban Muslims from slaughtering animals at religious events.²⁹¹⁶ Other examples include disparaging comments about Muslim traditions. About veils worn by women, Wirathu has said that: “Muslims use the robes in suicide bombings, helping men to pretend they are women... It is a security concern and a threat to the sovereignty of the country. We will make that tradition stop.”²⁹¹⁷ Below is an example of imagery widely circulated on Facebook with graphic images of cows being slaughtered.



1318. Many such messages or posts under all three narratives elicit profuse reactions and commentary online from sympathizers, often approving them in unambiguous language, including death threats and explicit calls for violence. For example, a 29 September 2017 post from Shwewiki.com featuring a Twitter statement from ARSA elicited the following comments: “Accusations of genocide are unfounded, because those that the Myanmar army is killing are not people, but animals. We won’t go to hell for killing these creatures that are not worth to be humans”; “If the (Myanmar) army is killing them, we Myanmar people can accept that... current killing of the Kalar is not enough, we need to kill more!”; “If we can’t clear them now, we will eradicate them with a world war.”

1319. A vast amount of these messages constitute forms of hate speech that either require prohibition and punishment under international law (because they amount to “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”) or may be prohibited (as necessary in a democratic society to protect the

²⁹¹⁵ Video available on YouTube: <https://www.youtube.com/watch?v=FDk4CST48PQ> (accessed August 2018).

²⁹¹⁶ Myanmar Now, “Special Report - With official help, Myanmar’s radical Buddhists target Muslim-owned businesses”, 17 September 2015.

²⁹¹⁷ Hnin Yadana Zaw, A. Slodkowski, “Myanmar radical monk endorses ruling party in election, raps opposition” (Reuters, 4 October 2015).

enjoyment of human rights by others). In the context of crimes against humanity, some of the extreme forms of hate speech may also amount to acts of persecution.²⁹¹⁸

(b) Coordinated hate campaigns and possible links to outbreaks of violence

1320. It is difficult to establish a comprehensive picture of the originators and propagators of hate messages, especially online. Clearly, however, Buddhist charity and welfare groups, movements such as 969 and MaBaTha, and Rakhine nationalist political parties and individuals have waged a campaign for the protection of “race and religion”. The use of dehumanising and stigmatising language targeting the Rohingya, and Muslims more generally, has been a key component of such campaigns.

1321. MaBaTha’s doctrine, as suggested by the group’s name (“Organization for the Protection of Race and Religion”), and as reflected in its publications, social media posts and public sermons, is based on the perceived need to protect, strengthen and spread Buddhism in Myanmar, and the assertion that Islam is in the process of overwhelming and marginalising Buddhism. 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.²⁹¹⁹ 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.

1322. The MaBaTha rhetoric spread quickly through various channels. MaBaTha produced inflammatory videos, including an infamous re-enactment of the alleged rape and murder of Ma Thida Htwe in May 2012, one of the triggers of the 2012 violence in Rakhine State.²⁹²⁰ These videos were distributed for free or at very low cost through pagodas, public sermons and other events. MaBaTha views were spread through schools, including monastic schools and Dhamma schools.²⁹²¹ The textbooks of the Dhamma schools for Grade 1 to 6 include sections warning against “improper associations” and “marrying the bad”, and on the concept of “Buddhist countries”.²⁹²² MaBaTha produced at least 10 different journals and magazines, published novels and nonfiction books, and spread messages through a variety of online platforms, including Facebook, YouTube, Twitter, blogs and websites. MaBaTha’s doctrine has been spread in popular culture by a wide network of writers, singers, businesses and other public figures who publicly support MaBaTha and have promoted its messages of hate at public events.

1323. MaBaTha is said to be widely supported among the general population. This may be partly explained by its religious and community services, including blood donation drives, vocational training and charity activities. The messages spread by MaBaTha and associated figures and organizations may also resonate well with the general population due to pre-existing and long-standing prejudices against Muslims, and concerns regarding the fate of Buddhism in the country, illegal immigration and unchecked borders.²⁹²³ MaBaTha certainly has a vast and well-resourced network penetrating the mainstream of Myanmar society through schools, popular culture, charity work, online and traditional communication means, exploiting long-standing prejudices and anxieties in calling on ordinary people to “protect the nation” and its Buddhist nature. MaBaTha and associated individuals have, in the process, succeeded in stigmatising the entire Muslim population as such, the Rohingya in particular.

²⁹¹⁸ See chapter VIII, section B: Crimes against humanity.

²⁹¹⁹ See chapter V, section B.5: Restrictions affecting private life.

²⁹²⁰ A copy of the video is on file with the Mission.

²⁹²¹ First opened in Myanmar in 2013, Dhamma schools are Sunday schools where children learn about Buddhism.

²⁹²² For example, lessons taught in the Dhamma school textbook include: “The lion that (wrongly) associated with the fox” (Grade 1), “Propitious conducts of association” (Grade 2), “Propitious way to live” (Grade 2), “What kind of race do you want to be” (Grade 3), “Propitious social conduct” (Grade 4), “Buddhist Countries” (Grade 5 and 6). Copies on file with the Mission.

²⁹²³ See e.g. Matthew Schissler, Matthew Walton, Phyu Phyu Thi, “Threat and virtuous defence: Listening to narratives of religious conflict in six Myanmar cities”, M.MAS Working Paper 1.1, University of Oxford, 2015.

The exact reach of MaBaTha across all these domains, and the role of specific individuals serving it to spread hate speech, merit further careful examination.

1324. Several of the hate speech messages and disinformation from the 2012-2013 period were distributed with the involvement or tacit approval of government or security officials. The MaBaTha campaign around the protection of race and religion has led directly to the adoption of specific legislation affecting the Rohingya (for example, denial of voting rights and the Race and Religion Laws).²⁹²⁴ From public statements and appearances at public events, rallies and demonstrations, it is clear that a range of politicians (in particular in Rakhine State) and officials within the military and security forces are supportive of MaBaTha's messages and proposed policies. There are also indications of closer links, including of financial donations, private and public sermons in support of the military's operations, and the organization of public rallies and talks in support of the military. There are allegations of personal links between MaBaTha monks and high-level politicians and security forces commanders that warrant further examination.

1325. Whether the hate campaigns against Muslims and Rohingya have led or contributed to actual outbreaks of violence is difficult to establish. Several reports have suggested that outbreaks of violence have been preceded by visits or sermons of monks associated with the MaBaTha, the distribution of anti-Muslim pamphlets and/or increased hate speech on social media.²⁹²⁵ One example is the violence that broke out in Mandalay at the beginning of July 2014. It resulted in two deaths, many persons injured and significant property damage. It is believed that the violence was triggered by an online news report from 30 June 2014 in which it was alleged that two Muslim teashop owners had raped a Buddhist woman, identifying the teashop by name and including its location and the full names of the alleged perpetrators and the alleged victim. Wirathu reposted the article on his Facebook page with a caption stating that the "Mafia flame (of the Muslims) is spreading" and that "all Burmans must be ready". Violence erupted the following day. The rape story turned out to be false, with the "victim" reportedly admitting that she had fabricated the rape allegations.²⁹²⁶ In an effort to contain the violence in Mandalay, the government reportedly blocked access to Facebook in the city, acknowledging the role that the platform plays in this regard.²⁹²⁷ The Chief of the Myanmar Police Force reportedly confirmed that the government blocked Facebook to stop the incitement.²⁹²⁸

1326. The Mission received information suggesting that the linkage between offline and online hate speech and real world acts of discrimination and violence is more than circumstantial. Patterns are emerging of hate speech sermons and rhetoric in specific locations that have subsequently experienced violence, and so are indications of peaks of online hate speech around outbreaks of violence. Such patterns and indications need to be comprehensively examined.²⁹²⁹

(c) Government and military mirroring and feeding the narrative

1327. The responsibility to address the proliferation of hate speech in the country and the coordinated campaigns of hatred directed at Muslims and Rohingya in particular lies with the government. The response in this regard has been wholly inadequate. In fact, the Myanmar authorities have not only condoned such practices, they have actively participated in and

²⁹²⁴ See chapter V, section B.5: Restrictions affecting private life.

²⁹²⁵ E.g. Justice Trust Policy Report, *Hidden Hands Behind Communal Violence in Myanmar: Case Study of the Mandalay Riots* (March 2015); B-001.

²⁹²⁶ Z. Mann, "5 Accused of Sparking Mandalay Riots Sentenced to 21 Years Jail" (The Irrawaddy, 19 March 2015).

²⁹²⁷ T. McLaughlin, "How Facebook's Rise Fueled Chaos and Confusion in Myanmar" (Wired, 6 July 2018).

²⁹²⁸ <https://burma.irrawaddy.com/opinion/2014/07/04/61420.html>; See also Thant Sin, "Who's to blame for Myanmar's spate of sectarian riots?" (Global Voices Online, 12 July 2014).

²⁹²⁹ With Facebook in the early stages of improving its transparency about country-specific data, the Mission has been unable to obtain comprehensive data from Facebook about the use of Facebook to spread hate speech and incite violence in Myanmar. See further below.

fostered them. This has contributed to and exacerbated a climate in which hate speech thrives and in which individuals and groups may be more receptive to calls of incitement to violence.

1328. The Mission found many deeply problematic public statements from a wide variety of government officials or representatives, including its military and security forces and politicians, and equally problematic statements made in official governmental or military settings. These are indicative of their own deep-rooted discriminatory sentiments towards Muslims, and Rohingya in particular. Below are a few of these statements:

- *Bengali do not have any characteristics or culture in common with the ethnicities of Myanmar. The tensions (in Rakhine State) were fuelled because the Bengali demanded citizenship.* [Senior-General Min Aung Hlaing, Commander-in-Chief of the Tatmadaw, on 19 March 2018]²⁹³⁰
- *We received news that the Rohingya terrorists, under the name “Rohingya Solidarity Organization” (RSO), are crossing the border with weapons. This is Rohingya infiltration from abroad. Because our troops have received the news in advance, we are going to eradicate²⁹³¹ them [the Rohingya], until the job is done. I assume that the troops are already eradicating [the Rohingya]. Regarding this issue, we don't want to hear any humanitarian or human rights excuses. We don't want to hear your moral superiority, or so-called peace and loving kindness. (Go and look at Buthidaung, Maungdaw areas in Rakhine State. Our ethnic people are in constant fear in their own land. I feel very bitter about this. This is our country. This is our land.) (I'm talking to you, national parties, MPs, Civil Societies, who are always opposing the president and the government.)* [Zaw Htay, then attached to President Thein Sein's Office, currently Director General in the Office of the State Counsellor and Spokesperson of the Office of the President, on 1 June 2012]²⁹³²
- *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 worth to be humans. Therefore it is a small sin and does not deserve your worry.* [Sitagu Sayadaw, one of Myanmar's most revered monks, on 30 October 2017, at the Bayintnaung military garrison and military training school in Thandaung, Karen State]²⁹³³
- *I won't say much, I will make it short and direct. Number one, shoot and kill them! (the Rohingya). Number two, kill and shoot them! (the Rohingya). Number three, shoot and bury them! (the Rohingya). Number four, bury and shoot them! (the Rohingya). If we do not kill, shoot, and bury them, they will keep sneaking into our*

²⁹³⁰ The statement in English posted on Senior-General Min Aung Hlaing's website and Facebook has since been deleted, following the United Nations Secretary-General Antonio Guterres' public condemnation of the remark on 26 March 2018 (see <https://www.un.org/press/en/2018/sgsm18957.doc.htm>). The article in Myanmar language remained available on this personal website (<https://www.seniorgeneralminhlaing.com.mm>), last accessed by the Mission in July 2018.

²⁹³¹ The Myanmar word “Chay Mhone” meaning “completely destroy” is usually used in the context of fighting an enemy. To replicate the strong tone used in the passage, the word is translated here as “eradicate”.

²⁹³² Online on Facebook, under the account Hmuu Zaw; V-045.

²⁹³³ He recounted a passage from the 5th century Buddhist chronicle Mahavamsa, in which eight monks visited King Dutthagamani, who was suffering from deep remorse after having led a war in which many people were killed. The sermon was given to a military audience and live-streamed on Facebook on 30 October 2017, soon after the “clearance operations” began: <https://www.facebook.com/sitagulivedhamma/videos/705111109681007/>.

country! [Nay Myo Wai, Chairman of the Peace and Diversity Party, on 27 May 2015 in Bo Sein Menn football ground in Bahan township, Yangon]²⁹³⁴

- *They 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.* [Aung Win, Arakan National Party's MP and Chairman of Rakhine Investigation Committee, on 7 November 2016 in interview with BBC (responding to allegations of large-scale rape and sexual violence against Rohingya women)]²⁹³⁵
- *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.)* [Ye Myint Aung, Myanmar Consul-General for Hong Kong and Macau (subsequently promoted to become Myanmar's Ambassador to the United Nations in Geneva), 9 February 2009 in a letter to all heads of Mission, Consular Corps, Hong Kong and Macau SAR]²⁹³⁶
- *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.* [Op-Ed column published in the Global New Light of Myanmar, a government newspaper, 26 November 2016]²⁹³⁷
- *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 Myanmar cannot be labelled as inhumane.* [Editorial in the Rakhine Nationalities Development Party (RNDP) magazine "Toe Thet Yay" (Towards Development), November 2012]²⁹³⁸
- *As a matter of fact, affairs in northern Rakhine are not concerned with racial and religious conflicts. It is the sole affair which offends the sovereignty of Myanmar and trespasses Myanmar territory. Simultaneously, Rakhine nationals are not the aggressive ones towards foreigners who profess other religions. They have been living*

²⁹³⁴ Special Rapporteur on the situation of human rights in Myanmar, Special Rapporteur on minority issues, and Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Urgent Appeal UA MMR 7/2015, 7 July 2015 (<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=20947>).

²⁹³⁵ J. Fisher, "Muslim civilians 'killed by Burmese army'" (BBC News, 7 November 2016).

²⁹³⁶ A copy of the letter is on file with the Mission; V-046.

²⁹³⁷ Khin Maung Oo, "A Flea Cannot Make a Whirl of Dust, But" (The Global New Light of Myanmar, 26 November 2016).

²⁹³⁸ A copy of the magazine is on file with the Mission.

together with Islamists Kamans for years. The government is responsible for solving any problems of offending the country's sovereignty, threatening its populace's lives and property, violating rule of law and causing instability. In other words, the thorn has to be removed as it pierces. [Op-Ed column published in the Global New Light of Myanmar, a government newspaper, on 31 October 2016]²⁹³⁹

- *Wirathu's sermons are about promoting love and understanding between religions. It is impossible he is inciting religious violence.* [Sann Sint, USDP Religious Affairs Minister, in an interview with Reuters in June 2013]²⁹⁴⁰
- *How can it be ethnic cleansing? They are not an ethnic group.* [Win Myaing, Rakhine State Government Spokesman, in his interview with Reuters in May 2013]²⁹⁴¹

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. The Mission has undertaken an in-depth examination of the communications issued by key government institutions in the months following the August 2017 events in Rakhine State. These include the official Facebook page of the Office of the Commander-in-Chief, Senior-General Min Aung Hlaing (2.9 million followers); the official State Counsellor's Information Committee Facebook page (almost 400,000 followers); the Senior-General Min Aung Hlaing's official Facebook page (1.4 million followers); and the official Ministry of Information Facebook page (1.3 million followers).²⁹⁴²

1330. The Mission's first finding is that the Government goes to great lengths to avoid using the term "Rohingya". The narrative that there are no Rohingya in Myanmar is actively fed and repeated continuously. For example, on 1 September 2017, the Commander-in-Chief Senior-General Min Aung Hlaing stated: "so we openly declare that 'absolutely, our country has no Rohingya race'".²⁹⁴³ While the Mission is aware that the history of the Rohingya in Rakhine State is contested, simplistic statements such as these, without providing a nuanced historical perspective, feeds the narrative that the Rohingya do not belong in Myanmar. It denies their right to self-identification and contributes to their stigmatisation and marginalisation. Moreover, Senior-General Min Aung Hlaing draws a direct, and deeply erroneous, consequence from his own statement: that the Tatmadaw does not need to protect the Rohingya, as it would other communities in the country. The related consequence is that the Tatmadaw must protect other parts of the Myanmar population, including from the Rohingya. For example, this is demonstrated in a post from 16 October 2017: "The Senior General said he would like to note at first that those Bengali are not Myanmar ethnics. [...] Therefore, the Tatmadaw needs to take security measures for local people" and "Bengali are not ethnic of Myanmar. Rohingya is not included on the list of Myanmar's ethnics. [...] The Tatmadaw on its part will give priority to safeguarding the security and interest of the ethnics while protecting the citizens residing in Myanmar".²⁹⁴⁴ Such statements reveal a disturbingly discriminatory understanding of the role of the Myanmar security forces and a flagrant disregard for one of the core principles of international human rights law, non-discrimination and equal protection.

²⁹³⁹ Khin Maung Oo, "The Thorn Needs Removing If It Pierces!" (The Global New Light of Myanmar, 31 October 2016).

²⁹⁴⁰ A. Marshall, "Special Report: Myanmar gives official blessing to anti-Muslim monks" (Reuters, 27 June 2013).

²⁹⁴¹ J. Szep, "Special Report: In Myanmar, apartheid tactics against minority Muslims" (Reuters, 15 May 2013).

²⁹⁴² The pages of the Office of the Commander-in-Chief, Senior-General Min Aung Hlaing and of Senior-General Min Aung Hlaing himself were deactivated by Facebook on 27 August 2018 (see Facebook Newsroom, "Removing Myanmar Military Officials From Facebook", <https://newsroom.fb.com/news/2018/08/removing-myanmar-officials/>). All posts relied on in this report are on file with the Mission.

²⁹⁴³ Post on file with the Mission.

²⁹⁴⁴ Note that Rohingya are not "citizens of Myanmar". Post on file with the Mission.

1331. The distinction between groups who belong in Myanmar (“ethnics”) and others also arises in the way the Myanmar authorities refer to victims and civilians who are affected by the violence. First, the Mission found almost no references to Rohingya (or “Bengali”) as potential victims. Even when the Tatmadaw confirmed the extrajudicial killing of 10 men found in a mass grave in Inn Din, they referred to the victims as “Bengali terrorists”.²⁹⁴⁵ The over 700,000 Rohingya who fled the violence to Bangladesh, and their suffering, were also rarely mentioned or acknowledged. They were referred to in convoluted phrases like “those who fled to the other country”.²⁹⁴⁶ In fact, Rohingya victims were often portrayed collectively as perpetrators and “terrorists” (see below). In contrast, victims from other ethnic groups and religions (including Rakhine, Hindus and Mro,) were frequently mentioned and humanized through interviews, photos and videos, which has led to widespread expression of sympathy on social media for these victims.²⁹⁴⁷

1332. The way in which the Myanmar authorities presented the return of eight Hindu women from Bangladesh to Myanmar, for instance, showed significant bias against the Rohingya. Photos, videos, interviews with, and stories about these women were promoted and shared by all official accounts. The women alleged that their husbands were killed by ARSA, that they were kidnapped and told to convert to Islam, or be killed. Accepting these claims at face value²⁹⁴⁸, the extreme focus on this one incident in a context where other allegations and severe incidents received no coverage or acknowledgement served the purpose of painting Islam as a violent religion and Rohingya as trying to islamise Myanmar. A video showing interviews with the Hindu women was posted on the official Facebook page of the Office of the Commander-in-Chief with the caption: “Voices of the survivors about the mass murder of Hindus [...] by Bengali terrorists”.²⁹⁴⁹ Comments under the video included: “Stay strong, my sister. These inhuman followers of the evil-religion will disappear from our land one day”; “Kill all these Kway Kalar. Motherfucking shit-Ro animals”.²⁹⁵⁰

1333. Myanmar authorities actively associated Rohingya identity with terrorism. Rohingya are typically only referred to as terrorists or suspected terrorists, often in sweeping phrases implying that the entire group is terrorist or violent in nature. This narrative preceded the emergence of ARSA. For example, in the 23 May 2016 issue of Myawady Daily, a newspaper run by the Tatmadaw, an article stated, “Throughout successive eras, several racial and religious conflicts have broken out in Rakhine State, due to the ‘Khoe Win Bengali’ [Bengali who entered the country by stealth]. The attack on the race happened again in 2012 in Rakhine State, between the ‘Khoe Win Bengali’, who are not citizens, and the ethnic people. This attack was disguised as a religious conflict.”²⁹⁵¹ In the concluding paragraph of the same article, the author claimed that “the issue of ‘Anout Ta Kha’ [West Gate]... is the concern of every Myanmar citizen”.

1334. This narrative of the whole Rohingya population being “terrorists” and inherently violent was reinforced in the aftermath of the ARSA attacks. When discussing the crisis in Rakhine State, the Tatmadaw generally referred to “extremist Bengali terrorists” and on occasion to “ARSA extremist Bengali terrorists” (sometimes even just to “Bengali”). It is

²⁹⁴⁵ Post on file with the Mission.

²⁹⁴⁶ Post on file with the Mission.

²⁹⁴⁷ For coverage on Hindu victims, see e.g. Information Committee posts “Interview with Hindus who fled from their villages” on 1 September 2017 (<https://www.facebook.com/InfomationCommittee/posts/788602791312829>) and “The words of bereaved families of Hindus killed by ARSA terrorists” on 27 September 2017 (<https://www.facebook.com/InfomationCommittee/posts/807089859464122>), as well as posts of the Office of the Commander-in-Chief no longer available on Facebook but on file with the Mission. Coverage on Mro victims, e.g. Information Committee post “ARSA extremist terrorists continue setting houses on fire” of 30 August 2017 (<https://www.facebook.com/InfomationCommittee/posts/788328661340242>).

²⁹⁴⁸ See chapter V, section D.1.c: The Arakan Rohingya Salvation Army.

²⁹⁴⁹ Post on file with the Mission.

²⁹⁵⁰ Post on file with the Mission.

²⁹⁵¹ See No. 35, Vol. 6 of Myawady Daily: <http://www.myawady.net.mm/index.php/download/category/35-%E1%81%85-%E1%81%82%E1%81%80%E1%81%81%E1%81%86?download=702:2352016&start=20>, p. 13.

important to note the systematic inclusion of the word “Bengali”. In relation to other insurgencies or armed conflicts in the country, the military never adds an ethnic affiliation when referring to its opponent or an alleged perpetrator. For example, in relation to the Kachin Independence Army, it refers to “KIA insurgents” or “KIA terrorists” but not to “Kachin insurgents” or “extremist Kachin terrorists”. Similarly, for the Arakan Army, it does not refer to “extremist Rakhine terrorists” but to “AA insurgents” or “AA terrorists”. Also notable is that, in the first few days following 25 August 2017, the official Facebook pages of the State Counsellor’s Office (Information Committee) and the Office of the Commander-in-Chief used “extremist Bengali terrorists”, but in the later days added the prefix ARSA, “ARSA extremist Bengali terrorists”.²⁹⁵² This narrative is further fuelled by the authorities’ use of emotive and divisive language, such as “blood-thirsty Bengali terrorists”²⁹⁵³, and posting the pictures of arrested “terrorists”.²⁹⁵⁴

1335. This tendency towards generalising statements in referring to the Rohingya and a manifest lack of interest in making appropriate distinctions between ARSA elements and civilians is also illustrated by the publication in the *Global New Light of Myanmar*, a government newspaper, of the names and photographs of approximately 1,300 so-called “ARSA terrorists”, including children.²⁹⁵⁵ This list was published without any form of due process and without offering any supporting evidence or information about any verification measures taken, putting the lives of both the individuals listed and their families at risk. The list was also posted by the Office of then President Htin Kyaw.²⁹⁵⁶

1336. The Commander-in-Chief Senior-General Min Aung Hlaing has made repeated references to the so-called “Alelthanyaw crisis” of 1942 in discussing what he calls “the Bengali problem”. On 1 September 2017, at the height of the “clearance operations” in Rakhine State, in a post entitled “Entire government institutions and people must defend the country with strong patriotism”²⁹⁵⁷, he started his statement as follows: “Rakhine ethnics lost their land in the Alelthanyaw crisis that broke out in Rakhine State in 1942 in which Bengali attacked, murdered and coerced them into leaving their homes. We will never let such terrible occurrence happen again. The Tatmadaw will fully safeguard the sovereignty of Myanmar, without allowing any damage to it.” The post continues by detailing the alleged atrocities from 1942, before stating: “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.” Reference to the same events was regularly included in later posts as well, including on 10 and 20 September 2017.²⁹⁵⁸ Regardless of the one-sided representation of the 1942 events²⁹⁵⁹, the 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

²⁹⁵² Posts on file with the Mission.

²⁹⁵³ https://scontent-mxp1-1.xx.fbcdn.net/v/t1.0-9/33333112_1702663973187794_20652123_38264342528_n.jpg?nc_cat=0&oh=442ac7b0455213ea2ded951fd9d35d8&oe=5B9F1BA8, photo accompanying a post by the Office of Commander-in-Chief Facebook page (on file with the Mission).

²⁹⁵⁴ Photo accompanying a post by the Information Committee Facebook page: <https://www.facebook.com/InformationCommittee/posts/855052794667828> (accessed July 2018).

²⁹⁵⁵ The *Global New Light of Myanmar*, issues of 18, 19, and 20 January 2018.

²⁹⁵⁶ <http://www.president-office.gov.mm/en/?q=issues/rakhine-state-affairs/id-8356> (accessed July 2018).

²⁹⁵⁷ Post on file with the Mission.

²⁹⁵⁸ Posts on file with the Mission.

²⁹⁵⁹ See for a study on the 1942 events: J. Leider, “Conflict and Mass violence in Arakan (Rakhine State) – The 1942 Events and Political Identity Formation”, in *Citizenship in Myanmar*, A. South, M. Lall (eds.), (Chiang Mai University Press, 2018), pp. 193-221, noting that “the waves of communal clashes of 1942 have been poorly documented, sparsely investigated and rarely studied” (p. 194) and that “the absence of a factual master narrative, which both Buddhists and Muslims could have agreed upon, barred the emergence of consensual interpretations of the events” (p. 211). The events occurred during World War II when the Rohingya supported the British and the Rakhine supported the Japanese. The Tatmadaw was founded during this period with the support of the Japanese Army.

roots and reinforces the narrative that *all* “Bengali” are a problem and that a distinction between “terrorists” and civilians/victims is not relevant.

1337. Most of the Myanmar authorities’ posts and communications also directly feed the narratives of illegal immigration and Islamic threat, as espoused by MaBaTha affiliated groups and individuals, and as widely promoted in Myanmar, both online and through other sources. The narrative representing the Rohingya as illegal immigrants from Bangladesh is promoted not only by the persistent use of the word “Bengali”, but also through the focus on citizenship and residence verification in the context of resettlement discussions and speculation that the actual numbers of refugees must be far lower. These messages are reinforced by government accounts that highlight the damage to Buddhist monasteries, and efforts of the military to cooperate with local monks to rebuild damaged monasteries.²⁹⁶⁰ For example:

**Extremists Bengali terrorists destroyed Buddha images
at NantTharTaung monastery
in Maung Taw Region, Rakhine state**



1338. The motto of the Ministry of Labour, Immigration and Population is: “The earth will not swallow a race to extinction but another race will”.²⁹⁶¹ The same theme appears throughout official communications from the Myanmar authorities. For example, in a 21 September 2017 post on Facebook (entitled “Gallant efforts to defend the HQ against terrorist attacks and brilliant efforts to restore regional peace, security are honoured”)²⁹⁶², Commander-in-Chief Senior-General Min Aung Hlaing states that, “the Bengali population exploded and the aliens tried to seize the land of local ethnics” and “in checking the cases in which Bengali trying to sneak into the country through various means were seized involvement of some officials were found. 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.” On 11 October 2017, he stated, “...not accepting the process means that there are lots of those born to illegal migrants and entry of illegal migrants. There are many Bengali families each of which has about 40 members”.²⁹⁶³ The same post also argues that “the native place of Bengali is really Bengal. Therefore, 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.” The theme of Rohingya not belonging in Myanmar was made explicit in a March

²⁹⁶⁰ See, for example, the following posts from Information Committee:
<https://www.facebook.com/InfomationCommittee/posts/786691611503947>;
<https://www.facebook.com/InfomationCommittee/posts/790059134500528>;
<https://www.facebook.com/InfomationCommittee/photos/a.639477959558647.1073741828.639456206227489/787636464742795/?type=3&theater> (accessed July 2018).

²⁹⁶¹ This motto, in Myanmar language, can be seen on the front page of the Ministry’s website:
<http://www.mip.gov.mm/> (accessed August 2018).

²⁹⁶² Post on file with the Mission.

²⁹⁶³ Post on file with the Mission.

2018 statement, in which Min Aung Hlaing said that the “Bengali do not have any characteristics or culture in common with the ethnicities of Myanmar. The tensions (in Rakhine State) were fuelled because the ‘Bengali’ demanded citizenship.”²⁹⁶⁴

1339. The impact of such public statements, closely mirroring and fuelling prevalent discriminatory narratives and sentiments, is compounded by two additional factors. First, a constant stream of misinformation about events in Rakhine State downplays the seriousness of the situation and misleads domestic audiences. Allegations of serious human rights violations by the Myanmar security forces are systematically denied²⁹⁶⁵, while the Government spreads demonstrably false information about the situation in Rakhine State. For example, it has regularly been suggested that the numbers of Rohingya who fled from Myanmar were not high, or that the Rohingya left Myanmar in an orderly fashion out of their own will. For example, on 11 October 2017 the Commander-in-Chief, Senior-General Min Aung Hlaing, posted: “there is exaggeration to say that the number of Bengali fleeing to Bangladesh is very large”. At the time more than 600,000 Rohingya had fled to Myanmar in a period of six weeks. On 12 October 2017, he posted “documentary photos show that those Bengali conveniently left for Bangladesh but they did not flee from Myanmar in panic” and that “they had fled to Bangladesh with the same language, race and culture as theirs. There are also some Bengali villages whose people did not flee as they did not get involved in the attacks.” On 15 November 2017, he informed his followers that the number of “Bengali” leaving Myanmar between 25 August and 5 September 2017 (the official end date of the “clearance operation”) was “very small” and that “more” left thereafter. He explained that the main reason for the exodus was that “ARSA extremist Bengali terrorists” fled out of fear of a counterattack and took their families with them. He added, “other Bengali were also threateningly forced to flee to Bangladesh, while some were persuaded to live in a third country”.

1340. The State Counsellor’s Information Committee similarly dismissed allegations of sexual violence as “rumours” under a banner stating “fake rape”.²⁹⁶⁶ The Information Committee has repeatedly dismissed reports of serious human rights violations as “fake news”.²⁹⁶⁷ The State Counsellor, Daw Aung San Suu Kyi, referred to an “iceberg of misinformation” about the situation in Rakhine State.²⁹⁶⁸ Some of the photographs shared by her Information Committee to advance the narrative that Rohingya were burning their own villages were demonstrated to have been staged.²⁹⁶⁹ Similarly, the Tatmadaw’s Directorate of the Public Relations and Psychological Warfare, in a 2018 publication “Myanmar Politics and the Tatmadaw”, used photographs from Tanzania and Bangladesh, which it claimed showed large numbers of “Bengalis” entering Rakhine State from Bangladesh, to illustrate its allegations against the “Bengalis”.²⁹⁷⁰

1341. A second aggravating factor is the explicit call for nationalist and patriotic action that accompanies such narratives and misinformation. The call suggests that the country is under siege, and at least implicitly encourages citizens to take action in their own hands. During his meeting with the ethnic people in Rakhine State on 22 September 2017, Senior-General Min Aung Hlaing expressed his regrets for “the shortage of the security forces in giving sufficient protection”. He added that “public cooperation and participation is important in taking security measures. Local ethnics can strengthen the defence prowess by living in unity and by joining hands with the administrative bodies and security forces in oneness.”²⁹⁷¹ On 27 October 2017, in another Facebook post entitled “every citizen has the duty to safeguard race,

²⁹⁶⁴ See also above.

²⁹⁶⁵ Several posts on file with the Mission.

²⁹⁶⁶ See detailed discussion in chapter X, section B: History and climate of impunity in Myanmar.

²⁹⁶⁷ E.g. this post about alleged mass graves:

<https://www.facebook.com/InfomationCommittee/posts/869272283245879> (accessed August 2018).

<https://www.facebook.com/InfomationCommittee/posts/790712274435214> (accessed August 2018).

²⁹⁶⁹ J. Head, “Rohingya crisis: Seeing through the official story in Myanmar” (BBC News, 11 September 2017).

²⁹⁷⁰ P. McPherson, “Exclusive: Fake photos in Myanmar army’s ‘True News’ book on the Rohingya crisis” (Reuters, 30 August 2018). The publication is on file with the Mission.

²⁹⁷¹ Post on file with the Mission.

religion, cultural identities and national interest”, Commander-in-Chief Min Aung Hlaing stated that “all must strive for the positive progress for the flourishing of good characteristics and deeds and preserve the excellent characteristics of the country. All the people living in the country must strive for the good of the country with patriotism. Additionally, the national defence duty falls on every citizen.” On 21 May 2018, Min Aung Hlaing reiterated this point, stating that “nationalistic spirit is the safeguarding of the own country and citizens forever... Only when youths with a wider knowledge prevent all the acts which undermine the patriotic spirit and nationalistic spirit, will the nationalistic defence capability of the nation rise and will Myanmar be existence as long as the world [exists]”.²⁹⁷²

(d) The role of Facebook and other social media platforms

1342. As elsewhere in the world, the Internet and social media platforms have enabled the spread of this kind of hateful and divisive rhetoric. The Myanmar context is distinctive, however, because of the relatively new exposure of the Myanmar population to the Internet and social media. Messages portraying Rohingya as violent, dishonest, anti-Bamar, anti-Buddhist, illegal immigrants and/or terrorists of the kind set out above are particularly widespread on social media. Death threats, incitement to violence and discrimination, and online harassment are common features as well, not only against the Rohingya themselves but also against moderate commentators, human rights defenders and ordinary people who have views that differ from the official line.

1343. Prior to 2011, the military regime heavily censored the media and the Internet was only available to a select few, as it was prohibitively expensive. This changed with the democratic reform process and the liberalisation of the telecommunications industry, which led to a rapid increase in the Myanmar population’s access to mobile telephony and the Internet.²⁹⁷³ While mobile cellular subscriptions per 100 inhabitants stood at 1.18 in 2010, it had reached 55.91 by 2014 and 95.65 by 2016. Similarly, mobile broadband subscriptions per 100 inhabitants rose from 0.02 in 2011 to 56.30 in 2016.²⁹⁷⁴ Such increased access to information and means of communication is one of the most tangible benefits of the democratisation process. It has undoubtedly contributed to greater enjoyment of the rights to freedom of expression, association and peaceful assembly, while also enabling far wider and faster dissemination of hate speech.

1344. With access to the Internet came access to social media platforms. While statistics on social media use in Myanmar are not readily available, Facebook is clearly by far the most common social media platform in use in Myanmar.²⁹⁷⁵ Although Facebook was available and used before, a specific Myanmar version was launched in 2015.²⁹⁷⁶ Experts have estimated the number of active Facebook users in Myanmar at approximately 20 million.²⁹⁷⁷ Mobile

²⁹⁷² Post on file with the Mission.

²⁹⁷³ In 2014, Telenor Myanmar Limited (TML) from Norway and Ooredoo Myanmar Limited (OML) from Qatar received licenses to compete with the government-owned Myanmar Posts and Telecommunications (MPT), which had been the sole operator. In 2017, a fourth license was issued to Telecom International Myanmar Company Limited (MyTel), a consortium of Myanmar companies and Viettel from Vietnam. It has been reported that Vietnam’s Viettel – wholly owned by the country’s Ministry of Defence – owns 49 per cent of MNTC, and that Star High Public Company, which has another 28 per cent, is owned by the Myanmar army through a holding company, Myanmar Economic Corporation. This makes MyTel essentially a joint venture between the militaries of Myanmar and Vietnam. See e.g. A. Burkitt-Gray, “Military dominates Myanmar’s fourth telecom licence” (Capacity Media, 13 January 2017). MyTel phone numbers start with 0-969.

²⁹⁷⁴ K-074.

²⁹⁷⁵ It is suggested that Facebook enjoys a more than 90 per cent share among social media platforms in Myanmar, and that this has been so since 2012. E.g. <http://gs.statcounter.com/social-media-stats/all/myanmar>.

²⁹⁷⁶ Submission from Facebook. Another popular platform for social messaging in Myanmar is Viber, with an estimated 18 million users in 2017. See Digital in Asia, “Myanmar 33 million mobile users, smartphone usage 80%” (9 January 2017).

²⁹⁷⁷ B-005; see also J. Russell, “Myanmar group blasts Zuckerberg’s claim on Facebook hate speech prevention” (Tech Crunch, 6 April 2018). In June 2016, the number of users was believed to have

networks offer specific deals privileging access to Facebook.²⁹⁷⁸ In July 2016, Facebook and Myanmar Post and Telecommunications jointly launched “Free Basics” and “Facebook Flex” in Myanmar.²⁹⁷⁹ Facebook Flex is a product that enables subscribers to have a text-only version of Facebook without incurring data charges. Free Basics provided access to basic services without data charges on their mobile phones, with the stated intention of providing people with an opportunity to “experience” the value and relevance of connectivity to the Internet for free but with access only to a limited number of sites. Free Basics was discontinued in Myanmar in September 2017. Between July 2016 and September 2017, people in Myanmar could use it to access a basic version of Facebook and a number of utilitarian applications and content sources.²⁹⁸⁰ It has been reported that, when people buy a smartphone, especially when they are unfamiliar with the Internet, shopkeepers offer to create and install a Facebook account for the customer.²⁹⁸¹

1345. The relative unfamiliarity of the population with the Internet and with digital platforms and the easier and cheaper access to Facebook have led to a situation in Myanmar where Facebook is the Internet. It has become the main mode of communication among the public and a regularly used tool for the Myanmar authorities to reach the public. The President, the State Counsellor, the Commander-in-Chief, the Ministry of Information, the Tatmadaw and other key governmental institutions rely on Facebook to release news and information. Media outlets like Eleven Media (17 million followers), 7 Days News (20.8 million followers), The Irrawaddy (12 million followers), Mizzima (12 million followers) and BBC Burmese (13.9 million followers) use Facebook as a main way of disseminating articles. For many people, Facebook is the main, if not only, platform for online news and for using the Internet more broadly. In a context of low digital and social media literacy, the Government’s use of Facebook for official announcements and sharing of information further contributes to users’ perception of Facebook as a reliable source of information.

1346. Facebook serves to connect people, often cited by the company as its main aim, and it facilitates communication and access to information. It can and has been used in many ways to enhance democracy and the enjoyment of human rights. However, the wide reach, relative user anonymity, and difficulty of monitoring or removing posts also make it a suitable instrument to spread messages that may constitute hate speech, including advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. It is unsurprising that propagators of hate speech resort to Facebook to wage hate campaigns, amplify their message, and reach new audiences. In addition to hate speech, Facebook has also been widely used to spread misinformation, including by government officials and the Tatmadaw, as illustrated above.

1347. Allegations that posts and messages on Facebook have increased discrimination and violence in Myanmar are rife, in particular where the posts and messages are framed in terms of an alleged Islamic “takeover” or Muslims harming Buddhists (especially women). For example, posts early in 2012 about the alleged rape and murder by Rohingya men of a Buddhist woman were reportedly shared widely and are considered to have contributed to the tension and violence in Rakhine State in that year.²⁹⁸² Similarly, posts about an alleged

reached 10 million; see C. Trautwein, “Facebook racks up 10m Myanmar users” (Myanmar Times, 13 June 2016).

²⁹⁷⁸ For example, MyTel offers to use Facebook to register users’ SIM cards and in exchange users receive six months of free data for exclusive use on Facebook (<https://www.facebook.com/mytelmyanmar/posts/394974640914463>). TML has packages that offer 1GB free for exclusive use on Facebook when users recharge a certain amount (<https://www.telenor.com.mm/en/offer/facebook-free>; <https://www.telenor.com.mm/en/offer/everyday-fb-bonus>) and Facebook-exclusive data rates that are cheaper than ordinary data plans (<https://www.telenor.com.mm/en/offer/myanmar%E2%80%99s-cheapest-facebook-pack>). Also Oreedoo and MPT have cheaper data plans for social media, including Facebook (<http://mpt.com.mm/en/home/mobile-services/data/>; <http://www.ooredoo.com.mm/en/Personal/Promotions/2017/08/01/Facebook-Plus-Pack.aspx>).

²⁹⁷⁹ Submission from Facebook.

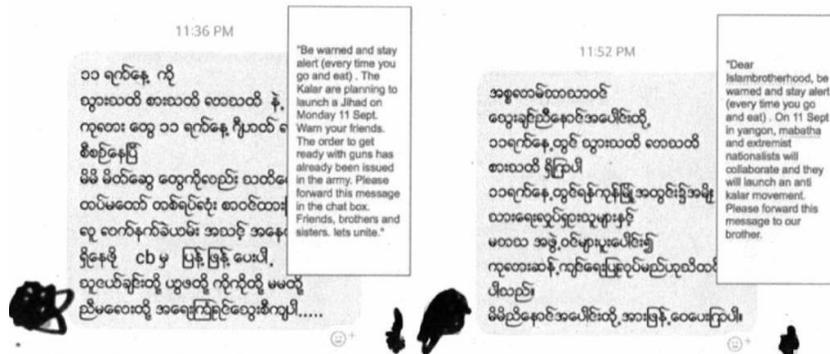
²⁹⁸⁰ Submission from Facebook.

²⁹⁸¹ B-004, B-005.

²⁹⁸² K-101; see also chapter V, section C.1: Violence in 2012 – Emblematic incidents.

rape of a Buddhist woman by Muslims in Mandalay are considered to have led to the riots there in 2014.²⁹⁸³

1348. Another example is the instigation of communal unrest in early September 2017, in the midst of the crisis in Rakhine State, through the parallel distribution of similar but conflicting chain messages on Facebook Messenger to Muslim and Buddhist communities. Each chain message stated that the other group was preparing for major violence on 11 September and encouraged the recipient to get ready to resist. Local civil society groups reported that the messages had a countrywide reach, caused widespread fear and at least three violent incidents.²⁹⁸⁴ Below is a screenshot of the messages, taken from the open letter sent by Myanmar civil society organizations to the CEO of Facebook.²⁹⁸⁵ The first was sent to Buddhists and the second to Muslims.



1349. Facebook’s Community Standards, to which each user must agree, include sections on hate speech and violence, and set out the company’s approach to fake accounts and false news. According to these standards, Facebook will remove content that violates its policies. Users can report such content to Facebook for review by its moderators. The company also uses technology to identify certain types of content that violate its standards. In November 2015, Facebook launched an illustrated Myanmar-language version of its Community Standards. Facebook also undertook a number of other initiatives to educate people in Myanmar about these standards.²⁹⁸⁶

1350. However, in an open letter to Facebook, six local civil society organizations working on the issue of hate speech highlighted the company’s ineffective content moderation. The organizations argued that Facebook moderation revealed “an over-reliance on third parties, a lack of a proper mechanism for emergency escalation, a reticence to engage local stakeholders around systemic solutions and a lack of transparency”.²⁹⁸⁷ Concerns were also raised that Facebook does not have enough content moderators who understand Myanmar language and its nuances, as well as the context within which comments are made; that Facebook’s technology is not compatible with the different Myanmar language fonts; and that Facebook has a strong, if not unique, focus on Myanmar language and Burman culture.²⁹⁸⁸

1351. The Mission itself experienced a slow and ineffective response from Facebook when it used the standard reporting mechanism to alert the company to a post targeting a human

²⁹⁸³ See above.

²⁹⁸⁴ Open letter from Myanmar civil society organizations to Mark Zuckerberg, CEO of Facebook (5 April 2018), available here: <https://www.documentcloud.org/documents/4432469-Myanmar-Open-Letter-to-Mark-Zuckerberg.html>.

²⁹⁸⁵ Ibid. Facebook confirmed having removed these messages after they became aware of them.

²⁹⁸⁶ Submission from Facebook.

²⁹⁸⁷ Open letter from Myanmar civil society organizations to Mark Zuckerberg, CEO of Facebook (5 April 2018), available here: <https://www.documentcloud.org/documents/4432469-Myanmar-Open-Letter-to-Mark-Zuckerberg.html>.

²⁹⁸⁸ B-005, K-101.

rights defender for his alleged cooperation with the Mission. The post described the individual as a “national traitor”, consistently adding the adjective “Muslim”. It was shared and re-posted over 1,000 times. Numerous comments to the post explicitly called for the person to be killed, in unequivocal terms: “Beggar-dog species. As long as we are feeling sorry for them, our country is not at peace. These dogs need to be completely removed.” “If this animal is still around, find him and kill him. There needs to be government officials in NGOs.” “Wherever they are, Muslim animals don’t know to be faithful to the country.” “He is a Muslim. Muslims are dogs and need to be shot.” “Don’t leave him alive. Remove his whole race. Time is ticking.” The Mission reported this post to Facebook on four occasions; in each instance the response received was that the post was examined but “doesn’t go against one of [Facebook’s] specific Community Standards”. The Mission subsequently sent a message to an official Facebook email account about the matter but did not receive a response. The post was finally removed several weeks later but only through the support of a contact at Facebook, not through the official channel.²⁹⁸⁹ Several months later, however, the Mission found at least 16 re-posts of the original post still circulating on Facebook.²⁹⁹⁰ In the weeks and months after the post went online, the human rights defender received multiple death threats from Facebook users, warnings from neighbours, friends, taxi drivers and other contacts that they had seen his photo and the posts on Facebook, and strong suggestions that the post was an early warning. His family members were also threatened. The Mission has seen many similar cases where individuals, usually human rights defenders or journalists, become the target of an online hate campaign that incites or threatens violence.

1352. Facebook has publicly acknowledged that the company had been “too slow” in reacting to the concerns raised by civil society organizations.²⁹⁹¹ In June 2018, Facebook informed the Mission that it was trying to solve two specific problems in Myanmar: hate speech and misinformation as a tool for hate speech.²⁹⁹² It stated that it was focusing on overcoming technical challenges (such as the different fonts used in Myanmar language), improving reporting flows (for example, the recent rollout of the ability to report content shared on Facebook Messenger), automation (including exploring the use of artificial intelligence to proactively identify content for review), and misinformation (acting on fake accounts). Facebook also stated it had added more Myanmar language reviewers to handle reports from users across all its services, increased the number of people across the company on Myanmar-related issues, and put in place a special team working to better understand the specific local challenges and build the right tools.²⁹⁹³ Facebook further announced that it will undertake a comprehensive human rights impact assessment in Myanmar, the findings of which will be made public.²⁹⁹⁴

1353. In 2018, Facebook designated MaBaTha and the monks Wirathu, Thuseitta and Parmakkha as hate figures and organizations.²⁹⁹⁵ They were no longer allowed a presence on Facebook, and any other profile, page, group or piece of content that praises or supports them would be removed. Since April 2018, the Mission noted increased efforts by Facebook to remove hate speech from its platform faster, including following alerts by the Mission. On 27 August 2018, Facebook further announced that it had removed a total of 18 Facebook accounts, one Instagram account and 52 Facebook pages, followed by almost 12 million

²⁹⁸⁹ K-104.

²⁹⁹⁰ After these were brought to Facebook’s attention, they were subsequently also removed.

²⁹⁹¹ See e.g. Facebook Newsroom, “Removing Myanmar Military Officials From Facebook”, <https://newsroom.fb.com/news/2018/08/removing-myanmar-officials/>. See also statements by Mark Zuckerberg, before the United States Congress: “We’ve been too slow to deal with the hate and violence in places like Myanmar [...]. The challenges we face in a country that has fast come online are very different than those in other parts of the world, and we are investing in people, technology, and programs to help address them as effectively as possible.” (<https://docs.house.gov/meetings/IF/IF00/20180411/108090/HHRG-115-IF00-Wstate-ZuckerbergM-20180411.pdf>)

²⁹⁹² Submission from Facebook.

²⁹⁹³ K. Roose, P. Mozur, “Zuckerberg Was Called Out Over Myanmar Violence. Here’s His Apology” (The New York Times, 9 April 2018).

²⁹⁹⁴ Submission from Facebook.

²⁹⁹⁵ Submission from Facebook.

people. It banned 20 individuals and organizations from Facebook in Myanmar, including Senior-General Min Aung Hlaing. It further stated that it had removed “46 Pages and 12 accounts for engaging in coordinated inauthentic behaviour on Facebook”, after discovering that “they used seemingly independent news and opinion Pages to covertly push the messages of the Myanmar military”.²⁹⁹⁶ Importantly, Facebook stated that it had preserved all data and content from these pages.²⁹⁹⁷ The removed data and content should be available to properly constituted international and national judicial authorities for accountability purposes, including criminal prosecution of perpetrators of serious human rights violations in Myanmar.

1354. The Mission has no doubt that the prevalence of hate speech in Myanmar significantly contributed to increased tension and a climate in which individuals and groups may become more receptive to incitement and calls for violence. This also applies to hate speech on Facebook. The extent to which the spread of messages and rumours on Facebook has increased discrimination and violence in Myanmar must be independently and thoroughly researched, so that appropriate lessons can be drawn and similar scenarios prevented. Similarly, the impact of the recent measures taken by Facebook to prevent and remedy the abuse of its platform needs to be assessed. The Mission regrets that Facebook has been unable to provide country-specific data about the spread of hate speech on its platform, which is imperative to assess the problem and the adequacy of its response.²⁹⁹⁸ It considers it essential that Facebook develop and implement systems to enable this country-specific data to be collected and made available publicly.

(e) Government response

1355. In a context where government officials and Buddhist leaders fail to denounce and address pervasive discrimination and human rights violations that are often State-supported and rooted in law, the haphazard efforts of some authorities to address the most extreme and radical instances of hate speech propagated by MaBaTha and some of its affiliate monks are grossly inadequate.²⁹⁹⁹ What is required is a clear, decisive and official reaction. A credible government response should begin with its own officials refraining from using hateful and divisive rhetoric³⁰⁰⁰, systematically condemning instances of hate speech, countering the prevailing discriminatory narratives about Muslims and Rohingya in particular, and actively promoting messages of tolerance and respect for the human rights of all. The Mission has

²⁹⁹⁶ Facebook Newsroom, “Removing Myanmar Military Officials From Facebook”, <https://newsroom.fb.com/news/2018/08/removing-myanmar-officials/>.

²⁹⁹⁷ Earlier, in June 2018, Facebook had informed the Mission that its policies did not allow to do so.

²⁹⁹⁸ Submission from Facebook; BM-050.

²⁹⁹⁹ The Mission took note of some high-level officials occasionally speaking out about specific statements, e.g. on 29 October 2014, when the Ministry of Information released a statement that an article in the MaBaTha journal *Aung Zeyathu* (no. 44) had been reported by the Myanmar Islamic Religious Organization for falsely portraying Islam, and had been found to be breaching sections 354(d), 362-364 of the Constitution as well as the News Media Act and the Print and Publication Act [Notice No.1-6 (8)/ 2014 (7182)]. On 10 March 2017, Sangha Maha Nayaka Committee (MaHaNa), the Government-appointed body that regulates the Myanmar Buddhist clergy, issued a statement banning Wirathu from preaching countrywide for one year until March 2018, citing the latter’s spread of religious hate-speech (see <http://www.mahana.org.mm/?p=1351> for the statement.) On 23 May 2017, MaHaNa issued a statement declaring that MaBaTha was not formed in accordance with the Sangha Organization Law and the Sangha Organizational Procedures, and that neither the group nor individuals associated with it can use the full Burmese name it was using and that all of the organization’s signboards across the country had to be taken down (see M. Walton, “Misunderstanding Myanmar’s Ma Ba Tha” (Asia Times, 9 June 2017)). On 20 July 2018, MaHaNa appears to have banned the Dhamma Wunthanu Rakkhita Association, the successor of MaBaTha (see *The Irrawaddy*, “Nationalists Rally in Yangon to Denounce New Ban on Ma Ba Tha”, 13 August 2018).

³⁰⁰⁰ On 13 August 2018, the International Organizations Department of the Ministry of Foreign Affairs sent an email to various United Nations agencies in Myanmar sharing the links to four videos about Rakhine State and the August 2017 events. The videos contain anti-Muslim/anti-Rohingya messages. It is highly significant that the Ministry headed by Daw Aung San Suu Kyi took the initiative of sharing such videos with the United Nations (K-069-16).

found no examples of such messages in its analysis of online government posts in the context of the “clearance operations” in Rakhine State. Similarly, while successive Myanmar governments have supported various interfaith gatherings aimed at diffusing tensions between religious groups in Myanmar³⁰⁰¹, they have generally not included dialogue with the Rohingya. To the contrary, some recent events appear to be organized to show support for the current Government, including the Tatmadaw, in the face of international condemnation of its handling of the crisis in Rakhine State.³⁰⁰² Such events, while nominally promoting interfaith relations and tolerance, risk hardening negative opinions of intolerance towards the Rohingya.

1356. There have been reports that the Government of Myanmar is preparing a Bill for Protection against Hate Speech, which had earlier been called the Interfaith Harmonious Coexistence Bill.³⁰⁰³ Although no official communications have been made with regard to this proposed law, and its exact status is unknown to the Mission, a draft text is circulating online. This draft focuses on the criminalisation of hate speech beyond what is required and permissible under international law. In May 2018, the Government of Myanmar also approved a budget of over 6.4 billion Kyat for the creation of a Social Media Monitoring Team.³⁰⁰⁴ Details of the terms of reference of this team are unknown, but civil society organizations are concerned that it may result in new forms of surveillance and censorship of freedom of speech generally, not hate speech, further curtailing the enjoyment of human rights.³⁰⁰⁵ The Mission encourages the Government of Myanmar to be transparent about these initiatives and to involve all relevant stakeholders, in particular civil society and media organizations, in the articulation of appropriate responses to the issue of hate speech. Rather than narrowly focusing on the (overly) broad criminalisation of hate speech and other measures that may result in censorship, the Mission urges the Government of Myanmar to adopt an approach that combines positive policy measures centred around the promotion and protection of the right to freedom of expression and the rights to equality and non-discrimination of all.

C. Conclusion

1357. The Mission has reasonable grounds to conclude that the Government of Myanmar has routinely violated the fundamental freedoms of its people, including the interrelated rights to freedom of expression, association and peaceful assembly, particularly of those who dissent, challenge the role of the military, and demand accountability. While these violations particularly affect individuals belonging to ethnic and religious minorities, or those defending their cause, they should be of concern to the entire country. These violations have a profoundly negative impact on the democratic space in the country as a whole and seriously risk bringing Myanmar’s slow democratic reform to a halt.

1358. The Myanmar authorities demonstrate a profound discomfort with scrutiny and criticism, taking active measures to restrict independent media commentary, stifle legitimate dissent and crack down on human rights defenders. At the same time, they have created an enabling environment for radical individuals and associated organizations, including 969 and MaBaTha, to openly disseminate hate speech and incite violence, hostility and discrimination

³⁰⁰¹ E.g. Myanmar News Agency, “Interfaith Dialogue for Peace, Harmony and Security held” (The Global New Light of Myanmar, 6 August 2017).

³⁰⁰² E.g. Su Myat Mon, “Thousands rally behind NLD at interfaith prayer for peace” (Frontier Myanmar, 11 October 2017).

³⁰⁰³ The Bill appears to have been initiated at the Ministry of Religious Affairs and Culture, but has reportedly been transferred to the Ministry of Home Affairs. This is unconfirmed.

³⁰⁰⁴ At the 19 March 2018 session of the Pyidaungsu Hluttaw, Union Minister U Thant Sin Maung stated, “according to the 2017 Union Budget Allocation Law, with the permission of the Union Government organization no. (5/2018), the President Office spent the emergency funds for the work of the Social Media Monitoring Team - SMMT, for the purchase of ‘Hardware and Devices, Software’ the total budget of 6,426,000,000 Kyats.” (<https://pyidaungsu.hluttaw.mm/second-meeting-records/record19032018>)

³⁰⁰⁵ E.g. Zaw Zaw Htwe, Aung Kyaw Nyunt, “Critics rail against govt budget for monitoring of Facebook” (Myanmar Times, 22 March 2018).

against certain groups. The authorities have condoned these developments and, although generally using less inflammatory language, their rhetoric has mirrored and promoted the radical narratives. The Myanmar authorities, including both the Government and the Tatmadaw, have fostered a climate in which hate speech thrives, human rights violations are legitimised, and incitement to discrimination and violence facilitated. They have emboldened those who preach hatred and intolerance, and silenced those who stand for tolerance and human rights.

1359. The combined effect of these two trends is that Myanmar is neither ensuring freedom of speech for participation in proper political debate nor preventing speech that incites hostility, violence and discrimination, and has been linked to the commission of grave crimes. In both respects it is failing to comply with its obligations under international law. It needs both to widen the scope for speech that promotes scrutiny and criticism of government and military actions and to restrict the scope for hate speech.

1360. What is needed to address the situation are not initiatives that criminalise, censor or silence legitimate speech. Instead, the Government of Myanmar should prioritise fostering a legal and enabling environment for the full enjoyment of the rights to freedom of expression, association and peaceful assembly in line with international human rights norms and standards. This starts with repealing laws that criminalise the legitimate exercise of fundamental freedoms, dismantling discriminatory laws and policies, putting in place a robust anti-discrimination and equality law and acting to prevent speech that incites hostility, violence or discrimination. Human Rights Council resolution 16/18 and the Rabat Plan of Action provide a detailed framework for such policies.

VII. Hallmarks of Tatmadaw operations

1361. In the course of its in-depth fact-finding on the human rights situation in northern Myanmar and in Rakhine State, and its assessment of the respect for fundamental freedoms across Myanmar, the Mission was struck by how military operations and conduct – despite the specific contexts and the differences of scale – are essentially similar. The Mission identified at least four common characteristics of Tatmadaw operations, including operations conducted jointly with other Myanmar security forces. These can be considered as “hallmarks”. These common characteristics establish the Tatmadaw’s basic methodology – its strategies and tactics – and enable conclusions to be made about its performance, or rather its lack of performance, of its obligations under international law.

A. Targeting civilians

1362. As shown in the preceding chapters, Tatmadaw-led operations consistently fail to respect international human rights law and the international humanitarian law principles of distinction, proportionality and precaution. They not only primarily affect civilians; often civilians are simply targeted.

1363. In Kachin and Shan States, the Mission established that the Tatmadaw intentionally, frequently and systematically directed attacks against the civilian population or individual civilians. It has also systematically engaged in attacks that were indiscriminate, either because they were not directed against a specific military objective, or because they employed a method or means of combat that cannot be directed at a specific military objective. Underlying these tactics is the assumption that everyone belonging to a specific ethnic group necessarily supports or sympathises with the insurgent EAO from that ethnic group, and therefore a deliberate assimilation between the civilian population and the EAO. Attacks frequently occur in civilian-populated residential areas and in flagrant disregard of life, property and the well-being of civilians. This modus operandi has been a catalyst for the range of serious human rights violations outlined in this report, including extrajudicial killings, torture and ill-treatment, rape and other forms of sexual violence, arbitrary arrest and detention, and the large-scale destruction of villages and civilian property. Witnesses gave consistent accounts of the Tatmadaw randomly shelling villages, dropping bombs into

civilian-populated areas, shooting at fleeing civilians, executing civilians in their custody and burning villages.

1364. While at a different level of intensity, the Tatmadaw's operations against the Rohingya in Rakhine State have followed similar patterns. They have been 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. Everyone and everything was a target. Large-scale massacres were carried out. Men, women and children were killed and subjected to unimaginable abuse. Entire villages were wiped off the map. The operations and use of force were 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.

1365. The Tatmadaw's disregard for civilians is further demonstrated by its treatment of the ethnic Rakhine population. Just as other groups in Myanmar, they have been subjected to forced labour, arbitrary confiscation of their possessions and other violations of their rights. The level of arbitrariness and abuse of power on the part of the Tatmadaw is astounding.

1366. The targeting of civilians is perhaps most noticeable in how children are not spared by Tatmadaw operations; on the contrary, children are often specifically targeted. The Mission has found all six grave violations affecting children in Myanmar, as set out by the United Nations Special Representative of the Secretary-General for Children and Armed Conflict.³⁰⁰⁶ These are the recruitment and use of children; killing and maiming of children; sexual violence against children; attacks on schools; abduction of children; and denial of humanitarian access. The Mission is particularly concerned about what appears to be the deliberate targeting of children for killing during the 2016 and 2017 "clearance operations" in Rakhine State. Accounts of children and infants being shot, stabbed and deliberately thrown into or trapped in burning houses are distressing in the extreme. Nearly 60 per cent of the refugee population in southern Bangladesh are children, with approximately 500,000 children arriving in the camps following the 2016 and 2017 operations. The majority of children, parents and relatives interviewed by the Mission gave consistent accounts of children and infants being subject to or witnessing serious violations. The damage to this generation of children cannot be understated. The consequences will be felt for generations to come.

1367. This deliberate targeting of civilians has been part of Tatmadaw policies, tactics and conduct for decades. The emergence and implementation of a "Four Cuts" counterinsurgency policy since the 1960s has long been reported. The policy is aimed at cutting off non-State armed groups from access to food, finances, intelligence and recruits from the local civilian population.³⁰⁰⁷ The policy has been implemented through "clearance operations", essentially scorched earth campaigns in which large numbers of civilians are killed and entire villages destroyed, leading to mass displacement.³⁰⁰⁸ The Tatmadaw has also been reported to categorise certain geographical areas based on the level of government control, resulting in tiered rules of engagement, some of which condone or even authorise targeting civilians including women and children.³⁰⁰⁹ Reports indicate that areas with the most Government control were considered "white", disputed areas "brown" and areas with little or no control "black". "Black" areas have been described as "free fire" zones in which civilians are legitimate targets. In addition to the loss of civilian life, "clearance operations" have

³⁰⁰⁶ A/RES/51/77.

³⁰⁰⁷ XM-009, XM-010; Maung Aung Myoe, *Building the Tatmadaw: Myanmar Armed Forces since 1948* (Institute of Southeast Asian Studies, Singapore, 2009); A. Selth, *Burma's Armed Forces: Power Without Glory* (EastBridge, 2002).

³⁰⁰⁸ XM-010, XM-009, XM-012; Also, International Human Rights Clinic at Harvard Law School, *Legal Memorandum: War Crimes and Crimes Against Humanity in Eastern Myanmar* (2014). International Human Rights Clinic at Harvard Law School, "Preventing Indiscriminate Attacks and Wilful Killings of Civilians by the Myanmar Military" (2014).

³⁰⁰⁹ *Ibid.*

consistently resulted in the displacement of large segments of the affected population.³⁰¹⁰ For example, in 2010, the then Special Rapporteur on the human rights situation in Myanmar reported that humanitarian and human rights groups had documented the destruction of over 3,500 villages and hiding sites and the forced relocation of their populations in eastern Myanmar since 1996.³⁰¹¹

1368. The Mission is not in a position to confirm whether the “Four Cuts” policy was formally in place in the period under review and whether any of the military campaigns reviewed emanated from it. However, while there are indications that the Tatmadaw has moved away from use of the term “Four Cuts”, the patterns of military operations clearly suggest that the policy – or a variant thereof – remains in place.³⁰¹² In a number of Facebook posts seen by the Mission, soldiers refer to its implementation in relation to recent operations. For example, in a 6 June 2017 post, one soldier posted in relation to an operation in Kachin State: “We are about to do area clearance operations. 15 June is the deadline to leave the area. Anyone remaining after the deadline will be considered an accomplice of the KIA. If we apply “Four Cuts” to the KIA, they don’t stand a chance. Now, those daring KIA members mingling with the civilians will face a good game!”³⁰¹³

1369. The Mission concludes, on reasonable grounds, that the widespread and systematic practice of targeting of civilians, including children, and the complete disregard for civilian life and objects can only be a consequence of the implementation of policies and rules of engagement that articulate such tactics. These policies and practices violate Myanmar’s obligations under international law and amount to criminal conduct. They are also unwarranted; military necessity can never justify killing indiscriminately, gang-raping women, killing and assaulting children, and burning entire villages. The tactics used by the Tatmadaw are consistently and grossly disproportionate to actual security threats, especially in Rakhine State, but also in northern Myanmar.

1370. While the present report outlines violations against civilians from many ethnic groups in Kachin, Rakhine and Shan States, the contempt shown by the Tatmadaw for human life, integrity and freedom and for international law generally should be of concern to the entire population of Myanmar. The number of refugees from areas outside these three States attests to the existence of similar concerns elsewhere in the country.

B. Sexual violence

1371. In 2011, in a video statement on sexual violence in conflict, Daw Aung San Suu Kyi, since 2016 State Counsellor, said, “Rape is used in my country as a weapon against those who only want to live in peace, who only want to assert their basic human rights. It is used as a weapon by armed forces to intimidate the ethnic nationalities and to divide our country.”³⁰¹⁴ The Mission, based on all information gathered, has concluded that Daw Aung San Suu Kyi’s views are correct. The use of rape and other sexual violence has continued unabated in the years since her statement.

1372. As is apparent from this report, rape and other sexual violence have been a particularly egregious and recurrent feature of the targeting of the civilian population in Rakhine, Kachin and Shan States since 2011. In Kachin and Shan States, women and girls have been subjected to abduction, rape, including gang rape, and other sexual violence. Individual soldiers or groups of them have raped, gang raped or attempted to rape women and girls in fields and forests, in military compounds and in their homes. In Rakhine State, similar instances of rape and sexual violence have occurred throughout the reporting period. However, during the “clearance operations” of 2016 and 2017, rape and other forms of sexual violence were

³⁰¹⁰ Ibid.

³⁰¹¹ A/HRC/65/368, para. 49; for similar figures, see A/61/369, para. 44; A/HRC/4/14, para. 54.

³⁰¹² XM-009, XM-010, XM-011, XM-013.

³⁰¹³ V-052, post on file with the Mission.

³⁰¹⁴ Daw Aung San Suu Kyi, video statement delivered at the Nobel Women’s Initiative “Women Forging a New Security: Ending Sexual Violence in Conflict conference” (2011). Video can be found here: <https://www.opendemocracy.net/5050/opendemocracy/aung-san-suu-kyi-on-sexual-violence-in-conflict>

perpetrated on a massive scale. Hundreds of women and girls were raped, frequently gang raped. Mass gang rape, involving multiple perpetrators and multiple victims in the same incident, was a notable pattern. Eighty per cent of incidents of rape corroborated by the Mission were of gang rape, and 82 per cent of these gang rapes were perpetrated by the Tatmadaw. It occurred in at least 10 village tracts between 25 August and mid-September 2017. In some incidents, up to 40 women and girls were raped or gang raped together. Women and girls were more commonly gang raped than raped, sometimes by as many as 10 perpetrators. The rapes of Rohingya women and girls were particularly brutal, often accompanied by acts of sexual humiliation and physical and mental torture. They were also often accompanied by the killing of their children. The operations involved the systematic abduction of women and girls and in many cases their detention in military and police compounds, where they were raped or gang raped. Rape, gang rape, sexual slavery, forced nudity, sexual humiliation, mutilation and sexual assault have frequently been followed by the killing of victims. The Tatmadaw was overwhelmingly the main perpetrator.

1373. Similar patterns of rape and sexual violence in the context of military operations in Myanmar have been reported for at least three decades, by the United Nations and by local and international civil society organizations. In 1995, the Special Rapporteur on the human rights situation in Myanmar, Yozo Yokota, reported indications that “soldiers view rape as a right, and that sometimes it is encouraged by officers”.³⁰¹⁵ Both the United Nations General Assembly and its Commission on Human Rights, in 2002 and 2005, expressed grave concern at systematic human rights violations in Myanmar, including rape, and called for them to be ended.³⁰¹⁶ In the following years, rape and sexual violence were reported as being widespread and systematic,³⁰¹⁷ especially in areas of conflict and increased militarisation.³⁰¹⁸ In 2008, the United Nations Committee on the Elimination of Discrimination against Women expressed concern about the high prevalence of sexual violence perpetrated by members of the armed forces and urged Myanmar to take immediate steps to end those violations and prosecute and punish perpetrators.³⁰¹⁹ More recently, in 2015, the United Nations Secretary-General found that sexual violence remained widespread in Kachin, northern Shan and Rakhine States and in areas subject to ceasefire agreements in Chin State and the southeast of the country.³⁰²⁰

1374. The scale, brutality and systematic nature of these violations, over this period of time, indicate that rape and sexual violence are part of a deliberate strategy to intimidate, terrorise or punish a civilian population, and are used as a tactic of war. This level of normalisation is only possible in a climate of long-standing impunity. When rapes and sexual violence are committed by, or in the presence of, senior military officers, with no sanction or consequence, it is easy to see how all Tatmadaw soldiers may consider themselves similarly authorised. The Myanmar authorities’ failure to address the widespread perpetration of sexual and gender-based violence by its security forces has certainly contributed to women and girls, rather than being relegated to the side-lines of conflict and protected from its effects, becoming its frontline victims.³⁰²¹

C. Exclusionary and discriminatory rhetoric

1375. The Tatmadaw has historically cast itself as the protector of the nation, preserving “national unity in the face of ethnic diversity”, while prioritising Bamar-Buddhist identity

³⁰¹⁵ A/50/568, para. 37.

³⁰¹⁶ E/CN.4/RES2002/67; A/RES/59/263.

³⁰¹⁷ E.g. A/49/594, para. 14; A/61/369, para. 27; A/HRC/10/19, para. 56.

³⁰¹⁸ E.g. A/HRC/22/58, para. 37; A/HRC/28/72, para. 35; A/HRC/31/71, para. 52; A/HRC/34/67, paras. 54-56.

³⁰¹⁹ CEDAW/C/MMR/CO/3, paras. 24 and 25.

³⁰²⁰ E.g. S/2015/203, para. 41; S/2018/250, paras. 55-60.

³⁰²¹ The Government’s failure to undertake any meaningful, independent or impartial investigations into allegations of widespread sexual violence also put it in breach of its obligations under arts. 2 and 15 of the Convention on the Elimination of All forms of Discrimination against Women, which it ratified in 1997.

and interests. Discrimination against ethnic and religious minority groups has been well documented for decades.

1376. Military operations on the ground are often accompanied by deeply insulting slurs and outright threats linked to ethnicity and religion. In Kachin and Shan States, the Mission received many accounts from victims and witnesses that the Tatmadaw used such derogatory language when committing human rights violations. For example, the manner in which torture and ill-treatment, including sexual violence, occurred often indicated the dehumanisation of ethnic minorities in Kachin and Shan States, with Tatmadaw soldiers verbally denigrating their religions and ethnicities. One Christian victim was made to imitate Jesus on a cross like the crucifixion.³⁰²² Rape victims reported that the perpetrators called them “Kachin bitch” or compared them to dogs.³⁰²³ One witness of a gang rape of two girls heard the perpetrators say, “We will torture you Kachin bitches until you are extinct”.³⁰²⁴

1377. The situation of the Rohingya in Rakhine State has been aggravated by their gradually increasing exclusion from the Myanmar nation since the 1960s, amid decades of State-sponsored stigmatization, leading to their being de facto stateless and reviled by much of the population. The members of the Mission were struck by the normality of deeply exclusionary and dehumanizing rhetoric in Myanmar society, actively nurtured by the Tatmadaw. While other ethnic and religious minorities are accepted, at least in theory, as belonging to the nation under their “national race” status, the Rohingya’s lack of status has dramatically increased their vulnerability and contributed to the extreme scale and intensity of the violence against them.

1378. 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*).³⁰²⁵ 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.³⁰²⁶ Several victims stated that they were told by the perpetrators to “leave the country and never come back, or be killed”.³⁰²⁷ Similarly, rape survivors stated that perpetrators used insults like “Kalar” and told them, “We will rape and kill you” and “We are going to kill you this way, by raping. We are going to kill Rohingya. This is not your country”.³⁰²⁸ In Facebook posts seen by the Mission, Tatmadaw soldiers have used such language. In a post of 26 August 2017, a soldier of the 99th LID said that he could not wait to be deployed to Rakhine State because, each passing second, the “Muslim dogs” are posing a threat to the citizens.³⁰²⁹ The following day he said, “on the battlefield, whoever is quick will get to eat you, Muslim dogs”.³⁰³⁰ On 27 August 2017, a police officer involved in the Tatmadaw operations in Rakhine State posted, “Have been wanting to kill these ‘Kalar’ for so long. Only got to kill them just now.”³⁰³¹

1379. 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 Buddhist groups.³⁰³² He has denied that a group called “Rohingya” exists, consistently called this group “Bengali”,

³⁰²² PI-056.

³⁰²³ PI-004, PI-023.

³⁰²⁴ PI-069.

³⁰²⁵ See chapter VI, section B: The issue of “hate speech”.

³⁰²⁶ BI-001, BI-006, EI-017, LI-006; LI-041, QI-041, QI-059, QI-064, YI-030, WI-010.

³⁰²⁷ BI-001, CI-147, LI-048, LI-059, LI-099, QI-038, QI-041, QI-111, YI-030.

³⁰²⁸ EI-084, EI-090.

³⁰²⁹ V-10.

³⁰³⁰ V-11.

³⁰³¹ V-01.

³⁰³² See chapter VI, section B: The issue of “hate speech”.

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. One recent example is the publication by the Tatmadaw Directorate of the Public Relations and Psychological Warfare of a document detailing the history of Rakhine State and the actions of the Tatmadaw. To demonstrate the alleged influx of “Bengali” into Rakhine State, it used photographs taken in Tanzania and Bangladesh.³⁰³³ The same booklet points out, “Despite living among peacocks, crows cannot become peacocks”.³⁰³⁴

D. Command climate and impunity

1380. The Tatmadaw acts with complete impunity and has never been held accountable for the violations of international law it is consistently involved in. Although occasionally a very small number of individual soldiers may be prosecuted for their actions, the Tatmadaw leadership and the Tatmadaw as an institution enjoy complete impunity.³⁰³⁵ The widespread and systemic nature of the violations committed by the Tatmadaw, across the country, is linked to the command climate within the Tatmadaw which, explicitly or implicitly, authorises these violations. Impunity for offences is one element that contributes to such command climate.

1381. The Mission considers that several factors have contributed to a particularly toxic command climate in the Tatmadaw, in which the widespread and systematic commission of abuses has become the norm: policies that explicitly or implicitly require the targeting of civilians; the institutionalised use of derogatory, dehumanising and exclusionary language; and the praising of Tatmadaw performance, even where deeply marred by violations. The Tatmadaw has a well-documented and long history of carrying out military operations consistently resulting in allegations of serious human rights violations and violations of international humanitarian law. When incoming commanders accept well-known and documented past behaviour, without recommending or implementing legal, doctrinal or operational changes, they accept past methodologies as the established norm and continue them.

1382. Senior-General Min Aung Hlaing, appointed Commander-in-Chief in 2011, has consistently denied any Tatmadaw wrongdoing, both in the context of specific operations, such as in Rakhine State in 2016 and 2017, and more generally. For example, he has stated that, “no sexual violence happened in the history of Myanmar Tatmadaw”.³⁰³⁶ He regularly publishes posts praising the behaviour and discipline of Tatmadaw troops. For example, an official statement of 13 November 2017 noted, “Security forces took actions in accordance with the law, and did not overstep the law” and that his men “strictly followed orders and acted in accordance with the rules of engagement during the recent Rakhine crisis”.³⁰³⁷ These kinds of statements not only indicate that the Tatmadaw’s most senior authority supports the actions taken but that the troops acted “strictly” as expected by his orders. There are no indications that any of the commanders responsible for the “clearance operations” in Rakhine

³⁰³³ P. McPherson, “Exclusive: Fake photos in Myanmar army’s ‘True News’ book on the Rohingya crisis” (Reuters, 30 August 2018); A. Slodkowski, S. Naing, “Myanmar army apologizes for mistaken photos in book on Rohingya crisis” (Reuters, 3 September 2018).

³⁰³⁴ Tatmadaw, Directorate of the Public Relations and Psychological Warfare, “Myanmar Politics and the Tatmadaw”, 2018, p. 115.

³⁰³⁵ See chapter X, section B: History and climate of impunity in Myanmar.

³⁰³⁶ Senior-General Min Aung Hlaing, Facebook post of 30 April 2018 (on file with the Mission).

³⁰³⁷ Office of the Senior-General Min Aung Hlaing, Facebook post with the “findings of the Investigation Team in connection with the performances of the security troops during the terrorist attacks in Maungdaw region, Rakhine State” (Tatmadaw True News Information Team, 13 November 2017). Post on file with the Mission.

State or in northern Myanmar have been held accountable for any wrongdoing on the part of their troops.

1383. A final factor contributing to this command climate is the role of the military justice system. The official investigation into the August 2017 “clearance operations”, led by the Tatmadaw Inspector-General Lieutenant-General Aye Win, concluded that, “all security members abided by the orders and directions of superior bodies”. The security forces were found to have “abided by the laws related to wars in conducting area clearance operations. So it is found that those security forces did not perform the use of excessive force.”³⁰³⁸ 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.

1384. The Tatmadaw leadership has consistently failed to attribute responsibility for serious human rights violations. It 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.

VIII. Crimes under international law

1385. The Mission was mandated to establish the facts and circumstances of alleged human rights violations by military and security forces, and abuses, “with a view to ensuring full accountability for perpetrators and justice for victims”. The Mission understood this to mean that it should consider the extent to which the violations and abuses may amount to crimes under international law entailing individual criminal responsibility. It has principally examined whether war crimes, crimes against humanity and/or genocide may have been committed.

1386. In doing so, the Mission was cognisant of the fact that it is neither a court of law nor a prosecutorial body, and cannot make final determinations on individual criminal responsibility. As such, where the Mission finds that there are reasonable grounds to conclude that a crime under international law has been committed, this should be understood as meaning that the Mission considers that a competent prosecutorial body would have sufficient elements to proceed with a criminal investigation and prepare a case for adjudication on such charges.

1387. The conduct referred to in this section appears in summarised form and draws on the facts as described in detail in the preceding chapters.

A. Genocide

1388. The prohibition of genocide is a peremptory norm of international law (*jus cogens*) from which no derogation is permitted. Genocide was first codified as a crime in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which almost 150 States, including Myanmar in 1956, have now ratified.

1389. Article II of the Genocide Convention defines genocide as any of the following acts committed with the 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; (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. The definition requires consideration of whether there is a protected

³⁰³⁸ Ibid.

group, whether acts in one or more of the specified categories have been committed, and whether the acts were committed with genocidal intent.

1. Protected group

1390. Genocide can be committed against national, “ethnic”, racial or religious groups. This list is exhaustive. Legal doctrine and jurisprudence is not consistent, but a practice has emerged of making a case-by-case assessment that combines the objective particulars of a given social or historical context, and the subjective perceptions of the perpetrator.³⁰³⁹

1391. The Mission is satisfied that the Rohingya, who predominantly live in Myanmar’s Rakhine State, constitute a protected group. The Rohingya can be seen as an ethnic (“members share a common language or culture”), racial (“based on hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors”) or religious (“members share the same religion, denomination or mode of worship”) group,³⁰⁴⁰ or a combination thereof. The Rohingya also consider themselves as a distinct group, as do the Myanmar authorities and security forces. The historic origins of the Rohingya in Myanmar, as well as their claim to “national race” status under Myanmar law, are disputed in Myanmar. However, this does not call into question that the Rohingya are a distinct group, nor does the fact that the Myanmar authorities do not officially recognize them as a “national race” or refer to them as “Bengali”. 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.

2. Physical acts

1392. Genocide requires the commission of physical acts within any of the five prohibited categories listed in its definition. The gross human rights violations detailed in this report, suffered by Rohingya at the hands of the Tatmadaw and other security forces (often in concert with civilians), include conduct that falls within four of these five categories of prohibited acts. Perpetrators have killed Rohingya, caused serious bodily and mental harm to Rohingya, deliberately inflicted conditions of life calculated to bring about the physical destruction of Rohingya, and imposed measures intended to prevent births of Rohingya.

1393. For prohibited physical acts, the ICC Elements of Crimes requires that the conduct took place “in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect [the] destruction”.³⁰⁴¹ This precludes isolated crimes from falling within the crime of genocide.³⁰⁴² As is evident from the preceding chapters and the discussion below, the physical acts in Myanmar were committed in the context of a manifest pattern of similar conduct.

(a) Killing members of the group

1394. 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

³⁰³⁹ ICTR, *Prosecutor v Bagilishema*, ICTR-95-1A-T, Judgment, 7 June 2001, para. 65; ICTY, *Prosecutor v Brdjanin*, IT-99-36-T, Judgment, 1 December 2004, para. 684.

³⁰⁴⁰ ICTR, *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, paras. 512-515.

³⁰⁴¹ International Criminal Court, *Elements of Crimes* (The Hague, 2011), hereafter “ICC Elements of Crimes”, art. 6(a), para. 4.

³⁰⁴² The ICTY rejected this requirement, considering that it does not form part of customary international law: ICTY, *Prosecutor v Krstic*, IT-98-33-A, Judgment, 19 April 2004, para. 224; ICTY, *Prosecutor v Jeliscic*, IT-95-10-T, Judgment, 14 December 1999, para. 100.

houses, and lined up and executed. Accompanying ethnic Rakhine slit the throats of those too injured, young or old to escape.

1395. The exact number of casualties may never be known, either for those who perished from years of oppression or those who died in the “clearance operations”. As outlined above, the Mission has concluded on reasonable grounds that the “clearance operations” that started on 25 August 2017 alone have directly resulted in more than 10,000 deaths. This report details large-scale massacres in five locations, sometimes with hundreds of villagers killed, with details of other incidents where dozens were killed. In Min Gyi and Maung Nu, villagers were gathered together, before men and boys were separated and killed. In Min Gyi, women and girls were taken to nearby houses, gang raped, then killed or severely injured. Houses were locked and set on fire. Few survived. 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. The killing was widespread, systematic and brutal.

(b) Causing serious bodily or mental harm to members of the group

1396. Serious *bodily* harm refers to harm that involves serious injury to health, disfigurement, or serious injury to the external or internal organs, or senses.³⁰⁴³ It can be caused by, but is not restricted to, conduct such as torture, rape, sexual violence or inhuman or degrading treatment.³⁰⁴⁴ Serious *mental* harm must amount to more than a temporary impairment of mental faculties³⁰⁴⁵ and is assessed on a case-by-case basis, with reference to the immediate circumstances surrounding the incident.³⁰⁴⁶ The harm, either bodily or mental, does not have to be permanent or irremediable, but must go beyond temporary unhappiness, embarrassment or humiliation, and inflict “grave and long-term disadvantage to a person’s ability to lead a normal and constructive life”.³⁰⁴⁷ The term “serious” means that the bodily or mental harm should be such that it threatens the destruction of the group, in whole or in part.³⁰⁴⁸

1397. The physical injuries of large numbers who survived the October 2016 and August 2017 “clearance operations” rise to the level of serious bodily harm. 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. Women and girls who had their breasts cut off and those who lost limbs or parts of limbs suffered “serious injury to external organs” rising to the level of serious bodily harm. 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”.³⁰⁴⁹ It has been recognized as demonstrating an intent to destroy a group “while inflicting acute suffering on its members in the process”.³⁰⁵⁰

³⁰⁴³ ICTR, *Prosecutor v. Kayishema*, ICTR-95-1-T, Judgment, 21 May 1999, para. 109.

³⁰⁴⁴ ICC Elements of the Crimes, art. 6; ICTR, *Prosecutor v. Karemera and Ngirumpatse*, ICTR-98-44-T, Judgment, 2 September 2012, para. 1609.

³⁰⁴⁵ ICTR, *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Judgment, 25 February 2004, para. 664.

³⁰⁴⁶ ICTR, *Prosecutor v. Rukundo*, ICTR-2001-70-T, Judgment, 27 February 2009, paras. 261-262.

³⁰⁴⁷ ICTY, *Prosecutor v. Karadzic*, IT-95-5/18-T, Judgment, 24 March 2016, paras. 543-545.

³⁰⁴⁸ ICTR, *Prosecutor v. Kajelijeli*, ICTR-98-44-T, Judgment, 1 December 2003, para. 814.

³⁰⁴⁹ ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 732.

³⁰⁵⁰ ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 733.

1398. 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”. “[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 well as for their own safety, is a traumatic experience from which one will not quickly, if ever, recover.”³⁰⁵¹ For 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.³⁰⁵² Numerous victims met by the Mission displayed signs of serious mental trauma. 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.³⁰⁵³

1399. 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 their escape.³⁰⁵⁴ 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.³⁰⁵⁵ There are clear parallels with the experiences and situations of the Rohingya refugees. The Rohingya who 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. The Mission concludes on reasonable grounds that serious bodily and mental harm, as an underlying genocidal act, is present.

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

1400. This category captures situations of so-called “measures of slow death”, meaning situations where the perpetrator does not immediately kill the members of the group but uses methods that seek to bring about their physical destruction in the end. It does not require proof that the conditions led directly to death or serious bodily or mental harm. It is enough that they were “calculated” to achieve that result.³⁰⁵⁶

1401. In other contexts, measures giving rise to liability have included: failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death, such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion.³⁰⁵⁷ Whether the measures constitute those calculated to bring about physical destruction of the group depends on the actual nature of the conditions, the length of time that members of the group were subjected to them, and the characteristics of the group, such as its vulnerability.³⁰⁵⁸

1402. The Rohingya are an objectively vulnerable group. Over a long period, they have suffered oppressive and systemic restrictions on all aspects of their life, amounting to

³⁰⁵¹ ICTY, *Prosecutor v. Blagojevic and Jokic*, IT-02-60-T, Judgment, 17 January 2005, para. 647.

³⁰⁵² ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-A, Judgment, 8 April 2015, para. 206.

³⁰⁵³ K-122, K-124.

³⁰⁵⁴ ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-A, Judgment, 8 April 2015, fn. 595.

³⁰⁵⁵ ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-A, Judgment, 8 April 2015, para. 210.

³⁰⁵⁶ ICTY, *Prosecutor v. Karadzic*, IT-95-5/18-T, Judgment, 24 March 2016, para. 546.

³⁰⁵⁷ ICTY, *Prosecutor v. Brdjanin*, IT-99-36-T, Judgment, 1 December 2004, para. 691; ICTY, *Prosecutor v. Stakic*, IT-97-24-T, Judgment, 31 July 2003, para. 517; ICTR, *Prosecutor v. Musema*, ICTR-96-13-T, Judgment, 27 January 2000, para. 157; ICTR, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, paras. 115–116; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 506.

³⁰⁵⁸ ICTY, *Prosecutor v. Karadzic*, IT-95-5/18-T, Judgment, 24 March 2016, para. 548.

persecution, which, on their face, appear calculated to bring about their physical destruction. The purpose is apparent from the process of gradual marginalization, exclusion and “othering” – in a context of hateful rhetoric targeting the Rohingya on ethnic or religious grounds. A complex system of oppressive rules, policies and orders was established to contain the group as a perceived “existential threat” to the nation, in an effort to bring its so-called “incontrollable” birth rates under control, and to change the demographic composition of Rakhine State. It has pushed the Rohingya population into extreme vulnerability, weakening individuals, families and communities.

1403. The movement restrictions; the restrictions on access to food and livelihood; the arbitrary and cumbersome procedures to access hospitals and health facilities; the restrictions on education; the exorbitant bribes, fees and economic pressures; their segregation from other communities; and the regular blocking of humanitarian assistance in Rakhine State – collectively these measures have eroded the ability of the Rohingya to support themselves and to survive as a community in Rakhine State. They have exposed them to destitution, immediate and long-term health risks, and preventable deaths. The acute levels of malnutrition in northern Rakhine State attest to that.

1404. The Rohingya have been systematically expelled from their homes and their lands. The State-sanctioned oppression and persecution and the repeated cycles of mass violence have forced unprecedented levels of Rohingya to flee Myanmar. Throughout the period under review, thousands of Rohingya felt compelled to risk their lives leaving on boats into the Bay of Bengal and the Andaman Sea. Tens of thousands were displaced by the violence in 2012. Approximately 87,000 crossed into Bangladesh following the 2016 “clearance operations”. Over 725,000 fled the 2017 “clearance operation” *en masse*, seeking protection in refugee camps in Bangladesh. There they live in extremely difficult conditions, including because of overcrowding and lack of privacy; lack of employment or livelihood or educational opportunities; limited access to health care; etc. The Rohingya have been pushed into these conditions through repeated cycles of forced displacement, causing grave and long-term disadvantage to their ability to lead a normal and constructive life, and contributing to their destruction as a group.

1405. A group is comprised of “its individuals, but also of its history, tradition, the relationship with other groups, and its relationship with the land”.³⁰⁵⁹ It has been held that “the physical or biological destruction of the group could therefore be considered the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself”.³⁰⁶⁰ The extensive burning that destroyed Rohingya villages, followed by the bulldozing of lands to an unrecognizable state in many locations, then completes the picture: the Rohingya fled for their lives from their homes and their land, in circumstances in which they can likely never return. Their villages, and the communities, as they once existed in the three townships of northern Rakhine, have been erased forever.

1406. This pattern of severe oppression and repeated displacement must be considered together with the pervasive sexual violence by Tatmadaw forces. Rape has been recognized as a condition of life designed to bring about its destruction, and has been equated with “the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period”.³⁰⁶¹ As observed by a scholar in the context of Rwanda, “the evidence illustrates that many rapists expected, consequent to their attacks, that the psychological and physical assault on each Tutsi woman would advance the cause of the destruction of the Tutsi people”.³⁰⁶² The scale, brutality and systematic nature of rape, gang rape, sexual slavery and other forms of sexual violence against the Rohingya lead inevitably to the inference that these acts were, in fact, aimed at destroying the very fabric of the community, particularly given the stigma associated with rape within the Rohingya community.

³⁰⁵⁹ ICTY, *Prosecutor v Blagojevic and Jokic*, IT-02-60-T, Judgment, 17 January 2005, para. 666.

³⁰⁶⁰ *Ibid.*

³⁰⁶¹ ICTR, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, para. 116.

³⁰⁶² B. Nowrojee, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*, 4 September 1996, p. 16.

1407. In combination, these factors, pervasive in their nature and many inflicted over a period of long duration, against a group that had previously been made extremely vulnerable, provide reasonable grounds to conclude the existence of the imposition of conditions of life calculated to bring about the physical destruction of the Rohingya group, as an underlying genocidal act.

(d) Imposing measures intended to prevent births within the group

1408. This category covers measures directed at inhibiting the capacity of group members to procreate. The measures can be physical (measures which destroy the reproductive capacity of a group by physical means) or psychological (measures setting up insurmountable psychological obstacles to having children).

1409. 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”.³⁰⁶³ The Myanmar authorities, including the Tatmadaw, have actively propagated the 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.³⁰⁶⁴ Concerns that Rohingya would soon be outnumbering the “native” groups had nevertheless led to a 2015 package of national laws to “protect race and religion”, which discriminate against women and girls. While the level of implementation of these laws is unclear, for many years local orders in northern Rakhine have imposed marriage restrictions on Rohingya, as well as restrictions on the permissible number and spacing of children. As detailed above, these have led to long delays in obtaining marriage permissions, in complex and humiliating procedures, often leading couples to marry religiously only and risking penalties. It has also led to unsafe abortions.

1410. Within this context of obsession with the procreation of the Rohingya, and the imperative of changing the demographic balance in Rakhine State, the high prevalence of rape and other brutal forms of sexual violence against women and girls in Rakhine State, in particular in the context of the “clearance operations”, may have been aimed at affecting their reproductive capacity. The majority of victims were either of childbearing age or younger, and the rapes were often accompanied by deliberate mutilation of genitalia. Eighty per cent of rape survivors interviewed by the Mission were victims of gang rape. Apart from the obvious physical destruction of the reproductive capacity in such cases, 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”.³⁰⁶⁵ Members of security forces perpetrating sexual violence, and certainly their commanders who ordered or condoned it, would be aware of this dynamic.

3. Genocidal intent

1411. The crime of genocide is defined by its specific intent requirement. In addition to demonstrating that the perpetrator had the intent to commit the underlying act, it must also be shown that the act was committed with the specific intent (*dolus specialis*), being the intent to destroy in whole or in part a protected group as such.

³⁰⁶³ ICTY, *Prosecutor v. Popovic et al.*, IT-05-88-T, Judgment, 10 June 2010, para. 855.

³⁰⁶⁴ See 2014 Population and Housing Census of Myanmar (available at http://myanmar.unfpa.org/sites/default/files/pub-pdf/UNION_2-C_religion_EN_0.pdf).

³⁰⁶⁵ ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 508.

(a) Legal requirements

1412. Genocidal intent requires that the perpetrator intend to “destroy” the protected group in whole or in part, as such. Destruction is understood to mean physical or biological destruction, rather than the disbandment or expulsion of the group. Other forms of destruction, such as social assimilation or attacks on cultural characteristics, do not constitute genocide if they are not related to the physical or biological destruction of the group.³⁰⁶⁶

1413. The words “in whole or in part” signify that it is not necessary that the perpetrator intends the destruction of the entire group. The partial destruction of the group (for example, destruction in a certain geographical location) suffices, when a substantial part of the group has been targeted, being a part that is sufficiently large to impact the group as a whole.³⁰⁶⁷ Factors relevant to whether the targeted part of the group meets this threshold include its numeric size (both absolute and relative) and the prominence of the targeted individuals within it.³⁰⁶⁸

1414. The words “as such” emphasize the intent to destroy the protected group “as a separate and distinct entity”, rather than an individual. The victims are chosen by reason of their membership of the group for which destruction is sought, as opposed to being targeted as individuals.³⁰⁶⁹

(b) Establishing genocidal intent

1415. Direct evidence of genocidal intent will rarely exist.³⁰⁷⁰ In its absence, genocidal intent can be inferred from circumstantial evidence, that is, “all of the evidence taken together”.³⁰⁷¹ For genocidal intent to be established to the criminal standard of “beyond reasonable doubt”, any inference drawn from circumstantial evidence must be the only inference that could reasonably follow from the acts in question.³⁰⁷² The factors relevant to a determination of genocidal intent include:³⁰⁷³

- *evidence emanating from or relating to an accused*: including various forms of communication to show the possible formation of intent, including discrete words and utterances by the accused, and evidence tending to show that the accused ordered attacks on the targeted group.³⁰⁷⁴

³⁰⁶⁶ ICTY, *Prosecutor v. Krstic*, IT-98-33-T, Judgment, 2 August 2001, para. 580; ICJ, Case Concerning Application of the Convention on the Prevention and Punishment of Genocide, Bosnia Herzegovina v. Yugoslavia (Serbia and Montenegro), Judgment, 27 February 2007, para. 344.

³⁰⁶⁷ ICJ, Bosnia Herzegovina v. Yugoslavia (Serbia and Montenegro), Judgment, 27 February 2007, para. 198.

³⁰⁶⁸ ICTY, *Prosecutor v. Krstic*, IT-98-33-A, 19 April 2004, paras. 12-14.

³⁰⁶⁹ Ibid.

³⁰⁷⁰ ICTR, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Judgment, 1 June 2001, para. 159: “explicit manifestations of criminal intent are, for obvious reasons, often rare in the context of criminal trials”.

³⁰⁷¹ ICTY, *Prosecutor v. Karadzic*, IT-95-5/18-T, Judgment, 24 March 2016, paras. 550, 2592; ICTY, *Prosecutor v. Popovic et al.*, IT-05-88-A, Judgment, 30 January 2015, para. 468; *Prosecutor v. Hategekimana*, ICTR-00-55A-A, Judgment, 8 May 2012, para. 133.

³⁰⁷² ICJ, Bosnia Herzegovina v. Yugoslavia (Serbia and Montenegro), Judgment, 27 February 2007, para. 373. See also ICTY, *Prosecutor v. Karadzic*, IT-95-5/18-T, Judgment, 24 March 2016, para. 2592; ICTY, *Prosecutor v. Brdjanin*, IT-99-36-T, Judgment, 1 December 2004, para. 970.

³⁰⁷³ ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-3, Separate and Dissenting Opinion of Judge Anita Usacka, 4 March 2009, pp. 17-29.

³⁰⁷⁴ ICTR, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Judgment, 1 June 2001, para. 148; ICTY, *Prosecutor v. Jelusic*, IT-95-10-T, Judgment, 14 December 1999, para. 75; ICTR, *Prosecutor v. Bagilishema*, No. ICTR-95-1A-T, Judgment, 7 June 2001, para. 63; ICTR, *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, 2 September 1998, para. 728; ICTR, *Prosecutor v. Rutaganda*, No. ICTR-96-3-T, Judgment, 6 December 1999, para. 399; ICTR, *Prosecutor v. Gacumbitsi*, ICTR-2001-64-T, Judgment, 17 June 2004, para. 259.

- *evidence relating to others*: the words and deeds of others acting with or at the behest of the accused.³⁰⁷⁵
- *contextual evidence in the form of plans, policies and preparation*: the existence of a genocidal plan or policy is not a legal requirement but proof of such plan has been considered relevant to establishing intent.³⁰⁷⁶ The existence of such plan or policy may be inferred from various indicia: government involvement in attacks;³⁰⁷⁷ the involvement of public officials or soldiers carrying out the attacks;³⁰⁷⁸ existence of execution lists targeting the protected group; the dissemination of extremist ideology; the screening and selection of victims on the basis of their membership in the protected group.³⁰⁷⁹
- *contextual evidence in the form of modus operandi*: where acts of a consistent character have been systematically directed against a protected group.³⁰⁸⁰
- *evidence of breadth and scale*: the breadth and scale of attacks, as well as whether or not the attacks were widespread, are relevant to an inference on the formation of intent.³⁰⁸¹ In some instances, one particularly brutal attack, targeting several thousand members of a group, can indicate the existence of intent.³⁰⁸²
- *other factors*: such as whether bodily injuries were extensive, whether property belonging to members of the targeted group was targeted, whether derogatory language was used by an accused or by others against members of the targeted group.³⁰⁸³

1416. An inquiry into genocidal intent should not be compartmentalized by considering separately whether there was specific intent to destroy a protected group through each of the genocidal acts.³⁰⁸⁴ The existence of genocidal intent must be based on all of the evidence, taken together.³⁰⁸⁵

(c) Consideration of genocidal intent in the case of the Rohingya

Scope of the present analysis

1417. With the legal elements of genocide in mind, a finding that “genocide” occurred cannot be made in the abstract. The inclusion of “genocidal intent” as an element of the crime means that an assessment of whether genocide occurs necessarily involves an assessment of whether a particular perpetrator (or group of perpetrators) possessed the specific intent to

³⁰⁷⁵ ICTR, *Prosecutor v Niyitegeka*, ICTR-96-14-T, Judgment, 16 May 2003, paras. 413, 419.

³⁰⁷⁶ ICTY, *Prosecutor v Jelusic*, IT-95-10-A, Judgment, 5 July 2001, para. 48; ICTR, *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, para. 94.

³⁰⁷⁷ ICTY, *Prosecutor v Krstic*, IT-98-33-A, Judgment, 19 April 2004, para. 35; ICTR, *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, paras. 309 - 312.

³⁰⁷⁸ ICTR, *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, para. 536; ICTR, *Prosecutor v Niyitegeka*, ICTR-96-14-T, Judgment, 16 May 2003, para. 414; ICTR, *Prosecutor v Kamuhanda*, ICTR-95-54A-T, Judgment, 22 January 2005, para. 644.

³⁰⁷⁹ ICTR, *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-A, Judgment, 1 June 2001, para. 139.

³⁰⁸⁰ ICTY, *Prosecutor v Jelusic*, IT-95-10-A, Judgment, 5 July 2001, para. 47; ICTR, *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 523; ICTR, *Prosecutor v Kayishema*, ICTR-95-1-T, Judgment, 21 May 1999, paras. 93, 289, 534-535, 537; ICTR, *Prosecutor v Muhimana*, ICTR-95-1B-T, Judgment, 28 April 2005, para. 496.

³⁰⁸¹ ICTY, *Prosecutor v Krstic*, IT-98-33-A, Judgment, 19 April 2004, para. 35; ICTR, *Prosecutor v Gacumbitsi*, ICTR-2001-64-T, Judgment, 17 June 2004, para. 258; ICTR, *Prosecutor v Kamuhanda*, ICTR-95-54A-T, Judgment, 22 January 2005, para. 629; ICTR, *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 730; ICTR, *Prosecutor v Muhimana*, ICTR-95-1B-T, Judgment, 28 April 2005, paras. 496, 498, 516; ICTR, *Prosecutor v Ntakirutimana*, ICTR-96-10 and ICTR-96-17-T, Judgment, 21 February 2003, para. 785.

³⁰⁸² ICTR, *Prosecutor v Ndindabahizi*, ICTR-2001-71-T, Judgment, 15 July 2004, para. 461.

³⁰⁸³ ICTR, *Prosecutor v Muhimana*, ICTR-95-1B-T, Judgment, 28 April 2005, para. 496; ICTR, *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 728.

³⁰⁸⁴ ICTY, *Prosecutor v Stakic*, IT-97-24-A, Judgment, 22 March 2006, para. 55.

³⁰⁸⁵ *Ibid.*

destroy a protected group, in whole or in part, at the relevant moment in time. The determinative factor therefore is the acts and conduct of the accused persons themselves, or the acts and conduct of others acting at their behest. Genocidal intent of an accused “should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action”.³⁰⁸⁶

1418. On the basis of information before it, and mindful of the limits of its mandate, the Mission has not concluded that particular individuals committed the identified prohibited acts with the requisite special intent, giving rise to individual criminal responsibility for genocide. Instead, the Mission assessed the body of available information in light of the jurisprudence of international tribunals, and considered whether the factors that have allowed for the reasonable inference of genocidal intent in other contexts and cases, are present in the case of the Rohingya in Rakhine State. This exercise has been undertaken to assist in any subsequent determination of genocidal intent on the part of particular perpetrators, properly identified, before a court of law.

Factors relevant to a finding of genocidal intent

1419. The factors identified by the Mission fall broadly into five categories. A first set of factors relates to the broader context within which the acts occurred and the widely prevalent rhetoric of hatred and contempt toward Rohingya. None of the prohibited physical acts described in the preceding chapters occurred in a vacuum. They were cultivated through an environment of long-standing, extreme and systemic discrimination based on the ethnic, racial and/or religious identity of the Rohingya. As described in this report, such discrimination is rooted in Myanmar’s laws, policies and practices. The Rohingya community has long been persecuted. This oppression and targeting has been 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.

1420. The Rohingya have not only been denied an identity; they have been systematically referred to in derogatory and dehumanizing terms.³⁰⁸⁷ The apparent intent and purpose of such rhetoric have been to exclude them from the Myanmar nation to which they once belonged, in pursuit of an exclusionary vision based on “national races”. This process of “othering” the Rohingya has resulted in them systematically being called “Bengali” or “illegal immigrants” who will overrun and Islamise the country. They are portrayed as an existential threat both to the nation and to its Buddhist character. Such rhetoric, coming from figures of authority, has fueled anti-Rohingya sentiment across the country for many years. Following the 2012 violence, a shift in this rhetoric saw an increase in references to Rohingya as “violent extremists” and “terrorists” and practicing “violent Islam”, further fueling fear and deep resentment. The impact of derogatory language has been magnified through social media platforms, on which hate speech, discriminatory narratives and incitement to hostility and violence against Rohingya have been rampant.

1421. The use of derogatory language toward members of the targeted group is a relevant indicator of genocidal intent.³⁰⁸⁸ It 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. “The general political doctrine”³⁰⁸⁹ which gives rise to the prohibited genocidal acts has been an important factor in determining the existence of genocidal intent in other contexts. In relation to the Rohingya, the general political doctrine is one of State-sanctioned oppression and persecution in all aspects of their life. This, in combination with past and present Governments’ failure to condemn the pervasive rhetoric of hatred and contempt towards the Rohingya, as well as the

³⁰⁸⁶ ICTR, *Prosecutor v Bagilishema*, ICTR-95-1A-T, Judgment, 7 June 2001, para. 63.

³⁰⁸⁷ See chapter VI, section B: The issue of “hate speech”.

³⁰⁸⁸ ICTR, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, paras. 93, 527; ICTY, *Prosecutor v. Popovic et al*, IT-05-88-T, Judgment and Sentence, 10 June 2010, para. 1177; ICTR, *Prosecutor v. Muhimana*, ICTR-95-1B-T, Judgment, 28 April 2005, para. 496.

³⁰⁸⁹ ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 524.

participation of high-level officials and figures of authority in it, could constitute one set of indicators from which to reasonably infer that acts were committed with genocidal intent.

1422. A second set of indicators is the specific utterances of government officials, politicians, religious authorities and military commanders, as well as of direct perpetrators prior, during and after the violence. Survivors of the “clearance operations” described the derogatory language that regularly accompanied acts of violence. This language was not only insulting, it often also revealed an exclusionary vision, with perpetrators using expressions such as “go away”, “you don’t belong here”, “you are Bengali”, “we will kill you all”.³⁰⁹⁰ A female survivor, gang raped with her sister, 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.”³⁰⁹¹ In Facebook posts dated August 2017, a Tatmadaw soldier spoke of excitement in being deployed to Rakhine State because “Muslim dogs” were posing a threat to the citizens³⁰⁹², while a police officer involved in “clearance operations” posted “Have been wanting to kill these ‘Kalar’ for so long. Only got to kill them just now.”³⁰⁹³ In Rwanda, the fact that attackers were heard singing songs referring to the extermination of the Tutsi was taken into account when finding genocidal intent.³⁰⁹⁴ Phrases such as “exterminate them, look for them everywhere, kill them, and get it over with” were relied upon to ascribe the specific intent to destroy the Tutsi population to the attackers at a particular massacre site.³⁰⁹⁵ In the context of the “clearance operations”, similar utterances may demonstrate an intent on the part of direct perpetrators to destroy the Rohingya as a group.

1423. Government officials, politicians, religious figures, and military and security force commanders have also made deeply disturbing public statements or comments. As highlighted in this report, the Mission found many statements that demonstrate utter contempt towards the Rohingya community, some including direct threats of, or incitement to, violence. In 2015, Nay Myo Wai, Chair of the Peace and Diversity Party, at a rally in Bo Sein Menn football ground in Bahan Township, Yangon, declared to a crowd who can be heard cheering in the video posted to YouTube: “I won’t say much, I will make it short and direct. Number one, shoot and kill them! (the Rohingyas). Number two, kill and shoot them! (the Rohingyas). Number three, shoot and bury them! (the Rohingyas). Number four, bury and shoot them! (the Rohingyas). If we do not kill, shoot, and bury them, they will keep sneaking into our country!” In combination with 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.³⁰⁹⁶

1424. Statements have been made by some of the most authoritative figures in Myanmar society. In July 2012, then President Thein Sein publicly stated, “the last resort to this issue is to hand in the Rohingya who sneaked in to UNHCR to stay in the refugee camps”. In October 2017, Sitagu Sayadaw, one of Myanmar’s most revered monks, made an address to members of the military at a training school, apparently absolving the military of any guilt or culpability for killing Rohingya. Senior-General Min Aung Hlaing, the Tatmadaw’s Commander-in-Chief since 2011 and the most powerful person in Myanmar, has made numerous public statements that deny the existence of Rohingya; label the group as illegal immigrants, terrorists and extremists; deny any wrongdoing in Tatmadaw operations in Rakhine State; ignore the suffering of Rohingya; and call on the Myanmar “ethnic people” to take patriotic action. At the height of the “clearance operations”, he stated that the “Bengali

³⁰⁹⁰ BI-001, BI-006, CI-147, EI-017, LI-006; LI-041, LI-048, LI-059, LI-099, QI-038, QI-041, QI-059, QI-064, QI-111, YI-030, WI-010.

³⁰⁹¹ EI-084.

³⁰⁹² V-10.

³⁰⁹³ V-01.

³⁰⁹⁴ ICTR, *Prosecutor v. Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgment, 13 December 2004, paras. 360-364.

³⁰⁹⁵ ICTR, *Prosecutor v. Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgment, 13 December 2004, paras. 360-364; ICTY, *Prosecutor v. Popovic et al.*, IT-05-88-T, Judgment, 10 June 2010, para. 1177.

³⁰⁹⁶ ICTR, *Prosecutor v. Karemera and Ngirumpatse*, ICTR-98-44-T, Judgment, 2 February 2012, para. 1597.

problem” was an “unfinished job” that the Government was taking great care to solve. These statements were all made in a highly volatile and tense context. The fact that figures of authority chose to mirror hateful narratives spread by ultranationalist movements, rather than combat them, may be revealing of their own sentiments and intent.

1425. A third set of indicators of intent relates to 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. As highlighted above, the Government of Myanmar and other figures of authority have been extremely preoccupied with the demographic composition of Rakhine State, to the point of adopting specific legislation and other measures to change it. Examples include the laws and orders restricting marriages and births among the Rohingya population in northern Rakhine, but also the policy of building NaTaLa “model villages” since the 1990s. This has required the appropriation of land and the resettlement of ethnic Rakhine or other Buddhists into the area from elsewhere. The development and reconstruction efforts of the Government in the aftermath of the “clearance operations” in 2017 also indicate plans to relocate other ethnic groups on land where Rohingya villages once stood. At a more general level, 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 also indicate a desire to rid Myanmar of the Rohingya.

1426. Against this background and the pervasive rhetoric of “uncontrollable birthrates” of Rohingya, the widespread rape and sexual violence against Rohingya women and girls, particularly in the context of the “clearance operations”, may very well have been aimed at affecting their reproductive capacity. In addition to the physical destruction of reproductive capacity in cases where the genitalia were mutilated, for the reasons discussed above, Rohingya women and girls who have been raped or gang raped are significantly less likely to marry and reproduce.

1427. Although an intent to alter the demographic or ethnic composition of an area is not conclusive of genocidal intent *per se*, these plans, policies and acts demonstrate an active preoccupation on the part of government and military authorities with the Rohingya presence in Rakhine State. The reduction of a protected group is also not synonymous with its destruction. It is certainly possible to imagine situations in which a particular ethnic or religious group could be encouraged or even forced to leave a defined geographical area, without the instigators possessing genocidal intent. However, in the context of the former Yugoslavia, the existence of a plan to create an ethnically homogenous state, along with evidence of an intent to exclude non-members by violence, and evidence that the targeted group could not lay claim to any specific territory, was found to support an inference that this plan of exclusion contemplated the destruction of the non-member ethnic groups.³⁰⁹⁷ In the case of the Rohingya, the manifest intention on the part of the authorities to reduce or remove this targeted group from Rakhine State is relevant to the intention with which the criminal acts themselves ultimately occurred.

1428. A fourth set of indicators of intent in the case of the Rohingya relates to evidence of an organized plan of destruction. The existence of a plan or policy is not a legal element of the crime of genocide. However, in the context of proving genocidal intent, the existence of a plan or policy may become an important evidentiary factor.³⁰⁹⁸ Where it is demonstrated that acts of a consistent character have been systematically directed against a protected group, such acts may support the inference of genocidal intent.³⁰⁹⁹ To this extent, the “clearance operations” of 2016 and 2017, while perhaps unique in terms of their scope, intensity and

³⁰⁹⁷ ICTY, *Prosecutor v Karadzic*, IT-95-5/IT-18-1-R-61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 94.

³⁰⁹⁸ ICTR *Prosecutor v. Jelusic*, IT-95-10-A. Judgment, 5 July 2001, para. 48; ICTY, *Prosecutor v Krstic*, IT98-33-A, Judgment, 19 April 2004, para. 225.

³⁰⁹⁹ ICTY, *Prosecutor v Jelusic*, IT-95-10-A, Judgment, 5 July 2001, para. 47; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 523; ICTR, *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, paras. 93, 289, 534-535, 537; ICTR, *Prosecutor v Muhimana*, ICTR-95-1B-T, Judgment, 28 April 2005, para. 496.

brutality, are only one piece of a larger picture. They are arguably the result of a long-standing policy of oppression and persecution targeting the Rohingya, leading to the extreme control and securitization of the area. They are also the most immediate cause of the mass exodus of Rohingya from Myanmar.

1429. A level of organization evidencing a plan of destruction can also be demonstrated by a number of facts: that the killings were perpetrated in a systematic manner;³¹⁰⁰ that types of weapons and methods employed by the attackers were consistent across attacks;³¹⁰¹ and that the attackers employed a consistent *modus operandi* across those attacks.³¹⁰² The manner in which the August 2017 operations (and to a certain extent the 2016 prelude) was carried out is strikingly consistent. The operations covered 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. There was a 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.

1430. The response of the security forces to the ARSA attacks of 25 August 2017 was immediate – within hours. It had been preceded by a build-up of military capacity in the area over the month beforehand, 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. The disarming of Rohingya paralleled the arming of ethnic Rakhine groups and militias. These elements suggest a level of pre-planning and preparation to the operations. Also relevant is the involvement of all levels of the Tatmadaw’s chain of command, from the Commander-in-Chief to the foot soldier. The “clearance operations” were not planned and executed by an isolated cell of soldiers but the army as a whole. The implication of multiple levels of military command in an operation can evidence the systematic nature of the culpable acts and an organized plan of destruction, supporting an inference of genocidal intent.³¹⁰³

1431. Consistent targeting by the perpetrators is also indicative of a level of planning and forethought.³¹⁰⁴ Women and girls of reproductive age were targeted for brutal rape, gang rape and sexual violence. Children were targeted for killing. There are indications that educated, wealthy and influential men, that is, the Rohingya leaders in towns and villages, were also specifically targeted. 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 a level of organization evidencing a plan of destruction. No reasonable argument can be made that the attacks against the Rohingya population were spontaneous or random, or that they evolved in an uncoordinated or unplanned manner or that their brutality and destructiveness were aberrations. Given the importance of the existence of a plan or policy for destruction in the context of proving genocidal intent, proof of synchronized and deliberate attacks may support an ultimate finding that the prohibited acts against the Rohingya were perpetrated with the intent to destroy.

1432. A fifth set of indicators of intent revolves around the extreme brutality of the acts and campaign against the Rohingya.³¹⁰⁵ The brutality of an attack is relevant to whether the perpetrators acted with specific intent, given that “a brutal attack targeting several thousand members of an ethnic group is itself indicative of the requisite intent to destroy an ethnic

³¹⁰⁰ ICTY, *Prosecutor v Krstic*, IT-98-33-T, Judgment, 2 August 2001, para. 547.

³¹⁰¹ ICTR, *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, para. 537.

³¹⁰² ICTY, *Prosecutor v Jelusic*, IT-95-10-T, Judgment, 14 December 1999, para. 88; ICTR, *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 535.

³¹⁰³ ICTY, *Prosecutor v Tolimir*, IT-05-88/2-A, Judgment, 8 April 2015, para. 252.

³¹⁰⁴ ICTY, *Prosecutor v Tolimir*, IT-05-88/2-A, Judgment, 8 April 2015, para. 263.

³¹⁰⁵ ICTY, *Prosecutor v Jelusic*, IT-95-10-A, Judgment, 5 July 2001, para. 47.

group, in whole or in part.”³¹⁰⁶ The fact that, for example, pregnant women and babies were not spared has been found to show an intention to “wipe out a group in its entirety.”³¹⁰⁷ The “extent of bodily injuries” is also a relevant factor.³¹⁰⁸

1433. The killing of civilians is inherently brutal in any context. The perpetrators of the “clearance operations” in Rakhine State introduced an additional dimension to this. There was not the least effort on their part to make any distinction between ARSA fighters and civilians, or to specifically target a military objective or identify and repel an immediate threat. 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 targeting of women and girls for rape, gang rape and other forms of sexual violence, as well as the targeting of and impact on children in general, has been shocking. The brutality with which the underlying acts were carried out provides further support for a conclusion that they were committed with genocidal intent.

Other reasonable inferences from the available information

1434. The Mission has also considered whether the information and material collected could lead to reasonable inferences other than that the specific prohibited acts were motivated by the intent to destroy.

1435. First, it has considered the credibility of the Government and military authorities’ official explanation that the “clearance operations” were legitimately targeted at eliminating a terrorist threat from ARSA. This official explanation appears to suggest that the operations were aimed at restoring security in Rakhine State, including by creating the conditions that would allow for even greater control and surveillance over the population. This would occur through the creation of a new physical environment, with newly built villages that are easier to control and in the vicinity of reinforced security posts. The controlled repatriation of the entire Rohingya population would then allow for managed resettlement, a rebalancing of ethnic groups, and the screening of all returnees to remove “terrorist” elements. It would also allow for the systematic imposition of NVC cards, on which a return is made conditional.

1436. This explanation is flawed. The manner in which the operations were conducted would have required that all Rohingya were “terrorists” and a legitimate target, necessitating the destruction of entire villages and communities. In reality, and as known to the Tatmadaw, ARSA posed a limited threat. The Tatmadaw had been present in the region for many years and was familiar with operational requirements. Enhanced security to eliminate the threat from an emerging, but still very small, armed group could have been implemented through far more limited, targeted and less pervasive means. Pursuing a campaign of absolute terror and brutality through gang raping women, killing babies and erasing entire villages, in the knowledge that such response is unlawful and disproportionate, reveals an alternative intent. The explicit and frequent linkage made by the Tatmadaw’s Commander-in-Chief, Senior-General Min Aung Hlaing, between the operations and the “Bengali problem” the country has supposedly been facing “since 1942” further indicates that the operations were not a response to the current and specific security threat posed by ARSA.

1437. Similarly, the suggestion that the authorities may have been legitimately seeking demographic change in Rakhine State (as opposed to the destruction of the Rohingya group as such) cannot be reconciled with the scope of violence and brutality of the military, or the serious bodily and mental harm inflicted on the civilian population. Demographic change had been pursued for many years through non-violent means, albeit profoundly discriminatory and oppressive. It would not have necessitated the killing of more than 10,000 civilians, the systematic and coordinated rape of women, the mass deportation of over 725,000 people, and the destruction of entire villages.

1438. An argument that the intent may have been to displace the Rohingya population, but not to seek its ultimate destruction, falls at the same hurdle. The scale and scope of violence in its varied forms, the intensity and brutality of the attacks, and the physical destruction of

³¹⁰⁶ ICTR, *Prosecutor v Nindabahizi*, ICTR-2001-71-T, Judgment, 15 July 2004, para. 461.

³¹⁰⁷ ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 121.

³¹⁰⁸ ICTR, *Prosecutor v. Muhimana*, ICTR-95-1B-T, Judgment, 28 April 2005, para. 496.

Rohingya life as it once was, through the mass demolition of their villages and homes, make it difficult to consider any such inferences as reasonable. When considered against the patterns of oppression and dehumanization spanning decades and a coordinated and widely prevalent discriminatory rhetoric on the part of the very authorities entrusted with ensuring the Rohingya's safety, livelihood and protection, the picture becomes even more complete.

(d) Conclusion

1439. The attack on the Rohingya population of Myanmar was horrendous in scope. The images of an entire community fleeing from their homes across rivers and muddy banks, carrying their babies and infants and elderly, their injured and dying, will and must remain burned in the minds the international community. So will the “before and after” satellite imagery, revealing whole villages literally wiped off the map. In much of northern Rakhine State, every trace of the Rohingya, their life and community as it had existed for decades, was removed. The situation in many areas now appears to match the official narrative: “there is no group called Rohingya in Myanmar”. The “clearance operations” were indeed successful.

1440. The question of whether genocidal intent exists can sometimes usefully be approached in reverse, by examining what the relevant authorities and perpetrators would have done, had they wished to destroy the target group in whole or in part. The actions of those who orchestrated the attacks on the Rohingya read as a veritable check-list: the systematic stripping of human rights, the dehumanizing narratives and rhetoric, the methodical planning, mass killing, mass displacement, mass fear, overwhelming levels of brutality, combined with the physical destruction of the home of the targeted population, in every sense and on every level.

1441. The Mission therefore concludes, on reasonable grounds, that the factors allowing the inference of genocidal intent are present. It is now for a competent prosecutorial body and court of law to investigate and adjudicate cases against specific individuals to determine individual guilt or innocence.

B. Crimes against humanity

1442. Crimes against humanity are among the gravest crimes under international law. They are particularly serious offences giving rise to grave humiliation or degradation, committed as part of a widespread or systematic attack against any civilian population.³¹⁰⁹ It is this specific context, indicating a scale and level of organization that shocks the conscience of humanity, which elevates “ordinary” criminal acts to those concerning the international community as a whole. In its consideration of whether established facts may amount to crimes against humanity, the Mission has relied on the definition contained in Article 7 of the Rome Statute of the ICC.³¹¹⁰ Possible divergences from custom are noted where relevant.

1443. The legal threshold for crimes against humanity is high. First, it must be demonstrated that one of the prohibited acts took place, with the requisite criminal intent.³¹¹¹ Given that crimes against humanity are defined by their contextual element, it must also be demonstrated that the act was committed “as part of a widespread or systematic attack directed against any civilian population”. An attack directed against any civilian population means “a course of conduct involving the multiple commission of [prohibited] acts against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”.³¹¹² An “attack” does not need to involve a military attack or the use of armed force;

³¹⁰⁹ A. Cassese, *International Criminal Law* (3rd ed.), (Oxford University Press, Oxford, 2013), pp. 90-91.

³¹¹⁰ This definition enjoys wide support among states: A/CN.4/680, International Law Commission, First report on crimes against humanity by Sean D. Murphy, Special Rapporteur, para. 122. See also A/70/10, Report of the International Law Commission, 14 August 2015, at p. 59, para. 8.

³¹¹¹ ICC Statute, art. 7(1).

³¹¹² ICC Statute, art. 7(2)(a).

it can, for example, encompass mistreatment of the civilian population.³¹¹³ “Directed against” requires that a civilian population be the intended primary target of the attack, rather than an incidental victim.³¹¹⁴ The word “any” indicates that “civilian population” is to be understood broadly,³¹¹⁵ regardless of nationality, ethnicity or any other distinguishing feature.³¹¹⁶

1444. The attack must be widespread *or* systematic. *Widespread* generally connotes a quantitative and geographic element, relating to the number of targeted persons,³¹¹⁷ the multiplicity of victims,³¹¹⁸ the frequency of acts,³¹¹⁹ and/or the attacks occurring in different locations.³¹²⁰ *Systematic* relates to the organized nature of the acts of violence and the improbability of their random occurrence,³¹²¹ or as organized conduct following a consistent pattern or pursuant to a policy or plan.³¹²² Patterns of crimes, or the “non-accidental repetition of similar criminal conduct on a regular basis”, are seen as a common expression of a systematic occurrence.³¹²³ An attack will be systematic when, for example, “the perpetrators employed similar means and methods to attack the different locations”.³¹²⁴ Lastly, it must also be demonstrated that the perpetrator was aware of the broader context in which the actions occurred.

1445. These contextual elements determine whether a set of prohibited acts amount to the level of crimes against humanity. Such prohibited acts include: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity; enforced disappearance of persons; apartheid; other inhumane acts of a

³¹¹³ ICC Elements of Crime, art. 7, para. 3; ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-A, Judgment, 12 June 2002, para. 86.

³¹¹⁴ ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-tENG, Judgment pursuant to article 74 of the Statute, 20 April 2015, para. 1104; ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001, para. 421.

³¹¹⁵ ICTY, *Prosecutor v. Mrksic et al.*, IT-95-13/1-T, Judgment, 27 September 2007, para. 442; ICTY, *Prosecutor v. Tadic*, IT-94-1-T, Judgment, 7 May 1997, para. 643; ICTY *Prosecutor v. Kupreskic*, IT-95-16-T, Judgment, 14 January 2000, para. 547.

³¹¹⁶ ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008, para. 399.

³¹¹⁷ ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008, para. 394; ICTY, *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, Judgment, 17 December 2004, para. 94; *Prosecutor v. Blagojevic and Jokic*, IT-02-60-T, Judgment, 17 January 2005, paras. 545-546.

³¹¹⁸ A/51/10, Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No.10, at p. 47 (using the phrase “on a large scale” instead of widespread); ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 5 September 1998, para. 580; ICTR, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, para. 123; ICTY, *Prosecutor v. Mrksic*, IT-95-13/1-T, Judgment, 27 September, 2007, para. 437.

³¹¹⁹ ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, 16 December 2011, para. 265, where the crimes were insufficient because, *inter alia*, they had been committed and scattered over a 6-month period.

³¹²⁰ ICC, *Prosecutor v. Ruto*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 177.

³¹²¹ ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 14 October 2008, para. 394; ICC, *Prosecutor v. Ruto*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 179; ICTY, *Prosecutor v. Mrksic*, IT-95-13/1-T, Judgment, 27 September 2007, para. 437; ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001, para. 429.

³¹²² ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 5 September 1998, at para. 580; *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, at para. 123.

³¹²³ ICTR, *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, para. 94.

³¹²⁴ ICC, *The Prosecutor v. Ntaganda*, ICC-01/04-02/06-36-Red, Decision on the Prosecutor's Application under Article 58, 14 July 2012, para. 31.

similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

1. Kachin and Shan States

(a) Underlying prohibited acts

Murder

1446. Murder is defined under international law as the unlawful and intentional killing of a human being.³¹²⁵ The death of the victim must result from an act or omission of the perpetrator, who possessed the intent to kill, or the intent to cause serious bodily harm which the perpetrator should reasonably have known might lead to death.³¹²⁶

1447. This report details consistent and credible information establishing a pattern of violations of the right to life, with numerous unlawful killings of civilians, in Kachin and Shan States during the period under review. Many killings reported to the Mission were murders or extrajudicial executions of persons in the custody of the Tatmadaw. Other unlawful killings occurred in the context of military operations, as a consequence of indiscriminate attacks and attacks directed at civilians. Accounts were received of the Tatmadaw shooting or aiming mortar shells directly at civilians, including women and children, while they were fleeing or seeking shelter from the fighting. Victims and witnesses consistently describe how the Tatmadaw repeatedly targets individual civilians of the same ethnic background as their armed adversary, specifically affecting men between the ages of 18 and 40 years old, considered of fighting age.

1448. The Mission accordingly considers that there are reasonable grounds to conclude that murder as an underlying act of crimes against humanity was committed in Kachin and northern Shan States.

Enslavement

1449. Enslavement is the exercise of any or all of the powers attaching to the right of ownership over a person,³¹²⁷ meaning “the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy”.³¹²⁸ This includes the purchasing, selling, lending or bartering of a person.³¹²⁹ Whether a situation amounts to enslavement depends on the control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.³¹³⁰ Forced labour can therefore rise to the level of enslavement, even without any additional evidence of mistreatment.³¹³¹ To determine if forced labour reaches the threshold, the question is whether “the relevant persons had no choice as to whether they

³¹²⁵ ICC Elements of Crime, art. 7(1)(a); ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 5 September 1998, para. 589.

³¹²⁶ ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgment, 28 February 2005, para. 259.

³¹²⁷ ICC Statute, art. 7(2)(c).

³¹²⁸ ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-tENG, Judgment, 7 March 2014, para. 975.

³¹²⁹ ICC Elements of Crimes, art. 7(1)(c), para. 1.

³¹³⁰ ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Judgment, para. 542; ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, para. 119; ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Judgment pursuant to Article 74 of the Statute, 7 March 2014, para. 976; ECCC, *Prosecutor v. Kaing Guek Eav*, 001/18-07-2007- ECCC/SC, Judgment, 3 February 2012, paras. 117-162.

³¹³¹ ECCC, *Prosecutor v. Kaing Guek Eav*, 001/18-07-2007- ECCC/SC, Appeal Judgment, 3 February 2012, para. 126; *Prosecutor v. Kunarac et al.*, IT-96-23/IT-96-23/1, Judgment, 22 February 2001, para. 541.

would work”,³¹³² Moreover, the perpetrator must have intended to exercise power attaching to the right of ownership.³¹³³

1450. The extent to which forced labour has been part of the lives of ethnic minorities in Kachin and Shan States is nowhere better illustrated than by a witness who told the Mission that she was not aware that the practice was illegal until she left Myanmar. In the words of another witness who had performed forced labour twice a month from the age of 12 or 13, “we have done this for our whole lives”.³¹³⁴ Refusal to participate was impossible. Anything other than compliance resulted in threats or violence, with reports of soldiers shooting at individuals attempting to escape. The Mission is satisfied that none of the acts of labour described in this report was carried out as a result of the labourer’s own free will, and that the Tatmadaw and security forces who managed the forced labour in many cases intentionally exercised the powers of ownership over the civilians whom they forced to work. This is evidenced by the levels of coercion, the threats, the impossibility of escape, the ill-treatment often associated with forced labour, and the fear experienced by the victims. The victims described how their lives, their activities, their movements, even their bodies were completely outside their control.

1451. As to the scale and scope of the forced labour, in enslavement cases in international jurisprudence, victims were forced to carry loads, perform domestic chores, work in diamond mines,³¹³⁵ perform sexual services,³¹³⁶ plant rice, build dams, and dig canals.³¹³⁷ There was no requirement that the labourers were subject to additional ill-treatment, beyond the labour itself. The Mission considers that much of the forced labour to which the populations of Kachin and Shan States were subjected is comparable, and notes, with particular concern, those who were forced to act as “human mine sweepers”, and women and girls subjected to rape and sexual violence by the military in this context.

1452. However, the practice was not permanent, even if indefinite. Although some instances of forced labour went on for months, or even years, in some cases it lasted only a day, with villagers returning home in the evenings. The duration of forced labour is relevant to whether it rises to the level of enslavement, with courts considering whether the exercise of ownership spanned a few months or only a matter of days.³¹³⁸ The importance of duration in any given case, however “will depend on the existence of other indications of enslavement”.³¹³⁹ The Mission considers that, even in circumstances in which the individual periods of forced labour may have been relatively short, its endemic and pervasive nature affected entire communities. No family could expect to be safe from its grasp. The Mission has also taken into account the fact that villagers were taken for forced labour on repeated occasions and, for many, from childhood to adulthood. Further, they had no idea, neither when they were seized nor during their captivity, how long they would be held. Their fate was unknown to them and completely outside their hands. As such, it is satisfied that this conduct gives rise

³¹³² SCSL, *Prosecutor v. Taylor*, SCSL-03-1-T, Judgment, 18 May 2012, para. 448; ICTY, *Prosecutor v. Krnojelac*, IT-97-25-T, Judgment, 15 March 2002, para. 359; *Trial of Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945 – 1 October 1946, Vol. 22 (1947), pp. 565-566; *Trial of Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945 – 1 October 1946, Vol. 22 (1947), at p. 579.

³¹³³ ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, para. 122.
³¹³⁴ DI-063.

³¹³⁵ SCSL, *Prosecutor v. Taylor*, SCSL-03-1-T, Judgment, 18 May 2012, para. 1738.

³¹³⁶ *Prosecutor v. Kunarac et al.*, IT-96-23/IT-96-23/1, Judgment, 22 February 2001, paras. 741-742.

³¹³⁷ ECCC, *Prosecutor v. Kaing Guek Eav*, 001/18-07-2007/ECCC/TC, Judgment, 26 July 2010, paras. 225-235.

³¹³⁸ In the case of Kunarac, for example, at the ICTY, the accused was convicted of enslavement on the basis that he abducted two girls who were kept in a house and forced to perform domestic duties and sexual services for a period of five to six months. He was not convicted in relation to a girl who had left the house “after a few days”. ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-A, Judgment, 12 June 2002, paras. 717-745.

³¹³⁹ ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-T, Judgment, 22 February 2001, para. 542.

to reasonable grounds to consider that enslavement as an underlying act of crimes against humanity has occurred.

Forcible transfer of a population

1453. Forcible transfer is the “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”.³¹⁴⁰ It refers to displacement within national boundaries.³¹⁴¹

1454. The displacement must occur as a consequence of “expulsion or other coercive acts”. This includes the threat of coercion or force “such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment”.³¹⁴² The determining factor is the absence of a genuine choice on the side of the victim.³¹⁴³ Fleeing to escape from violence and persecution is neither voluntary nor free choice.³¹⁴⁴ The crime includes “the full range of coercive pressures on people to flee their homes, including death threats, destruction of their homes, and other acts of persecution, such as depriving members of a group of employment, or access to schools”.³¹⁴⁵ The perpetrator does not need to intend to displace the population permanently.³¹⁴⁶ The forced displacement must, however, be unlawful under international law and not justified, for example, by reasons of security or military necessity.³¹⁴⁷ Moreover, the displaced population needs first to have been lawfully present in the territory.³¹⁴⁸

1455. The Mission has described the Tatmadaw practice of forcing civilians from their homes in Kachin and Shan States. The Mission collected consistent accounts of villagers being ordered to leave their homes and villages, being ordered not to return, or being physically prevented from doing so. The account of a former farmer from Loilen District, Shan State, is illustrative. The Tatmadaw came to his village and told the villagers “you are no longer allowed to farm and you all need to leave the village immediately, otherwise we will burn your homes”.³¹⁴⁹ The Tatmadaw soldiers later burned down his house, along with others in the village. The Mission has identified a widespread practice of attacking, destroying and looting civilian property, including intentional burning of civilian houses. Some victims, who tried to return after attacks, found that their land had been confiscated.

1456. The civilians who were displaced were lawfully present in the territory. Having reviewed the consistent accounts describing the displacement, the Mission considers that it was not voluntary and that those who were displaced had no choice but to flee. Recalling that “coercive acts” (and not just physical expulsion) can give rise to criminal liability, the Mission also notes the corroborated accounts of the Tatmadaw arresting civilians, confiscating food, harassing and intimidating, and generally “making it impossible to survive in our village”.³¹⁵⁰ Given the context in which these displacements occurred, including during attacks on villages, it is difficult to see how they could have been justified by any level of military necessity. In these circumstances, the Mission considers on reasonable grounds that

³¹⁴⁰ ICC Statute, Art. 7(1)(d); ICC Elements of Crimes, art. 7(1)(d).

³¹⁴¹ ICC, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under article 19(3) of the Statute”, ICC-RoC46(3)-01/18-37, 6 September 2018, paras. 53-55.

³¹⁴² ICC Elements of Crimes, art. 7(1)(d), fn. 12.

³¹⁴³ ICTY, *Prosecutor v. Krnojelac*, IT-97-25-A, Judgment, 17 September 2003, para. 229.

³¹⁴⁴ ICTY, *Prosecutor v. Krstic*, IT-98-33-T, Judgment, 2 August 2001, para. 530.

³¹⁴⁵ Christopher K. Hall in Otto Triffler (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), at p. 162.

³¹⁴⁶ ICTY, *Prosecutor v. Stakic*, IT-97-24-A, Judgment, 22 March 2006, paras. 278, 307; ICTY, *Prosecutor v. Brdjanin*, IT-99-36-A, Judgment, 3 April 2007, at para. 206.

³¹⁴⁷ Article 49 of Geneva Convention IV Relative to the Protection of Civilians; ICRC/Customary IHL, rule 129.

³¹⁴⁸ ICC Elements of Crimes, art. 7(1)(d), para. 2.

³¹⁴⁹ PI-082.

³¹⁵⁰ PI-035.

forcible transfer as an underlying act of crimes against humanity has occurred in Kachin and Shan States during the period under review.

Rape, sexual slavery and sexual violence

1457. Rape is an act by which “the perpetrator invaded the body of a person by conduct resulting in penetration of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body”,³¹⁵¹ This invasion must be “committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent”.³¹⁵²

1458. Sexual slavery is a particularly serious form of enslavement. As well as exercising any or all of the powers attaching to the right of ownership over the person(s), the perpetrator must also cause the person to engage in one or more acts of a sexual nature.³¹⁵³ A commercial transaction is not required, as the notion of servitude relates primarily to “the impossibility of the victim’s changing his or her condition”.³¹⁵⁴ Sexual slavery also encompasses situations where women and girls are forced into “marriage”, domestic servitude, or other forced labour involving compulsory sexual activity, including rape, by their captors.³¹⁵⁵

1459. The definition of crimes against humanity also lists “other sexual violence of comparable gravity” as a prohibited underlying act. This covers cases where the perpetrator committed an act of a sexual nature or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.³¹⁵⁶ The conduct must be of comparable gravity to rape, sexual slavery, enforced prostitution, forced pregnancy and forced sterilisation.

1460. Sexual violence has been a feature of military presence and offensives in Kachin and Shan States.³¹⁵⁷ Despite presumed significant underreporting, the Mission has found a significant number of corroborating accounts of the Tatmadaw targeting women and girls for sexual violence in various forms. It notes that the prevalence of rape and sexual violence committed by soldiers and groups of soldiers, including in the presence of (or by) senior military officers, reflects a widespread culture of tolerance, if not an explicit policy, of humiliation and denigration. Consistently, women who managed to fight or escape were later looked for by their attackers, who came to their homes and threatened and physically abused the victims’ family members and destroyed or confiscated property.

1461. The Mission also established a pattern of sexual violence perpetrated as torture or ill-treatment against men. This report details accounts from victims who were forced to undress and rape each other in front of SaYaPa agents who laughed as the victims begged to stop.³¹⁵⁸ SaYaPa agents rubbed the penis of one victim until the skin was torn and bleeding.³¹⁵⁹ The perpetrators took advantage of a coercive environment of detention, and their position of power, to force the detainees to perform these acts.

³¹⁵¹ ICC Elements of Crimes, art. 7(1)(g)-1, para. 1.

³¹⁵² ICC Elements of Crimes, art. 7(1)(g)-1, para. 2.

³¹⁵³ ICC Elements of Crimes, art. 7(1)(g)-2, para. 2.

³¹⁵⁴ ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-tENG, Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 976.

³¹⁵⁵ ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008, para. 431.

³¹⁵⁶ ICC Elements of Crimes, art. 7(1)(g)-6, para. 1.

³¹⁵⁷ A/HRC/31/71, p.11; A/66/365, p.11.

³¹⁵⁸ PI-052.

³¹⁵⁹ PI-055.

rape and sexual violence in this context constitute serious violations of international humanitarian law amounting to war crimes.

1517. In addition to crimes committed by the Tatmadaw, ARSA has also been accused by both the Government, and credible third parties, of committing abuses in Rakhine State both against members of the Rohingya population and against other ethnic groups. As noted in this report, the Mission has not had comparable access to victims of these alleged abuses and so further investigation is warranted. Many alleged ARSA crimes, such as the murders of suspected informers, pre-date August 2017, the date from which the Mission considered a non-international armed conflict to exist. Those actions would constitute crimes but not war crimes. Some allegations, however, relate to the relevant period of armed conflict and appear to be linked to it. This includes the burning of the Rakhine village of Ah Htet Pyu Ma, which may as such constitute a war crime and give rise to individual criminal responsibility. As noted above, it has been alleged that ARSA is responsible for the killing of up to 100 Hindu men and women from Kha Maung Seik village tract. The Mission was able to confirm the killing, but its information on the perpetrator is inconclusive. The Mission recommends further investigation, and prosecution, of those responsible for these killings – which may amount to a war crime.

IX. Responsibility

1518. The human rights violations and abuses, as well as crimes under international law, outlined in this report give rise both to State responsibility and to individual criminal responsibility.

1519. A State is responsible for all acts that are attributable to it and constitute a breach of an international obligation.³²³¹ There is no question that the acts and conduct outlined in this report are in breach of Myanmar's international obligations under international treaty and customary law. As for the second criterion, under international customary law, acts are attributable to the State when they are committed by a State organ or persons or entities exercising elements of governmental authority.³²³² In the case of conduct of non-State individuals or groups, the State still incurs responsibility where these persons or groups act on the instruction of or under the direction or control of the State, or when State agents acknowledge and adopt the conduct of non-State groups.³²³³ The State is also responsible when it fails to take all reasonable, necessary measures to prevent the non-State actor committing the acts and to protect its population from the conduct of non-State actors.

1520. Additionally, the violations and abuses outlined in this report will undoubtedly give rise to individual criminal responsibility, either under domestic criminal law or international criminal law. As stated in the Nuremberg judgment, “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.³²³⁴

A. Tatmadaw and other security forces

1521. In the period under review, the Tatmadaw was the main perpetrator of serious human rights violations and crimes under international law in Kachin, Rakhine and Shan States. Additionally, in Rakhine State, the Myanmar Police Force, NaSaKa and Border Guard Police were also perpetrators. Militias and militant “civilian” groups participated or assisted in the commission of some violations and crimes.

³²³¹ See article 2 of the International Law Commission Articles on State Responsibility (General Assembly resolution 56/83), hereinafter “ILC Articles”.

³²³² See ILC Articles, arts. 4 and 5.

³²³³ See ILC Articles, arts. 8 and 11.

³²³⁴ International Military Tribunal, *France and others v. Göring and others*, Judgment and Sentence, (1946) 22 IMT 2013, (1947).

1. Tatmadaw and its command structure

1522. According to the Myanmar Constitution, the Tatmadaw is the “main armed force for the Defence of the Union”, with complete autonomy in all matters related to defence, security and its internal running. The Constitution also stipulates that “all the armed forces in the Union shall be under the command of the [Tatmadaw]”.³²³⁵ The Tatmadaw consists of three branches: Army, Navy and Air Force. Senior-General Min Aung Hlaing has been its Commander-in-Chief since 2011, the entire period under review. He is the Supreme Commander of all armed forces in Myanmar.³²³⁶ He can order all units of the Tatmadaw into combat and oversees the deployment and subordination of auxiliary forces (including the Myanmar Police Force, Border Guard Police, and militias) to combat units as necessary.

1523. The Commander-in-Chief commands all subordinate units through the General Staff, at times referred to as the War Office. Overall military strategy and policy is decided within the General Staff. All subsequent orders are based on this overall strategy. Each branch of the Tatmadaw has its own structure. The Army, for example, has its own Commander-in-Chief (“Commander-in-Chief Army”, currently Vice Senior-General Soe Win, who is also concurrently the Deputy Commander-in-Chief of the Tatmadaw) and an Army General Staff. The Army General Staff has various subordinate departments, including the Directorate of People’s Militia and Border Forces (the entity responsible for the organization and training of people’s militias).

1524. The Army is comprised of six Bureaus of Special Operations (BSO), which are considered the first level of operational-level command. Each BSO is responsible for a particular geographic region. Each geographic region is then divided among Regional Military Commands (RMCs). For example, BSO-3 is comprised of three RMCs, the Western Regional Command, Southern Regional Command, and the South-western Military Command. Each Regional Military Command will have between one and three “Combat Divisions” subordinated to it, usually called Military Operational Commands (MOCs), which are comprised of as many as ten infantry battalions. For example, the Western Regional Command, responsible for Rakhine State, had MOC-5, MOC-9 and MOC-15 under its command as well as other infantry battalions. It may also have auxiliary forces subordinated to it for specific operations.

1525. Light Infantry Divisions (LIDs) are not permanently deployed to a geographical area but are directly subordinated to the Commander-in-Chief Army as “mobile” units deployable according to need. As such, their deployment is ordered at minimum from the Commander-in-Chief Army within the chain of command, likely with knowledge of the Commander-in-Chief. As already noted, the Commander-in-Chief Army is also Deputy Commander-in-Chief of the whole Tatmadaw. The LIDs, along with air and artillery units, are strategic-level assets that would normally only be deployed with the authorization of the Commander-in-Chief.³²³⁷ The LIDs are also considered the most battle-hardened and experienced units within the Tatmadaw. They are often deployed as the main strike force of an operation, and directed for use in counter-insurgency operations against non-State armed groups. Once deployed, LIDs fall under daily operational command of the relevant Regional Military Command. However, any subsequent re-deployment, such as back to their base or to another front, will be ordered by the Commander-in-Chief Army.³²³⁸

1526. The information collected by the Mission indicates that the Tatmadaw is a functioning, organized military force, with an identifiable chain of command, operating under the principle of “unity of command”. All levels of leadership are able to assert effective control over their subordinate units, orders are issued and obeyed, and strict reporting requirements are adhered to.³²³⁹ The Tatmadaw’s operational sophistication is demonstrated by its ability to carry out joint operations on a large scale across broad geographical areas.³²⁴⁰

³²³⁵ Constitution of Myanmar, s. 337-338.

³²³⁶ Constitution of Myanmar, s. 20(c).

³²³⁷ XM-009, XM-010, XM-011, XM-012, XM-013.

³²³⁸ XM-009, XM-010, XM-011, XM-013.

³²³⁹ XM-009, XM-010, XM-011, XM-012, XM-013, K-015.

³²⁴⁰ XM-010, XM-011, XM-012.

This indicates not only that it has the relevant structures in place (intelligence, logistics, communications, and so on), but that it has an effective chain of operational command, led by the General Staff, that can relay and receive information in real-time and effectively direct the activities of its forces.³²⁴¹

1527. The Tatmadaw is a tightly controlled armed force, meaning that subordinate units will generally operate only pursuant to direct orders, deviation from which is unlikely given the risk of immediate sanction.³²⁴² There are reports that the Tatmadaw has, at times, suffered from low recruitment, low morale, poor training, high desertion and other factors that can affect its effectiveness and efficiency.³²⁴³ However, these obstacles have not affected the existence of a very strong and centralised command structure.³²⁴⁴ The Mission is satisfied that the Tatmadaw is a functioning and organized national army, with the ability to direct, order, and control its subordinates and with access to information relating to its operations throughout the country.³²⁴⁵

2. Command responsibility for security forces' crimes

1528. Acts of the Tatmadaw and other State security forces of Myanmar, as well as acts of their subordinate units during security operations, are attributable to the State and incur State responsibility.

1529. When members of an armed force (or those acting within its effective control) commit crimes against civilians, both the direct perpetrator and the commander can incur criminal liability. The Mission has concluded on reasonable grounds that the Commander-in-Chief of the Tatmadaw, members of the General Staff of the Tatmadaw, senior commanders and Tatmadaw commanders on the ground during the events in question incurred criminal liability for the actions of perpetrators who committed crimes in Kachin, Rakhine and Shan States during the period under review.

1530. A commander can be held criminally liable for the crimes committed by subordinates, if he or she is (a) a military commander or person effectively acting as a military commander; (b) who has effective command and control over troops; (c) who knew (or owing to the circumstances at the time should have known) that the forces were committing or about to commit such crimes; (d) who failed to take all necessary and reasonable measures to prevent or repress the commission; and (e) the crimes occurred as a result of the commander's failures.³²⁴⁶ Each of these requirements has been met in the circumstances in Myanmar.

(a) Military commander

1531. As outlined above, the Tatmadaw exhibits the key components of an armed force, including a command structure that controls subordinate units through orders and directives. There is no question that those within this command structure, including the Commander-in-Chief, Senior-General Min Aung Hlaing, members of the General Staff and commanders directing operations on the ground are military commanders for the purpose of assessing criminal liability.

(b) Effective control

1532. The crimes discussed in the present report were conducted by the Tatmadaw either acting alone, or together with subordinated units such as the Myanmar Police Force, Border

³²⁴¹ XM-009, XM-010, XM-011, XM-012, XM-013.

³²⁴² XM-009, XM-010, XM-012.

³²⁴³ XM-009, XM-010.

³²⁴⁴ XM-009, XM-010, XM-012.

³²⁴⁵ XM-009, XM-010, XM-011, XM-012, XM-013.

³²⁴⁶ ICC Statute, art. 28(a). At the ICTY and ICTR, the Prosecution was not required to establish that the crimes occurred "as a result of" the commander's failings (the causal nexus). See ICTY, *Prosecutor v. Hadzihasanovic*, IT-01-47-T, Judgment, 15 March 2006, at para. 191. The question of whether Article 28(a) of the Rome Statute includes a causal nexus remains open. See ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-3636-Anx2, Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison, 8 June 2018, para. 51. It is included in the present analysis for completeness.

Guard Forces and elements of militia forces. Whether a commander has “effective control” over particular subordinates is a question of fact. Factors indicating the existence of effective control include the commander’s official position, the power to issue orders, to ensure compliance with orders, to promote, replace, remove or discipline any member of the forces, and the authority to send forces to certain areas and withdraw them at any given moment.³²⁴⁷

1533. There is no doubt that the troops who participated in operations in Kachin, Rakhine and Shan States in the period under review were under the effective control of their commanders and under the leadership of the Commander-in-Chief, Senior-General Min Aung Hlaing.³²⁴⁸ The Commander-in-Chief led the Tatmadaw General Staff and the General Staff 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. The systematic, sustained and repeated nature of the operations demonstrates the existence and implementation of a high-level plan to carry out the operations in Kachin, Rakhine and Shan States. Large-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.³²⁴⁹ This is further demonstrated by the close involvement of the Commander-in-Chief in the operations, as apparent from his Facebook page, and the removal or transfer of some senior commanders following the operations in Rakhine State.³²⁵⁰ In a military as tightly controlled as the Tatmadaw, lower echelon units will only operate under direct orders, and deviation from orders is unacceptable.³²⁵¹ The Tatmadaw’s senior commanders could have halted the operations at any time, or could have withdrawn the units and troops involved in reported abuses. Effective control was continuous and absolute at all relevant times.

1534. Members of the Myanmar Police Force, including the Border Guard Police, who were engaged alongside Tatmadaw troops during military operations also fell within the effective control of the Tatmadaw.³²⁵² The Police Force is a separate organization from the Tatmadaw, with its own chain of command.³²⁵³ However, once deployed in joint operations with the Tatmadaw, police units are subordinated to the relevant Tatmadaw unit with responsibility over the area. Operational control over the police units is then assumed by the Tatmadaw.³²⁵⁴

1535. Similarly, the Border Guard Forces in northern Myanmar, being a former non-State armed group or “ethnic armed organization”, are integrated and subordinate to the Tatmadaw. They are armed, supplied and trained by the Tatmadaw, and the Tatmadaw assumes control over their actions during operations.³²⁵⁵ Other militias, although not integrated into the army itself, were often at least partially supplied, armed and trained by the Tatmadaw.³²⁵⁶ In Rakhine State, the recurrent and organized involvement of “civilian” groups in the operations, and the consistent way in which they were equipped, tasked and executed their roles across northern Rakhine State, demonstrate orchestration and control by the Tatmadaw. There is no doubt that these groups followed the Tatmadaw’s operational orders and fell under its effective control.

1536. The *modus operandi* of Tatmadaw attacks lends further support to a reasonable conclusion that its General Staff, led by the Commander-in-Chief, exercised effective control over all units and personnel participating in the military and security operations under review. A consistent pattern of conduct was adopted, demonstrating a tactical formula that is not only

³²⁴⁷ ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-3343, Judgment, 21 March 2016, at para. 188.

³²⁴⁸ XM-009, XM-010, XM-011, XM-012, XM-013.

³²⁴⁹ XM-011, XM-009, XM-010, XM-012.

³²⁵⁰ Htet Naing Zaw, “Myanmar Army Replaces Rakhine Commander” (The Irrawaddy, 14 November 2017); Lun Min Mang, “Tatmadaw sacks top general included in EU sanction list” (Myanmar Times, 26 June 2018).

³²⁵¹ XM-009, XM-010, XM-012.

³²⁵² XM-009, XM-010, XM-011.

³²⁵³ However, many senior officers of the Police Force are former military officers. The Minister for Home Affairs, to whom the Police Force reports, is a military officer appointed by the President on the nomination of the Commander-in-Chief: Constitution of Myanmar, s. 232(b)(ii).

³²⁵⁴ XM-009, XM-010.

³²⁵⁵ BM-038, XM-009; J. Buchanon, *Militias in Myanmar* (The Asia Foundation, July 2016).

³²⁵⁶ XM-090, XM-010.

indicative of a significant level of pre-planning, but a level of coordination in its execution only possible when all troops are acting under the effective control of a single unified command.

(c) Knowledge of crimes

1537. Whether a commander knew (or had reason to know) of the criminal conduct of subordinates is normally assessed in the context of crimes committed by a rogue or isolated platoon or company of troops, and whether the acts of these “rotten apples” were known to operational level commanders. In the case of the Tatmadaw, not only were crimes known to the highest levels of operational command, they form a part of the Tatmadaw’s overall military strategy. The “Four Cuts” strategy, discussed above, was the operational framework for a policy of clearing an area of any conceivable support from the civilian population, including the population itself. In line with such policies, Tatmadaw troops have targeted civilians, killed and raped as part of an over-arching plan. Against this backdrop, no sensible suggestion can be made that military commanders within the Tatmadaw did not know or have reason to know that their subordinates were committing crimes. It was being done everywhere, in every operation, and pursuant to a policy of their own making and implementation. Tatmadaw commanders knowingly accepted the high probability of unlawful civilian casualties and destruction of civilian property. They accepted that the commission of grave crimes as an essential ingredient in the military strategy they approved and ordered.

1538. Even in the absence of an articulated policy to attack civilians, concerns about crimes against civilians in the context of Tatmadaw military operations have been raised with the military hierarchy for decades, including by all five United Nations Special Rapporteurs on the human rights situation in Myanmar. Members of the Tatmadaw have responded to these allegations. On rare occasions, they claim that some perpetrators of a small number of infractions have been severely punished. More frequently, they issue strident denials of any criminal conduct. Regardless, no credible claim can be made that hierarchical commanders within the Tatmadaw neither knew nor had reason to know of allegations of criminal conduct by subordinates. In the case of Rakhine State, this conclusion is only strengthened by the fact that the “clearance operations” and allegations of serious human rights violations were contemporaneously reported, almost in real-time, by the international press, and known throughout the world. Ignorance was effectively impossible.

1539. Knowledge of crimes can be ascribed to the Tatmadaw hierarchy in general, and to specific individuals within it. For example, Senior-General Min Aung Hlaing appeared well-informed of real-time developments on the ground. On 19 September 2017, the Commander-in-Chief visited the Regional Operational Command in Sittwe where he was given a detailed brief on the situation and reviewed operational maps.³²⁵⁷ The next day, he visited Taung Baza, Buthidaung Township, and held meetings at the local Tatmadaw battalion headquarters where he exhibited detailed knowledge on how events on the ground transpired.³²⁵⁸ It was reported that the Commander-in-Chief “gave instructions on getting timely information, close supervision by officials as there could not be any more mistakes with security affairs, cooperation in ensuring regional peace and stability, secure and firm border fencing... then instructed the continued citizenship verification process for issuing NVCs to those living in the region”. This was a commander with a full picture of what was transpiring, both on his orders and on his watch. This is further demonstrated by the daily updates on the “clearance operations” on the Tatmadaw’s and the Commander-in-Chief’s Facebook pages, as well as the State Counsellor’s Information Committee Facebook page throughout the operations.

(d) Failure to take all necessary and reasonable measures

1540. There is no check-list in international law of the measures which a commander must have taken to ensure responsible command and comply with the duty to “prevent and repress”

³²⁵⁷ Facebook post on file with the Mission.

³²⁵⁸ Facebook post on file with the Mission.

1544. A concrete example of how the dereliction of the duty to prevent and punish can act as a causal nexus to crimes involves the Light Infantry Divisions in Rakhine State. The 33rd and 99th Light Infantry Divisions have been accused of committing crimes against civilians in Kachin and Shan States prior to August 2017. Rather than initiating credible and genuine investigations into these allegations, Senior-General Min Aung Hlaing escalated the situation in Rakhine State by deploying the 33rd and 99th Light Infantry Divisions into this zone earlier in August 2017, before the ARSA attacks of 25 August. It should come as no surprise that some of the most egregious violations during the “clearance operations” were committed by these troops.

1545. Further contributing to this command climate is the Tatmadaw leadership’s praise and promotion of commanders and soldiers who were known to have been involved in crimes or were suspected of involvement. Senior-General Min Aung Hlaing, for example, hailed the Tatmadaw’s handling of the crisis in Rakhine State. An official statement noted that “security forces took actions in accordance with the law, and did not overstep the law”, and that his men “strictly followed orders and acted in accordance with the rules of engagement during the recent Rakhine crisis”.³²⁶⁵ When military operations that encompass widespread attacks on civilians are celebrated as an example of soldiers acting in accordance with the law, and when those who direct them are praised and promoted, the scene is set for cycles of violence. That is what has happened in Myanmar throughout the period under review.

B. Civilian authorities

1546. The constitutional powers of the civilian authorities afford little scope for controlling the actions of the Tatmadaw. Nor is there any indication that they directly participated in planning or implementing security operations or were part of the command structure, either in relation to operations in Rakhine State or in northern Myanmar. As outlined above, security matters fall entirely within the purview of the Tatmadaw, without civilian oversight. The Commander-in-Chief, Senior-General Min Aung Hlaing, is the Supreme Commander of all armed forces in Myanmar, which deviates from most modern constitutional frameworks where the Head of State is usually the Supreme Commander to whom the highest ranking military officers and institutions are subordinated. The key Ministers of Defence, Home Affairs and Border Affairs are appointed by the Tatmadaw. Through these appointments, the Commander-in-Chief also controls the majority of votes in the National Defence and Security Council.

1547. The Commander-in-Chief recently asserted, in the context of the United Nations Security Council visit to Myanmar, that, “though I am the head of the Tatmadaw, our country has the President. And we Tatmadaw take actions under the leadership of the President” and “Our Tatmadaw is under the guidance of the Myanmar government. We only take action according to the mandate given by the law and we are not authorized to do anything beyond the boundaries of law.”³²⁶⁶ Nonetheless, the Mission has found no indication that the Tatmadaw has operated under orders from outside its own chain of command, specifically the Commander-in-Chief and his subordinates.

1548. Nevertheless, nothing indicates that civilian authorities at Union and State level used their limited powers to influence the situation on the ground in the country, in Rakhine State in particular, where the gravest crimes under international law were being perpetrated. The State Counsellor, Daw Aung San Suu Kyi, has not used her *de facto* position as Head of Government, nor her moral authority, to stem or prevent the unfolding events, or seek alternative avenues to meet the Government’s responsibility to protect the civilian population or even to reveal and condemn what was happening. On the contrary, the civilian authorities have spread false and hateful narratives; 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. Ignorance on the part of the Myanmar civilian authorities was effectively impossible. The

³²⁶⁵ Facebook post on file with the Mission.

³²⁶⁶ <https://www.facebook.com/seniorgeneralminaugnhlaing/posts/1963383073696171> (on file with the Mission).

1552. Local authorities, politicians and monks participated or assisted in the commission of violations and crimes, to varying degrees. To this end, the Mission recalls for example the apparent link between virulent anti-Rohingya and anti-Muslim hate speech, rhetoric and propaganda, and outbreaks of violence. Those whose acts or omissions had a substantial effect on the commission of crimes, can be liable for aiding and abetting in their commission. This contribution need not have been physical, liability can also arise for individuals who provide moral support, or who fail to act in the face of a clear legal duty. The degree of individual culpability of these local authorities, politicians, and monks, warrants further examination.

D. Non-exhaustive list of alleged perpetrators

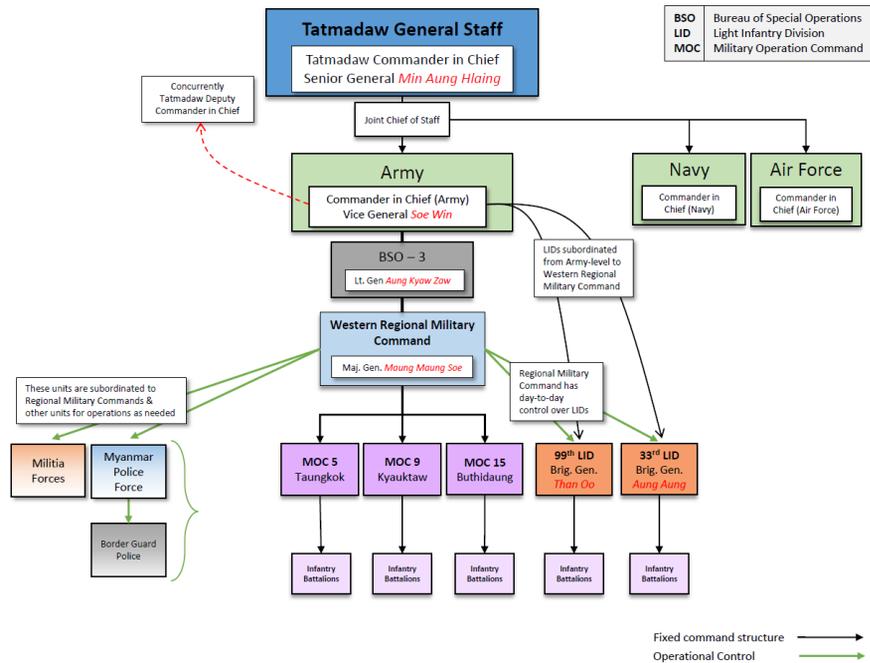
1553. The Mission has drawn up a non-exhaustive list of persons it considers warrant individual investigation and prosecution as possible perpetrators of crimes under international law, indicating priority subjects. It includes all persons concerning whom the Mission has received information indicating their involvement in the serious human rights violations and abuses, as well as possible crimes under international law, outlined in this report. The list includes individuals belonging to the Tatmadaw and other security forces in Myanmar, non-State armed actors and certain civilian individuals. While the list includes names of alleged direct perpetrators, it focuses on those exercising effective control over them.

1554. The majority of violations and crimes found by the Mission were committed by the Tatmadaw or by forces under its control. Considering the analysis on command and control within that institution, making it clear that the Tatmadaw commanders exercise effective control over their own soldiers, as well as over other armed actors deployed in military operations, the Mission decided to publicly release the names of six senior commanders within the Tatmadaw. While the top commanders have responsibility over the entire country, including Kachin and Shan State, others are specifically in relation to the “clearance operations” in Rakhine State (as per the pictured chart). In naming the highest levels of command, the Mission seeks to underscore their responsibility for crimes committed. Responsibility starts at the top.

1555. The list includes:

- Tatmadaw Commander-in-Chief, Senior-General Min Aung Hlaing;
- 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.

Chart providing an overview of the Tatmadaw chain of command during the “clearance operations” as of 25 August 2017



1556. The full list will form part of the Mission’s archives, kept in the custody of the United Nations High Commissioner for Human Rights. It can be shared with any competent and credible body pursuing accountability in line with recognized international norms and standards, including with regard to fair trial.

E. International community

1557. Considering the nature and scale of the gross human rights violations and abuses committed in Myanmar since 2011, amounting to the gravest crimes under international law, the question arises whether the international community has met its responsibility to protect civilian populations from the commission of atrocity crimes, including possibly genocide. The international community, through the United Nations, has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means and, through the Security Council, other collective measures to help to protect populations from atrocity crimes.³²⁷³

1558. The role of the United Nations and humanitarian community in relation to the issues set out in this report has not been specifically investigated by the Mission. At the same time, the Mission is concerned that these events, particularly in Rakhine State, occurred with a large active international presence on the ground and – significantly – while the United Nations was rolling out its Human Rights Up Front Action Plan.³²⁷⁴

1559. Throughout the period under review, Myanmar was repeatedly identified as a situation that required the “whole of UN”, human rights driven, response to crises set out in the Action

³²⁷³ A/RES/60/1 (2005 World Summit Outcome), para. 139.

³²⁷⁴ The Human Rights Up Front Action Plan was put in place in 2013, to draw appropriate lessons from a 2012 report of the Secretary-General Internal Review Panel on United Nations action in Sri Lanka, which had identified a “systemic failure” in how the United Nations had dealt with the crisis in Sri Lanka. The principal aim of this Action Plan was to strengthen “the UN system’s ability to effectively prevent and respond to serious human rights violations and complex crises” and to provide a framework for a timelier and more predictable UN-wide response to such situations.

Plan. This approach was rarely, if ever, pursued. Rather, it was largely “business as usual”, with development goals and humanitarian access prioritised only. Information received by the Mission indicates that a number of individuals within the United Nations system in Myanmar tried to pursue the Human Rights Up Front approach. The Mission is concerned to note allegations that these individuals were ignored, criticised, side-lined or blocked in these efforts.

1560. The United Nations leadership in-country engaged on human rights issues through a “quiet diplomacy” approach to raise concerns with the Government. This included letters to the Myanmar authorities and meetings with senior officials. However, public advocacy was left to the “usual suspects”, primarily the United Nations High Commissioner for Human Rights and the United Nations Special Rapporteur on the human rights situation in Myanmar. This is exemplified by the fact that, even after the events following 25 August 2017, the only statement made by the Resident Coordinator’s Office was to condemn the ARSA attacks and losses suffered by the Myanmar security forces.³²⁷⁵ Leaving human rights to the specialized entities rather than addressing them collectively as the United Nations system, undermined the effectiveness of the United Nations in Myanmar. One detailed study of the approach of the international community in Myanmar concluded:

*UN leaders inside Myanmar consistently left the public advocacy role to a few externally based human rights mandate-holders, without visibly supporting or backing them up. [...] The deeply ingrained and well-practiced habit of self-censorship remained too powerful, even when the worst of violence struck in 2016 and 2017.*³²⁷⁶

1561. Even now, the approach displays few signs of any lessons having been learned. There has been no review of what happened, of where the approach taken had some positive effect and where it did not, and of how the UN’s approach could be improved in future crises. A review of this kind is the very least that would be expected in any organization dealing with a catastrophe such as this. Human rights remain missing from agreements recently signed between the Government and United Nations agencies and international donors. Integration of a coherent human rights approach throughout the work of the United Nations and international community, including advocacy from the most senior levels, remains essential if the fundamental challenges outlined in this report are to be addressed. As the detailed study also highlighted:

*The international community in Myanmar has boxed itself in to a very small space, pressured and manipulated into silent complicity with ethnic cleansing, and it remains to be seen whether the UN and its humanitarian partners will find the courage and creativity to try to push that space open. In situations like this, international actors tend to bemoan how little political space and manoeuvrability they believe they have, and paradoxically use this as an excuse for not trying to expand it. But political space is often self-constrained: the Myanmar government has learned that it can count on UN and humanitarian self-censorship.*³²⁷⁷

1562. The Mission is extremely grateful to United Nations entities and individuals who provided valuable assistance and information to it in its work. However, it also regrets the lack of cooperation from others. The Mission is concerned that a number of interlocutors within the United Nations system took a defensive attitude towards its work and appeared to view it as a threat, rather than a means to address the most deep rooted human rights challenges facing Myanmar. This attitude and approach must change.

³²⁷⁵ Statement of the Resident Coordinator of the United Nations in Myanmar Renata Lok-Dessallien on attacks in Rakhine State (25 August 2017).

³²⁷⁶ L. Mahoney (Fieldview Solutions), “Time to break old habits: Shifting from Complicity to Protecting the Rohingya” (July 2018).

³²⁷⁷ Ibid.

X. Impunity and accountability

*I do not see any justice for us. Justice was never there in Myanmar. It is just that now the situation is more in focus because of the extreme levels of the violence.*³²⁷⁸

1563. In 2012, United Nations Member States explicitly agreed to end impunity for genocide, war crimes and crimes against humanity, violations of international humanitarian law and gross violations of human rights law. They committed to the proper investigation and appropriate sanction of violations, including by bringing the perpetrators of crimes to justice through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law.³²⁷⁹ The United Nations Security Council has also emphasized the responsibility of States to comply with their obligations to end impunity and thoroughly investigate and prosecute “in order to prevent violations, avoid their recurrence and seek sustainable peace, justice, truth and reconciliation”.³²⁸⁰

1564. Myanmar has a legal obligation to ensure accountability for the violations and crimes outlined in this report. To date, no significant steps have been taken. At the Human Rights Council session in February 2018, the representative of Myanmar stated that his government would not condone impunity and that action would be taken against perpetrators “where there is concrete evidence”.³²⁸¹ The Mission welcomes this statement of principle but highlights its insufficiency. The statement illustrates a misunderstanding of Myanmar’s legal obligations. Its duty is not linked to the presentation of “concrete evidence” by others. It is to ensure that all allegations of human rights violations and abuses are promptly, thoroughly, independently and impartially investigated – and that concrete evidence is gathered, rather than lost or destroyed. It must act, not take a passive stance.

1565. Ensuring accountability for crimes is not only a legal obligation. In Myanmar, it is also the key to disrupting patterns of oppression and cycles of violence in which the country has remained trapped for half a century. Impunity for gross human rights violations has significantly and demonstrably contributed to the validation of deeply oppressive and discriminatory conduct, enabled recurrence of human rights violations and atrocity crimes, and emboldened perpetrators and silenced victims. It has undermined the legitimacy of the State and exacerbated ethnic and racial divisions. It has prevented Myanmar’s development as a modern democratic State. Accountability is the key to re-establishing the population’s trust in the State and in its capacity to ensure a secure and equitable society in which all people can prosper. As stated in the preamble of the United Nations Principles to Combat Impunity, “there can be no just and lasting reconciliation unless the need for justice is effectively satisfied”.³²⁸² The transformation of South Africa after apartheid and of South American States after the end of military dictatorships and civil wars stand as concrete examples of this principle.

A. Legal framework and international standards on accountability

1566. Impunity means the impossibility, *de jure* or *de facto*, to bring perpetrators of violations to account, whether in criminal, civil, administrative or disciplinary proceedings. Perpetrators are shielded from any inquiry that might lead to their being accused, arrested, tried and - if found guilty - sentenced to appropriate penalties and required to provide reparations to victims.³²⁸³ The Mission adheres to a broad understanding of the concept of

³²⁷⁸ DI-048.

³²⁷⁹ A/RES/67/1, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels.

³²⁸⁰ E.g. S/PRST/2010/11 (Statement by the President of the Security Council, Promotion and strengthening of the rule of law in the maintenance of international peace and security 29 June 2010).

³²⁸¹ H.E. Mr. Kyaw Tin, “Statement at the High-Level Segment - 4th Meeting, 37th Regular Session of the Human Rights Council” (27 February 2018).

³²⁸² Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (E/CN.4/2005/102/Add.1), hereafter “Principles to Combat Impunity”.

³²⁸³ Principles to Combat Impunity, definitions.

accountability. As highlighted by the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, “criminal justice alone would not be enough to satisfy the justice claims of victims of massive or systematic human rights abuse”.³²⁸⁴ In addition, accountability also encompasses measures to realize the right to know the truth, the right to an effective remedy and to reparation, and guarantees of non-recurrence.³²⁸⁵

1567. This broad understanding of accountability stems from States’ obligations under international law. States have a duty to ensure that individuals have accessible and effective remedies to enforce their rights, including through redress for violations.³²⁸⁶ This includes a duty to investigate, prosecute and punish gross human rights violations and serious violations of international humanitarian law, in particular where they amount to crimes under international law.³²⁸⁷ For example, under the Convention on the Elimination of Discrimination against Women, States parties like Myanmar have a due diligence obligation to prevent, investigate, prosecute and punish acts of gender based violence. A failure to investigate and prosecute could, in itself, constitute a human rights violation.³²⁸⁸ Investigations into allegations of violations and crimes must be prompt, thorough and effective, independent and impartial, and transparent.³²⁸⁹ International and domestic courts have recognised this obligation on governments to prevent, investigate and, if necessary, prosecute.³²⁹⁰

³²⁸⁴ A/HRC/36/50/Add.1, para. 25.

³²⁸⁵ Principles to Combat Impunity, principle 1.

³²⁸⁶ B. Ramcharan, “The Law-Making Process: From Declaration to Treaty to Custom to Prevention”, in *The Oxford Handbook on International Human Rights Law*, D. Shelton ed. (Oxford, Oxford University Press, 2013), p. 512. The right of victims to an effective and enforceable remedy for violations of their human rights is proclaimed in numerous international instruments, including the Universal Declaration of Human Rights (art. 8), the ASEAN Human Rights Declaration (art. 5), and several international treaties (e.g. art. 2 of the International Covenant on Civil and Political Rights; article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; art. 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; art. 39 of the Convention on the Rights of the Child; art. 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907; art. 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977; and arts. 68 and 75 of the Rome Statute of the International Criminal Court). It is also further developed in the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, hereafter “Basic Principles and Guidelines on the Right to a Remedy and Reparation”.

³²⁸⁷ E.g. A/HRC/27/56, para. 27. See also e.g. Genocide Convention, art. 1; U.N. Human Rights Committee, General Comment No. 31 (CCPR/C/21/Rev.1/Add.13); J.M. Henckaerts and L. Doswald-Beck, “Customary International Humanitarian Law. Volume I: Rules” (Cambridge, ICRC/Cambridge University Press, 2005), rules 150, 158 (hereinafter “ICRC/Customary IHL”); Basic Principles and Guidelines on the Right to a Remedy and Reparation (principles 1-5); and the Principles to Combat Impunity.

³²⁸⁸ E.g. United Nations Human Rights Committee, General Comment No. 31 (CCPR/C/21/Rev.1/Add.13), para. 15.

³²⁸⁹ Ibid. Also Principles to Combat Impunity, principle 19; Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (New York and Geneva, United Nations, 2017) (hereafter “Minnesota Protocol”).

³²⁹⁰ Inter-American Court of Human Rights, *Velasquez Rodriguez v. Honduras*, Judgment of 29 July 1988, Ser. C, No. 4, which held that States had an obligation, as a corollary to their obligation to ensure rights, to investigate and, if warranted, prosecute and punish violations and to provide remedies to victims. Other regional human rights bodies, as well as United Nations treaty bodies, have all reaffirmed this principle. E.g. European Court of Human Rights, *Case of Benzer and others v. Turkey*, App no. 23502/06, 24 March 2014; African Commission on Human and Peoples’ Rights, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication no. 245/2002 (2006); U.N. Human Rights Committee, *Observations on Algeria*, CCPR/C/109/D/1874/2009, 7 January 2014, para. 7.10.

1568. Considering the specific context in Myanmar, it is important to briefly recall what is meant by prompt, thorough and effective, independent and impartial, and transparent investigations, according to international standards:

- **Prompt:** the State must initiate and conduct an investigation into an alleged human rights violation as soon as possible and proceed without unreasonable delays. A reasonable allegation is sufficient to trigger an investigation; a formal complaint or concrete evidence is not required.
- **Thorough and effective:** investigations must be conducted in a manner that can lead to the identification, prosecution and punishment of those responsible for violations, including, for example, members of the military or government. In relation to unlawful deaths, this would include collecting eyewitness testimony and forensic evidence, as well as carrying out an autopsy.³²⁹¹ As well as seeking to identify individual perpetrators, the investigation should seek to identify policies and systemic failures that may have contributed to unlawful deaths and to identify patterns, where they exist.³²⁹² The investigation must be conducted by a mechanism that is appropriately empowered and resourced, with capacity to ensure the security of witnesses.
- **Independent and impartial:** the persons or mechanism responsible for and carrying out the investigation must be independent from those implicated in the events under investigation. This, at the very least, implies no hierarchical or institutional link between the alleged perpetrator and the investigators.³²⁹³ Investigators must be impartial and without bias, analysing evidence objectively.
- **Transparent:** investigative processes and their outcomes must be transparent, and open to the scrutiny of the general public and of victims' families. Limitations on transparency must be strictly necessary for a legitimate purpose (e.g. protecting the privacy and safety of affected individuals, ensuring the integrity of continuing investigations, or securing sensitive information about military or police operations).³²⁹⁴

1569. In addition to establishing individual criminal responsibility, measures also need to be taken to realize the right of victims to know the truth about violations.³²⁹⁵ The U.N. Principles on Combating Impunity describe the full and effective exercise of the right to the truth as "a vital safeguard against the recurrence of violations". Victims and societies have the right to know the truth about the perpetration of heinous crimes and the circumstances that led to their commission.³²⁹⁶ The right to the truth appears in several international instruments;³²⁹⁷ is recognized by the Human Rights Council;³²⁹⁸ and is protected in international law concerning enforced disappearances.³²⁹⁹ Additionally, in the event of death or disappearance, victims' families have the right to know the truth about the circumstances in which violations took

³²⁹¹ Minnesota Protocol, paras. 24-25.

³²⁹² Minnesota Protocol, para. 26.

³²⁹³ For unlawful deaths, see Minnesota Protocol, para. 28.

³²⁹⁴ Minnesota Protocol, paras. 32-33.

³²⁹⁵ On the right to the truth, see E/CN.4/2006/91, A/HRC/5/7, A/HRC/12/19 and A/HRC/15/33.

³²⁹⁶ Principles to Combat Impunity, principle 2.

³²⁹⁷ E.g. Basic Principles and Guidelines on the Right to a Remedy, principle 24; Principles to Combat Impunity, principles 2-5.

³²⁹⁸ In 2005, the Commission on Human Rights adopted resolution 2005/66 on the right to truth, requesting OHCHR to prepare a study on the right to the truth (E/CN.4/2006/91). Human Rights Council resolutions 9/11, 12/12 and 21/7 also support the right to the truth. In 2014, the General Assembly adopted a resolution on the right to the truth (A/RES/68/165), recognizing "the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights".

³²⁹⁹ International Convention for the Protection of All Persons from Enforced Disappearance, art. 24(2).

place and the victims' fate.³³⁰⁰ Governments are obliged to establish mechanisms to facilitate the revelation of the truth about gross human rights violations.³³⁰¹

1570. Remedies further include adequate, effective and prompt reparation for harm suffered.³³⁰² Victims are entitled to full and effective reparations, which entail restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.³³⁰³ Restitution aims to restore the victim to the situation existing before the violation. It may include 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. Compensation should be provided for any economically assessable damage (e.g. physical or mental harm, lost opportunities, material damage). Rehabilitation includes medical and psychological care as well as legal and social services.³³⁰⁴ Satisfaction may include effective measures aimed at the cessation of continuing violations; verification of the facts and full and public disclosure of the truth; search for the whereabouts of the disappeared; search for, identification and burial of bodies; public apology and acknowledgment of the facts and acceptance of responsibility; commemorations and tributes to victims.³³⁰⁵ Reparations should be proportional to the gravity of the violation and the circumstances of each case.

1571. A critical element of the right to an effective remedy is the provision of guarantees of non-recurrence.³³⁰⁶ Examples include ensuring effective civilian control of military and security forces; ensuring that all civilian and military proceedings abide by international standards of due process; strengthening the independence of the judiciary; protecting journalists and human rights defenders; providing human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; promoting public servants' observance of codes of conduct and ethical norms, in particular international standards; promoting mechanisms for preventing and monitoring social conflicts and their resolution; reviewing and reforming laws contributing to or allowing human rights violations.³³⁰⁷

1572. These legal obligations and international norms provide a roadmap for genuine and comprehensive accountability in Myanmar. That road is long, with no quick fixes. A response amounting to "show us the evidence and then we will investigate", however, is manifestly insufficient.

B. History and climate of impunity in Myanmar

1573. Justice has remained elusive for victims in Myanmar for decades, with the authorities systematically failing to condemn, investigate and prosecute perpetrators. Thirty years of United Nations resolutions and reports, as well as those from civil society, have identified impunity as a root cause of continued human rights violations in Myanmar. The United Nations General Assembly, Commission on Human Rights and Human Rights Council have highlighted the negative impact of impunity since at least 1994, calling on Myanmar to bring perpetrators to account.³³⁰⁸

³³⁰⁰ Principles to Combat Impunity, principle 4. This right finds its roots in international humanitarian law, see ICRC/Customary IHL, rule 117.

³³⁰¹ E.g. A/HRC/24/42, para. 20; D. Groome, "The Inalienable Right to the Truth", in *The United Nations Principles to Combat Impunity – A Commentary*, F. Haldemann, T. Unger, eds. (Oxford, Oxford University Press, 2018), pp. 59-70.

³³⁰² Basic Principles and Guidelines on the Right to a Remedy, principles 11, 14-15; Principles to Combat Impunity, principle 4 and 31. See also ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012.

³³⁰³ Basic Principles and Guidelines on the Right to a Remedy, principle 18.

³³⁰⁴ *Ibid.*, principle 21.

³³⁰⁵ *Ibid.*, principle 22.

³³⁰⁶ Also A/HRC/30/42 for an in-depth exploration of the concept of guarantees of non-recurrence.

³³⁰⁷ Basic Principles and Guidelines on the Right to a Remedy, principle 23.

³³⁰⁸ See e.g. E/CN.4/1994/132, op. 8, reminding "the Government of Myanmar of its obligation to put an end to the impunity of perpetrators of violations of human rights, including members of the military,

1574. All five United Nations Special Rapporteurs on the human rights situation in Myanmar have identified systemic impunity as a critical obstacle to the realization of human rights in Myanmar. In 1994, the first Special Rapporteur, Yozo Yokota, recommended that, “given the magnitude of the abuses, official condemnation should be made by the Government of all acts by authorities involving human rights violations. Such acts, including all acts of intimidation, threat or reprisal, should not benefit from the present system of complete denial by, and impunity under, the Government.”³³⁰⁹

1575. Twelve years later, in a 2006 report, Special Rapporteur Paulo Sergio Pinheiro demonstrated how impunity had exacerbated a range of human rights concerns and contributed to a deterioration of the socio-economic situation of villagers in Myanmar.³³¹⁰ He found that violations were “indulged with impunity” by the regime, authorized and sanctioned by law. He identified the misuse of the legal system and a lack of judicial independence as providing a legal basis for abuse of power and exoneration of perpetrators.³³¹¹ Another decade later, the current Special Rapporteur, Yanghee Lee, identified the impunity enjoyed by the military and other security forces, and their dominant position in the government, as the two main causes for recurrent human rights issues in the country. She noted that, where violations and abuses were alleged, the Government appeared “quick to resort to its standard position of ‘defend, deny and dismiss’”,³³¹² the antithesis of accountability.

1576. The Myanmar authorities, both civilian and military, still adhere to this established policy of denial of mass violations and impunity for their perpetrators.

1. Key obstacles to accountability in Myanmar

1577. Beyond the question of unwillingness, 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.

(a) Structural obstacles to criminal accountability

1578. Impunity for human rights violations is enshrined in the 2008 Constitution and other domestic laws. Article 445 of the Constitution provides that no proceedings can be instituted against military officials or government members for “any act done in the execution of their respective mandate”. This blanket amnesty appears intended to shield the former military regimes, the SLORC and the SPDC, from prosecution for acts committed prior to March 2011, although the clause could be interpreted as also providing immunity for later conduct. In 2016, the outgoing government of Thein Sein also adopted the Former Presidents’ Security Act, providing presidents with legal immunity from prosecution for crimes committed during their term of office.³³¹³

1579. Furthermore, article 20(b) of the Constitution gives the Tatmadaw the right to “independently administer and adjudicate all affairs of the armed forces”. Articles 293(b) and 319 establish permanent military tribunals. The 1959 Defence Services Act provides that military personnel on active service who commit serious crimes against a civilian (murder, culpable homicide, rape) shall be tried by military tribunals (article 72). The Act defines “active service” in such broad manner that military personnel would effectively always fall under military courts’ jurisdiction.³³¹⁴ Article 343(b) of the Constitution further makes

and its responsibility to investigate alleged cases of human rights violations committed by its agents on its territory, to bring them to justice, prosecute them and punish those found guilty, in all circumstances.” For General Assembly, see e.g. A/RES/52/137, A/RES/53/162, A/RES/56/231, A/RES/59/263.

³³⁰⁹ E/CN.4/1994/57, para. 74(g).

³³¹⁰ A/61/369, paras. 27-33. See also E/CN.4/1999/35, para. 78.

³³¹¹ A/61/369, para. 34; A/62/233, para. 30.

³³¹² A/HRC/34/67, para. 83. Also A/HRC/28/72, para. 57.

³³¹³ Former Presidents’ Security Law (Pyidaungsu Hluttaw Law No. 25/2016, 28 January 2016).

³³¹⁴ The provision reads: “The time during which [the person] (1) is attached to, or forms part of, a force which is engaged in military operations against an enemy, or (2) is engaged in military operations in,

decisions of the Commander-in-Chief concerning military justice matters “final and conclusive”, with no right of appeal. This effectively means that the Commander-in-Chief can also pardon anyone convicted by a military tribunal. The Mission has been unable to ascertain whether the rare soldiers convicted of serious crimes actually serve their sentences.

1580. These legal provisions provide broad immunities and make the Tatmadaw accountable only to itself. This is incompatible with the duty of States to ensure independent and impartial investigations for alleged human rights violations. It is inconsistent with international standards requiring that human rights violations fall within the jurisdiction of ordinary domestic courts.³³¹⁵ Military courts are inappropriate venues to adjudicate human rights violations.³³¹⁶ In Myanmar in particular, military courts lack the independence and impartiality required to judge military officers for serious human rights violations. Additionally, trials in military courts are generally not open to the public; victims generally remain unaware or uninformed of any action taken against alleged perpetrators.

1581. In short, under the current constitutional and legal framework, the civilian authorities cannot hold the military or its members accountable for human rights violations. Amending the Constitution requires more than 75 per cent of the votes in Parliament. Given that the Constitution also guarantees that 25 per cent of parliamentary seats are held by the military, any amendments would require their consent.³³¹⁷

1582. As for the police, the 1995 Myanmar Police Force Maintenance of Discipline Law also assists in shielding police officers from prosecution for crimes committed in the course of their service. The Law lists a range of “offences” for which police officers may be tried before a Police Court, such as threatening a witness (article 13(c)), unlawful detention (article 17(a)), beating or ill-treatment of prisoners (article 17(c)), or corruption (article 17(h)). As such, even for acts which may constitute serious human rights violations and crimes under the Penal Code, police officers are shielded from prosecution in the domestic criminal system. In addition to concerns over its independence and impartiality, an accused before a Police Court faces lesser sentences (e.g. “threatening a witness” is punishable by a maximum prison term of one year, whereas “criminal intimidation” under the Penal Code is punishable by a maximum prison term of seven years³³¹⁸). The police and its administration fall under the Ministry of Home Affairs, which is ultimately answerable to the Tatmadaw Commander-in-Chief.

(b) Inadequate substantive legal framework

1583. As Myanmar has ratified the Genocide Convention, it must criminalise and punish genocide in its domestic laws. This has not been done. Nor have crimes against humanity or war crimes been specifically criminalised. While other serious crimes are included in the Penal Code, the definitions do not consistently comply with international norms and standards. For instance, while torture is criminalised in the Penal Code (articles 330 and 331), the definition only extends to acts undertaken with a view to compelling the victim’s response (e.g. confession), while the international definition is broader. There is no specific provision for ill-treatment. The Penal Code provisions for rape and sexual violence are restrictive.³³¹⁹

1584. The Constitution is particularly problematic in that generally it only extends human rights protections to “citizens”. In a context where the citizenship rules are fundamentally

or is on the line of march to, a country or place wholly or partly occupied by an enemy, or (3) is attached to or forms part of a force which is in military occupation of a foreign country”.

³³¹⁵ See Principles to Combat Impunity, principle 29; United Nations Commission on Human Rights, Draft Principles Governing the Administration of Justice Through Military Tribunals (E/CN.4/2006/58).

³³¹⁶ See e.g. F. Ni Aolain, “Principle 29. Restrictions on the Jurisdiction of Military Courts”, in F. Haldeemann and T. Unger (eds.), *The United Nations Principles to Combat Impunity – A Commentary* (Oxford, Oxford University Press, 2018), p. 322: “When military courts are deployed in fragile, transitional, and post-conflict states there is a clear and present danger that the modality of trial may compound rather than address serious human rights violations and the deficiencies of the rule of law.”

³³¹⁷ Constitution of Myanmar, s. 436.

³³¹⁸ Penal Code of Myanmar, s. 503, 506.

³³¹⁹ See CEDAW/C/MMR/CO/4-5, para. 27(a).

discriminatory and have rendered a large segment of the population *de facto* stateless, this effectively excludes non-citizens from seeking protection for their rights and an effective remedy for violations. Furthermore, Myanmar's legal framework includes laws, regulations and orders that oppress the Rohingya specifically, and more generally curtail freedom of expression, association and peaceful assembly.

(c) Lack of effective complaint mechanisms and avenues for justice

1585. There are no effective avenues for justice within the civilian administration. Neither the justice system nor the Myanmar National Human Rights Commission is a realistic option for pursuing accountability for gross human rights violations. Myanmar has not recognized the competence of any of the individual complaints mechanisms under the international human rights framework either.

1586. The Myanmar judiciary has been systematically undermined, weakened and neglected during the long period of military dictatorship. Despite some progress reported since 2011³³²⁰, it is consistently assessed as lacking independence, poorly trained and resourced, inefficient, and prone to corrupt practices.³³²¹ These factors impact on its ability to guarantee fair trial rights.

1587. The judiciary's lack of independence is generally acknowledged. The President appoints judges to the Supreme Court and the Chief Justices of the High Courts, with a very limited role for review by the Union Parliament.³³²² It suffices that the President is of the opinion that the person is "an eminent jurist"; a law degree or legal practice is not required. Most judges on the Supreme Court are military appointees and several have military backgrounds, including the current Chief Justice, Htun Htun Oo, who was appointed in 2011. These structural factors may explain the level of undue influence from State authorities, in particular the executive and the military, particularly in politically sensitive cases, including those regarding human rights violations.

1588. Other challenges include insufficient legal expertise and judicial experience. A general lack of adequate resources results in low remuneration, understaffing and limited training options. Many experts, observers and practitioners consider corruption widespread.³³²³ In March 2018, at the "Conference on the Justice Sector Coordinating for Rule of Law" in Naypyidaw, State Counsellor Aung San Suu Kyi said, "the public trust in people who are working in the justice sector has eroded. It is because of corruption, exercising the law for their own interests, failing the principle of upholding justice without

³³²⁰ The Judicial Strategic Plan 2018-2022 ("Towards improving justice for all") of the Supreme Court of Myanmar lists "enhance judicial independence and administrative capacity" and "promote and ensure the professionalism, accountability and integrity of the judiciary" as key strategic action areas. Recent positive developments include the launch of the Codes of Ethics of the Union Supreme Court and the Union Attorney General's Office. A Manual of Fair Trial Standards for Law Officers (prosecutors) was also recently launched by the Union Attorney General, to raise awareness about the rights of the accused and the proper conduct of criminal proceedings.

³³²¹ See e.g. International Bar Association, *The Rule of Law in Myanmar: Challenges and Prospects* (London, December 2012); Kyaw Min San, "Critical Issues for the Rule of Law in Myanmar", in *Myanmar's Transition: Openings, Obstacles and Opportunities*, N. Cheesman, M. Skidmore, T. Wilson, eds. (Singapore, Institute of Southeast Asian Studies 2012), pp. 217-229; N. Cheesman, "Myanmar's Courts and the Sound Money Makes", in *Myanmar's Transition: Openings, Obstacles and Opportunities*, N. Cheesman, M. Skidmore, T. Wilson, eds. (Singapore, Institute of Southeast Asian Studies 2012), pp. 231-248; N. Cheesman, *Opposing the Rule of Law – How Myanmar's Courts Make Law and Order*, Cambridge University Press, Cambridge, 2015; Justice Base, *Monitoring in Myanmar – An Analysis of Myanmar's Compliance with Fair Trial Rights* (Yangon, 2017); International Commission of Jurists, *Achieving Justice for Gross Human Rights Violations in Myanmar – Baseline Study* (Geneva, January 2018); M. Crouch, "Judiciary", in *Routledge Handbook of Contemporary Myanmar*, A. Simpson, N. Farrelly and I. Holliday, eds. (Routledge, London and New York, 2018), pp. 248-256.

³³²² Constitution of Myanmar, s. 299.

³³²³ See same references as for preceding paragraphs.

favour, and not performing their work efficiently and lacking expertise.”³³²⁴ This sentiment was echoed by many of the Mission’s interviewees, who invariably stated that they had no trust in the Myanmar justice system.

1589. Similar problems plague the investigation of cases. The Myanmar Police Force is poorly regarded by the public, has limited institutional independence and high levels of corruption.³³²⁵ The head of the Myanmar Police Force has a military background and the Police Force falls under the Ministry of Home Affairs, one of the military controlled ministries. During joint security operations, the police fall under the command of the Tatmadaw.³³²⁶ Its technical capacity to undertake complex investigations, including in terms of crime scene investigations and forensic analysis in line with international standards, is also limited.³³²⁷ There can be no expectation that the police will conduct credible, independent investigations into alleged gross human rights violations by the military or other security forces.

1590. Similarly, the Union Attorney-General is a member of the executive branch of the government. The Attorney-General plays a critical role in upholding the rule of law and respect for human rights, as his Office supervises the country’s prosecutors and can select cases and initiate criminal proceedings. However, the Office of the Attorney-General enjoys low public confidence, largely due to its history of defending the interests of the military and its poor track record regarding sensitive matters such as human rights violations – including the prosecution of journalists, human rights defenders and activists on spurious grounds. Legal officers and prosecutors are generally not considered to have the independence and capacity to prosecute acts constituting human rights violations.³³²⁸

1591. The Myanmar National Human Rights Commission (MNHRC), which was created in 2011³³²⁹ and reconstituted in 2014,³³³⁰ in principle has a broad mandate to promote and protect human rights. The MNHRC has the power to investigate human rights violations, including the power to summon witnesses and to visit detention centres (although only with prior notification). It may initiate an inquiry when it becomes aware of “widespread, systemic or entrenched situations or practices that violate human rights”, and can also receive complaints from individuals, although it cannot investigate cases pending before a court or in which a court has already taken a final decision. Following its restructuring in 2014, the MNHRC received a “B status” accreditation from the International Coordinating Committee of National Human Rights Institutions,³³³¹ meaning that it is partially compliant with the United Nations Paris Principles providing the benchmarks for accreditation.

1592. The main obstacles to an “A status” accreditation were insufficient diversity among its membership (in particular a lack of women), issues with its independence and funding,

³³²⁴ The Republic of the Union of Myanmar, Ministry of Information, “Rule of law for all - Judiciary, legal institutions urged to work honestly for reforms” (7 March 2018), available at: <http://www.moi.gov.mm/moi:eng/?q=news/8/03/2018/id-12933> (accessed August 2018).

³³²⁵ E.g. A. Selth, *Police reform in Burma (Myanmar): aims, obstacles and outcomes*, Regional Outlook Paper: No. 44, 2013 (Griffith Asia Institute)

³³²⁶ For more detail, see chapter IX, A: Responsibility - Tatmadaw and other security forces.

³³²⁷ Recent cooperation projects have focused on supporting the Myanmar Police Force in its modernisation, focusing on areas such as community policing, crowd management and crime investigation. See for example the European Union funded project “MYPOL” (<http://www.mypol.eu/>).

³³²⁸ See e.g. International Commission of Jurists, *Achieving Justice for Gross Human Rights Violations in Myanmar – Baseline Study* (Geneva, January 2018); D. Aguirre, V. Sathisan, “Rule of law depends on reform of Union Attorney General’s Office” (Myanmar Times, 27 January 2016). See also Union Attorney General’s Office, *Moving Forward to the Rule of Law – Strategic Plan 2015-2019*, (Naypyidaw, 2015).

³³²⁹ The Republic of the Union of Myanmar, Presidential Ordinance No. 34/2011.

³³³⁰ Myanmar National Human Rights Commission Law, Law No. 21/2014.

³³³¹ Now “Global Alliance of National Human Rights Institutions”.

and being insufficiently rigorous in the implementation of its mandate.³³³² For example, the MNHRC was encouraged to be more active in addressing the rights of the Rohingya and other minorities.³³³³ Civil society organizations have previously criticised the MNHRC for being insufficiently proactive (or invisible) regarding the protection of human rights in the context of armed conflicts and for not addressing human rights violations committed by security forces.³³³⁴

(d) Intimidation, fear of reprisal and lack of protection for victims and witnesses

1593. Impunity for human rights violations is compounded by a pattern of harassment and legal action against those who bring complaints. The Tatmadaw and Police have brought legal charges against victims and their family members, under a range of problematic legal provisions.³³³⁵ One victim interviewed by the Mission about the offensives in Tanai Township (Kachin State) in January 2018 encapsulated the inevitability of repercussions, stating: “I want to give my testimony to you and I am ready to be arrested for it.”³³³⁶ Victims, including survivors of sexual violence, have also been publicly shamed and ridiculed by the authorities.³³³⁷

2. Two illustrative case studies: sexual violence and violence in Rakhine

(a) Case study 1: the use of rape and other forms of sexual violence by the military

1594. As highlighted above, the Mission considers rape and other forms of sexual violence one of the hallmarks of Tatmadaw operations. Sexual violence has been a recurring feature of military operations in Kachin, Shan and Rakhine States between 2011 and 2018, consistent with similar allegations for at least 30 years. Its systematic occurrence indicates that sexual violence forms part of a larger strategy to intimidate, terrorise or punish a civilian population. Such level of normalisation is only possible in a climate of long-standing tolerance and impunity, where military personnel have no reason to fear punishment or disciplinary action.

1595. The impunity for sexual violence has for 30 years been raised as a key issue requiring urgent remedy.³³³⁸ In 2006, for example, Special Rapporteur Pinheiro highlighted the high number of allegations of sexual violence against women and girls committed by members of the military as “another noteworthy illustration of the consistent and continuing pattern of impunity”. He listed hundreds of cases brought to his attention.³³³⁹ He found this trend “particularly alarming” bearing in mind likely underreporting because of trauma and social stigma. He reported not being aware of “any initiatives by the Government of Myanmar to look into these serious human rights abuses with a view to identifying the perpetrators and bring them to justice”. He concluded that “the failure to investigate, prosecute and punish those responsible for rape and sexual violence has contributed to an environment conducive to the perpetuation of violence against women and girls in Myanmar”.³³⁴⁰

1596. The standard response of the Myanmar authorities has been categorical denial and the intimidation of victims and witnesses. Occasionally, often in response to sustained

³³³² For a full analysis of the MNHRC and its challenges, see J. Liljeblad, “The Efficacy of National Human Rights Institutions Seen in Context: Lessons from the Myanmar National Human Rights Commission”, *Yale Human Rights and Development Journal*, Vol. 19(1) 2017, pp. 95-132.

³³³³ For an overview of the MNHRC’s response to the crisis in Rakhine State, see this chapter, section B.2.b: Case study 2 – Violence and oppression in Rakhine State.

³³³⁴ E.g. Asian NGOs Network on National Human Rights Institutions, Progressive Voice, Smile Education and Development Foundation, Action Committee for Democracy Development, *Suspicious Minds: The Myanmar National Human Rights Commission’s Trust Deficit* (2017).

³³³⁵ See chapter VI, section A.1: Legal toolbox for restricting fundamental freedoms.

³³³⁶ PI-043.

³³³⁷ See following paragraphs.

³³³⁸ E.g. A/HRC/7/18, para. 87; E/CN.4/2006/34, para. 79.

³³³⁹ For an overview of civil society organizations’ reports detailing instances of sexual violence in Myanmar between 1988-2007, see International Center for Transitional Justice, *Impunity Prolonged: Burma and its 2008 Constitution* (New York, 2009), p. 14.

³³⁴⁰ A/61/369, para. 30.

international pressure, a superficial investigation has been undertaken. For example, in 2003, the Special Rapporteur closely followed the authorities' response to allegations that Shan women had been systematically raped by Myanmar military personnel. He received detailed briefings from the authorities on three investigations, which had found that the allegations were unfounded, exaggerated, and made with the purpose of "hurting the prestige of Myanmar and the Myanmar armed forces".³³⁴¹ The investigations were conducted by a "special team of security personnel", the Deputy Minister for Home Affairs under the guidance of General Khin Nyunt (then First Secretary of the State Peace and Development Council) and a team of the Myanmar National Working Committee on Women's Affairs led by Daw Khin Win Shwe (General Khin Nyunt's wife). The investigations concluded that there were "no rape cases committed by military personnel between 1996 and 1999 and in 2002" but there were "three cases in 2000 and 2001", the perpetrators of which had reportedly been sentenced.

1597. The Special Rapporteur considered that these investigations "lacked the independence required to be convincing and credible", having been undertaken by military and other government personnel. He concluded that investigations had not been conducted in line with international human rights standards and methodologies and had not, for example, been conducted in an environment in which victims and witnesses could testify without fear of reprisals.³³⁴² He proposed several options for credibly investigating these and numerous other alleged human rights violations.³³⁴³ None was taken up.

1598. Impunity has continued since 2011. Sporadic convictions of a small number of soldiers for acts of sexual violence do nothing to suggest a significant effort to address the scope of the problem or its root causes.³³⁴⁴ In 2016, the United Nations High Commissioner for Human Rights reported that he had no information that allegations of sexual and gender-based violence against women and girls in Rakhine State, "which have been reported for decades", had been investigated or that perpetrators had been held accountable.³³⁴⁵ The same year, the Special Rapporteur welcomed the convictions of two military personnel for rape in 2014 but noted that "these examples do not reflect the general trend nor the structural challenges involved, which often result in impunity".³³⁴⁶ In 2016, the United Nations Committee on the Elimination of All Forms of Discrimination against Women recommended that Myanmar "repeal all laws that perpetuate impunity for sexual violence committed during and after conflict and expedite the investigation and prosecution of crimes of sexual violence perpetrated by the military and armed groups".³³⁴⁷

1599. The lack of genuine effort to hold perpetrators of sexual violence to account is best illustrated by a number of publicly reported incidents and statements in relation to the recent government investigations into events in Rakhine State:

- On 7 November 2016, U Aung Win, a Rakhine parliamentarian and the chairperson of a State-level committee established to investigate allegations of human rights violations during the "clearance operations" in October 2016, gave an interview. When questioned about rape allegations, he said that rape was inconceivable, explaining, "They 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."³³⁴⁸ The investigative committee had not made any findings yet.

³³⁴¹ E/CN.4/2003/41, paras. 38-46.

³³⁴² *Ibid.*, para. 42.

³³⁴³ *Ibid.*, para. 43.

³³⁴⁴ E.g., in 2016, the Special Rapporteur reported that the Ministry of Defence had informed her that 61 members of the military had been prosecuted for acts of sexual and gender-based violence between 2011 and 2015. Of these, 31 were reportedly tried before a military tribunal (A/HRC/31/71, para. 49).

³³⁴⁵ A/HRC/32/18, para. 36.

³³⁴⁶ A/HRC/31/71, para. 49.

³³⁴⁷ CEDAW/C/MMR/CO/4-5, para. 27.

³³⁴⁸ J. Fisher, "Muslim civilians 'killed by Burmese army'" (BBC News, 7 November 2016), including a video of the conversation.

- On 26 December 2016, the State Counsellor’s Office released a statement to refute “rumours of rape” in the context of the October 2016 “clearance operations”.³³⁴⁹ It explained that the government’s Investigation Commission had interviewed a Rohingya woman, who reportedly told the commissioners that she had not been raped and had not witnessed rape. The statement then claims that the same woman was later interviewed by journalists, to whom she said that she had been raped. The statement included several photos of the woman being interviewed and a banner with the words “fake rape”. A few days earlier, the President’s Office had posted a video clip showing the same woman being interviewed about the rape allegations.³³⁵⁰ A review of the footage shows:
 - The woman was publicly interviewed by the commissioners, recorded and filmed, while surrounded by a group of mainly men. This breaches basic rules of human rights investigation regarding informed consent, privacy, confidentiality and security.
 - The manner in which questions were asked deprived the woman of an opportunity to freely share her experience. She was questioned in a hostile tone. The male interpreter can be heard telling her, “Don’t say that”. The interpreter also did not correctly convey the detail of her account. 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”.
 - The statements prompted public ridiculing of the woman, as demonstrated by the comments under the Government’s Facebook posts. As 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.”³³⁵¹ Other comments included insults that Rohingya women are liars, unattractive, have bad hygiene, and are “disgusting”. Over a year and a half later, these posts and comments still feature on the President’s Facebook page.
 - The statements from the President’s and State Counsellor’s Offices were released before the Investigation Commission had released its interim or final report, i.e. while the investigation was still underway.
- On 30 April 2018, the Tatmadaw Commander-in-Chief, Senior-General Min Aung Hlaing, posted on his Facebook page a read-out of his meeting with a delegation of the United Nations Security Council. After stating that “sexual violence is abominable on the ground of culture and religion of Myanmar” and that “severe action is taken against the offenders”, he added, “No sexual violence happened in the history of Myanmar Tatmadaw”.³³⁵²

1600. Against a backdrop of decades of denial of credible allegations of rape and other forms of sexual violence, and when public officials have participated in the cover-up of such crimes and the ridiculing of alleged victims and witnesses, it is unsurprising that rape and sexual violence have become a widespread, systematic and institutionalised tactic of the security forces’ operations.

³³⁴⁹ The Republic of the Union of Myanmar, State Counsellor Office, “Information Committee refutes rumours of rapes” (26 December 2016, <http://www.statecounsellor.gov.mm/en/node/545>).

³³⁵⁰ Myanmar President Office (Facebook post, 23 December 2016) (https://m.facebook.com/story.php?story_fbid=1181529845228083&id=813476528700085&tra=1&efid=52&_tn_=%2As%2As-R) (accessed August 2018).

³³⁵¹ https://www.facebook.com/myanmarpresidentoffice.gov.mm/videos/1181529845228083/?comment_id=1181606718553729&comment_tracking=%7B%22tn%22%3A%22R9%22%7D (accessed August 2018).

³³⁵² Post on file with the Mission.

(b) Case study 2: violence and oppression in Rakhine State

1601. Soon after the violence in Rakhine State in 2012, the then Special Rapporteur on the situation of human rights in Myanmar expressed concern about “widely divergent” information regarding the events.³³⁵³ He stressed that truth and accountability would be critical to ensure reconciliation in Rakhine State and that, “if the facts are not established, exaggerations and distortions will fill the vacuum to further fuel distrust and tensions between communities”.³³⁵⁴ The facts were never established. There was no accountability. Relationships between communities in Rakhine State significantly deteriorated – amid an intense disinformation campaign vilifying the Rohingya, whose rights were further restricted to unbearable levels. As explained above, this led to increased tensions, to a deterioration of the security situation and ultimately to the ARSA attacks and Tatmadaw “clearance operations”.

1602. Since 2012, the Myanmar authorities have conducted several official investigations and inquiries into the situation in Rakhine State and the episodes of violence. However, none was a credible investigation into the allegations of human rights violations and abuses, in line with international standards (prompt, thorough and effective, independent and impartial, and transparent). None contributed to accountability.

1603. Following the 2012 violence in Rakhine State, President Thein Sein created the Inquiry Commission on Sectarian Violence in Rakhine State. The commission had a relatively broad mandate. The initial 27 commissioners comprised only four women and six Muslims. Two of the Muslims were later dismissed. None of the commissioners was Rohingya but several had demonstrated public anti-Rohingya views. In addition to the general anti-Rohingya bias that permeates the report,³³⁵⁵ the work undertaken by the Inquiry Commission was flawed. It did not critically examine the alleged human rights violations or the opposing perceptions of the respective communities on the events and its underlying causes. It did not establish the role of the security forces, attribute responsibility, or include robust calls for accountability.³³⁵⁶ The commission did not tackle the opposing viewpoints it had identified among the communities, but reinforced the narrative of a longstanding “intercommunal conflict” and “security threat”, validating prejudices, discriminatory acts and policy options.³³⁵⁷ Its recommendations generally emphasized the need for heightened security and rule of law.³³⁵⁸ The question of how stricter law enforcement and increased presence of security forces would contribute to better protection for the Rohingya, in a context of prevailing impunity and where existing laws were unjust and discriminatory, was not considered.

1604. When in January 2014 fresh allegations of serious human rights violations emerged in the context of a police operation in Du Chee Yar Tan village in Rakhine State, including

³³⁵³ A/67/383, para. 58.

³³⁵⁴ Ibid.

³³⁵⁵ The Republic of the Union of Myanmar, *Final Report of Inquiry Commission on Sectarian Violence in Rakhine State* (8 July 2013). The Mission acknowledges that the report contains some important recommendations. For example, it clearly states that, to ensure peaceful coexistence in Rakhine State, the “government and all responsible entities” should “start by ensuring protection of human rights for all parties involved in the conflict” (see para. 12.13). Many of its recommended actions are also conditional on compliance with international human rights standards.

³³⁵⁶ The recommendations contain general statements of principle, e.g. “the security and emergency response personnel must carry out their duties lawfully and those who break the law must be held accountable under existing laws”.

³³⁵⁷ Interestingly, the commission recommended that the Government form a “Truth-Finding Committee to determine the root causes of sectarian violence between the Buddhist and Islamic communities”.

³³⁵⁸ The government subsequently established a Central Committee for Implementation of Stability and Development in Rakhine State, chaired by then Vice-President Dr. Sai Mauk Kham. This Committee had six subcommittees, tasked to implement the policies adopted by the Central Committee and the recommendations of the Inquiry Commission. These followed the course set out by the Inquiry Commission and the President. They were not focused on human rights or accountability.

of killing, sexual violence and destruction of properties through arson,³³⁵⁹ the Special Rapporteur expressed concern that domestic investigations into the incident were unsatisfactory.³³⁶⁰ A Rakhine Investigation Commission and the Myanmar National Human Rights Commission visited the village, concluding that allegations of Rohingya killings and anti-Rohingya violence were false or “unverifiable and unconfirmed”.³³⁶¹ The President subsequently appointed a 10-member Investigation Commission. This commission released a summary report of its findings, with similar conclusions.³³⁶² The Mission takes note of concerns raised by civil society organizations that the initial visit of the Rakhine Investigation Commission was preceded by intimidation of and warnings to villagers not to talk about killings.³³⁶³ While the Mission cannot confirm this, it would be consistent with patterns established elsewhere. The report itself also raises questions. For example, it states that Rohingya properties were not set on fire by the police (as many Rohingya had reported), but by “a group opposed to the Government with political motivations for starting the fire and subsequent unrest”. This finding was not explained and the alleged group was not identified.

1605. Tensions in the region increased, leading to the first ARSA attacks in October 2016 and the Tatmadaw “clearance operations”. Credible allegations of serious human rights violations by the Myanmar security forces were rife and included acts that could constitute crimes against humanity. The authorities undertook at least four inquiries: at the Union-level, by the police, by the Tatmadaw and at State-level.³³⁶⁴

1606. On 1 December 2016, President Htin Kyaw established a 13-member Investigation Commission for Maungdaw in Rakhine State.³³⁶⁵ The commission was chaired by Vice-President Senior General Myint Swe (the military appointed Vice-President) and included another former Tatmadaw general (Aung Kyi) and the Chief of the Myanmar Police Force (Major-General Zaw Win). There were no Rohingya on the commission and only two women. In early January 2017, the commission issued an interim report,³³⁶⁶ finding “no cases of genocide and religious persecution in the region”. This was purportedly proven by the continued presence of Rohingya and the presence of mosques and religious edifices in Maungdaw. The commission found no sufficient evidence of rape, arson, illegal arrests or torture.

1607. On 6 August 2017, the commission released a summary of its final report.³³⁶⁷ It concluded that, while the security forces generally followed applicable rules and regulations,

³³⁵⁹ See OHCHR, “Pillay calls for killings in northern Rakhine State to be investigated” (23 January 2014).

³³⁶⁰ A/HRC/25/64, paras. 47-48.

³³⁶¹ A/HRC/25/64/Add.1, paras. 20-22.

³³⁶² *Summary Report of the Investigation Commission for the Du-Chee-Yar-Tan incident of January 2014 and related events*, February 2014

(<https://drive.google.com/file/d/0Bwd1WXitJ5PHdVJxWGtSdVISX0U/view>, accessed August 2018).

³³⁶³ International Coordinating Committee Sub-Committee on Accreditation - Accreditation of the National Human Rights Commission of Myanmar, Stakeholder submission by The Asian NGO Network on National Human Rights Institutions and Burma Partnership (16 July 2015).

³³⁶⁴ In August 2016, President Htin Kyaw established a nine-member Advisory Commission on Rakhine State, chaired by former United Nations Secretary-General Kofi Annan and composed of six national and three international experts. Its mandate was focused on proposing concrete measures for improving the welfare of all people in Rakhine State. It was not mandated to investigate specific cases of alleged human rights violations. The Government subsequently formed a Committee for Implementation of the Recommendations on Rakhine State, led by Union Minister for Social Welfare, Relief and Resettlement Dr. Win Myat Aye; as well as an Advisory Board for the Implementation of Recommendations on Rakhine State, led by Dr. Surakiart Sathirathai, former Deputy Prime Minister and Minister of Foreign Affairs of Thailand.

³³⁶⁵ The Republic of the Union of Myanmar, President Office, “Formation of Investigation Commission” (Notification 89/2016, 1 December 2016).

³³⁶⁶ The Republic of the Union of Myanmar, President Office, “Interim Report of the Investigation Commission on Maungdaw” (3 January 2017).

³³⁶⁷ Summary of the Report of the Investigation Commission for Maungdaw in Rakhine State (6 August 2017), available here: <http://www.myanmarembassydhaka.com/wp->

there may have been cases of violations “in areas of weak command”. It stated that action was being taken in relation to these violations, with no further detail. In relation to specific allegations of human rights violations, including killings, torture, rape and arson, the commission indicated that there had been cases where action was taken but that it was difficult to gather evidence or to “identify who set fire to buildings with any level of certainty, whether it was security forces or villagers or members of terrorist organizations”. It noted that, in February and March 2017, 21 cases were filed for “murder, rape, arson, destruction of evidence, loss of money/property and deaths”, but that for some cases there were “mismatches between the complaint and the results of the investigations” and in other cases “the complaints were fabricated”. Its methodology and skills regarding sensitive human rights investigations have been called into question.³³⁶⁸ The commission made no specific findings regarding the role and responsibility of the security forces.

1608. At the request of the Investigation Commission, the Tatmadaw and police formed teams to investigate allegations of their own wrongdoing. On 9 February 2017, the Tatmadaw stated it had formed a five-member Inquiry Board, led by Lieutenant-General Aye Win (Inspector-General of the Defence Services). This Inquiry Board was tasked with investigating the findings of the OHCHR Flash Report “Interviews with Rohingyas fleeing from Myanmar since 9 October 2016”, which was on 3 February 2017. The OHCHR report concluded, *inter alia*, that “the attacks against the Rohingya population in the area (killings, enforced disappearances, torture and inhuman treatment, rape and other forms of sexual violence, arbitrary detention, deportation and forced transfer as a result of violence and persecution) seems to have been widespread as well as systematic, indicating the very likely commission of crimes against humanity”.³³⁶⁹ On 23 May 2017, the Tatmadaw True News Information Team released the results of Lieutenant-General Aye Win’s investigation. It found 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”. No further detail was provided. Instead, the Tatmadaw investigation noted 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. These offences were reportedly punished.³³⁷⁰

1609. In February 2017, the Ministry of Home Affairs reportedly established a five-member investigation committee, led by Police Brigadier-General Win Tun, to investigate the allegations of human right violations by the police forces during the clearance operations in 2016.³³⁷¹ The Mission has not seen a final report of this inquiry. Media reports suggest that five policemen seen beating a group of Rohingya in Koe Tan Kauk village in Rakhine State on a (widely viewed) video were sentenced to two months imprisonment³³⁷² and that three border guard officers were sentenced to imprisonment for negligence during the 2016 operations.³³⁷³ The latter conviction was reportedly not for excessive use of force or ill-treatment of Rohingya but for failing to protect the security post against the attack in the first place. It is unclear whether these convictions are related to the Police’s investigation

content/uploads/2017/10/Summary-Report-of-the-Investigation-Com.-8.8.17.pdf (accessed August 2018).

³³⁶⁸ One example regarding the public interviewing and shaming of an alleged victim of sexual violence has been discussed in detail above.

³³⁶⁹ OHCHR, *Report of OHCHR mission to Bangladesh – Interviews with Rohingyas fleeing from Myanmar since 9 October 2016 – Flash Report* (3 February 2017).

³³⁷⁰ The Republic of the Union of Myanmar, Ministry of Information, <http://www.moi.gov.mm/moi:zg?q=news/3/01/2017/id-10311>

³³⁷¹ See Htoo Thant, “Military to punish unlawful acts in Rakhine” (Myanmar Times, 2 March 2017); see also The Republic of the Union of Myanmar, President Office, “Tatmataw ends area clearance operations in northern Rakhine” (undated, available here <http://www.president-office.gov.mm/en/?q=issues/rakhine-state-affairs/id-7288>).

³³⁷² Reuters, “Myanmar to probe police over allegations of crimes against Rohingya” (13 February 2017).

³³⁷³ Frontier Myanmar, “Senior police jailed over Rakhine guard post raids” (25 February 2017); Htet Naing Zaw, “Govt Jails Maungdaw Border Guard Police for Negligence” (The Irrawaddy, 24 February 2017).

committee. Earlier the State Counsellor's Information Committee had already issued a statement that action was being undertaken against those identified in the video.³³⁷⁴

1610. Meanwhile, another 11-member State-level committee, formed by the Rakhine State Parliament and headed by Rakhine politician Aung Win, conducted its own investigation. The bias of Aung Win has been highlighted above. The committee submitted interim and final reports to the Rakhine State Parliament in December 2016 and March 2017 respectively. The Mission saw a copy of the interim report³³⁷⁵, but only news reports about the final report.³³⁷⁶ These suggest that the committee did not find any wrongdoing on the part of the security forces, nor made any recommendations regarding accountability. It detailed the "terrorist attacks" by the "Mujahideen" operating in Maungdaw and Rathedaung Townships.

1611. The Union-level Investigation Commission for Maungdaw in Rakhine State presented its final report, which also concluded that most, if not all, accusations levelled against the security forces were false. Less than three weeks later, the Tatmadaw launched further "clearance operations" following a new ARSA attacks on 25 August 2017.

1612. In the year since the "clearance operation" began, there have been no credible initiatives for a prompt, independent and impartial, thorough and effective, and transparent investigation into the allegations of human rights violations. On 13 November 2017, the Tatmadaw True News Information Team released the "findings of the Investigation Team in connection with the performances of the security troops during the terrorist attacks in Maungdaw region, Rakhine State".³³⁷⁷ The Investigation Team was again led by Lieutenant-General Aye Win and reportedly toured northern Rakhine State for 26 days, between 13 October and 7 November 2017, interviewing 3,217 villagers in 58 villages and collecting the accounts of 804 witnesses. The team did not seek the views of the 700,000 Rohingya who had fled to Bangladesh. The Team categorically concluded:

The findings of the investigation have proved that all security members up from the 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. [...] 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. [...] As such, the security forces abided by 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.

1613. In relation to the arrest and detention of Rohingya, the Team found:

In discharging duty of peace and stability of the regions, the security forces exposed and arrested ARSA Bengali terrorists and their supporters. [...] In arresting, only members of Border Guard Police Force who were attached to the Tatmadaw columns arrested those Bengalis, and Tatmadawmen took security measures. After arresting, those Bengalis were systematically handed over in good situations to the local police

³³⁷⁴ Information Committee, "Press Release on a video clip which members of Police Forces took during area clearance operation in Kotankauk Village, Maungdaw" (Facebook post, 2 January 2017), available at <https://www.facebook.com/InfomationCommittee/posts/663761827130260>.

³³⁷⁵ The interim report was published on the Rakhine Hluttaw's official Facebook page: <https://www.facebook.com/rakhinestatenews/photos/a.321754331295753.1073741828.319947374809782/771298783007970/?type=3> (accessed July 2018).

³³⁷⁶ Release of the full report was reported in the media, but the Mission was unable to trace a copy of the actual report. See e.g. Yee Ywal Myint, "Maungdaw-Rathedaung probe committee submits final report" (Myanmar Times, 22 March 2017); and in Myanmar language media: <https://www.facebook.com/rakhinestatenews/posts/816665458471302>; <https://www.facebook.com/rfaburmese/videos/10155660569523128/>; <https://www.facebook.com/themyanmartimes/photos/a.269945775975.153936.269917285975/10154340883955976/?type=3>.

³³⁷⁷ Hard copy and Facebook post on file with the Mission.

stations. Members of security forces did not commit persecution against those persons in arresting. It was found that those Bengalis were exposed and arrested under provisions of the Geneva Conventions and the laws of wars.

1614. However, two months later, on 11 January 2018, the Tatmadaw released a statement from the same Investigation Team, still headed by Lieutenant-General Aye Win, that it had conducted an additional 12-day investigation in the village of Inn Din, after receiving reports of a mass grave.³³⁷⁸ The investigation purportedly revealed that the security forces had arrested 10 men and that:

Although it 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.

1615. According to the statement, two police vehicles had been burned in the attack and the security forces had been busy carrying out “peace and stability of the region”, and so there “was no situation to send 10 Bengali terrorists to the police station”. In other words, it was inconvenient to follow the rules and easier to kill. The statement further claims that the 10 men had been brought to the cemetery the following morning, where the security forces, together with villagers, killed them. The Investigation Team found that the incident “was not submitted to superior levels” but that “the officials who needed to control subordinates despite no direct relation to the incident will be necessarily exposed and taken action”. The Tatmadaw later stated that legal action was being taken against members of the Myanmar Police Force and civilians under their respective laws and that seven “officials and other ranks of the Tatmadaw” were convicted and sentenced to 10 years imprisonment under military law. The Mission has been unable to confirm whether the convicted men are serving these sentences.³³⁷⁹

1616. The Government hailed this development as a sign that the Tatmadaw took responsibility. However, this additional statement raises more questions as to the credibility of the investigation, given the same Team’s initial claim that no violations had been committed. The additional investigation and admission of responsibility was in all likelihood triggered by the imminent publication by Reuters of an investigative piece on the mass grave in Inn Din.³³⁸⁰

1617. Meanwhile, the Myanmar National Human Rights Commission (MNHRC) has undertaken no meaningful action in relation to the events in Rakhine State.³³⁸¹ In July 2012, it called for measures to build trust between communities and strict law enforcement. In May 2013, it endorsed the Government’s approach to the situation in Rakhine State. In 2014, the MNHRC informed that it had undertaken a field visit to Du Chee Yar Tan, but that the serious allegations of human rights violations in that village were “unverifiable and unconfirmed”. It recommended increased security measures and better ammunition for the police. In 2015, the MNHRC visited Buthidaung and Sittwe prisons, making some recommendations regarding prison conditions. In relation to the 2016 ARSA attacks and “clearance operation”, the MNHRC remained silent. Following the August 2017 “clearance operations, in October 2017 it recommended additional police stations, police outposts and Border Guard Force outposts “as necessary”. In December 2017, it urged the authorities to ensure that the two arrested Reuters journalists could enjoy their human rights in prison by not torturing them, giving access to healthcare and family visits. It did not address whether the detention itself was arbitrary. In January 2018, the MNHRC condemned an ARSA attack. At no point during these six years, however, did the MNHRC call for or conduct a full, independent investigation

³³⁷⁸ Facebook post on file with the Mission.

³³⁷⁹ State media reported that these prisoners had been released in the context of the Presidential pardon upon the inauguration of President Win Myint. The same day the Government denied these reports. See H. Beech, “Did Soldiers Jailed for Killings Go Free? Myanmar TV Says Yes (Briefly)” (The New York Times, 18 April 2018).

³³⁸⁰ Regarding the arrest of the Reuters journalists, see chapter VI, section A.1: Legal toolbox for restricting fundamental freedoms.

³³⁸¹ All statements are available online: <http://www.mnhrc.org.mm/en/statements-2/>

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.³³⁸²

1618. The Government took no steps to ensure a prompt, effective and thorough, independent and impartial investigation as required by international law. It refused to cooperate with or give access to the Mission, which was operational throughout this period. It permitted the demolition and bulldozing of Rohingya villages, and subsequent reconstruction efforts, without prior investigation or collection of evidence from the crime scenes.

1619. On 30 July 2018, nearly one year after the events, the Government announced the establishment of an “Independent Commission of Enquiry”,³³⁸³ comprised of two national and two international “personalities”. None appears to have a background in complex human rights or criminal investigations. Information about the commission’s legal framework, terms of reference, or scope and power to investigate is scarce. However, several public statements from the Myanmar authorities and the selected commissioners suggest prejudice, compromising its impartiality from the outset. For example, the spokesperson of the Office of the President said that, “We have formed the Independent Commission of Enquiry to respond to false allegations made by the UN agencies and other international communities”.³³⁸⁴ During a press conference, the Chairperson of the Commission said that, “there will be no blaming of anybody, no finger-pointing of anybody because we don’t achieve anything by that procedure”.³³⁸⁵ She considered that accountability was unhelpful and amounted to “quarrelling”. One of the national commissioners, Dr. Aung Tun Thet, is the chief coordinator of the Government’s “Union Enterprise for Humanitarian Assistance, Resettlement and Development in Rakhine”, 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.³³⁸⁶ Dr. Aung Tun Thet is also extensively quoted in the media denying that any ethnic cleansing or genocide took place and that the Government’s position on this question must be heard.³³⁸⁷ The Mission has therefore concluded on reasonable grounds that this newly-created commission will not and cannot provide a real avenue for accountability, even with some international involvement.

3. Conclusion

1620. The authorities of Myanmar, both military and civilian, have failed to condemn, investigate or punish perpetrators of gross human rights violations. Rather, they have 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. These acts are in violation of the international human rights norms and standards highlighted at the outset of this chapter.

1621. Impunity is deeply entrenched in Myanmar’s political and legal system, effectively placing the Tatmadaw above the law. The Constitution and other laws provide for immunities

³³⁸² The MNHRC is explicitly mandated to initiate an inquiry “where it becomes aware of widespread, systematic or entrenched situations or practices that violate human rights”. See art. 28 of the Myanmar National Human Rights Commission Law (Pyidaungsu Hluttaw Law No. 21/2014 of 28 March 2014).

³³⁸³ The Republic of the Union of Myanmar, Office of the President (Press Release 8/2018), “Government of the Republic of the Union of Myanmar Establishes the Independent Commission of Enquiry” (30 July 2018).

³³⁸⁴ Global New Light of Myanmar, “U Zaw Htay, Spokesman of the Office of the President: the questions have been raised as to the reasons for the removal of the Facebook accounts and pages associated with Tatmadaw” (29 August 2018).

³³⁸⁵ International Commission of Enquiry, Press Conference of 16 August 2018 in Naypyidaw, video available at: <https://www.facebook.com/theirrawaddyburmese/videos/218544952337657/>.

³³⁸⁶ Dr Aung Tun Thet reportedly denied this. See S. Naing, “Bulldozing Rohingya villages was not ‘demolition of evidence’, Myanmar official says” (Reuters, 26 February 2018).

³³⁸⁷ E.g. Global New Light of Myanmar, “Myanmar’s perspectives should be voiced at Berlin Conference on Myanmar Genocide: Dr Aung Tun Thet” (27 February 2018).

and place the Tatmadaw beyond civilian oversight. The Tatmadaw can independently adjudicate its own matters, with the Commander-in-Chief having the final word. The rare cases, brought mostly before military courts without transparency, are wholly insufficient to counter the overall trend of impunity. Additionally, military courts are inadequate forums to deal with large-scale human rights violations perpetrated by the military. Nor are civilian courts the answer; the domestic justice system is not independent and lacks capacity to respect fair trial standards. Nor does it have the capacity to deal with the breadth and gravity of the violations perpetrated by high-level officials, especially crimes under international law. Those who file complaints often face intimidation and reprisals. In short, there is no rule of law in Myanmar and accountability at the domestic level is currently unattainable

1622. Impunity acts as an obstacle to the rule of law, sustainable peace and stability, and Myanmar's transition to democracy. In the Framework of Analysis for Atrocity Crimes, developed by the United Nations Offices of the Special Advisers on the Prevention of Genocide and on the Responsibility to Protect, a history of atrocity crimes, in combination with a record of impunity and weak State institutions, is listed among the core risk factors for further violations.³³⁸⁸

C. Way forward

1623. Myanmar's transformation into a democratic State has barely begun. The near-total impunity for the most serious and shocking violations of human rights, and the apparent unwillingness to change this, are major red flags. Myanmar must vigorously pursue its transformation into a fully democratic State based on equality, accountability and respect for human rights. The alternative is a continuation of the same cycles of violence and repression, at risk of ultimately jeopardizing the little progress made.

1624. The Mission considers that three, interrelated, fundamental shifts are required to avoid the repetition of the kind of violence and atrocity crimes outlined in this report.

- **Democracy:** the security forces, and the Tatmadaw in particular, must be brought under civilian oversight. All State institutions must be answerable to the people. This may require a complete reconstitution and vetting of the Tatmadaw.
- **Inclusivity:** a reconciliation process can only be driven by a concept of the State and Nation that is inclusive, based on equality and respect for human rights. Citizenship should not be conditional on the belonging to a "national race", and human rights should not be conditional on being a "citizen".
- **Accountability:** The climate of impunity must be ended. Unless the Myanmar military and other security forces are held accountable for past, current and future crimes, violence and associated atrocity crimes will happen again.

1625. Realizing these shifts requires a constitutional reform process and will take time. However, significant steps can be taken immediately, both at the domestic level and internationally.

1. Steps towards a system of accountability at national level

1626. The Mission encourages the Myanmar authorities to convene – as a matter of urgency – all relevant stakeholders, with support from international partners, to adopt a comprehensive national road map and action plan towards a system that ensures accountability for human rights violations in Myanmar. The road map and action plan should contribute to the three key transformative shifts highlighted above.

1627. The Government of Myanmar, in close consultation with all stakeholders, including civil society, has the responsibility to formulate the most appropriate and feasible actions, as well as timelines for implementation. The Mission recommends it includes steps in the following areas:

³³⁸⁸ A/70/741-S/2016/71 (annex).

(a) Acknowledgement

1628. Change starts with acknowledgement. The Government and other authorities of Myanmar should immediately condemn all human rights violations and abuses (past, present and future), without exception and without discrimination. The condemnation should be specific: it should explicitly acknowledge the serious violations that have occurred in Kachin, Rakhine, and Shan States and elsewhere. It should explicitly acknowledge specific groups that have borne the brunt of the military and other security forces' repression. This includes ethnic and religious minorities, but also human rights defenders, journalists, students, farmers and monks. Allegations and complaints should be taken seriously, and the pain and suffering of all victims must be acknowledged.

1629. The Mission is concerned that neither the current peace process nor the Government's initiatives to resolve the crisis in Rakhine State include discussions on how to ensure accountability for violations of international law. Any political process aimed at resolving these conflicts and crises must include the issue of accountability in its agenda, with the goal to bring about reconciliation and sustainable peace.

(b) Security sector reform

1630. Without significant reform of the security sector, serious human rights violations and atrocity crimes will occur again, with certainty. The Framework of Analysis for Atrocity Crimes highlights several factors associated with security institutions that increase the risk of atrocity crimes, including the "lack of effective civilian control of security forces" and "absence of or inadequate external or internal mechanisms of oversight and accountability".³³⁸⁹

1631. Through a political, constitutional and legislative reform process, the Myanmar authorities must reconsider the place, role and power of the military and other security forces in society. Steps would be required in at least five areas:

- Review, repeal and revision of all military and other security forces' policies, tactics, rules of engagement and training manuals to ensure full compliance with international law, in particular the principle of non-discrimination and equal protection of all civilians regardless of race, religion or nationality.
- Clear articulation of the roles and responsibilities of the respective security forces, for example avoiding the use of the military in situations that essentially require a law enforcement or crowd control response. This requires a clear distinction between the "external" defence (military), "internal" public safety (police) and intelligence functions; the removal of the police and intelligence functions from the Tatmadaw command structures; and the disbanding of militias and border guards, and an overall review of policies around their use. The reform of the police, to transform it into a police service completely independent of military control and operations, is especially urgent. International support and assistance can contribute to this.
- Enhanced civilian oversight to ensure a democratic framework within which the military and other security services are at the service of the population, under the oversight of elected officials representing the population (e.g. parliamentary oversight committee; executive oversight; judicial review).³³⁹⁰ This should include creation of an external, independent body to receive reports from within the security forces, as well as from the public, of wrongdoing by the security forces, to ensure prompt, independent, impartial, effective and thorough investigations.
- A vetting or screening process to remove officials responsible for serious violations of international law from positions of authority and to prevent their promotion. Enhanced inclusion of personnel from diverse population groups.
- Removal of military prerogatives including in politics and the economy.

³³⁸⁹ A/70/741-S/206/71, annex, risk factors 5 and 7.

³³⁹⁰ For a discussion of how security sector reform contributes to the prevention of atrocity crimes, see A/HRC/37/65, para. 39-57.

(c) Narrowing the scope of military justice

1632. The jurisdiction of military courts should be limited to military personnel committing military disciplinary offenses, excluding human rights violations and serious violations of international humanitarian law.³³⁹¹ Especially where cases involve civilians, as perpetrators or as victims, these should be brought before the civilian justice system. The rationale is twofold: the commission of human rights violations is necessarily outside the scope of the duties performed by military personnel, and military courts cannot be trusted to try such serious offenses properly as they may be tempted to shield military perpetrators, in particular senior ones.³³⁹² In the context of Myanmar in particular, there can be no prospect for justice should human rights violations committed by the military continue to fall within the jurisdiction of military tribunals.

1633. In parallel to the restriction of the jurisdiction of military courts, efforts should be taken to ensure that trials under the military justice system are fully compliant with international fair trial norms and standards. In particular, military courts should be independent of the military chain of command in their determination of cases and should meet the standards of due process and procedural fairness.

(d) Accelerated rule of law reform

1634. Rule of law reform at domestic level should have high priority. The Mission is aware of several projects in this area and encourages States to redouble their support to Myanmar. Rule of law reform must, however, be based on an understanding of rule of law that is consistent with international standards, which is different from the concepts of “law and order” or “rule by law”:

*Rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.*³³⁹³

1635. The law reform process must be accelerated, thoroughly revising all laws to ensure that they are just, fair, and fully compliant with international human rights norms and standards. This includes a repeal of all discriminatory laws as well as pieces of legislation that unduly restrict the exercise of fundamental freedoms. It also includes the adoption of legislation incorporating crimes under international law within domestic criminal law, removing all existing immunities and amnesties for such crimes and other serious human rights violations and then ensuring implementation of the law through independent civilian courts. It would also include ratification of all international human rights conventions not yet ratified by Myanmar, as well as their individual complaints mechanisms.

1636. An enhanced focus is also required on judicial reform. This includes measures to strengthen the independence of the judiciary and build their legal and judicial expertise. No civilian justice personnel should be under the control or influence of the military or the other branches of government. All judges in superior and appellate courts should be legally qualified. Additionally, programmes are required to build capacity to adequately investigate, prosecute and bring to trial cases of serious human rights violations. Such cases, in particular where they amount to crimes under international law, require specialised knowledge and expertise.

³³⁹¹ See e.g. Principles to Combat Impunity, principle 29; also Draft Principles Governing the Administration of Justice Through Military Tribunals (E/CN.4/2006/58), principle 9. These principles are increasingly considered as reflective of international law. See e.g. A/70/438, para. 51.

³³⁹² See A/68/285, para. 67.

³³⁹³ Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies (S/2004/616).

1637. The Mission further encourages the Government of Myanmar to consider establishing a cross-sectoral and cross-institutional National Mechanism for the Prevention of Atrocity Crimes, with the role of conducting periodic risk assessments, establishing an early warning system, developing training programmes, recommending and creating policies, and working with civil society, as well as regional and international organizations towards the prevention of atrocity crimes.

(e) Truth-seeking

1638. The Mission is particularly concerned about the prevailing narratives of hate, exclusion and intolerance in Myanmar. It is also concerned about the radically divergent and often incompatible understandings, among segments of the population, of history and the circumstances of the commission of gross human rights violations and abuses. Exaggerations, distortions and misunderstandings only serve to fuel tension and distrust. It is of the utmost importance that the Government, with appropriate support from the international community, takes credible initiatives to satisfy the right of victims and society to the truth about alleged human rights violations and abuses. While there is an urgent need for credible truth-seeking initiatives for Rakhine State specifically, it is also required for northern Myanmar and the rest of the country. It would contribute to the formation of a common national narrative based on inclusion, tolerance and respect for the human rights of all.

1639. This requires the establishment of mechanisms and procedures empowered to seek information, ascertain facts and effectively reveal the truth about what happened. Importantly, such mechanisms can give voice to victims and affirm their status as rights holders and contribute to social integration.³³⁹⁴ However, such mechanisms must be appropriately designed and led by independently minded commissioners or experts who meet the highest standards of professionalism, integrity and expertise. They must be free from political or military influence.

(f) Empowering victims and civil society

1640. There is an immediate need to provide victims of serious human rights violations with the care, support and assistance they need. While communities have shown remarkable resilience, little social support has been possible when living in fear of the next attack or arrest. Most such support for victims has been aimed at coping rather than healing. The Government of Myanmar should ensure that psychosocial support and trauma counselling are provided as core components of a strategy to empower victims and provide redress, and to avoid recurrence of violations.

1641. The people of Myanmar have suffered at the hands of the military and other security forces. This is evidently so for all ethnic and religious minority groups, including the Rohingya, but also for the Bamar or Buddhists in general. They have never had access to truth, justice or reparations. This must change. Any accountability process or measure must be human rights based, ensuring that the rights and needs of victims are placed at the centre of their design and implementation. This requires a fully participatory process. Victims of human rights violations, and civil society generally, must be consulted at every step of the accountability process, giving them a voice and restoring their dignity.

1642. A first step in enabling and empowering victims of human rights violations is to recognize the legal status and identity of each person, and to ensure that each person has proof of that. In Myanmar, where large numbers of the population have not been registered at birth and/or have been arbitrarily deprived of their nationality and identity documents, proof of legal status and identity is a challenge for many victims of human rights violations. Legal identity is important to have rights respected, for claiming them and for obtaining redress when they are violated.³³⁹⁵ The Government should take immediate steps to ensure that all individuals in or from Myanmar have appropriate recognition and documentation of their legal status and identity.

³³⁹⁴ A/HRC/24/42, paras. 90-91.

³³⁹⁵ A/HRC/30/42, para. 41.

1643. Equally important is to ensure an enabling environment where individuals can file complaints and seek redress. This requires immediate steps to halt the intimidation, harassment and reprisals against those who speak out. Victims of human rights violations, but also human rights defenders, lawyers, journalists and civil society actors more broadly, must have the space to enjoy their human rights and seek justice for abuses. It is critical that the full enjoyment of fundamental freedoms, including the rights to freedom of opinion and expression, association and peaceful assembly, is actively promoted.

1644. Closely linked is the need to ensure the presence of an organized, knowledgeable, strong and representative civil society, and a free, diverse and independent media sector that is able to operate freely.³³⁹⁶ In the Framework of Analysis for Atrocity Crimes, the lack of such civil society and media sector is listed as an indicator for increased risk of atrocity crimes.³³⁹⁷

1645. Steps should also be considered to improve and transform the education system to ensure that it is based on principles of inclusivity, tolerance, equality and the respect for human rights of all, actively combating exclusionary rhetoric and divisive narratives. Human rights should be part of the standard curriculum in all schools. The teaching of history should be carefully reviewed to avoid the perpetuation of divisions. Teaching should be focused on stimulating children's capacity to analyse and think critically.

(g) Reparations

1646. The Government of Myanmar should, as a matter of priority, take steps to realize victims' right to full and effective reparation for the harm suffered. As outlined at the beginning of this chapter, this entails restitution, compensation, rehabilitation and satisfaction. Particularly relevant for Myanmar are measures to restore liberty, identity, family life and citizenship, as well as the return to one's place of residence; return of property and rebuilding of homes; compensation for damages; medical and psychological care; legal and social services; search for whereabouts of the missing or disappeared; search for, identification and burial of bodies; as well as commemorations and tributes to victims.

1647. Reparation is the legal duty of the State. It is particularly important as a symbol of acknowledgement of responsibility.³³⁹⁸ It promotes trust in the State and its institutions, and a sense of belonging of those whose rights were previously trampled upon. In Myanmar, the harm is of tremendous proportions, requiring a wide range of coherently organized reparatory measures. Restitution and compensation are especially important. The violence has resulted in significant economic loss, mostly for the victims. It must be met by the perpetrators and the State, which is directly responsible.

2. Criminal accountability at international level

1648. The primary responsibility for investigating and prosecuting crimes under international law lies with the national authorities of Myanmar. While any domestic system would have difficulties addressing the scale of violations committed in Myanmar, the Myanmar authorities have demonstrated that they are unable and unwilling to meaningfully engage in this process. The military's involvement in all levels of government and the legal and judicial deficiencies outlined above mean that 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. As such, the impetus for accountability must come from the international community.

1649. While two of the fundamental shifts outlined above (democracy and inclusivity) will largely have to be driven domestically, the international community has an important role in achieving the third shift (accountability). By initiating an accountability process, the international community can put a first crack in the massive impunity wall. To ensure its legitimacy, such process must be driven by the following principles:

³³⁹⁶ A/HRC/37/65, para. 20.

³³⁹⁷ A/70/741-S/206/71, annex, risk factor 6.

³³⁹⁸ A/69/518, para. 83.

- **Be transformative:** designed to address patterns of impunity and their underlying structural causes. It must assist in addressing the root causes of the recurrent violations and in further transforming society into one based on the rule of law, non-discrimination, equality and respect for human rights.
- **Be victim-centred:** driven by the interests of victims and designed to empower them, restore their dignity, and build their confidence in the State. Their views must be sought and they must be encouraged to participate in the process.
- **Be comprehensive:** including measures to realize the right of victims to know the truth and their right to reparations, in addition to establishing individual criminal accountability for serious crimes under international law.
- **Be inclusive:** allowing all victims to seek justice and an effective remedy on equal footing, regardless of their ethnic or religious background, and avoiding the exacerbation of tensions. An accountability process must not be focused only on the situation in Rakhine State.

1650. The Mission recommends that the international community takes the following steps:

(a) An international justice mechanism

1651. There must be an international judicial mechanism with jurisdiction to deal with serious crimes under international law in Myanmar. The International Criminal Court (ICC) is the most appropriate venue. As a permanent institution, it has the capacity to investigate immediately upon its jurisdiction being triggered. Although Myanmar is not a party to the Rome Statute, it is able to file a declaration of acceptance of ICC jurisdiction under article 12(3) of the Rome Statute. In the alternative, the Mission urges the Security Council to refer the situation in Myanmar to the ICC under article 13(b) of the Rome Statute, without delay. This referral should cover the entire territory of Myanmar, with a temporal scope starting from 1 July 2002 (the date of entry into force of the Rome Statute).

1652. The Mission welcomes the ICC Prosecutor's application of 9 April 2018 for a ruling on jurisdiction under article 19(3) of the Rome Statute³³⁹⁹, and the ICC Pre-Trial Chamber's decision of 6 September 2018 on the matter.³⁴⁰⁰ The Pre-Trial Chamber decided that the ICC has jurisdiction over the alleged deportation of Rohingya from Myanmar to Bangladesh on the basis that an essential element of the crime – crossing an international border – occurred on the territory of a State Party (Bangladesh). It emphasized that the same rationale may apply to other crimes within the jurisdiction of the ICC, e.g. the crime against humanity of persecution. While welcoming this decision, the Mission urges the Security Council to refer the situation in Myanmar to the ICC in the terms outlined above, to avoid partial accountability and ensure that all victims in Myanmar benefit from an avenue for justice.

1653. The ICC can only exercise jurisdiction over crimes committed after 1 July 2002, being the date of entry into force of the Rome Statute. Given its resources and mandate, the ICC is only in a position to prosecute those most responsible for the crimes in question; it should not be expected to prosecute a large number of lower-level perpetrators. Moreover, its ability to prosecute higher-level perpetrators necessarily depends on the will of Myanmar or other States to arrest and transfer suspects to the Court. As such, and considering the number of crimes and possible perpetrators, other additional and complementary accountability mechanisms should be considered.

1654. The creation of an *ad hoc* international criminal tribunal for Myanmar is an alternative to (or could complement) a Security Council referral to the ICC. Such tribunal would not be without its challenges, particularly in the absence of cooperation from Myanmar. Again, it would rely on the cooperation of States in arresting and transferring accused persons to the court. However, it would be free from the jurisdictional constraints of the ICC or domestic

³³⁹⁹ ICC, *Application under Regulation 46(3)*, ICC-RoC46(3)-01/18-1, Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 9 April 2018.

³⁴⁰⁰ ICC, *Request under Regulation 46(3) of the Regulations of the Court*, ICC-RoC46(3)-01/18-37, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018.

courts, and its temporal, territorial, personal and subject matter jurisdiction could be shaped to meet the specific context and requirements, including the needs of victims. An international criminal tribunal could also serve as a repository of information and evidence and facilitate other justice initiatives, including domestically. It could be specifically mandated to engage actively in outreach to communities across Myanmar, enabling much-needed awareness raising, participation and education around human rights and justice issues. An *ad hoc* international criminal tribunal for Myanmar would involve a long-term commitment from the international community, including sustained financial and political support.

1655. In the absence of ICC jurisdiction, the Mission therefore strongly encourages the Government of Myanmar to consent to and cooperate in the creation of an *ad hoc* tribunal, to assist in overcoming domestic challenges in ensuring accountability for serious crimes under international law. Should the Myanmar authorities not cooperate, the Mission considers that the Security Council should adopt a Chapter VII resolution to create an *ad hoc* tribunal without delay.³⁴⁰¹

1656. Justice mechanisms that mix national and international elements have been created in a number of States. These mechanisms either form part of the country's justice system (e.g. specialised chambers) or constitute a separate legal entity. The creation of such mechanism would ordinarily be initiated by the country concerned, with the assistance of the United Nations or another intergovernmental organization. A formal agreement would then be negotiated, articulating the mechanism's jurisdictional parameters, mandate and authority. Hybrid justice mechanisms benefit from proximity to victims and witnesses, as well as domestic ownership. Operating as part of the national judicial system, yet applying international fair trial standards, they have been credited with capacity building of the local justice sector. At present, however, the Mission considers that the prevailing conditions in Myanmar would serve to undermine the effectiveness of this model. Lack of independence and experience among domestic judges and practitioners would be unlikely to be rectified through exposure to a hybrid environment, at least within a necessarily short period of time. Nor does it currently appear possible to ensure the protection and security of victims and witnesses, officials and staff, against any form of intimidation or reprisal.

1657. In addition to an ICC referral and/or the creation of an *ad hoc* international criminal tribunal for Myanmar, the Mission encourages States to actively pursue investigating and prosecuting crimes committed in Myanmar before their respective domestic courts, under the principle of universal jurisdiction for serious crimes under international law. Many countries require the presence in their territory of the accused or the victim to activate jurisdiction, and complex investigation and prosecution of crimes under international law are costly. Cases before domestic courts of third States are therefore likely to lead to a fragmented or partial form of accountability at best. However, their importance should not be underestimated, especially in a context where there is no international tribunal with jurisdiction to handle cases. Domestic courts exercising universal jurisdiction may also encourage victim communities and serve as an incentive for legal reforms within the country concerned.

1658. States could also explore the creation of an international criminal tribunal through a specific negotiated treaty. Under this model, a number of committed States would pool resources and create a treaty-based mechanism to which they delegate their respective powers based on the principle of universal jurisdiction. This could present a more comprehensive approach to accountability for the crimes in question, should Myanmar not cooperate and should the Security Council decline to act. However, the success and effectiveness of such mechanism would greatly depend on the participation of a large and geographically diverse group of States with a genuine interest in ensuring accountability for victims.

(b) Collection and preservation of evidence; preparation of files for prosecution

1659. Pending the conferral of jurisdiction on the ICC or the establishment of an alternative international accountability mechanism, it will be imperative to immediately collect and

³⁴⁰¹ The Mission notes that it has been argued that the General Assembly has the power to create an *ad hoc* international criminal tribunal, should the Security Council fail to act.

