

Flygtningenævnets baggrundsmateriale

Bilagsnr.:	264
Land:	Myanmar
Kilde:	UN. Human Rights Council
Titel:	Detailed findings of the independant International Fact-Finding Mission on Myanmar
Udgivet:	16. september 2019
Optaget på baggrundsmaterialet:	17. december 2019

Distr.: General
16 September 2019

Original: English

Human Rights Council
Forty-second session
9-27 September 2019
Agenda item 2
Human rights situation that require the Council's attention

**Detailed findings of the Independent International Fact-Finding
Mission on Myanmar***

* Information complementary to that contained in the official report (A/HRC/42/50), submitted to the Human Rights Council pursuant to resolution 39/2. Reproduced as received, in the language of submission only.

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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 villages"	Ministry for Development of Border Areas and National Races "model
SaYaPa	Myanmar Intelligence Office

I. Executive summary

1. This report provides an update on conflict-related and other human rights violations and abuses in Myanmar since the Mission's last report to the Human Rights Council in September 2018.¹ The report focusses on the situation of ethnic minorities in Myanmar's Rakhine, Chin, Kachin and Shan States. More specifically, the report highlights the situation of the Rohingya, the armed conflict between the Arakan Army and the Tatmadaw, and the situation in northern Myanmar. The report documents violations and abuses under international human rights law and violations of international humanitarian law, principally by the Myanmar military, known as the Tatmadaw, and also by ethnic armed organizations (EAOs). The report also provides a brief overview of the situation of the Karen in Kayin State and the Kokang Self-Administrative Zone in northern Shan State.

The situation of the Rohingya

2. The situation of the Rohingya continues to be of grave concern to the Mission. The Mission did not document in relation to the last year violations of a similar gravity to the Tatmadaw's "clearance operations" after attacks on police and military posts on 25 August 2017, described in its last report. However, it confirmed that the Rohingya remain the target of a Government attack aimed at erasing the identity and removing them from Myanmar, and that this has caused them great suffering. Additionally, many of the factors that contributed to the killings, rapes and gang rapes, torture, forced displacement and other grave human rights violations by the Tatmadaw and other government authorities that the Mission documented in its 2018 report are still present. This has led to the conclusion that the situation of the Rohingya in Rakhine State has remained largely unchanged since last year. The laws, policies and practices that formed the basis of the Government's persecution against the Rohingya have been maintained. With another year having passed without improvements to their dire living conditions, prospects for accountability or legal recognition as citizens of Myanmar, their plight can only be considered as having deteriorated.

3. The Government of Myanmar has made no progress towards addressing the underlying structural discrimination against the Rohingya by amending the discriminatory laws, including the 1982 Citizenship Law. State policies that impose and force Rohingya to accept national verification cards (NVCs) have intensified. The Rohingya continue to perceive the NVCs with scepticism due to their history as a tool of persecution, having been used to disenfranchise and "other" them from the rest of the population.

4. The Mission found that movement restrictions, applied to the Rohingya in a discriminatory and arbitrary manner, touch almost every aspect of the lives of the 600,000 Rohingya remaining in Rakhine State, affecting basic economic, social and cultural rights, including their ability to sustain themselves, obtain an education, seek medical assistance or even pray and congregate.

5. The lack of safe and viable homes and land for Rohingya to return to is further exacerbating their situation. The Mission found that Rohingya villages continue to be bulldozed and razed. An estimated 40,600 structures were destroyed between August 2017 and April 2019, with over 200 settlements almost completely wiped out. Instead, new structures are being built on land that used to be cultivated and lived on by those who fled. Paradoxically, the Mission found that Rohingya have been forced to work in constructing new housing developments, in conditions that amount to forced labour.

6. Against the backdrop of these unbearable conditions, insecurity has been heightened as a result of the conflict between the Arakan Army and the Tatmadaw in northern Rakhine, in areas from which Rohingya were expelled. This has been an additional contributing factor to making a safe, dignified and sustainable return of the Rohingya population impossible at this time.

¹ A/HRC/39/64 and A/HRC/39/CRP.2.

7. Justice remains elusive for the victims of grave crimes under international law that the Mission documented in its last report, in particular those perpetrated during the 2016 and 2017 “clearance operations”. The Government of Myanmar has not taken the necessary measures to effectively investigate or prosecute those responsible.

8. The cumulative effect of these factors has led the Mission to conclude on reasonable grounds that the Government’s acts continue to be part of a widespread and systematic attack against the remaining Rohingya in Rakhine State, amounting to the crimes against humanity of inhumane acts and persecution.

9. Furthermore, having considered the Government’s hostile policies towards the Rohingya, including its continued denial of their citizenship and ethnic identity, the living conditions to which it subjects them, its failure to reform laws that subjugate the Rohingya people, the continuation of hate speech directed at the Rohingya, its prior commission of genocide and its disregard for accountability in relation to the “clearance operations” of 2016 and 2017, the Mission also has reasonable grounds to conclude that the evidence that infers genocidal intent on the part of the State, identified in its last report, has strengthened, that there is a serious risk that genocidal actions may occur or recur, and that Myanmar is failing in its obligation to prevent genocide, to investigate genocide and to enact effective legislation criminalizing and punishing genocide. Against this background, the Mission deems that the conditions enabling the safe, voluntary, dignified and sustainable return of close to one million Rohingya refugees from Bangladesh do not yet exist. The current conditions makes their return impossible at this time. Because of the absence of positive change over the past two years, the Mission cannot foresee when repatriation will be feasible.

The conflict between the Tatmadaw and the Arakan Army

10. The most recent conflict between the Tatmadaw and the Arakan Army in northern Rakhine and southern Chin States bears many of the hallmarks of the Tatmadaw’s brutal military operations, in line with its notorious “four cuts” strategy. In an attempt to prevent civilian support to the insurgency, the Tatmadaw has cut the lifelines of ethnic Rakhine communities, restricting both people’s freedom of movement and humanitarian access, with direct consequences on access to food and livelihoods. Again the civilian population, especially ethnic Rakhine and Chin communities, bear the brunt of the Tatmadaw’s operations.

11. The Mission found that attacks by the Tatmadaw have resulted in civilian loss of life, including the lives of children. The Tatmadaw continues the practice of rounding up men and boys of fighting age in villages, interrogating them and, in some instances, detaining and torturing them for the purpose of obtaining confessions about their support to the Arakan Army. The Mission also documented deaths in custody that were the direct result of this practice. All of these acts have undeniably led to a general climate of fear and insecurity for the ethnic Rakhine.

12. The Mission concluded on reasonable grounds that a number of Tatmadaw attacks that took place over the last months, in the context of its conflict with the Arakan Army, violated several rules of international humanitarian law, in particular the rule prohibiting indiscriminate attacks. The Mission’s findings of violations of international humanitarian law also constitute violations of the right to life under international human rights law, which is applicable alongside international humanitarian law in situations of armed conflict. The Mission also calls attention to the military use of schools and places of worship and encourages the parties to the conflict to cease this practice.

13. Many of the patterns of violations, such as forced labour, torture and ill-treatment, that are associated with all of the Tatmadaw’s operations, were found to be prominent features of its conflict with the AA. These constitute violations of international human rights law and international humanitarian law, including war crimes that require effective criminal investigation.

14. The Mission also concluded on reasonable grounds that the Tatmadaw’s firing indiscriminately into the ancient town of Mrauk-U violated rules under international law that protect cultural property.

15. Notably, however, the Mission did not find evidence of the Tatmadaw engaging in widespread mass sexual violence against ethnic Rakhine women as a part of its military strategy to combat the AA. This is in striking contrast to the widespread and systematic use of sexual violence against the Rohingya during the 2017 “clearance operations”. It indicates that the highest levels of command appear to be able to control when their troops do or do not use sexual violence during attacks on civilians and civilian populations.

16. Although to a much lesser extent than the Tatmadaw, the Mission found that the Arakan Army has also been responsible for human rights abuses and violations of international humanitarian law, including forced labour and abductions of civilians. The Mission finds that these violations require effective investigation.

Northern Myanmar

17. The Mission found that many of the patterns of violations in northern Myanmar, documented in its last report, have continued despite the Tatmadaw’s unilateral ceasefire since December 2018. While fighting has decreased in Kachin State, it has continued and recently increased in northern Shan State, resulting in the death and injury of civilians. Casualties may have been the result of indiscriminate attacks by the parties to the conflict in violation of international humanitarian law and warrant further investigation.

18. The Mission found that torture by Tatmadaw and Tatmadaw-supported militia of suspected members of EAOs have continued throughout the last twelve months. The Mission also found that, while sexual and gender-based violence was not prevalent in some other ethnic conflicts, it remains a prominent feature of the conflicts in Shan and Kachin States, although not on the scale or with the extremity as against the Rohingya in 2017.

19. The humanitarian situation in northern Myanmar continues to be of grave concern, with another year passing without UN access to non-government controlled areas and with IDPs unable to return to their lands, due to the prevailing insecurity in the region. The amendment of the Vacant, Fallow and Virgin Land Management Act has further exacerbated the situation. It has created uncertainty over land titles and communal usage of land, indispensable for the many ethnic populations in northern Myanmar dependent on land for their livelihoods.

20. The Mission also found that EAOs have been involved in human rights abuses and violations of international humanitarian law in the context of the armed conflicts in northern Myanmar. Abuses have included arbitrary detention and cruel treatment. The Mission also documented or received information on alleged cases of EAOs forcibly recruiting adults, recruiting and using children, using landmines and exposing civilians under their control to the effects of attacks. The Mission also collected information about allegation of the persecution of the Christian minorities that warrants further investigation. The Mission also concludes that further investigation is required into reports of sexual and gender-based violence by EAOs in Kachin and Shan States.

21. The Mission gathered limited information on the situation of the Karen ethnic group in Kayin State and the ethnic groups of the Kokang Self-Administrative Zone from northern Shan State, with a view to drawing attention to these situations and the need for further investigations.

22. With respect to the Karen, the Mission found that further investigations into allegations that the Tatmadaw continues to violate their rights in the context of long-standing armed hostilities that date back to 1949 are warranted. The Tatmadaw’s construction of a road has been the cause of renewed fighting between the Tatmadaw and the Karen National Liberation Army (KNLA). That has triggered credible reports of new human rights violations, with significant displacements. The hostilities stand in the way of a potential return of the Karen refugees who have settled in refugee camps along the Myanmar-Thai border.

23. The situation in the Kokang Self-Administrative Zone also requires further investigation. Cyclical bouts of hostilities in this region of northern Shan State appear to bear some of the hallmarks of Tatmadaw’s operations, including the killing of civilians and

a range of restrictions, including on humanitarian access, that have led to significant displacement of the civilian population.

24. While each of the situations of the ethnic minorities in Myanmar is distinct with its own facts and dimensions, a common thread underlies the situation of each of the ethnic groups. All ethnic groups highlighted in this report have suffered human rights violations and violations of international humanitarian law at the hands of the Tatmadaw. They have experienced the insecurity and hardship that prevail wherever the Tatmadaw operates. They have all been driven off their traditional lands and subjected to forms of marginalisation as a result of the Tatmadaw's policies.

25. All the ethnic minority communities that the Mission investigated have been deprived of justice for the serious human rights violations perpetrated against them. For this reason, the Mission found it necessary to highlight once again the situation of ethnic minorities in Myanmar, to provide an independent and impartial assessment of the violations committed against them, and to call on the Government of Myanmar and the international community to put a halt to these violations by finally breaking the cycle of impunity that protects the Tatmadaw and leads to further violence in the future.

II. Introduction

26. This report complements the Mission's report submitted to the Human Rights Council pursuant to resolution 39/2,² by which the Council extended the mandate of the Independent International Fact-Finding Mission on Myanmar ("the Mission"). The Council requested the Mission to present a final report on its activities to the Council at its forty-second session.

27. This report focuses on human rights developments since September 2018. It highlights the situation of ethnic groups in Rakhine, Chin, Kayah, Kachin and Shan States, focussing on conflict-related human rights violations and abuses and violations of international humanitarian law. It also provides a legal analysis of the situation of the Rohingya under the rules of State responsibility and the 1948 Genocide Convention, to which Myanmar is a party. The Mission further presents its findings on the situation of the conflict between the Tatmadaw and the Arakan Army since the beginning of 2019 and the latest developments in northern Myanmar.

28. The Mission comprised three experts: Marzuki Darusman (Indonesia, chair), Radhika Coomaraswamy (Sri Lanka) and Christopher Sidoti (Australia).

29. The Mission regrets the continuing lack of cooperation from the Government of Myanmar, despite the numerous appeals made by the Human Rights Council and the Mission. During the reporting period, the Mission requested to meet with the Permanent Representative of Myanmar in Geneva on two occasions and requested country access on 12 February 2019. It sent a detailed list of questions pertaining to the mandate of the Mission on 28 March 2019. The Mission received no official response to any of its communications. The Mission's draft main findings were shared with the Government prior to its public release, providing an opportunity to comment or make factual corrections. No response was received. This conference room paper, containing the detailed findings of the Mission in relation to conflict-related and other human rights violations, was also shared with the Government on 11 September 2019. No response was received. The Mission's letters are in annex 2.

² A/HRC/42/50.

III. Mandate and follow up to Human Rights Council resolution 39/2

A. Interpretation of the mandate

30. In extending the Mission's mandate, the Human Rights Council sought to avoid an investigative gap between the end of the Mission and the operationalization of the Independent Investigative Mechanism for Myanmar. The mandate given to the Mission by the Council in its resolution 39/2 therefore includes the extension of its original mandate, as contained in Council resolution 34/22, 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. Accordingly, the Mission focused on investigating both alleged human rights violations and abuses perpetrated since the end of its previous investigation and some previously undocumented historical incidents and patterns of human rights violations and abuses. This report has been prepared with a view to fulfilling this part of the Mission's mandate.

B. Methodology

31. The Mission continued to base its factual findings on the "reasonable grounds" standard of proof (A/HRC/39/64, para. 6). The Mission also continued to employ the same methodology as it did for its 2018 report,³ unless otherwise indicated.

32. Between February and June 2019, the Mission conducted 419 interviews with victims and witnesses, both targeted and randomly selected. It obtained and analysed satellite imagery, photographs and videos and a range of documents. It cross-checked the information against secondary information assessed as credible and reliable, including organizations' raw data or notes, expert interviews, submissions and open source material.

33. In this second phase of its work, the Mission took special care to avoid re-interviewing victims and witnesses with a view to avoiding re-traumatization and contamination of evidence.

34. The Experts travelled to Bangladesh, Indonesia, Malaysia and Thailand to interview victims and witnesses and hold other meetings. The secretariat undertook six additional field missions between February and June 2019. The Mission held consultations with other stakeholders, including intergovernmental and non-governmental organizations, researchers and government officials and diplomats, in person and remotely.

35. The Mission strictly adhered to the principles of independence, impartiality and objectivity and to the obligation to "do no harm". Special attention was paid to the protection of victims and witnesses, considering their well-founded fear of reprisals, especially following the publication of the Mission's previous report.

C. Legal framework

36. The Mission assessed facts under international human rights law, international humanitarian law and international criminal law, as applicable in Myanmar. The Mission's 2018 report provides a detailed analysis of those bodies of law. This report cross references and supplements that analysis as needed in its legal findings and conclusions. The Mission also finds it necessary to set out the obligations that Myanmar has to respect, protect and fulfil the right to an adequate standard of living, including adequate food and housing, and right to the highest attainable standard of health as a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the

³ A/HRC/39/CRP.2, paras. 8-32.

Child (CRC).⁴ The Mission also finds it necessary to elaborate on the rules of State responsibility under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, to which Myanmar is a party.

1. Economic, social and cultural rights

37. The ICESCR places obligations on States to recognize and ensure the right to an adequate standard of living, including adequate food and housing,⁵ and the highest attainable standard of health.⁶ The CRC provides similar obligations towards children specifically.⁷ Under these obligations, State parties are generally required to undertake steps, to the maximum of their available resources, with a view to achieving progressively the full realization of these rights.⁸ These rights apply to everyone including non-nationals, such as stateless persons, regardless of legal status and documentation.⁹ Complaints of violations should be promptly, impartially and independently investigated and adjudicated, providing the complainant with access to an effective remedy where appropriate.¹⁰ The United Nations Committee on Economic, Social and Cultural Rights and the United Nations Committee on the Rights of the Child further consider that their respective treaties requires States parties to adopt an active approach to eliminating discrimination, with the former explaining that for systematic discrimination:

*Tackling such discrimination will usually require a comprehensive approach with a range of laws, policies and programmes, including temporary special measures. States parties should consider using incentives to encourage public and private actors to change their attitudes and behaviour in relation to individuals and groups of individuals facing systemic discrimination, or penalize them in case of non-compliance. Public leadership and programmes to raise awareness about systemic discrimination and the adoption of strict measures against incitement to discrimination are often necessary. Eliminating systemic discrimination will frequently require devoting greater resources to traditionally neglected groups. Given the persistent hostility towards some groups, particular attention will need to be given to ensuring that laws and policies are implemented by officials and others in practice.*¹¹

⁴ ICESCR, arts. 11 and 12; CRC, arts. 24 and 27. Myanmar became a party to the ICESCR in October 2017 and a party to the CRC in July 1991.

⁵ ICESCR, art. 11.

⁶ ICESCR, art. 12.

⁷ CRC, arts. 24 and 27.

⁸ ICESCR, art. 2; Committee on the Rights of the Child, General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), CRC/C/GC/15, 17 April 2013, para. 71.

⁹ United Nations Committee on Economic, Social and Cultural Rights, “General Comment No. 20: Non-discrimination in economic, social and cultural rights” (E/C.12/GC/20), para. 30; Committee on the Rights of the Child, General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), CRC/C/GC/15, 17 April 2013, para. 72; Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, CMW/C/GC/3-CRC/C/GC/22, 16 November 2017, para. 9.

¹⁰ United Nations Committee on Economic, Social and Cultural Rights, “General Comment No. 20: Non-discrimination in economic, social and cultural rights” (E/C.12/GC/20), para. 40; Committee on the Rights of the Child, General Comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, 27 November 2003, para. 24.

¹¹ United Nations Committee on Economic, Social and Cultural Rights, “General Comment No. 20: Non-discrimination in economic, social and cultural rights” (E/C.12/GC/20), para. 39; Committee on the Rights of the Child, General Comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, 27 November 2003, paras. 12 and 30.

38. While the right to an adequate standard of living and the highest attainable standard of health are to be progressively realised, Myanmar, as a party to the ICESCR and CRC, must take immediate action, irrespective of its resources to, inter alia, eliminate discrimination, comply with the components of rights that are not subject to progressive realization because they do not require significant resources, and refrain from retrogressive measures that would reduce the enjoyment of the Covenant's rights, unless there are strong justifications for doing so.¹²

39. States' obligations in relation to the right to an adequate standard of living, including adequate food and housing, and the right to the highest attainable standard of health, do not cease in times of emergency or humanitarian crisis. In such situations, violations of the right to food can occur, for example, through the prevention of access to humanitarian food aid and the failure to regulate individuals or groups restricting others' access to food.¹³ The Special Rapporteur on the right to food defined the right to food as "the right to have regular, permanent and free [unobstructed/unrestricted] access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free from anxiety".¹⁴ The right to food and health are also closely linked to non-derogable rights, such as the right to life: "without food there is no life, and with the wrong food, life is shorter and more prone to ill-health".¹⁵ This requires, for example, States to take measures to increase life expectancy, especially in adopting measures to eliminate malnutrition.¹⁶

2. Rules of State responsibility

40. Based on the Mission's past and present findings, the Mission has considered Myanmar's obligations under the rules of State responsibility, under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, to which Myanmar is a party. Relatedly, the Mission welcomes the efforts of States, in particular The Gambia and Bangladesh, and the Organisation of Islamic Cooperation to encourage and pursue a case against Myanmar before the International Court of Justice (ICJ) under the Genocide Convention. Elected officials in The Netherlands and Canada have also called on their governments to pursue such a case.

41. Many of the people to whom the Mission spoke emphasized the need for perpetrators of the most serious crimes of international law to be held criminally accountable. The Mission discussed this in its 2018 report. Many of those people also stressed that the safe and dignified treatment of the Rohingya people required legislative and institutional reforms that run deeper than sanctioning individuals. The rules of State

¹² OHCHR, Frequently Asked Questions on Economic, Social and Cultural Rights: Fact Sheet No. 33, 2008, <https://www.ohchr.org/Documents/Issues/ESCR/FAQ%20on%20ESCR-en.pdf>, p. 15-17. The Committee on the Rights of the Child also interprets the CRC as placing an obligation on States, irrespective of resources, "not to take any retrogressive steps that could hamper the enjoyment of children's right to health". United Nations Committee on the Rights of the Child, General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), CRC/C/GC/15, 17 April 2013, para. 72.

¹³ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The right to adequate food (Art. 11)*, E/C.12/1999/5, 12 May 1999, para. 19; Committee on the Rights of the Child, General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), CRC/C/GC/15, 17 April 2013, para. 40.

¹⁴ E/CN.4/2001/53, 7 February 2001, p. 2.

¹⁵ A. Eide, "Adequate Standard of Living", in *International Human Rights Law*, 2nd ed., D. Moerkli, S. Shah and S. Sivakumaran (Oxford University Press, Oxford, 2014), p. 199; Committee on the Rights of the Child, General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), CRC/C/GC/15, 17 April 2013, paras. 16-18.

¹⁶ United Nations Human Rights Committee, *General Comment No. 6: Right to life (Art. 6)*, 30 April 1982, HRI/GEN/1/Rev.1, para. 5.

responsibility help address this demand by providing for forms of reparation that are reformatory and additional to what criminal accountability most often provides.¹⁷

42. Under the rules of State responsibility, reparation is often assessed not by the injury caused to individuals but by the injury caused to a State, which includes material and moral damages.¹⁸ In the case of a State that commits genocide or other violations against its own people, it would be more appropriate for reparation to benefit the individuals directly harmed and the international community as a whole.¹⁹ Such reparation may include, as required, restitution, compensation and satisfaction, either singly or in combination.²⁰ The purpose of these reparations is to “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”.²¹ The enormity and scope of the destruction that Myanmar caused to people’s lives makes it impossible to suggest that reparation could ever achieve this purpose. At the same time, the enormity and causes of the acts that the Mission has documented indicate that Myanmar’s reparation obligations are far reaching and wide ranging.²²

43. Restitution may require, depending on the breach, restoration of liberty; enjoyment of human rights, identity, family life and citizenship; return to one’s place of residence; and restoration of employment and return of property. This may include requiring juridical restitution through legislative modifications.²³ *Compensation* may be required for economically assessable damage, such as physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; and costs required for legal or expert assistance, medicine and medical services, and psychological and social services. Compensation may also be payable in respect of damage suffered where restitution is either not possible or not possible in full. The inability to restore people’s homes and property, because they have been destroyed, is an example of a situation in which compensation is payable as a result of inability to make restitution. *Satisfaction* may require effective measures aimed at the cessation of continuing violations; verification of the facts and full and public disclosure of the truth; the search for the whereabouts of the disappeared and killed and assistance in the recovery, identification and reburial of bodies; official

¹⁷ ICJ, Case Concerning Application of the Convention on the Prevention and Punishment of Genocide, (Croatia v. Serbia), Judgment of 3 February 2015, para. 129.

¹⁸ Article 31 of the Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001).

¹⁹ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), para. 3 of the commentary to Article 33. See, also, Article 48(2) of the Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001).

²⁰ Article 34 of the Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001).

²¹ Permanent Court of International Justice, *Factory at Chorzów*, Merits, 13 September 1927, p. 47.

²² Reparation under the rules of State responsibility are in addition to a separate obligation that States have under international law to provide full and effective reparation to persons who make direct claims of gross violations of international human rights law and serious violations of international humanitarian law against the State. See, 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, Principle 18 (“...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... which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”).

²³ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), para. 5 of the commentary to Article 35. Note, also, that where a wrongful act is ongoing, such restitution may overlap with the obligation of cessation. See, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), para. 6 of the commentary to Article 35. Notwithstanding the distinction between reparations owed to individuals and reparations owed to States, given the nature of damage incurred by the act of genocide against individuals, this paragraph is also informed by 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, Principles 18–22.

declarations or judicial decisions restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; public apology, including acknowledgement of the facts and acceptance of responsibility; judicial and administrative sanctions against persons liable for the violations; and commemorations and tributes to the victims.²⁴ When a State breaches its international obligations under the rules of State responsibility it must also cease the wrongful act, if it is continuing, and the State must offer appropriate assurances and guarantees of non-repetition if circumstances require.²⁵

(a) Prohibition on committing genocide

44. Under the Genocide Convention, States parties have an implicit obligation not to commit genocide²⁶ and express obligations to prevent and punish genocide crimes.²⁷ For a State to be in breach of the genocide prohibition, it must be shown that State organs, or persons or groups whose acts are attributable to the State,²⁸ committed one or more specific acts “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.²⁹ Those acts, referred to as “underlying acts”, are (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; and (e) forcibly transferring children of the group to another group.³⁰ The Mission’s 2018 report provides the Mission’s assessment that the Rohingya constituted a protected group under the terms of the Genocide Convention and that the violence directed at them constituted underlying acts (a), (b), (c) and possibly (d).³¹

45. To establish that a State had the intent to destroy, in whole or in part, a protected group, an investigator must be able to establish either that a State had a plan expressing the intent to commit genocide or that a pattern of conduct reveals such intent.³² To make a finding of genocide under the rules of State responsibility it is sufficient to demonstrate that genocide is attributable to a State organ, such as a ministry or security force, without identifying specific individuals who are responsible for the genocide.³³ In the case of Myanmar, the Mission has concluded on reasonable grounds that the Tatmadaw is the most notable, but not the only, State organ that engaged in underlying genocidal acts with the inference of genocidal intent.³⁴ In sum, State involvement through military and civilian acts, organs and persons was extensive.

²⁴ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), para. 5 of the commentary to Article 36.

²⁵ Article 30 of the Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001).

²⁶ 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. 166 (“...the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.”).

²⁷ 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Art. I.

²⁸ 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. 181.

²⁹ 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Art. II.

³⁰ 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Art. II.

³¹ A/HRC/39/CRP.2, paras. 1392-1410.

³² ICJ, Case Concerning Application of the Convention on the Prevention and Punishment of Genocide, (*Croatia v. Serbia*), Judgment of 3 February 2015, para. 145; and 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. 373.

³³ A finding of genocide should not be precluded, for example, where it is clear that a State organ carried out prohibited acts with genocidal intent, but where the author of a genocidal plan or the perpetrators of genocidal acts are not yet identified.

³⁴ Article 4 of the Draft articles on Responsibility of States for Internationally Wrongful Acts makes it clear that the Tatmadaw is a “state organ” whose actions are attributable to the State: “(1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the

46. There is limited guidance for assessing what factors are relevant for making a finding of genocidal intent under the rules of State responsibility. When assessing whether a pattern of conduct reveals genocidal intent, the Mission was guided by case law from international criminal tribunals and took into account interrelated factors, as documented in its previous report and supplemented by the Mission's 2019 investigation.³⁵

(b) Obligation to investigate genocide

47. The Genocide Convention places a general obligation on all States parties to prevent and punish genocide.³⁶ Article III places an obligation to punish all genocide crimes regardless of the suspect's government position.³⁷ Article VI places a specific obligation on States parties in whose territory genocide was committed to try in a competent court individuals charged with genocide or, alternatively, allow them to be tried by an international tribunal with jurisdiction.³⁸ Article V requires States parties to enact legislation to give effect to the Convention's provisions and, in particular, to provide effective penalties for persons guilty of genocide.³⁹

48. The Mission interprets the Genocide Convention as placing an obligation on Myanmar to effectively investigate allegations of genocide where reasonable grounds exist and, where appropriate, to bring charges. This interpretation follows the approach of international and regional human rights treaties.⁴⁰ Any other interpretation would render much of the Genocide Convention ineffective and go against the Convention's object and purpose of freeing the world of such as "odious scourge".⁴¹ If there were no obligation to conduct an effective investigation and prosecute where appropriate, a State's obligation to enact legislation to "give effect" to the Genocide Convention, as well as the State's obligation to hold perpetrators criminally accountable, would be rendered meaningless.

organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. (2) An organ includes any person or entity which has that status in accordance with the internal law of the State." Article 4 of the Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001).

³⁵ See, generally, A/HRC/39/CRP.2, paras. 1419-1433.

³⁶ 1948 Convention on the Prevention and Punishment of the Crime of Genocide, art I.

³⁷ 1948 Convention on the Prevention and Punishment of the Crime of Genocide, art IV.

³⁸ 1948 Convention on the Prevention and Punishment of the Crime of Genocide, art VI.

³⁹ 1948 Convention on the Prevention and Punishment of the Crime of Genocide, art V.

⁴⁰ For a detailed discussion of this issue see, International Law Commission, Second report on crimes against humanity, 21 January 2016, A/CN.4/690, paras. 121-130.

⁴¹ Vienna Convention on the law of treaties, Art. 31, read in conjunction with the preamble to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The ICJ has determined that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, para. 53. In addition to the incorporation of a duty to investigation into human rights treaty law, states have shown strong support for a duty to investigate genocide. See, Basic Principles and Guidelines on the Right to a Remedy and Reparation (principles 3-4) ("...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...")(Emphasis added); and Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, para. 22. ("We commit to ensuring that impunity is not tolerated for genocide, war crimes and crimes against humanity or for violations of international humanitarian law and gross violations of human rights law, and that such violations are *properly investigated* and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law, and for this purpose we encourage States to strengthen national judicial systems and institutions.") (Emphasis added.) See, also, 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. ("The Security Council further emphasizes the responsibility of States to comply with their relevant obligations to end impunity and to *thoroughly investigate* and prosecute persons responsible for war crimes, genocide, crimes against humanity or other serious violations of international humanitarian law in order to prevent violations, avoid their recurrence and seek sustainable peace, justice, truth and reconciliation.") (Emphasis added.)

Moreover, punishment without an investigation, prosecution and conviction would contravene basic procedural guarantees and the right to a fair trial.

49. The obligation to conduct an investigation typically requires that the investigation be carried out whenever there is “reason to believe” or a “reasonable ground” to believe that an offence has been committed.⁴² The obligation is one of conduct, not of result. In meeting that obligation, it is generally recognized that an investigation must always be independent, impartial, prompt, thorough, effective, credible and transparent.⁴³

(c) Obligation to enact legislation

50. Article V of the Genocide Convention requires States Parties to enact the necessary legislation to give effect to the Convention and, in particular, to provide effective penalties for persons guilty of genocide and persons who incite genocide, attempt to commit genocide or are complicit in genocide.⁴⁴ Although there is limited guidance on how courts would interpret a State’s obligation under the Convention to enact effective legislation, the legislation that Article V requires States to enact has been understood as a statutory law that results from formal domestic enactment procedures.⁴⁵ For the legislation to “give effect” to the Convention the State’s domestic criminal law must include the specific acts in Article II and the list of offenses in Article III.⁴⁶ Legislation that simply criminalizes individual acts without referring to genocide, for example homicide, is insufficient.⁴⁷ The Convention also places requirements on how States penalize the crimes of genocide. The penalties must be “effective” and the penalties and the form of the penalties must be sufficiently defined.⁴⁸ The duration of a penalty of imprisonment must meet a minimum threshold of severity, given the grave nature of the crime, taking into account a State’s national scale of penalties, including domestic penalties for the ordinary crime of murder.⁴⁹ The Convention requires that legislation that criminalizes and penalizes acts of genocide does not permit a person convicted of genocide to receive a pardon or to be free from punishment.⁵⁰

(d) Obligation to prevent genocide

51. The obligation to prevent genocide, which includes a corresponding duty to act, arises when a State “learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed”.⁵¹ The Mission does not consider that a

⁴² International Law Commission, Second report on crimes against humanity, 21 January 2016, A/CN.4/690, para. 126.

⁴³ HRC, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, para. 28. For a detailed discussion, see A/HRC/39/CRP.2, para. 1568.

⁴⁴ Genocide Convention, art. V.

⁴⁵ Christian J. Tams, et. al, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014), pp. 221–22, paras.13–15.

⁴⁶ See Christian J. Tams, et. al, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014), p. 228, para. 34; see also Ben Saul, *The Implementation of the Genocide Convention at the National Level*, in *The UN Genocide Convention* (Paola Gaeta, ed.) (Oct. 15, 2009), 62 (calling only for the complete implementation of Article II in domestic legislation).

⁴⁷ Christian J. Tams, et. al, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014), p. 223, paras. 18–19; see also Ben Saul, *The Implementation of the Genocide Convention at the National Level in The UN Genocide Convention* (Paola Gaeta, ed.) (Oct. 15, 2009), 66 (citing William Schabas, *Genocide in International Law: The Crime of Crimes*, 353).

⁴⁸ See Christian J. Tams, et. al, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014), p. 229, para. 39. See Christian J. Tams, et. al, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014), pp. 229–30, paras. 40–42.

⁴⁹ See Christian J. Tams, et. Al, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014), pp. 229–30, paras. 40–42.

⁵⁰ See Christian J. Tams, et. al, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014), p. 229, para. 38.

⁵¹ 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. 431.

“serious risk” requires that the risk be imminent or immediate. Such a narrow interpretation would hollow out the preventive nature of the Convention by effectively requiring States to act only once the genocide were inevitable.⁵² But once a serious risk of genocide is identified, a State is under a duty to make use of available means to deter “those suspected of preparing genocide, or reasonably suspected of harbouring specific [genocidal] intent”.⁵³ In the case of Myanmar, it may appear incongruous to place expectations on a State to prevent genocide when its own organs and agents are the ones that pose the serious risk of committing genocide. Nonetheless, Myanmar has a legal obligation to apply important and potentially wide ranging deterrent measures, arising from the core of the Convention’s object and purpose, to bring an end to genocide.

(e) Responsibilities of third party states

52. The Mission’s findings also attract the obligations of *all* States through general rules of State responsibility, international humanitarian law, arms transfer law and international human rights law.⁵⁴ As a general matter, States must not aid or assist another State in the commission of unlawful acts. States must also cooperate to bring to an end the gross or systematic failure of another State to abide by obligations arising under a peremptory norm of general international law, which includes crimes against humanity, torture, genocide, racial discrimination and apartheid, and slavery. They must also not render aid or assistance in *maintaining* a situation that arose from such failures.⁵⁵

53. The Genocide Convention specifically requires *all* States parties to prevent and punish genocide.⁵⁶ These obligations are not territorially limited⁵⁷ or merely abstract. The obligation to prevent genocide has a corresponding duty to act that arises when a State “learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed”.⁵⁸ Once this happens, a State is under a duty to make use of available means to deter “those suspected of preparing genocide, or reasonably suspected of harbouring specific intent”.⁵⁹

54. States with greater influence over deterring genocide should do more.⁶⁰ Factors for determining influence can include political, military and financial links.⁶¹ Levels of

⁵² This view is reflective of the ICJ’s case law, which holds that the obligation to prevent is triggered when someone is “preparing genocide” or is suspected of having genocidal intent. 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. 431.

⁵³ 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. 431. See, also, ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, *Provisional Measures, Order of 8 April 1993*, para. 52 (In its provisional measures order, the Court ordered the Federal Republic of Yugoslavia (Serbia and Montenegro) to “take all measures within its power to prevent commission of the crime of genocide.”)

⁵⁴ For a more detailed discussion see A/HRC/42/CRP.3, paras. 27-36.

⁵⁵ Articles 16 and 40 of the Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001).

⁵⁶ 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Art. I.

⁵⁷ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, 11 July 1996, para. 31.

⁵⁸ 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. 431.

⁵⁹ 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. 431. See, also, ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, *Provisional Measures, Order of 8 April 1993*, para. 52 (In its provisional measures order, the Court ordered the Federal Republic of Yugoslavia (Serbia and Montenegro) to “take all measures within its power to prevent commission of the crime of genocide.”)

⁶⁰ Simma, in: Safferling/Conze, *The Genocide Convention Sixty Years After its Adoption*, 262; see, also, ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of*

influence can also depend on geographic proximity, regularity of contact and legal powers.⁶² But even a State with limited influence retains obligations under the duty to prevent genocide.⁶³ Moreover, the failure to prevent genocide does not require proof that the State definitely had the power to prevent the genocide. It is sufficient that the State manifestly refrained from using its powers when it had the means to do so.⁶⁴ International law restricts States from doing only what is legally permissible when fulfilling their duty to prevent genocide.⁶⁵

55. The Genocide Convention is silent on the issue of States prosecuting people who are under their jurisdiction but who committed genocide on another State's territory. Conversely, the Rome Statute recognized in its preamble "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".⁶⁶ Regardless of whether the Genocide Convention contains a similar obligation on foreign States parties to prosecute or extradite,⁶⁷ the Mission continues its call to States to exercise their criminal jurisdiction over perpetrators of genocide crimes.

IV. The situation of the Rohingya

56. In its 2018 report, the Mission found that the attack on the Rohingya population of Myanmar was "horrendous in scope". It found that, in much of northern Rakhine, "every

Genocide, *Bosnia Herzegovina v. Yugoslavia (Serbia and Montenegro)*, Judgment, 27 February 2007, para. 430.

⁶¹ 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. 434.

⁶² 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. 430; see, also, Christian Tams, Article I, in *Convention on the Prevention and Punishment of the Crime of Genocide: a commentary* (eds. Tams, Christian J.; Berster, Lars.; Schiffbauer, Björn.), page 52.

⁶³ 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. 430. ("it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.").

⁶⁴ 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. 438.

⁶⁵ 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. 430. ("it is clear that every State may only act within the limits permitted by international law.")

⁶⁶ Rome Statute, preamble.

⁶⁷ See, for example, ILC, *The obligation to extradite or prosecute (aut dedere aut judicare)*, Final Report of the International Law Commission, 2014, at footnote 447. The ICJ has addressed this issue with respect to Article VI of the Genocide Convention, ruling that an obligatory duty to punish did not exist under that article. The ICJ did not address, however, whether the duty was embedded in other articles of the Convention. See 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. 442. Notably, the drafters of the Convention intentionally omitted the doctrine of universal jurisdiction from art. VI. Drafters' intent is not, however, dispositive for treaty interpretation. Moreover, it is reasonable to conclude that the discomfort that States had with universal jurisdiction in 1946 is less significant now in light of the human rights treaties that include universal jurisdiction clauses, many of which deal with prohibited acts that are, or could be construed as, genocide's underlying acts. To that end it is noteworthy that the ICJ has determined that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." See, ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, para. 53.

trace of the Rohingya, their life and community as it had existed for decades, was removed” and that “indeed the clearance operations were successful”.⁶⁸ The Mission concluded on reasonable grounds that, in addition to crimes against humanity and war crimes, the factors allowing for inference of genocidal intent were also present.⁶⁹

57. Based on information gathered by the Mission over the last year, this section describes the human rights situation of the approximately 600,000 Rohingya that remain in Rakhine State, of which 126,000 are in internally displaced camps and the remaining non-displaced population is spread across 10 townships.⁷⁰

58. Rohingya are faced with a situation where they continue to be denied the legal status of citizens and live in dire conditions. The Mission’s findings conclude that the Myanmar Government bears responsibility for the severe inhumane suffering that displaced Rohingya are facing. The policies and practices also make return impossible and are indicative of the continued persecution of the Rohingya population as a crime against humanity. The Mission concludes, based on its findings, that grave violations against the Rohingya continue and that there is a real and significant danger of the situation deteriorating further. The Mission also has reasonable grounds to conclude that the evidence that infers genocidal intent on the part of the State against the Rohingya, identified in its last report, has strengthened, that there is a serious risk that genocidal actions may occur or recur, and that Myanmar is failing in its obligation to prevent genocide, to investigate genocide and to enact effective legislation criminalizing and punishing genocide.

59. One year since the publication of its report, and two years since the “clearance operations” that began on 25 August 2017 and resulted in the exodus of over 743,000 Rohingya to neighbouring Bangladesh, the situation in Rakhine State also makes the prospect for a return of the Rohingya population impossible in the foreseeable future. This was the conclusion of the Mission last year and this remains its conclusion at present.⁷¹

A. Citizenship

60. In its 2018 report, the Mission found that “*the lack of legal status and identity is the cornerstone of the oppressive system targeting the Rohingya*”.⁷² It found that the denial of citizenship had a profound impact on the enjoyment of other fundamental rights and that the requirement of membership of a “national race” as a key criterion of Myanmar citizenship was profoundly discriminatory against the Rohingya.⁷³

61. Section 347 of the 2008 Constitution of Myanmar stipulates that the Government is to “*guarantee any person to enjoy equal rights before the law and shall equally provide legal protection*”. The reality is that rights, such as the right to access to education, health care and livelihood activities, are linked to citizenship.⁷⁴ Most notably, Constitutional provisions link land ownership with citizenship,⁷⁵ giving rise to a well-founded fear that Rohingya can be legally dispossessed of their lands without confirmation of citizenship.

⁶⁸ A/HRC/39/CRP.2, para. 1439.

⁶⁹ A/HRC/39/CRP.2, paras. 1441, 1511 and 1516.

⁷⁰ UNICEF, Investing in children should be the foundation of Myanmar’s progress and development, 31 January 2019, available from <https://www.unicef.org/eap/press-releases/investing-children-should-be-foundation-myanmars-progress-and-development>; <https://www.msf.org/independent-humanitarian-agencies-and-access-healthcare-still-blocked-northern-rakhine>, 15 August 2018.

⁷¹ A/HRC/39/CRP.2, paras. 1180-1182.

⁷² A/HRC/39/CRP.2 para. 491.

⁷³ A/HRC/39/CRP.2 para. 491-492.

⁷⁴ <https://www.icj.org/wp-content/uploads/2019/06/Myanmar-Citizenship-law-reform-Advocacy-Analysis-Brief-2019-ENG.pdf>.

⁷⁵ Constitution of Myanmar, see sections 37(c) and 357.

62. The Citizenship Law 1982 provides three categories of citizenship: “citizen”,⁷⁶ “associate citizen”⁷⁷ and “naturalized citizen.”⁷⁸

63. Only those identified as belonging to one of the 135 “national races” recognized in Myanmar’s Constitution are eligible for full citizenship,⁷⁹ effectively making Myanmar a race-based State, where full rights are only reserved for those who are recognised as from one of the “national races”. The Rohingya are automatically disqualified from full citizenship, not being one of the 135 recognised national races. Individual Rohingya people may however qualify for associate or naturalised citizenship if they prove ancestral links to residence in what is now Myanmar since 1824 or a link that predates the establishment of the State in 1948.⁸⁰ In a country where over 25 per cent of the population lacks official documents and where many have lost documents due to violence or departures, a large portion of the population, in particular the Rohingya, is unable to meet these requirements and so is unable to claim any of these categories of citizenship.⁸¹

64. The few Rohingya who have been successful in obtaining citizenship in the past received the lesser “naturalised citizenship”.⁸² To qualify for naturalised citizenship, Section 44 of the 1982 Citizenship Law requires applicants to be over 18 years of age, speak one of the ethnic languages,⁸³ be of good character and of sound mind. Naturalised citizenship falls short of full citizenship in that naturalized citizens may not hold political office or form a political party,⁸⁴ and their citizenship may be revoked on various grounds.⁸⁵

⁷⁶ Full citizenship is primarily reserved for “national ethnic groups ... such as the Kachin, Kayah, Karen (Kayin), Chin, Burmese (Bamar), Mon, Arakan (Rakhine) or Shan and ethnic groups who settled in Myanmar before 1823”. The law further states that “the Council of State may decide whether any ethnic group is national or not”. 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. 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. Full citizens receive a Citizenship Scrutiny Card, a “pink card”. 1982 Citizenship Law, Sections 3, 4, 5-7.

⁷⁷ “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. They receive an Associate Citizenship Scrutiny Card, a “blue card”. 1982 Citizenship Law, Section 23.

⁷⁸ “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. 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 ethnic languages, and be of “good character” and “sound mind”. Naturalised citizens receive a Naturalised Citizenship Scrutiny Card, a “green card”. See Burma Citizenship Law 1982 (Pyithu Hluttaw Law No 4 of 1982), Section 42.

⁷⁹ Section 3 of the 1982 Citizenship Law defines “Nationals” as “the Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine or Shan and ethnic groups as have settled in any of the territories included within the State as their permanent home from a period prior to 1185 B.E, 1823 AD are “Burma citizens”. Section 4 of the 1982 Citizenship Law provides that the “Council of the State may decide whether any ethnic group is a national or not”. The list of 135 regularly features in State publication, including for example “The Working People’s Daily” issue of 26 September 1990 (“Our Union of Myanmar where 135 national races reside”).

⁸⁰ 1982 Citizenship Law, Chapter 3 and 4.

⁸¹ International Commission of Jurists, *Citizenship and Human Rights in Myanmar: Why Law Reform is Urgent and Possible*, June 2019. Available from <https://www.icj.org/wp-content/uploads/2019/06/Myanmar-Citizenship-law-reform-Advocacy-Analysis-Brief-2019-ENG.pdf>.

⁸² Irrawaddy, *Rohingya trading identity for partial citizenship in Rakhine*, available from <https://www.irrawaddy.com/news/burma/rohingya-trading-identity-partial-citizenship-rights-rakhine-state.html>, See also census form available from http://users.pop.umn.edu/~rmccaa/IPUMSI/CensusForms/Asia/mm2014ef_myanmar_census_form.m y.pdf.

⁸³ Myanmar language is the official national language of the country. See Myanmar Constitution, art 450.

⁸⁴ Full citizens enjoy full legal rights and protections. For example, the Constitution connects the right to property with citizenship and protects the privacy and security of home, property, correspondence and other communications of citizens under the law. Additionally, the 1982 Citizenship Law and its

These provisions adversely affect women, who are less likely to speak an ethnic language.⁸⁶ A UNHCR assessment of a group of 2,000 Rohingya from Myebon Township, who received citizenship documentation in a pilot project that began in 2014, found “no tangible changes” in their overall situation and found that “their constraints on freedom of movement persist, as well as their access to basic services including education, health and livelihoods”.⁸⁷

65. In 2017, the Rakhine Advisory Commission urged the authorities to review the 1982 Citizenship Law, acknowledge the arbitrary deprivation of nationality of the Rohingya community and restore their citizenship rights through a speedy administrative process developed through meaningful consultation with the Rohingya community.⁸⁸ The Mission is not aware of any steps taken by the Government to review the 1982 Citizenship Law. Instead, the Government has intensified its efforts to force Rohingya to enter into a citizenship verification process by accepting National Verification Cards (NVCs) that explicitly recognize cardholders as non-citizens who need to apply for citizenship. Moreover, without amendments to the Citizenship Law, the NVC process could at best give them the status of either associate or naturalised citizens, neither of which confers the same level of rights as enjoyed by full citizens, further entrenching long-standing discrimination against the Rohingya community.

1. National Verification Cards

66. The Government claims that the National Verification Card process is a means for it to assess, verify and confirm or grant citizenship to the Rohingya.⁸⁹ The process applies equally to Rohingya displaced internally, displaced across an international border and not displaced.⁹⁰ An NVC declares that the holder is a “Bengali”,⁹¹ a term Rohingya reject as it

1983 procedures define certain criminal offences and set out severe penalties upon conviction. Section 18 of the Law stipulates criminal penalties and revocation of citizenship for persons who are considered to have “acquired citizenship by making a false representation or by concealment”. This can only apply to persons not considered as a “citizen by birth”. Persons who have lawfully acquired full citizenship are exempt from criminal penalties, except if they abet a crime. A range of other criminal penalties may apply only to “associate” and naturalized citizens; these can be imposed alongside revocation of citizenship. See also International Commission of Jurists, *Citizenship and Human Rights in Myanmar: Why Law Reform is Urgent and Possible*, June 2019. Available from <https://www.icj.org/wp-content/uploads/2019/06/Myanmar-Citizenship-law-reform-Advocacy-Analysis-Brief-2019-ENG.pdf>.

⁸⁵ FFFGEN-1-85650; The State may strip a naturalized citizen of her or his nationality on a number of grounds including, *inter alia*, communicating with a hostile organization; showing disloyalty to the State; conviction for a crime of moral turpitude (e.g. theft, adultery); committing an act likely to endanger Myanmar’s sovereignty and security; or on an executive order in the interest of the State.

⁸⁶ While there is close to parity with respect to literacy rates between men and women and within formal education in Myanmar, literacy among ethnic minority women is significantly lower. For example, only 45.9 per cent of Shan women are literate in comparison to 85.7 per cent of Shan men. See Myanmar Gender Situation Analysis (2016) Asian Development Bank, UNDP, UNFPA, UN Women.

⁸⁷ Study on Community Perceptions of Citizenship, Documentation and Rights in Rakhine State, UNHCR, August 2016, available at: https://www.themimu.info/sites/themimu.info/files/assessment_file_attachments/Community_Perceptions_FINAL.PDF <https://www.equaltimes.org/citizenship-for-a-few-rights-for#.XUqlGORlKmQ>, Reuters, ‘We can’t go anywhere’: Myanmar closes Rohingya camps but ‘entrenches segregation’, 8 December 2018.

⁸⁸ Advisory Commission on Rakhine State, Final Report, *Towards a peaceful, fair and prosperous future for the people of Rakhine* (August 2017), pp. 26-28.

⁸⁹ FFFGEN-1-84054.

⁹⁰ FFFGEN-1-84054; Open democracy, “Why Rohingya refugees are resisting ID cards”, Burma Human Rights Network, National Verification Cards, A barrier to Rohingya Repatriation, July 2019, Eleven Myanmar, Myanmar ready for return of Bengali refugees, 31 May 2019.

⁹¹ In 2014, The Government held a UN-backed national census and initially permitted Rohingya to identify themselves as Rohingya. However, The Government changed its decision after Buddhist nationalists threatened to boycott the census and decided Rohingya could only register if they identified as Bengali. See Council on Foreign Relations, “The Rohingya Crisis”, 5 December 2018.

implies the Rohingya are illegal immigrants from Bangladesh,⁹² and so not citizens of Myanmar. The Government is coercing people into accepting NVCs. It implies that accepting NVCs can lead to receiving citizenship and the fulfilment of other rights but in practice, for the great majority of those holding NVCs, it does not.

67. Intensified efforts by the Government of Myanmar in the lead up to and since the August 2017 “clearance operations” to coerce Rohingya to accept NVCs have been of grave concern. As one interviewee stated: “The authorities have linked everything to the NVC. People cannot fish or cut wood in the forest without holding a NVC. Businesspersons cannot do their business and families cannot visit relatives in prison. The Government is using every possible means to force people to obtain NVC.”⁹³

68. The Government has denied the Rohingya access to essential life-saving and life-supporting goods and services as punishment for refusing to accept the NVCs. Rohingya believe their refusal to accept NVCs in 2017 has led to the genocidal “clearance operations”, as described by the Mission’s 2018 report.⁹⁴ Some civil society actors have gone so far as to suggest that the enforcement of the NVC process is a tool to commit genocide.⁹⁵ The Government’s use of NVCs in this manner makes it inconceivable that they could be a pathway for the Government to respect the human rights of Rohingya; it is also inconceivable that Rohingya should trust the NVC process.

What the Government of Myanmar claims the NVCs provide

69. The Government continues to claim that the only pathway to citizenship for the Rohingya is through the NVC process.⁹⁶ On 31 May 2019, the Government claimed that 67,699 individuals nationwide had received NVCs during the past three years.⁹⁷ On 7 March 2019, U Shein Win, the deputy director-general of the National Registration and Citizenship Department of the Ministry of Labor, Population and Immigration, said that 14,000 NVCs had been issued in Rakhine, with half of the holders subsequently applying for citizenship. He noted that most of the successful applicants received green cards (Naturalized Citizenship cards) and blue cards (Associate Citizenship cards), with few who had the most complete family records receiving pink cards (Nationality cards).⁹⁸ He did not indicate how many Rohingya had received citizenship through the NVC process.

70. Senior government officials claim that the NVC allows Rohingya to apply for citizenship in accordance with Myanmar’s Citizenship Law.⁹⁹ In April 2018, a senior government official stated that “anyone who holds a NVC can apply for citizenship and can become a citizen within five months”.¹⁰⁰ In May 2019, Dr Win Myat Aye, Vice-chair of

⁹² A/HRC/39/CRP.2, Para 460, See also Reuters, Myanmar rejects citizenship reform at private Rohingya talks, available from <https://www.reuters.com/article/us-myanmar-rohingya-meeting-exclusive-idUSKBN1JN0D7>, The Guardian, Rohingya call for recognition as Myanmar holds fresh repatriation talks, 28 July 2019; Council on Foreign Relations, The Rohingya Crisis, 5 December 2018.

⁹³ FI-010.

⁹⁴ A/HRC/39/CRP.2, Para 485-488, 1130-1133, 1180, 1200.

⁹⁵ FFFGEN-1-84054; Open Democracy, Genocide cards: Rohingya refugees on why they risked their lives to refuse ID cards, 21 October 2018, Burma Human Rights Network, National Verification Cards, “A barrier to Rohingya Repatriation”, July 2019.

⁹⁶ See official statement of the Myanmar authorities claiming the number of NVCs distributed as of 31 May 2019, available from https://myanmar.gov.mm/web/guest/news-media/news/latest-news/-/asset_publisher/idasset354/content/--5113.

⁹⁷ https://myanmar.gov.mm/web/guest/news-media/news/latest-news/-/asset_publisher/idasset354/content/--5113.

⁹⁸ See Irrawaddy, “Rohingya trading identity for partial citizenship in Rakhine”, available from <https://www.irrawaddy.com/news/burma/rohingya-trading-identity-partial-citizenship-rights-rakhine-state.html>, See also census form available from http://users.pop.umn.edu/~rmccaa/IPUMSI/CensusForms/Asia/mm2014ef_myanmar_census_form.my.pdf.

⁹⁹ CI-295, CI-296, CI-298, CI-300, CI-305.

¹⁰⁰ Radio Free Asia, “Myanmar Lifts Travel Restrictions on Rohingyas with verification cards”, 19 April 2018, available on <https://www.rfa.org/english/news/myanmar/travel-04192018165606.html>.

Union Enterprise for Humanitarian Assistance, Resettlement and Development in Rakhine stressed that the returnees would be entitled to citizenship only after obtaining a NVC. This, he said, “is the first step in officially providing them with the right to citizenship”.¹⁰¹ In late July 2019, during a visit to the camps in Bangladesh, the Myanmar Government delegation restated the position about the requirement of a NVC to determine citizenship status.¹⁰²

71. The Mission received credible information suggesting that some applications for citizenship have remained unanswered for an extensive period and that the few successful applicants¹⁰³ received only naturalized citizenship rather than full citizenship.¹⁰⁴ Despite the Government’s claim to the contrary, the Mission found no evidence that supports its claims that the NVC process is to be extended to other ethnic groups apart from the Rohingya.

72. The Government of Myanmar claims that the NVC also provides cardholders with a series of rights,¹⁰⁵ including registered residency and the ability to travel in accordance with local laws, orders and instructions.¹⁰⁶ In January 2019, the Rakhine State Minister stated that NVCs will facilitate travel within Myanmar.¹⁰⁷ Informational brochures prepared by the Ministry of Labour, Immigration and Population state that “the holders of NVCs in Rakhine State have the right to travel within Rakhine in accordance with the local orders and directives of the Rakhine State Government”.¹⁰⁸ This followed reports that, in certain areas, NVC-holders could enjoy freedom of movement. For instance, in June 2018, the Government announced that NVC-holders can enjoy freedom of movement in Maungdaw district.¹⁰⁹ In January 2019, authorities in central Rakhine’s Pauktaw Township announced that Rohingya traveling to neighboring villages require a NVC.¹¹⁰

73. On 14 January 2018, during a visit to Sittwe Township, Union Minister for Social Welfare, Relief and Resettlement, Dr. Win Myat Aye, stated that NVC-holders can use the NVC as an official fishing licence and can overcome the difficulties of procuring food,

¹⁰¹ Eleven Myanmar, “Myanmar ready for return of Bengali refugees”, 31 May 2019, available from <https://elevenmyanmar.com/news/myanmar-ready-for-return-of-bengali-refugees-uehrd-says>.

¹⁰² Radio Free Asia, “Bangladesh Gives Myanmar 25,000 Rohingya Names for Potential Repatriation”, 31 July 2019, available from <https://www.rfa.org/english/news/myanmar/bangladesh-refugees-07292019172753.html>.

¹⁰³ FFFGEN-1-84278 ; Documents required for submission with the applications include a family tree, ancestry documentation, a copy of the NVC, household list, blood test and recommendation letters from the Village Administrator and police.

¹⁰⁴ FFFGEN-1-84278.

¹⁰⁵ CI-295, CI-296, CI-298, CI-301, CI-303, FI-010, FI-015, FI-018, FI-024, FI-039.

¹⁰⁶ The Committee for Implementation of Recommendations on Rakhine State, 13 June 2018, available from <http://www.globalnewlightofmyanmar.com/the-committee-for-implementation-of-recommendations-on-rakhine-state-2/>, Pyidaungsu Hluttaw puts implementations recommendations on Rakhine State on the record, 15 May 2018, available from <http://www.globalnewlightofmyanmar.com/pyidaungsu-hluttaw-puts-implementations-recommendations-rakhine-state-record/>, Q and A session of Press Conference in Yangon for repatriation readiness in Rakhine State, 12 November 2018, available from <http://www.globalnewlightofmyanmar.com/q-and-a-session-of-press-conference-in-yangon-for-repatriation-readiness-in-rakhine-state/>.

¹⁰⁷ Dialogue will make Myanmar stronger, Special Envoy of the Secretary-General, 29 January 2019, available from <https://yangon.sites.unicnetwork.org/2019/01/30/on-behalf-of-the-office-of-the-secretary-generals-special-envoy-on-myanmar/>.

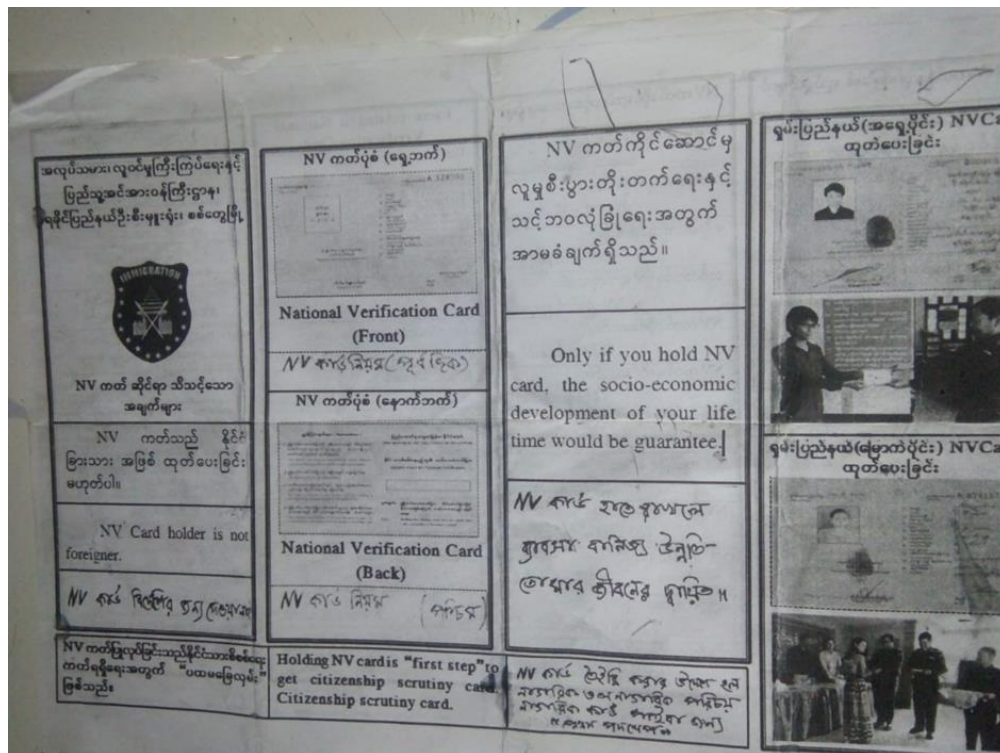
¹⁰⁸ FFFGEN-1-84279.

¹⁰⁹ The Committee for Implementation of Recommendations on Rakhine State, 13 June 2018, available from <http://www.globalnewlightofmyanmar.com/the-committee-for-implementation-of-recommendations-on-rakhine-state-2/>, Pyidaungsu Hluttaw puts implementations recommendations on Rakhine State on the record, 15 May 2018, available from <http://www.globalnewlightofmyanmar.com/pyidaungsu-hluttaw-puts-implementations-recommendations-rakhine-state-record/>, Q and A session of Press Conference in Yangon for repatriation readiness in Rakhine State, 12 November 2018, available from <http://www.globalnewlightofmyanmar.com/q-and-a-session-of-press-conference-in-yangon-for-repatriation-readiness-in-rakhine-state/>.

¹¹⁰ FFFGEN-1-84279.

clothing and shelter.¹¹¹ In October 2018, during a visit to Cox's Bazar, a delegation from Myanmar¹¹² distributed brochures to refugees that also stated that travel, fishing rights, social and economic activities and “guarantees of life” all require the possession of an NVC.¹¹³

Image of brochure distributed by a Myanmar delegation in Cox's Bazar in October 2018¹¹⁴ (page 1)



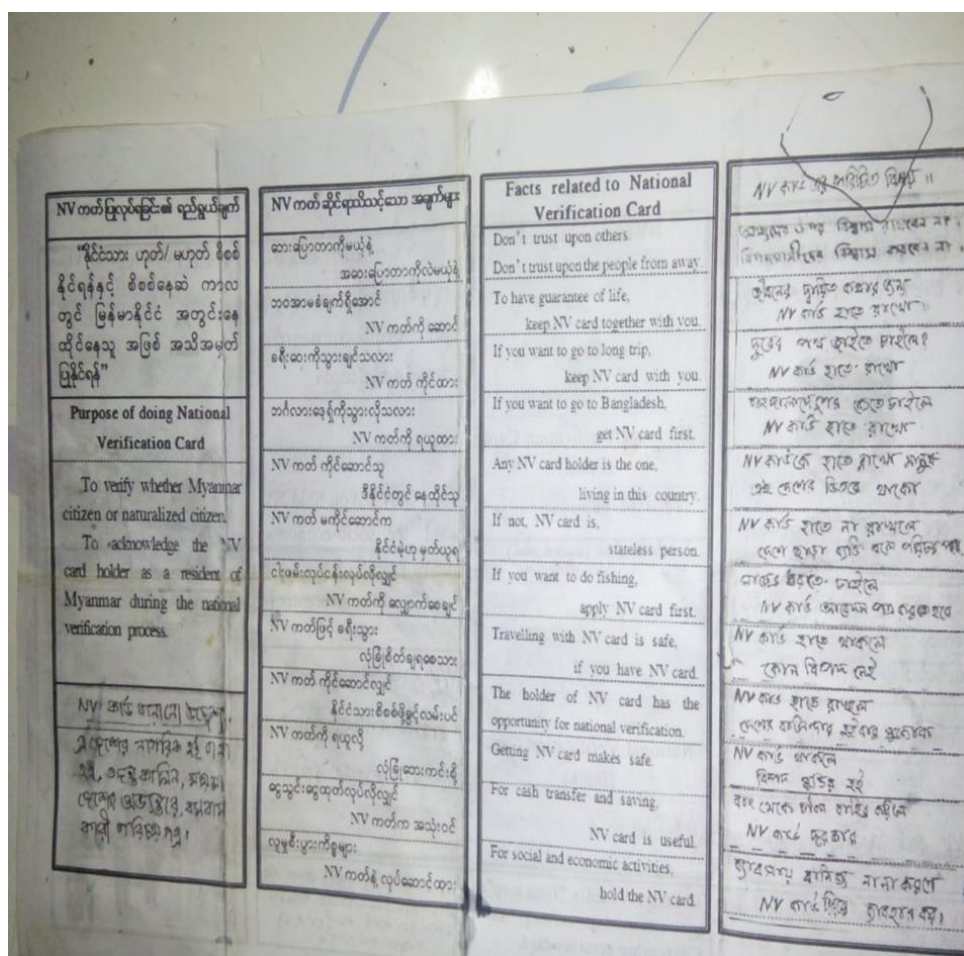
¹¹¹ President's Office, Union Minister inspects of issuing NVCs in Sittwe, 15 January 2018, <http://www.president-office.gov.mm/en/?q=issues/rakhine-state-affairs/id-8341> (accessed 26 June 2019).

¹¹² <https://www.refworld.org/docid/5c2cc3a41d.html>.

¹¹³ Brochure on file with the Mission.

¹¹⁴ Copy received from refugees in the camps in August 2019.

Image of brochure distributed by a Myanmar delegation in Cox's Bazar in October 2018¹¹⁵ (Page 2)



Rights conferred on NVC-holders in practice

74. While the Government has claimed that NVCs “are not for foreigners but for people residing in Myanmar”¹¹⁶ and that it allows for the enjoyment of a wide range of rights, the Mission finds that these various statements do not reflect the facts on the ground.

75. First, the NVCs do not grant automatic citizenship or trigger an automatic assessment of the applicant’s citizenship status.¹¹⁷ With the NVC, the cardholder may apply for citizenship and will need to undergo a citizenship assessment in accordance with Myanmar’s citizenship law. The card states this explicitly: “the holder of the card is a

¹¹⁵ Copy received from refugees in the camps in August 2019.

¹¹⁶ Special Envoy of the Secretary-General on Myanmar: “Dialogue will make Myanmar stronger”, 30 January 2019, available from <https://reliefweb.int/report/myanmar/special-envoy-secretary-general-myanmar-dialogue-will-make-myanmar-stronger-enmy>, see also Burma Human Rights Network, National Verification Cards - A Barrier to Rohingya Repatriation, 11 July 2019, available from <http://www.bhrn.org.uk/en/report/1090-national-verification-cards-a-barrier-to-rohingya-repatriation-full-report.html>.

¹¹⁷ The Committee for Implementation of Recommendations on Rakhine State, 13 June 2018, available from <http://www.globalnewlightofmyanmar.com/the-committee-for-implementation-of-recommendations-on-rakhine-state-2/>, Pyidaungsu Hluttaw puts implementations recommendations on Rakhine State on the record, 15 May 2018, available from <http://www.globalnewlightofmyanmar.com/pyidaungsu-hluttaw-puts-implementations-recommendations-rakhine-state-record/>, Q and A session of Press Conference in Yangon for repatriation readiness in Rakhine State, 12 November 2018, available from <http://www.globalnewlightofmyanmar.com/q-and-a-session-of-press-conference-in-yangon-for-repatriation-readiness-in-rakhine-state/>.

person who needs to apply for citizenship in accordance with the Myanmar citizenship law”.¹¹⁸ With the exception of the group of 2,000 Rohingya from Myebon, who received a form of citizenship in the pilot verification exercise that began in 2014,¹¹⁹ the Mission is unaware of any cases where NVCs have led to the same, or similar, results.

76. Second, the NVCs have not granted cardholders the ability to travel more freely or access their rights in a more meaningful way. Information from interviewees indicates that NVC-holders, similar to non NVC-holders, continue to face harassment and extortion at security checkpoints by the Tatmadaw and Border Guard Police (BGP) officials, affecting their freedom of movement.¹²⁰ The Mission is also aware of reports of fishermen in Sittwe in possession of NVCs still being permitted to fish for only two days a week.¹²¹

Harassment, intimidation and coercion

77. In its 2018 report, the Mission found that Rohingya were forced to accept NVCs through administrative pressure, threats and acts of violence.¹²² BGP and immigration officers consistently used threats and intimidation to force Rohingya to accept NVCs.¹²³ Rohingya were told that they were Bengali,¹²⁴ as the NVCs recorded, and did not belong to Myanmar.¹²⁵ These derogatory statements were often accompanied by threats that their villages would be burnt down and people killed if they refused to accept the NVC.¹²⁶ In some instances, Rohingya were told that they had to either accept the NVC or leave the country.¹²⁷

78. Some of these patterns continue to be reported to the Mission. In incidents that the Mission investigated, authorities resorted to extreme measures, including by making NVCs compulsory to enjoy freedom of movement, which resulted in the deprivation of livelihoods and work. NVCs have become the mandatory document to be checked at the security checkpoints,¹²⁸ in the context of an increased number of security checkpoints throughout northern Rakhine State. One interviewee stated to the Mission:

My brother and I used to work as drivers in Maungdaw Town. Following the August 2017 violence, authorities began checking NVC when traveling from one location to another. Prior to the violence, only driving licence was required for driving. Without NVC I was unable to travel a long distance and could only move within my

¹¹⁸ NVC on file with IFFM.

¹¹⁹ UNHCR, Study on Community Perceptions of Citizenship, Documentation and Rights in Rakhine State, UNHCR, August 2016, p.2, available from https://themimu.info/sites/themimu.info/files/assessment_file_attachments/Community_Perceptions_FINAL.PDF; See also Equal Times, Citizenship for a few and rights for none, available from <https://www.equaltimes.org/citizenship-for-a-few-rights-for#.XUqlGORlKmQ>.

¹²⁰ CI-325, FI-052, FI-053.

¹²¹ European Interest, National Verification Card – A Barrier to Rohingya Repatriation, 31 July 2019, available from <https://www.europeaninterest.eu/article/national-verification-card-barrier-rohingya-repatriation/>.

¹²² FI-052, FI-053, A/HRC/40/37, <https://www.dhakatribune.com/world/south-asia/2017/10/30/take-national-verification-card-leave-myanmar/>, <https://www.europeaninterest.eu/article/national-verification-card-barrier-rohingya-repatriation/>.

¹²³ A/HRC/39/CRP.2, Para 1130.

¹²⁴ CI-238, FI-052.

¹²⁵ CI-228, FI-014, FFFGEN-1-84054.

¹²⁶ CI-238, FFFGEN-1-84054, <https://www.dhakatribune.com/world/south-asia/2017/10/30/take-national-verification-card-leave-myanmar/>.

¹²⁷ CI-293, FI-015, FI-018, FI-019, FI-022, FI-039, FI-044, FFFGEN-1-84054, Dhaka Tribune, Take national verification card or leave Myanmar, 31 October 2017; Human Rights Watch, World report 2019.

¹²⁸ CI-287, CI-306, FI-023, FI-024, FI-025, FI-029, FI-035, FI-052, LI-226, CM-007, LM-058, RM-010, V-370, Australian Strategic Policy Institute, Mapping Conditions in Rakhine State, available from <https://pageflow.aspi.org.au/rakhine-state>.

*hamlet. The lack of job, shortage of food and movement restrictions without NVC, forced me to leave my village.*¹²⁹

NVCs and prisoner release

79. The Government also forced NVCs on Rohingya prisoners as a condition of release, through threats and other forms of coercion.¹³⁰ Individuals refusing to receive the document were at risk of indefinite arbitrary detention.¹³¹ A prisoner told the Mission: “I was handed a NVC on the day of my release. When I objected, I was told that I should either take a NVC or spend my entire life in prison.”¹³² Without asking Rohingya prisoners if they wanted to receive the cards, immigration officers made the prisoners accept the cards by forcing the prisoners to sign, electronically or on paper, and to have identity photos taken inside the prison.¹³³ During this process, prisoners were not allowed to ask questions and were reminded that they were “Bengali”. The cards were prepared in advance and handed over to prisoners on the day of their release. Additionally, Rohingya prisoners had to pay 10,000 Kyat (7 USD) to receive the card. Prisoners from other ethnic communities were not issued NVCs.¹³⁴

80. A Rohingya man, who was released from Buthidaung prison in late 2018, after having served for 44 months, stated:

*Prior to my release, prison officials issued me a NVC against my will. They forced me to accept the document. Prison officials threatened that they would keep me in prison for an indefinite period if I refused. My release was strictly conditional upon NVC and I knew refusal to accept would mean additional suffering inside the prison. I had no option but to give in and accept NVC card.*¹³⁵

81. Authorities also required Rohingya family members to present a NVC to be able to visit relatives in detention. Individuals unwilling or unable to produce a NVC could not visit family throughout the course of their detention.¹³⁶

82. As an indication of what a repatriation process might include for the thousands of displaced Rohingya, authorities forced NVCs on Rohingya who were returned to Myanmar from India in October 2018 and January 2019.¹³⁷ In its preliminary needs assessment for repatriation in Rakhine State, ASEAN-ERAT confirmed this process, noting that returnees will be issued NVCs upon completion of the registration process at the Reception Centre. It was said that the NVC would serve as a guarantee for the returnees to access livelihood opportunities and basic needs such as health and education services.¹³⁸ However, the experiences of Rohingya with NVCs to date indicate the contrary.

Attitudes towards the NVCs

83. The Mission heard many accounts from the Rohingya community about their strong opposition to the NVCs. There appears to be a complete distrust in the Government’s sincerity regarding its assurances that the NVCs are a pathway to citizenship.¹³⁹ The

¹²⁹ CI-214.

¹³⁰ CI-243, CI-291, FI-046, FI-047, FI-052, FI-053.

¹³¹ CI-243, CI-291, FI-052.

¹³² FI-052.

¹³³ FI-052, FI-053.

¹³⁴ CI-243, FI-052, FI-053.

¹³⁵ FI-047 (Copy of the NVC is on file with the Mission).

¹³⁶ FI-010, FI-015.

¹³⁷ FFFGEN-1-84279.

¹³⁸ FFFGEN-1-86990, Human Rights Watch, Don’t Whitewash Atrocities Against Rohingya, 19 June 2019; Progressive Voice of Myanmar, ASEAN Civil Societies and Rohingya Organizations Issue A Joint Statement on ASEAN – ERAT Preliminary Needs Assessment for Repatriation in Rakhine State; ASEAN, ASEAN SecGen briefs diplomatic corps on the Preliminary Needs Assessment for Repatriation in Rakhine State, available from <https://asean.org/asean-secgen-briefs-diplomatic-corps-preliminary-needs-assessment-repatriation-rakhine-state-myanmar/>.

¹³⁹ FI-015, FI-018, FI-019, FI-022, FI-024, FI-025, FI-027, FI-039, FI-041, FI-042, FI-046, V-047.

inherent distrust arises from a variety of factors, including a long history of cancellation or replacement of previous cards with new cards for Rohingya.¹⁴⁰

84. The Rohingya perceive the NVC as a tool of suppression that adversely affects nearly every aspect of their lives and erodes their fundamental freedoms, including their right to an identity, as it does not allow them to identify as Rohingya.¹⁴¹ Rohingya in Myanmar, Bangladesh, Malaysia and other parts of the region have consistently shared concerns with the Mission over the NVC and the associated process, and it has been cited as one of the main factors leading to their decision to leave the country and not return.¹⁴²

85. The NVC application form gives Rohingya no other option than to identify as “Bengali”. The Government’s apparent attempt to address this issue was to remove references to religion and ethnicity in an updated NVC sometime last year. However, the NVC application form still includes this specification, which renders the process deeply inadequate. The NVC application form is completed by the authorities, who record “Bengali” under ethnicity.¹⁴³

¹⁴⁰ Oral update of the High Commissioner for Human Rights on situation of human rights of Rohingya people, 3 July 2018, A/HRC/38/CRP.2, paras. 472-476.

¹⁴¹ UNHCR, Study on Community Perceptions of Citizenship, Documentation and Rights in Rakhine State, UNHCR, August 2016, p.11, available from https://themimu.info/sites/themimu.info/files/assessment_file_attachments/Community_Perceptions_FINAL.PDF.

¹⁴² CI-228, CI-229, FI-038, FI-046, FM-003.

¹⁴³ FFFGEN-1-84278, CI-301, CI-303, FI-052, FI-053.

Image of the NVC application form¹⁴⁴ (Page 1)

နိုင်ငံသား၊ ဧည့်နိုင်ငံသား၊ နိုင်ငံသားပြုခွင့်ရသူ ဟုတ်မဟုတ်အဆုံးအဖြတ်ခံယူရန် လျှောက်ထားသူများ
တကွက်လျှောက်လွှာပုံစံ

မှတစ်ဆင့်
မြို့နယ်ဦးစီးဌာနမှ
ခန့်အပ်သူ.....မြို့နယ်လူဝင်မှုကြီးကြပ်ရေးနှင့် အမျိုးသားမှတ်ပုံတင်ရေး
ဦးစီးဌာနမှ
ခန့်အပ်သူ.....မြို့

သို့
ဗဟိုအဖွဲ့

ရက်စွဲ..... နေ့စွဲ..... လ..... ရက်စွဲ.....
အကြောင်းအရာ..... နိုင်ငံသား၊ ဧည့်နိုင်ငံသား၊ နိုင်ငံသားပြုခွင့်ရသူ ဟုတ်မဟုတ်
အဆုံးအဖြတ်ပေးပါရန် လျှောက်ထားခြင်း

၁။ ကျွန်တော်/ကျွန်မ.....အား မြန်မာနိုင်ငံသားဥပဒေ ပုဒ်မ - ၆၅ အရ
နိုင်ငံသား၊ ဧည့်နိုင်ငံသား၊ နိုင်ငံသားပြုခွင့်ရသူဟုတ်မဟုတ် အဆုံးအဖြတ်ပေးပါရန် တောင်းဆို
အချက်များကို ဖော်ပြလျှောက်ထားအပ်ပါသည်။

(က) လျှောက်ထားသူအကြောင်းအရာ

(ခ) အမည်အပြည့်အစုံ.....

(ဂ) အခြားအမည် (ရှိလျှင်).....

(ဃ) မွေးသက္ကရာဇ်.....

(င) မွေးဖွားရာနေရာ.....

(စ) ကျား/မ.....

(ဆ) လူမျိုးနှင့် နိုင်ငံသားအမျိုးအစား.....

(ဇ) ကိုးကွယ်သည့်ဘာသာ.....

(ဈ) ကိုင်ဆောင်သည့်လက်မှတ်အမှတ်နှင့်ရက်စွဲ.....

(ည) ပညာအရည်အချင်း.....

(ဋ) အလုပ်အကိုင်.....

(ဌ) နေရပ်လိပ်စာ.....

(ဍ) မြန်မာနိုင်ငံသို့ ချောက်ဖျံသည့် ရက်စွဲနှင့် အရပ်ဝေးသေ.....

6. Ethnicity and Nationality/ Type of Citizen

12. Date of Entry into Myanmar and Place (of arrival)

86. Rohingya also have the well-founded view that the NVC process is a deliberate attempt by the authorities to force Rohingya to concede they are foreigners who do not have Myanmar citizenship.¹⁴⁵ The application form for the NVC requires applicants to provide information on “ethnicity and nationality, date and entry into Myanmar and place of arrival, vehicle and transport route into Myanmar”, all of which implies they came from elsewhere. The NVC states that the cardholder is someone who needs to apply for citizenship. This language implies that Rohingya are outsiders and plays into the false hate-filled narratives of Rohingya as “Bengali intruders”. This language on the NVC implies the cardholder is not already a citizen.

¹⁴⁴ Copy of application form received from refugees in June 2019, on file with the Mission.

¹⁴⁵ CI-293, FI-015, FI-042, FM-003, Aljazeera, Rohingya suspicious as Myanmar touts repatriation plan, 30 July 2019, Human Rights Watch, Rohingya refugees disappointed again, 31 July 2019, Rohingya Refugees Disappointed Again: Myanmar Delegation Fails to Make Convincing Case for Safe Return, 31 July 2019, available from <https://reliefweb.int/report/bangladesh/rohingya-refugees-disappointed-again-myanmar-delegation-fails-make-convincing-case>.

Image of the NVC application form¹⁴⁶ (Page 2)

The image shows a handwritten NVC application form in Burmese. The form is divided into several sections, each with a label in English and Burmese. The sections are:

- 13. Vehicle and Transport Route Used (to come into Myanmar)**: This section includes a list of options for transport (e.g., boat, car, bus, etc.) and a space for the applicant's details.
- 6. Ethnicity and Nationality/ Type of Citizen**: This section includes a list of options for ethnicity and nationality.
- 12. Date of Entry into Myanmar and Place (of arrival)**: This section includes a space for the date and place of arrival.
- 13. Vehicle and Transport Route Used (to come into Myanmar)**: This section includes a list of options for transport (e.g., boat, car, bus, etc.) and a space for the applicant's details.
- 16. If deceased, date of death and place**: This section includes a space for the date and place of death.

The form is filled out with handwritten Burmese text. The sections are labeled with numbers in parentheses (e.g., (၁၃), (၆), (၁၂), (၁၃), (၁၆)). The form is titled "Image of the NVC application form¹⁴⁶ (Page 2)".

87. Given that, under the Constitution, land ownership is connected to citizenship,¹⁴⁷ for Rohingya who registered land titles at a time when they were considered citizens,¹⁴⁸ acceptance of the NVC may carry a real risk of a loss of their land and connected livelihood opportunities.¹⁴⁹

88. Many Rohingya also reject the NVC and its process due to a lack of clarity regarding the rights conferred upon NVC-holders. Rohingya interviewed by the Mission stated that NVCs do not grant them rights and discrimination continues regardless of whether the individuals are in possession of an NVC,¹⁵⁰ as detailed above.

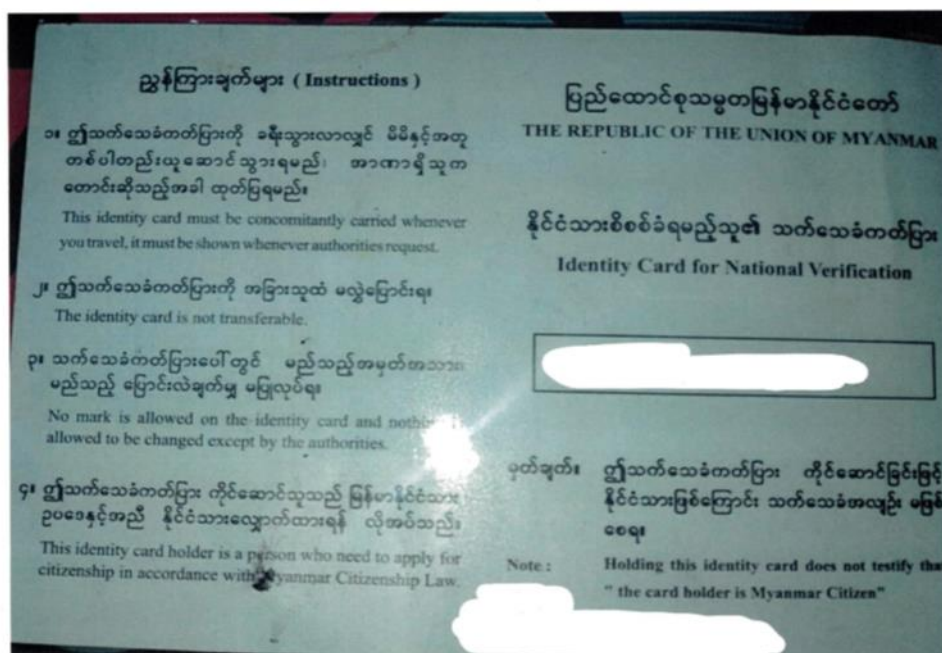
¹⁴⁶ Copy of application form received from refugees in June 2019, on file with the Mission.

¹⁴⁷ Constitution of Myanmar, sections 37(c) and 357.

¹⁴⁸ Rohingya were considered citizens in the past under the 1947 Constitution which was more inclusive. Many lost citizenship at a number of occasions, including in 1960; 1974; 1982 and again in 2015. See A/HRC/39/CRP.2. paras. 472-476.

¹⁴⁹ CI-298, FI-010, FI-015, FI-018, FI-019, FI-024, FI-039, FI-041.

¹⁵⁰ FI-052, FI-053.

Part of an image of a NVC¹⁵¹

89. Overall, Rohingya the Mission spoke to, did not believe NVCs provide a clear pathway to citizenship.¹⁵² They perceived NVCs as unwarranted because their ancestors were nationals of Myanmar, who actively participated in democratic processes, including elections, and some of whom held senior ministerial positions in the country.¹⁵³ They assert a right to be recognised as full citizens and to be treated equally with other ethnic groups.¹⁵⁴ An interviewee told the Mission:

*We are citizens of Myanmar. Our grandparents were citizens of Myanmar. The Government introduced NVC to deprive us of our nationality. We will never give in to pressure and will never accept NVC. We knew by accepting the NVC, we would run into more sophisticated problems.*¹⁵⁵

90. These attitudes are well-founded and understandable. Statements by government officials demonstrate that the “clearance operations” beginning on 25 August 2017 were a response to Rohingya villagers collectively refusing to accept NVCs and, that the “clearance operations” were not aimed at crushing the ARSA, as the Government claimed.¹⁵⁶ The Mission has evidence that these statements were made at important village meetings, in front of large audiences of soldiers and Rohingya civilians, immediately preceding the “clearance operations” against the Rohingya.

91. At a 22 August 2017 meeting in the village of Chut Pyin in northern Rathedaung Township, a Tatmadaw commander from the 33rd LID told a group of Rohingya villagers, in the presence of members of the 33rd LID, that he would kill and burn them if they did not accept the NVCs.¹⁵⁷ The commander told the audience,¹⁵⁸ “We came from Yangon, from LID 33. You don’t belong to this country. As you are here, we gave you place to stay. You have to live here as how we want, we decide. You have to follow our order. We came from Kachin and Shan. We killed many people. We came here directly from there. We will kill

¹⁵¹ Copy of NVC received in July 2019 from a card-holder currently in Rakhine State. Copy on file with the Mission.

¹⁵² FI-015, FI-018, FI-019, FI-024, FI-025, FI-027.

¹⁵³ FI-018, FI-051, Aljazeera, “Who are the Rohingya”, 18 April 2018.

¹⁵⁴ CI-298, CI-301, FI-018.

¹⁵⁵ FI-018.

¹⁵⁶ CI-298, CI-302, CI-303, FI-022, FI-024, FI-038, FI-039, FI-044, FI-051.

¹⁵⁷ CI -185, CI-186, CI-199, RI-001, RI-018, CI-191.

¹⁵⁸ CI-191.

you as well. You have to receive the NVC. We will burn your village and turn into ashes.”¹⁵⁹ A few days later, on or around 27 August, the 33rd LID attacked villages in the Chut Pyin village tract after villagers rejected the cards.¹⁶⁰

92. A similar meeting took place on the same day in front of an old mosque in Min Gyi (Tu Lar Tu Li) village tract in northern Maungdaw Township. It is less clear who from the government attended or spoke at the meeting.¹⁶¹ When the villagers said they would not accept the NVC cards, the person conducting the meeting, referred to by one witness as “the chief”, said “If you don’t receive it, you will suffer, you will be destroyed.”¹⁶² Soon after the Tatmadaw attacked the village.¹⁶³

93. In March 2018, the media quoted Senior General Min Aung Hlaing as saying, “Rohingya do not have any characteristics or culture in common with the ethnicities of Myanmar” and “the current conflict has been fuelled because the Bengalis demanded citizenship”.¹⁶⁴ These incidents and statements strengthen the inference that the military’s attack on the Rohingya was carried out with genocidal intent to destroy the Rohingya, in whole or in part, as a people.¹⁶⁵

2. Annual household list

94. Government authorities conduct an annual household listing exercise to record those living in Myanmar. Each year’s list adds newborns and deletes the names of the departed or deceased. The process includes taking photos of all family members in a household, often carrying a card with individual names and their “serial number” on the household list.

95. Household lists are issued and updated by the Ministry of Immigration and Population and the Ministry of Home Affairs.¹⁶⁶ They are the only form of identification for many Rohingya since the revocation of Temporary Registration Cards on 31 March 2015,¹⁶⁷ which established their place of origin and rights to their property. The household lists are so important that Rohingya the Mission interviewed in camps in Bangladesh showed interviewers their household photos, with the cards with their names that they had brought with them when they fled Myanmar.

96. Being absent from a household list puts people at risk of arrest, detention and extortion. Individuals not on a household list could also be denied access to basic services, including healthcare, education or other essential administrative services, including NVC applications, and marriage and travel permits.¹⁶⁸

97. These risks are so severe that Rohingya who arrived in Bangladesh during the reporting period told the Mission that they had fled due to their inability to register on the household lists.¹⁶⁹

98. Persons interviewed by the Mission reported that authorities were aggressive during the annual listing process and randomly removed individuals from the list, including those

¹⁵⁹ CI-185.

¹⁶⁰ CI-191, LM-014, XM-008, V-067, V-071. For a detailed account of these attacks, see A/HRC/39/CRP.2, paras. 779-798.

¹⁶¹ CI-197, CI-198.

¹⁶² CI-198.

¹⁶³ For a detailed account of these attacks, see A/HRC/39/CRP.2, paras. 756-778.

¹⁶⁴ Reuters, “Myanmar rejects citizenship reform at private Rohingya talks”, 27 June 2018.

¹⁶⁵ A/HRC/39/CRP.2, paras. 1422-1424

¹⁶⁶ Household lists are issued by the Immigration and National Identification Headquarters, which is jointly maintained by the General Administration Department which is under the supervision of Ministry of the Office of the Union Government since December 2018 and the Ministry of Labour, Immigration and Population.

¹⁶⁷ A/HRC/39/CRP.2 paras. 583-584.

¹⁶⁸ FFFGEN-1-84278, FI-024, FI-029, A/HRC/39/CRP.2, para 466, 593, 603, 607.

¹⁶⁹ CI-240, CI-241, CI-242, CI-245, FI-029.

who were absent at the time when the officials went house to house to update the lists.¹⁷⁰ Individuals not registered are at risk of arrest, detention and extortion.¹⁷¹ An interviewee from Buthidaung, who sought shelter in Bangladesh in early April 2019, stated:

*BGP and immigration officers carried out an unannounced and sudden household inspection in early 2019. They removed the names of villagers who were absent. My family members were able to register but I could not, since I was not present when the officials carried out the inspection. I pleaded the village Administrator for help, which he refused. Following the removal of my name, I was risking arrest for staying in the village and had to flee Myanmar.*¹⁷²

99. After the “clearance operations”, the BGP and the Committee for the Prevention of the Illegal Immigration of Foreigners, or Makapa, commenced a “household list” updating exercise in late 2018. Conducting population checks after the “clearance operations” had a particularly detrimental impact on the hundreds of thousands of Rohingya who were unable to return to their homes to be present for the checks. The Mission received accounts of inspection authorities deleting the names of Rohingya who had fled to Bangladesh following the August 2017 events.¹⁷³

100. One victim recounted to the Mission that the household list updating exercise in his village, that took place in February 2019, was accompanied by intimidation, coercion, arbitrary arrests, extortion, high unofficial fees and physical and sexual violence. Women were forced to remove their veils, which is culturally and religiously sensitive, and in many cases they were inappropriately touched and sexually harassed by male officials. The interviewee said officers also used insulting and derogatory language. In addition, each family had to pay between 3,000 and 5,000 Kyat (2 to 4 USD) to the registering officers as a bribe.¹⁷⁴ Families had to be photographed carrying a card representing their serial number on the household list, for an additional fee of 5,000 Kyat (4 USD).¹⁷⁵

3. Conclusion and legal findings

101. Consistent with its 2018 report, the Mission concludes on reasonable grounds, and for the same reasons, that the Government of Myanmar continues to exceed its sovereign right to establish laws governing the acquisition, renunciation and loss of citizenship by violating the prohibition against discrimination and arbitrary deprivation of citizenship, including when it would result in statelessness.¹⁷⁶ The Mission restates its position that the 1982 Citizenship Law is discriminatory, is inconsistent with Myanmar’s international human rights obligations and arbitrarily denies Rohingya the possibility of attaining full citizenship. As a result, the Rohingya are also denied access to basic services, including education, health care and livelihood opportunities, thereby depriving them of fundamental human rights.

102. The Mission also concludes on reasonable grounds that the Government is using the NVC process and its annual household list as tools to deny the Rohingya these rights. The Government uses NVCs to deny Rohingya their right to citizenship in exchange for false promises of an effective citizenship process and other fundamental human rights. The Government is using its annual household list process as a tool to limit the number of people who can apply for NVCs.

103. When used in this manner, the NVC process is as an integral part of the Government’s protracted attempts to deny the Rohingya their identity and citizenship.

¹⁷⁰ FI-024, FI-026, FI-027, FI-029, Statement by UN Deputy High Commissioner for Human Rights, available from <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24811&LangID=E>.

¹⁷¹ CI-240, CI-241, CI-245, FI-029.

¹⁷² FI-029.

¹⁷³ FI-024, FI-026, FI-027, FI-028, FI-029.

¹⁷⁴ The average daily wage in the area is between 5,000 and 10,000 kyat.

¹⁷⁵ FI-050.

¹⁷⁶ A/HRC/39/CRP.2, paras. 469-498.

Authorities are holding hostage the fundamental human rights of Rohingya through the NVC process, with a policy of denying the Rohingya their universal human rights unless they accept the NVC. When Rohingya refused to accept the NVCs in August 2017, authorities used it as a pretext to uproot and remove them from Myanmar through mass forced displacement, death and destruction. For all these reasons, the Mission concludes on reasonable grounds that the NVCs are being used in this manner only against the Rohingya population and that the NVC process is incapable of serving the purposes that the Government claims. Instead, the NVC is a tool that undermines and distracts from the immediate and effective legislative and other reforms required to resolve the human rights crisis that the Rohingya are facing.

104. Authorities enflame the situation by carrying out the household listing in a manner that intentionally omits people from the list and, in doing so, puts them at risk of detention, extortion and denial of access to basic services, including healthcare, education or other essential administrative services, such as marriage and travel permits. Rohingya who arrived in Bangladesh during the reporting period told the Mission that they fled because the consequences of not being on the household list were so severe.¹⁷⁷ The Mission therefore concludes on reasonable grounds that the manner in which the Government applies the household list further demonstrates the disingenuous nature of its claims that the NVC is a pathway to citizenship.

105. The Mission also concludes on reasonable grounds that Rohingya have a deep-rooted and well-founded distrust in the NVC process¹⁷⁸ and that the Myanmar Government must implement effective guarantees to acknowledge or recognize the citizenship of Rohingya through a direct citizenship application process, with due process rights guaranteed. Such a process cannot be through the NVC procedures. Rather, the right to citizenship of Rohingya must be recognized in an amended Constitution and Citizenship Law. This will support the voluntary, safe, dignified and sustainable return of Rohingya refugees to Myanmar. Consideration should be given to enable Rohingya to apply for citizenship from Bangladesh and elsewhere.

106. To understand the full consequences of the Government's 1982 Citizenship Law, NVC process and household lists for the Rohingya people, the Mission finds it appropriate to assess this issue in combination with its other findings and conclusions. As explained in greater detail in the report's *Conclusions and legal findings: the impossibility of return*, the Mission concludes on reasonable grounds that the Government's citizenship restrictions contribute to the continued persecution of the Rohingya people and deny them rights that result in serious or great inhumane suffering, both of which are crimes against humanity. The manner in which the Government restricts citizenship also denies Rohingya their identity and deprives them of the rights people need to survive and live with dignity. The Mission regards such restrictions and denials as one of several indicators that it has identified to infer that the Government continues to harbour genocidal intent and that the Rohingya remain under serious risk of genocide. Finally, the Mission concludes that citizenship restrictions contribute to an overall condition that makes it unsafe, unhumane, unsustainable and impossible for Rohingya to return to Myanmar.

B. Land clearance, destruction, confiscation and construction

107. The Government of Myanmar has made statements to the effect that it will restore peace and stability in Rakhine State in order to facilitate repatriation.¹⁷⁹ However, the

¹⁷⁷ CI-240, CI-241, CI-242, CI-245, FI-029.

¹⁷⁸ Statement by UN Deputy High Commissioner for Human Rights to the 41st session of the Human Rights Council, 10 July 2019, Committee on the Elimination of Discrimination Against Women, Concluding observations on the exceptional report of Myanmar, 8 March 2019, CEDAW/C/MMR/EP/CO/1, Report of the Working Group on the Universal Periodic Review, 23 December 2015, A/HRC/31/13.

¹⁷⁹ Government of Myanmar response to the Special Rapporteur on the situation of human rights in Myanmar, 2 July 2019, available from

Mission has found that the conditions under which some 600,000 remaining Rohingya live in Rakhine State are such that do not allow for safe, dignified and sustainable repatriation. Indeed, the Mission found that the Government of Myanmar has not put in place the necessary conditions to allow the returning Rohingya population to return to their land.

108. In May 2019, the Experts of the Mission visited Konarpara, Zero Point Zone, on the Myanmar-Bangladesh border,¹⁸⁰ where approximately 4,000 internally displaced Rohingya remain trapped, predominantly inside Myanmar territory, since September 2017.¹⁸¹ Immediately after their arrival at the Zero Point Zone, Myanmar authorities replaced an old border fence with concrete, steel and wire barriers. This was aimed at preventing the displaced Rohingya from returning to their homes and land.¹⁸² The displaced population explained to the Mission that they have been unable to return to their places of origin despite repeated requests and pleas to the Myanmar authorities.¹⁸³

109. In March 2018, Myanmar authorities through loudspeakers demanded that they leave the area.¹⁸⁴ High-level Myanmar officials visited the area and spoke with the displaced population. Rohingya requested the visiting delegation to allow them to return to their places of origin. Their responses had always been that they would discuss the matter with authorities in Naypyidaw, the capital. However, to date, there has been no progress on their return.¹⁸⁵ The population remains in a precarious situation with limited access to humanitarian support, with only the International Committee of the Red Cross (ICRC) providing humanitarian assistance to the displaced population.¹⁸⁶

110. New arrivals in Bangladesh, with whom the Mission spoke, paint a bleak picture of the reality on the ground in Rakhine.¹⁸⁷ This section summarises these findings.

1. The situation of the internally displaced

111. Myanmar has 128,000 internally displaced persons (IDPs) in central Rakhine who have been living in camps or camp-like settings for the past seven years. Some 126,000 of them are Rohingya; all of them are Muslims. About 80 per cent of the camp population are women and children.¹⁸⁸ These camps were established following the 2012 violence, which resulted in the displacement of over 140,000 people. Most of them were Rohingya.¹⁸⁹ During the violence, security forces committed serious human rights violations against Rohingya and Kaman and failed to intervene to stop the violence, leading the Mission to find that the violence was pre-planned and instigated and that the security forces acted in complicity with ethnic Rakhine.¹⁹⁰

<https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/41Session/Pages/Statements.aspx?SessionId=30&MeetingDate=02/07/2019>.

¹⁸⁰ The Experts held discussions with the displaced Rohingya on the Bangladesh side of the border and did not enter Myanmar territory as they did not have permission to do so.

¹⁸¹ FI-051.

¹⁸² FI-051, FM-006, A/HRC/42/CRP.3, Paras 107, 110-113.

¹⁸³ FI-051.

¹⁸⁴ FI-051, FM-006, A/HRC/42/CRP.3, Paras 107, 110, 111, 112, 113.

¹⁸⁵ FI-051.

¹⁸⁶ FI-051, FM-006, FM-007.

¹⁸⁷ CI-209, CI-211, CI-212, CI-213, CI-214, CI-217, CI-222, CI-223, CI-224, CI-226, CI-227, CI-228, CI-229, CI-239, CI-240, CI-241, CI-242, CI-243, CI-245, CI-246, CI-287, CI-288, CI-289, CI-290, CI-291, CI-292, FI-007, FI-010, FI-011, FI-026, FI-027, FI-028, FI-029, FI-030, FI-031, FI-034, FI-035, FI-037, FI-038, FI-046, FI-047, FI-048. A total of 1051 individuals have arrived in Bangladesh during the first seven months of 2019. UNHCR, population factsheet, available from <https://data2.unhcr.org/en/documents/download/70585>.

¹⁸⁸ FFFGEN-1-885653, UNICEF, Investing in children should be the foundation of Myanmar's progress and development, available from <https://www.unicef.org/eap/press-releases/investing-children-should-be-foundation-myanmars-progress-and-development>;

¹⁸⁹ UNHCR, One year on: Displacement in Rakhine state, Myanmar, available from <https://www.unhcr.org/news/briefing/2013/6/51b1af0b6/year-displacement-rakhine-state-myanmar.html>.

¹⁹⁰ A/HRC/39/CRP.2, paras. 628 and 747.

112. The harsh living conditions to which the Government is subjecting Rohingya IDPs is additional evidence that the Rohingya are not welcome. It indicates what premature repatriation of Rohingya from camps in Bangladesh would look like.

113. When the camps were established, the Government asserted that they would not be permanent.¹⁹¹ The Mission's 2018 report described the camps' appalling conditions.¹⁹² Seven years on, in May 2019, the High Commissioner for Refugees, Filippo Grandi, raised concerns over restrictions on IDP freedom of movement and access to livelihoods.¹⁹³ The United Nations Assistant Secretary-General for Humanitarian Affairs, Ursula Mueller, reaffirmed that same month that "After seven years of displacement, the conditions in camps have deteriorated and are simply unacceptable".¹⁹⁴ At the end of a three day visit to Myanmar, on 31 January 2019, the UNICEF Executive Director, Henrietta Fore, remarked that living conditions in one of the camps she visited in Rakhine State were "sub-optimal, stripping children of their dignity and exposing them to violence, exploitation, disease and neglect. Families were confined to the camps, depriving them of a livelihood and leaving their children malnourished." The camp was designed as a temporary shelter but had been housing families for over six years.¹⁹⁵

114. In June 2018, the Government announced a strategic plan to close IDP camps in Rakhine, Kachin, Shan and Kayah States.¹⁹⁶ However, over a year later, a few camps have been declared "closed" but Rohingya residing there continue to live in the same conditions, dependent on humanitarian assistance, due to a lack of access to sustainable livelihood opportunities and basic services, further entrenching segregation.¹⁹⁷ The draft plan states that the objective of the camp closure strategy is "to ensure sustainable resettlement and to create livelihood opportunities..."¹⁹⁸ as well as to "...proceed with resettlement arrangements in accordance with the will of those residing in the camps in order to enable the residents in those camps to become independent and resume their normal lives..."¹⁹⁹ While the draft strategy is welcome, it is important for the authorities to hold meaningful consultations with the affected communities and to take on board any of their concerns in implementing it. It is essential for the strategy to be implemented in a way that ensures the human rights of the IDPs.

115. In a recommendation of the Rakhine Advisory Commission in 2017, the Government was called upon to ensure freedom of movement, access to education, health, livelihood and basic services to the IDPs.²⁰⁰ However, in declaring a few camps closed, the Government has focused only on infrastructure and shelter changes without addressing the fundamental issues identified by the Commission, such as freedom of movement and access to livelihoods and other services.²⁰¹ Without these reforms, IDPs remain unable to achieve normal and sustainable living conditions and to access basic services such as education, health and livelihoods. The lack of access to basic services and livelihoods and the

¹⁹¹ A/HRC/39/CRP.2, para. 693.

¹⁹² A/HRC/39/CRP.2, para. 693, See also, Statement by UN Deputy High Commissioner for Human Rights, 10 July 2019.

¹⁹³ UNHCR, UN High Commissioner for Refugees concludes visit to Myanmar, 24 May 2019.

¹⁹⁴ <https://frontiermyanmar.net/en/un-official-urges-durable-solutions-for-270000-people-displaced-by-conflict>.

¹⁹⁵ UNICEF, Investing in children should be the foundation of Myanmar's progress and development, 31 January 2019.

¹⁹⁶ Irrawaddy, Ministry Announces Plan to Close IDP Camps in 4 States, 5 June 2018.

¹⁹⁷ FFFGEN-1-86989.

¹⁹⁸ National Strategy on Closure of IDP camps, draft received by the Mission in May 2019 strategy, para 2 (b).

¹⁹⁹ Ibid para. 1, page 2.

²⁰⁰ Recommendation 8, Ibid.

²⁰¹ Reuters, 'We can't go anywhere': Myanmar closes Rohingya camps but 'entrenches segregation', 6 December 2018. UNHCR, UN High Commissioner for Refugees concludes visit to Myanmar, 24 May 2019. FFFGEN-1-86987, Strait Times, "UN official urges Myanmar to grant aid workers access to Rakhine state", 16 May 2019; The Irrawaddy, "Ministry Announces Plan to Close IDP Camps in 4 States", 5 June 2018.

movement restrictions have only increased the reliance of IDPs on humanitarian assistance.²⁰²

(a) Construction

116. The human rights crisis that the Rohingya remaining in Rakhine state are facing is in large part due to the Government's confiscation and re-appropriation of land they once lived on and cultivated. This is in addition to the Government's clearance and destruction of Rohingya lands during its 2017 "clearance operations". According to a UNOSAT assessment, from the start of the "clearance operations" that began in August 2017, up until April 2019, 214 Rohingya settlements were completely or almost completely (more than 90 per cent) destroyed and another 202 settlements were partially destroyed. UNOSAT estimates that 40,600 structures were destroyed in these 416 settlements.²⁰³

117. The Government of Myanmar established the Union Enterprise for Humanitarian Assistance, Resettlement and Development in Rakhine (UEHRD) in response to widespread international condemnation of the August 2017 "clearance operations" in northern Rakhine State. The UEHRD is a public-private partnership for implementing government policy in Rakhine State. Its stated aims are to provide humanitarian assistance to violence-affected populations and facilitate the return of Rohingya refugees from Bangladesh. It has an Infrastructure Development and Construction task force for renovating buildings and undertaking new construction in partnership with private companies. The UEHRD is chaired by State Counsellor, Daw Aung San Suu Kyi, with the Union Minister for Social Welfare, Relief and Resettlement, Dr. Win Myat Aye, as vice chair.²⁰⁴

118. As outlined under the UEHRD Action Plan, the Ministry of Construction leads village development and Regional and State governments, carry out village construction, as well as the Infrastructure Development and Construction task force and the Ministry of Construction, using UEHRD funds. Donations for building new homes for victims of conflict are also accepted from private individuals and local foundations.²⁰⁵ Available information indicates that the UEHRD has engaged crony companies for these construction projects²⁰⁶ and that these companies and their leaders, with enduring links to the Tatmadaw, are financing UEHRD development projects in northern Rakhine.²⁰⁷ In her keynote remarks to an investment fair sponsored by Japan in Rakhine State on 22 February 2019, State Counsellor, Daw Aung San Suu Kyi, said,

*For too long the international community's attention has been focused narrowly on negative aspects related to problems in north Rakhine rather than on the panoramic picture that shows the immense potential of this state for peace and prosperity.*²⁰⁸

119. The FAO and WFP also reported in July 2019 that the Ministry for the Progress of Border Areas and National Races (now the Ministry of Border Affairs) constructed new "model villages" to host relocated "Burmese and Arakan people" on confiscated land in northern Rakhine.²⁰⁹ These villages, the report concluded, were mostly concentrated around

²⁰² FFFGEN-1-86988.

²⁰³ Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT indicates that the number of structures is likely underestimated by about 10%.

²⁰⁴ Union Enterprise for Humanitarian Assistance, Resettlement and Development in Rakhine, available from <http://rakhine.unionenterprise.org/index.php/about-uehrd>.

²⁰⁵ UEHRD Action Plan.

²⁰⁶ For a definition of "crony company", see the Mission's conference room paper on "The economic interests of Myanmar's Military", A/HRC/42/CRP.3, para. 75.

²⁰⁷ A/HRC/42/CRP.3, para. 6(c).

²⁰⁸ Reuters, Myanmar's Suu Kyi woos investors to crisis-hit Rakhine, decries "negative" focus, 22 February 2019.

²⁰⁹ FAO/WFP, the 2018 Agriculture and Food Security Mission to Rakhine State, available from <http://www.fao.org/3/ca5330en/ca5330en.pdf>.

Maungdaw Township and “were part of a scheme to remodel the demographics of Northern Rakhine State”.²¹⁰

Deprivation of Rohingya-owned and cultivated land

120. The forced deportation of over 812,000 Rohingya from Maungdaw, Buthidaung and Rathedaung Townships in 2016 and 2017 has significantly depopulated northern Rakhine.²¹¹ Prior to the clearance operations, Rakhine State was home to 1.2 million Rohingya – with two thirds residing in Buthidaung, Maungdaw and Rathedaung Townships.²¹² There are now estimated to be 600,000 Rohingya left, of which 126,000 are IDPs and the remaining non-displaced population is scattered across 10 Townships in central and northern Rakhine.²¹³ In a highly agrarian area, this has meant that large areas of agricultural land have been left unattended to and unharvested.²¹⁴

121. The Myanmar Government, including through the UEHRD, has adopted several measures that have resulted in the large-scale confiscation of land where Rohingya had lived and farmed and in the appropriation of profits from that land into the national budget, under Union Government policy. One measure has been the harvesting of untended rice paddies by government personnel, in collaboration with private sector companies, under the auspices of the UEHRD.²¹⁵ According to an official statement from the UEHRD information and communications office, another measure has involved Agriculture Mechanisation Department personnel, including additional staff from Sagaing and Mandalay States, recording ownership of paddies, plot numbers and quantity harvested, so that any rice or profit could be returned to the “original owners”.²¹⁶ However, according to the Rakhine State Chief Minister, the proceeds of sale of the harvest from 70,000 acres of rice paddies in Maungdaw Township will be transferred to the national budget. The Chief Minister was quoted as saying, “We don’t want the paddies to go to waste so we are doing our utmost to quickly reap them and plus this can contribute to the national budget as well. The money that we receive from sales of these crops will be used in this state’s development. We have already signed a contract with [a local buyer]... We are currently reaping the paddies in Rathedaung and southern Maungdaw, and we will eventually head towards Buthidaung. As per the contract, money from the sales of the paddies will be deposited in a bank account as part of the national budget. As to how the money will be utilised will depend on the policies and guidelines the Union Government puts forward.”²¹⁷

122. Prior to the 2016 and 2017 “clearance operations”, 80 per cent of the population of Maungdaw Township was Rohingya. In Rakhine State, 85 per cent of agricultural land under cultivation was used for rice paddy cultivation.²¹⁸ The Myanmar Rice Federation and Myanmar Agribusiness Public Cooperation were involved in the harvesting of Rohingya owned and cultivated land in 2017 and 2018. The General Secretary of the Myanmar Rice Federation stated that, to assist the UEHRD, the Myanmar Rice Federation would provide

²¹⁰ FAO/WFP, the 2018 Agriculture and Food Security Mission to Rakhine State, available from <http://www.fao.org/3/ca5330en/ca5330en.pdf>.

²¹¹ A/HRC/39/CRP.2, paras. 1488-1489.

²¹² UNHCR, Culture, Context and Mental Health of Rohingya Refugees, available from <https://www.unhcr.org/5bbc6f014.pdf>.

²¹³ UNICEF, Investing in children should be the foundation of Myanmar’s progress and development, 31 January 2019, available from <https://www.unicef.org/eap/press-releases/investing-children-should-be-foundation-myanmars-progress-and-development>.

²¹⁴ Nikkei Asian Review, Rohingya crisis starves Myanmar's farms of workers, 26 May 2018, available from <https://asia.nikkei.com/Economy/Rohingya-crisis-starves-Myanmar-s-farms-of-workers>.

²¹⁵ Consult-Myanmar, UEHRD says Rakhine harvest will be returned to owners, 16 November 2017, available from <https://consult-myanmar.com/2017/11/16/uehrd-says-rakhine-harvest-will-be-returned-to-owners/>.

²¹⁶ Ibid.

²¹⁷ Myanmar Times, UEHRD says Rakhine harvest will be returned to owners, 14 November 2017,

²¹⁸ <http://www.fao.org/3/ca5330en/ca5330en.pdf>; https://www.dica.gov.mm/sites/dica.gov.mm/files/news-files/report_on_rsios_for_printing_20190215_english.pdf

harvesters and dryers to harvest 30 to 40,000 acres of rice paddies in Buthidaung and Maungdaw Townships “because farmers and owners left their places”.²¹⁹

123. Rohingya-owned and cultivated land was also confiscated in areas of northern Rakhine State where Rohingya remained. Rohingya farmers living in Ah Lel Chaung in Buthidaung described the situation as becoming increasingly difficult from around October 2017, when security forces began harvesting Rohingya fields to the west of the village and took the crops away in trucks.²²⁰ According to the Rakhine State Minister of Agriculture, Livestock, Forestry and Mining, the UEHRD oversaw the harvesting and sale of 45,000 acres of “ownerless Bengali land” in northern Rakhine State.²²¹ A Rakhine State lawmaker was quoted as saying that farmland formerly owned and cultivated by Rohingya would be leased out to local ethnic [Rakhine] farmers and private rice-growing companies.²²²

124. Recent amendments to the Vacant, Fallow and Virgin Lands Management Act (VFV Law)²²³ increase greatly the insecurity of tenure Rohingya people have over the land they own and farm. Under the VFV Law as amended, anyone living on land categorized as “vacant, fallow, or virgin” must apply for a permit to continue using it. Failure to do this can result in harsh criminal sanctions, including imprisonment and fines.²²⁴ In May 2019, the Government announced that it would confiscate 19,000 acres (7,689 hectares) of land for not complying with the law.²²⁵ According to government estimates, “vacant, fallow or virgin” land totals more than 20 million hectares, 30 per cent of Myanmar’s land area. Seventy-five per cent of this land is located in Myanmar’s most ethnically diverse states, as a result of the Government’s failure to recognize the ethnic groups’ traditional and informal documentation of land ownership.²²⁶ Rakhine State has one of the highest proportions of land categorized as “vacant, fallow or virgin”, amounting to 42 per cent of its land area.²²⁷ Under the VFV Law, Rohingya cannot apply for permits for their land as they are not recognized as members of a “national race”. This could result in the confiscation of the land owned by nearly one million forcibly displaced and deported Rohingya.

125. In 2019, seven Special Procedures mandate holders of the UN Human Rights Council expressed serious concerns that the law could result in the dispossession of land without adequate notice, loss of livelihoods and adequate food and that it could drive people into poverty.²²⁸ Combined with the Government’s other land access restrictions, the law will have a disproportionate impact on Rohingya.

²¹⁹ Thai Biz, “Myanmar Rice Federation and Myanmar Agribusiness Public Cooperation made efforts to develop the agriculture sector in northern Rakhine State”, 31 October 2017, available from <http://www.thaibizmyanmar.com/en/news/detail.php?ID=818>.

²²⁰ V-371.

²²¹ Consult-Myanmar, “UEHRD says Rakhine harvest will be returned to owners”, 16 November 2017,

²²² The Irrawaddy, “Rakhine Govt Undecided on How to Use Farmland Abandoned by Rohingya Refugees”, 31 May 2018.

²²³ Myanmar Library, Pyidaungsu Hluttaw Law No. 10/2012 - Vacant, Fallow and Virgin Land Management Act. For additional discussion of this law in the context of northern Myanmar see *Displacement, Livelihoods and Land*.

²²⁴ Burma Library, Government of the Union of Myanmar Vacant, Fallow and Virgin Lands Management Central Committee, 30 October 2018.

²²⁵ The Republic of Union of Myanmar, Ministry of Information, Over 19,000 acres of vacant, fallow, virgin land to be confiscated, available from <https://www.moi.gov.mm/moi:eng/?q=news/24/05/2019/id-17794>

²²⁶ Myanmar Library, Pyidaungsu Hluttaw Law No. 10/2012 - Vacant, Fallow and Virgin Land Management Act.

²²⁷ News Deeply, “Land Confiscation Is Latest Barrier to Return for Myanmar’s Displaced”, 15 March 2019.

²²⁸ The Special Rapporteur on the situation of human rights in Myanmar; the Special Rapporteur on the right to food; the Special Rapporteur on the rights of indigenous peoples; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Special Rapporteur on the human rights of internally displaced persons; the Special Rapporteur on minority issues and the Special Rapporteur on extreme poverty and human rights. MMR 5/2018, available from <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24275>,

First-hand accounts

126. The Mission received information from Rohingya directly affected by the Government's land policies. This included accounts of the Tatmadaw and ethnic Rakhine confiscating Rohingya land²²⁹ for the construction of security bases or camps.²³⁰ In some cases, the Tatmadaw confiscated cultivatable lands that belong to Rohingya who fled Myanmar.²³¹ In other instances, ethnic Rakhine forcibly occupied Rohingya lands.²³² One interviewee described to the Mission how the military marked the land by placing a military flag - a sign indicating that the land had been confiscated.²³³ Some Rohingya told the Mission that they were no longer allowed to consume products from their own lands following the confiscation²³⁴ and that the land was used for the Tatmadaw's own interests.²³⁵ One interviewee described how he and his brother were driven out of their house and how their house was destroyed and the site turned into a police base.²³⁶ An interviewee who was released from prison in early 2019 gave the following account:

*After my release, I spent a couple of days in Buthidaung Township before I visited my village. As I arrived, I found the entire village demolished. The authorities were constructing a huge compound. It looked like a military compound or an IDP camp. The area was fenced and the compound was constructed on around 200 hectares of land. I saw huge bulldozers, vehicles and construction materials. The construction of the building was yet to begin. I couldn't stay in the village for fear of arrest.*²³⁷

127. Satellite imagery confirms these types of accounts and that new construction is taking place, particularly in Maungdaw and Buthidaung Townships, on sites of Rohingya villages that were either burnt or abandoned around the time of the "clearance operations" in 2017.²³⁸

128. UNOSAT identified destruction still occurring in northern Rakhine State after November 2018, mostly concentrated in central Maungdaw and Buthidaung Townships. Between November 2018 and May 2019, a total of 30 villages, including five new villages, across these two townships were destroyed, mostly by burning. These five villages are Yae Khat Chaung Gwa Son village, Yae Khat Chaung Gwa Son village tract, the three villages of Ka Nyin Tan, Doe Tan, and Na Khaung To, Ka Nyin Tan (a) Alel Than Kyaw Ka Nyin Tan village tract, Maungdaw Township and the village of Taung (Pale Taung), Nan Yar Kone village tract, in Buthidaung Township.

129. Demolition of a significant number of structures was also visible throughout the reporting period as was construction of new structures throughout the analysed area.²³⁹

Myanmar: New land law could have disastrous impact on ethnic minorities, Available from <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24296&LangID=E>.

²²⁹ CI-214, CI-287, FI-025, FI-029, FI-031.

²³⁰ CI-214, CI-287, FI-011, FI-031.

²³¹ FI-007, FI-025, FI-029, FI-032, FI-038, Land Portal, Land Confiscation Is Latest Barrier to Return for Myanmar's Displaced, Available from <https://landportal.org/news/2019/03/land-confiscation-latest-barrier-return-myanmar%E2%80%99s-displaced>

²³² FI-007, FI-029, FI-038, FI-046.

²³³ FI-031.

²³⁴ FI-029, FI-031, FI-038.

²³⁵ FI-029.

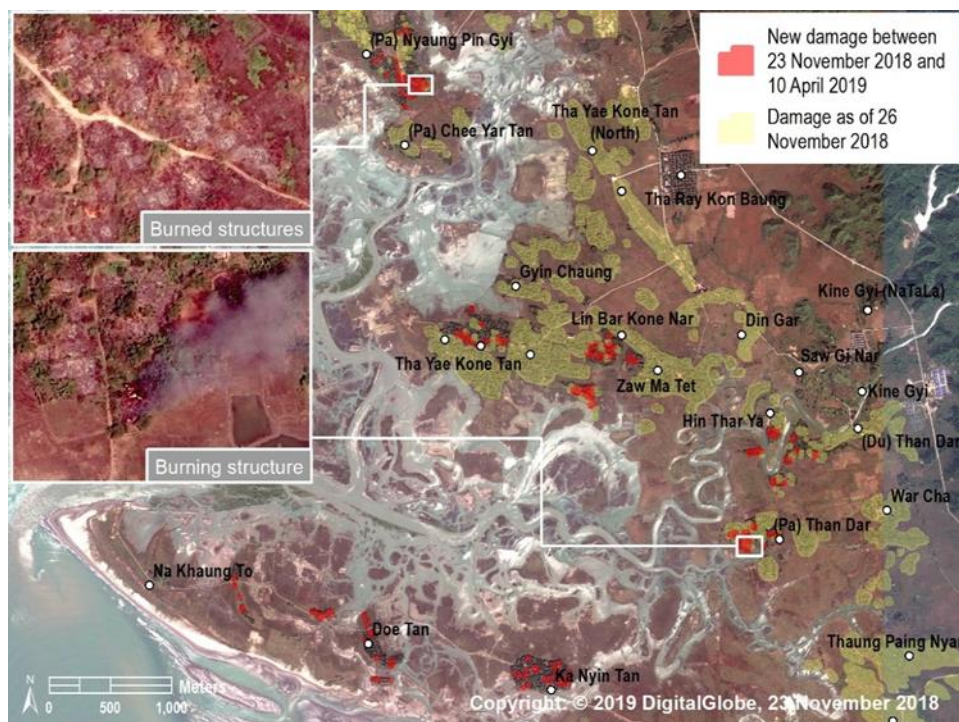
²³⁶ CI-214.

²³⁷ FI-011.

²³⁸ A/HRC/39/CRP.2, Para: 828, 842, 879, 967, 971 1222, 1230, <https://www.bbc.com/news/world-asia-49596113>.

²³⁹ Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT, May 2019.

Image around the village tracts of (Pa) Nyaung Pin Gyi, Tha Yae Kone Tan, Zaw Ma Tet, Than Dar, and Ka Nyin Tan (a) Alel Than Kyaw Ka Nyin Tan, Maungdaw Township dated 10 April 2019 showing structures damaged by fire



130. In addition, UNOSAT detected four small cleared areas in Maungdaw Township: the first related to previous road improvement works 500 meters south of Khway Lar Bin Gar, Thi Ho Kyun village tract; the second affected a small damaged portion of the Tha Yae Kone Tan (North) village, Tha Yae Kone Tan village tract, possibly a small excavation site; the third in Myin Hlut Ywar Thit village, Myin Hlut village tract, potentially related to an enlargement of a recently constructed small security post; and the fourth at Zay Di, Kyauk Pan Du village tract, in a previously detected new construction site, with new buildings (on top of a damaged area) and possible security features constructed in the area.²⁴⁰

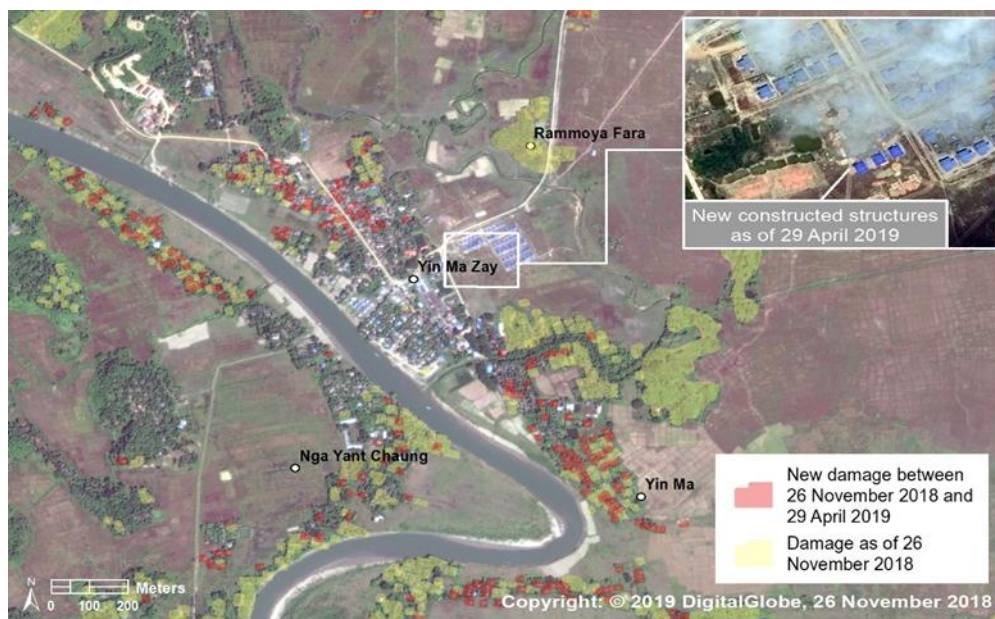
Image of Zay Di, Kyauk Pan Du village tract dated 30 March 2019 showing terrain clearing, newly constructed features and previously damaged areas bulldozed in the area



²⁴⁰ Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT, May 2019.

131. Further damage has been identified mainly in three different areas: around Yin Ma Zay village, Nga Yant Chaung (a) Taung Bazar village tract, Buthidaung Township; in Dar Gyi Zar village, Dar Gyi Zar village tract, Maungdaw Township; in the village tracts of (Pa) Nyaung Pin Gyi, Tha Yae Kone Tan, Zaw Ma Tet and Than Dar, Maungdaw Township, affecting also three previously intact villages: Na Khaung To, Doe Tan and Ka Nyin Tan, Ka Nyin Tan (a) Alel Than Kyaw Ka Nyin Tan village tract. This last large affected area was almost completely destroyed in September 2017, and was mainly marked by freshly burnt fields and structures, with fire still visible in the images.²⁴¹

Image of damage within and around the village of Yin Ma Zay, Nga Yant Chaung (a) Taung Bazar village tract, Buthidaung Township, as of 29 April 2019



132. Construction of a considerable number of new single structures or very small groups of houses was also visible during the reporting period. New structures were also constructed in 3 village tracts which were destroyed previously, namely Shein Kar Li, Hla Poe Kaung village tract (Maungdaw), Gu Dar Pyin in Gu Dar Pyin village tract (Buthidaung) and Chein Khar Li in Koe Tan Kauk village tract (Rathedaung). Minor infrastructure construction was identified in Yae Myet Taung and Gaw Du Thar Ra (Ywar Thit Kay) in Maungdaw Township. In Gu Dar Pyin, in addition to the new houses, built in November 2018, more than 50 additional structures were built on the areas destroyed in September 2017. In the north between the villages of Hla Poe Kaung and Shein Kar Li, Maungdaw Township, a total of 120 structures were detected forming a possible reception centre planned in the area. This area is near the resettlement camp constructed by March 2018 over the bulldozed damaged area of the former Haw Ri Tu Lar village, Zin Paing Nyar village tract. In Chein Khar Li, a new site under construction was identified that would possibly accommodate 50 structures.²⁴²

²⁴¹ Ibid.

²⁴² Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT, May 2019, <https://www.bbc.com/news/world-asia-49596113>.

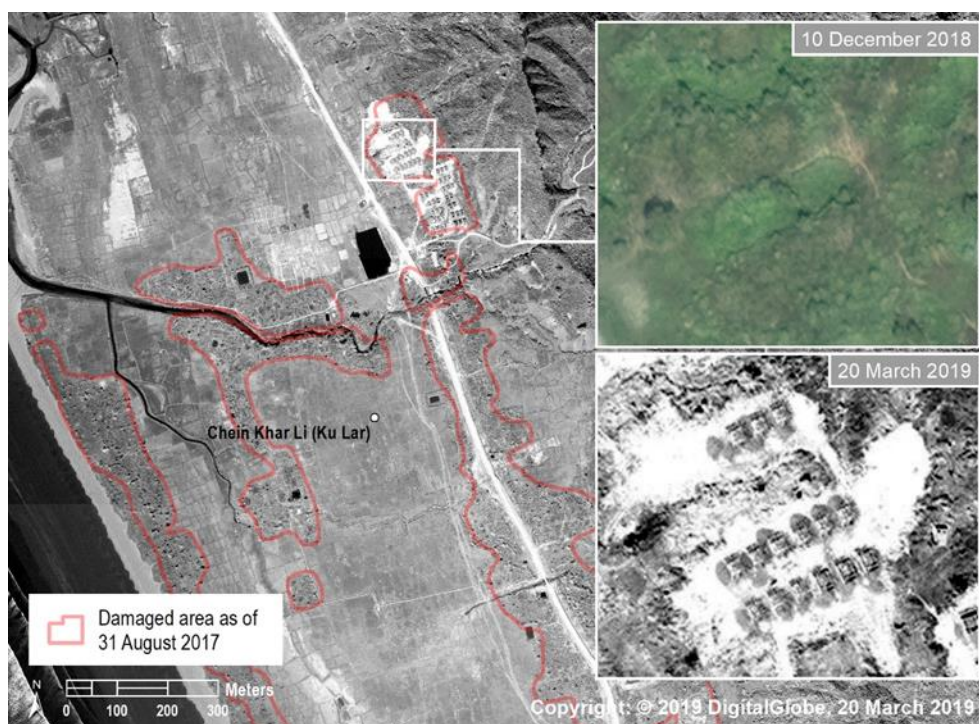
Image of new construction in Gu Dar Pyin village, Buthidaung Township as of 2 April 2019



Image of new structures north of the resettlement camp of Haw Ri Tu Lar village between 23 November 2018 and 8 April 2019



Image of Chein Khar Li (Ku Lar), Koe Tan Kauk village tract, Rathedaung Township as of 20 March 2019 showing new structures under construction in the village



133. UNOSAT identified further development in four village tracts including Aung Ba La village in Shwe Zar Kat Pa Kaung village tract, Maungdaw Township, Inn Din village tract in Maungdaw Township, Yin Ma Zay village in Nga Yant Chaung (a) Taung Bazar village tract, Buthidaung Township, and a security area in the northern Buthidaung region. In Aung Ba La a large new site appeared completed with 150 structures. In the small port area west of Ka Nyin Chaung village in Maungdaw Township, a small road network, a new bridge and a couple of additional features were under construction.²⁴³

Image of Aung Ba La, Shwe Zar Kat Pa Kaung village tract, Maungdaw Township as of 8 April 2019 showing the completion of new structures near the village



²⁴³ Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT, May 2019, <https://www.bbc.com/news/world-asia-49596113>.

134. In Inn Din village tract, a considerable number of structures appear to be under construction in addition to the new large structures at the security post that was initially visible as of March 2018 on damaged land.²⁴⁴ In Tha Ra Zaing, Aye Yar Cha village tract, Buthidaung Township, two artillery pieces and many possible missile transport trailers were visible near the large main central buildings of the security post.²⁴⁵

Image of Inn Din village tract, Maungdaw Township showing additional security structures as of 19 April 2019



Image of northern Buthidaung Township showing new structures and two artillery pieces dated 29 April 2019



²⁴⁴ Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT, May 2019, <https://www.bbc.com/news/world-asia-49596113>.

²⁴⁵ Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT, May 2019.

Image showing new structures, helicopters and artillery pieces at the security post near the village of Da Pyu Chaung, Da Pyu Chaung village tract as of 19 April 2019



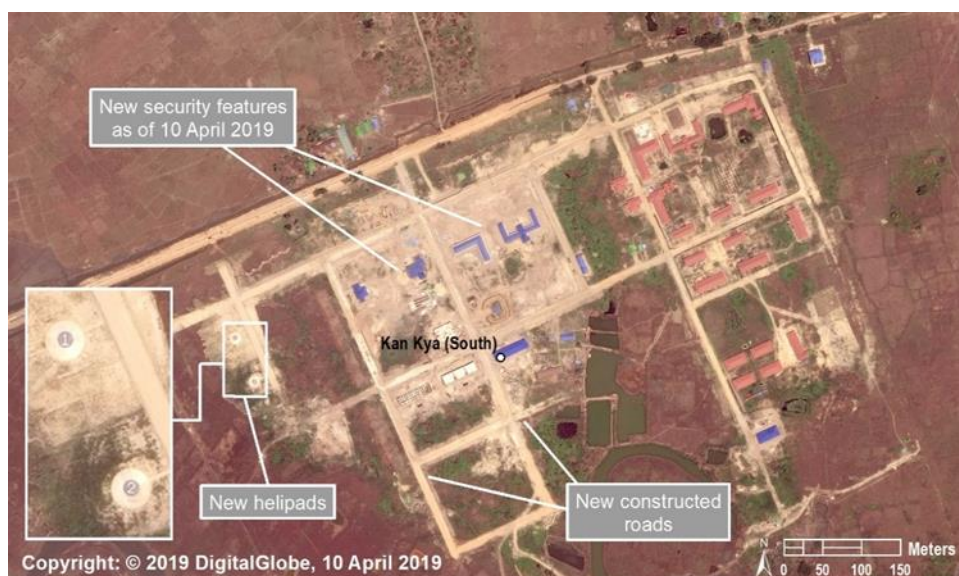
135. Further expansion of security posts, constructed by March 2018, were identified in November 2018, including the ones at Let Thar village, Ah Lel Chaung village tract, Kan Kya (South) village in Myo Thu Gyi village tract and Inn Din village tract.²⁴⁶

Image of continuous security post expansion works near the village of Let Thar, Ah Lel Chaung village tract, Buthidaung Township, as of 2 April 2019



²⁴⁶ Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT, May 2019.

Image of Kan Kya (South) village in Myo Thu Gyi Village Tract, Maungdaw Township showing newly constructed security features and those under construction as of 10 April 2019



136. Road construction is visible in the northern part of the major north-south road axis running from Myin Hlut Ywar Thit, Myin Hlut village tract, Maungdaw Township, to Ah Ngu Maw (Kone Tan), Ah Ngu Maw Kone Tan village tract, Rathedaung Township. A new road has been constructed between Ku Toet Seik village, Nan Yar Kone village tract, Buthidaung Township, located opposite the river east of Buthidaung Town, and Pyin Shey (Rakhine) village, Kyauk Taung (a) Pyin Shey village tract, Buthidaung Township.²⁴⁷

137. UNOSAT also reported a steady increase in securitization after November 2018, including through building fences or trenches in and around existing posts. In a few places additional structures were built inside or around the posts. Other new apparent security features include single small lines of security fences constructed around small areas, some enclosing a few new buildings. Most of them were constructed close to populated places, like NaTaLas²⁴⁸ or Buddhist villages, distinguished by proximity to pagodas.²⁴⁹ In addition, excavation activities are visible in three places, including one between Gandamar (NaTaLa)

²⁴⁷ Satellite imagery analysis prepared for the Mission by UNITAR-UNOSAT, May 2019.

²⁴⁸ Ministry for Development of Border Areas and National Races “model villages”.

²⁴⁹ Ibid.

village and Buthidaung prison, a second north of Kyauk Hla Pyin village, both in Let Wea Det Pyin Shey village tract, Buthidaung Town, and the last one between the villages of Baw Di Kone and DPA (Nyein Chan Ray), (Du) Chee Yar Tan village tract, Maungdaw Township.

Image of Myin Hlut showing excavation sites as of 20 March 2019



138. The Mission acknowledges reports that the Government is purportedly building new houses for Rohingya returnees but it received strong indications that these new constructions will be used to control and manage the Rohingya population in a manner that will not respect their rights and freedoms. It appears that they will remain segregated from other ethnic communities,²⁵⁰ as has been the case with the existing Rohingya IDP camps. A man who left Buthidaung said that, around July 2018, a group of military officials said at a meeting that the Government was building these camps, while at the same time telling villagers that “This is not your country. You are Bengali, Bangladeshi. You have to follow our order. Everything belong to us –even the cows, goats.”²⁵¹

By its own admission, in June 2019, the Government said that it would “take into consideration the distance to original villages” in relocating returnees and that it had only “identified 42 villages to be relocated whereby a total of 80,000 houses were expected to be constructed and that as of then, only 1,036 permanent houses had been completed, 618 permanent houses were under construction, and 27 permanent houses had been earmarked but not started yet”.²⁵² These numbers alone speak to the impossibility of return for the close to one million displaced Rohingya people. There are also strong indications that the constructions on Rohingya land are not destined for the returning Rohingya, but for ethnic Rakhine and other Buddhists, in an effort to ethnically re-engineer northern Rakhine State.²⁵³

²⁵⁰ Reuters, “Erasing the Rohingya” <https://www.reuters.com/investigates/special-report/myanmar-rohingya-return/>

²⁵¹ CI-228.

²⁵² Preliminary Needs Assessment for Repatriation in Rakhine State, Myanmar, p. 43 available from <https://asean.org/asean-secgen-briefs-diplomatic-corps-preliminary-needs-assessment-repatriation-rakhine-state-myanmar>

²⁵³ Reuters, “Erasing the Rohingya”.

Conclusions and legal findings

139. The Mission concludes on reasonable grounds that the Government undertook a concerted effort to clear and destroy and then confiscate and build on the lands from which it forcibly displaced hundreds of thousands of Rohingya. The consequences are two-fold. This government-led effort subjugates Rohingya to inhumane living conditions as IDPs and refugees by denying them access to their land, keeping them uprooted from their homes, depriving them of their ability to progress in healthy and safe communities and preventing them from engaging in livelihood activities that sustain them as a people. The second consequence of the Government's four-pronged approach of clearing, destroying, confiscating and building on land is that it is fundamentally altering the demographic landscape of the area by cementing the demographic re-engineering of Rakhine State that resulted from mass displacement. Much of this is being done under the guise of "development", with a clear discourse emerging to this effect in the immediate aftermath of the August 2017 "clearance operations".²⁵⁴

140. The Government's four-pronged land approach represents a total onslaught against the rights of the Rohingya, in particular their economic, social and cultural rights. To understand its full consequences, the Mission finds it appropriate to assess this issue in combination with its other findings and conclusions. As explained in greater detail in the report's *Conclusions and legal findings: the impossibility of return*, the Mission concludes on reasonable grounds that land restrictions contribute to the Government's continued persecution of the Rohingya people and result in serious or great inhumane mental or physical suffering, both of which are crimes against humanity. The manner in which the Government deprives Rohingya of land is one of several indicators that the Mission has identified to infer that the Government continues to harbour genocidal intent and that the Rohingya remain under serious risk of genocide. Finally, the Mission concludes on reasonable grounds that the Government's severe land access restrictions contribute to an overall condition that makes it unsafe, inhumane, unsustainable and impossible for Rohingya who remain in Rakhine State and those who might be allowed to return to Myanmar. The current situation of IDPs is a testament to what awaits Rohingya who might return after having fled across the border.

C. Restrictions

1. Restrictions on movement

141. The Mission's 2018 report documented government patterns and practices that severely affected freedom of movement through harassment, vehicle searches, interrogation, extortion, payment of bribes and physical abuse at security checkpoints.²⁵⁵ These restrictions have continued unabated with an increased degree of severity.²⁵⁶ The movement restrictions have been imposed more strictly through increased security patrols and increased numbers of security checkpoints across Rakhine State. The consistent requirement of a NVC or other travel documentation has led to arrests, detentions and harassment of the remaining Rohingya. Rohingya face movement restrictions when they want to travel inside their village tracts or to other tracts, Townships, or States.²⁵⁷

142. The number of new Rohingya arrivals from Rakhine State to Bangladesh has seen a dramatic drop, especially since March 2019.²⁵⁸ Only 1,051 individuals have arrived in

²⁵⁴ BBC, Myanmar's Suu Kyi visits troubled Rakhine, 2 November 2017; Keynote speech by State Counsellor at the Rakhine State Investment Fair, February 2019, <https://www.investrakhine.com/>

²⁵⁵ A/HRC/39/CRP.2, Para, 500, 508-516.

²⁵⁶ CI-229, CI-240, CI-246, CI-270, CI-273, CI-287, CI-288, CI-305, CI-308, CI-310, FI-007, FI-010, FI-023, FI-024, FI-025, FI-026, FI-027, FI-028, FI-029, FI-031, FI-035, FI-046, FI-048, FI-052, FI-053.

²⁵⁷ CI-240, FI-007, FI-010, FI-025, FI-027, FI-028, FI-029, FI-031, FI-046, FI-048.

²⁵⁸ FM-006, FM-007, RM-006, RM-010.

Bangladesh during the first seven months of 2019.²⁵⁹ The Mission found that this drop in arrivals has been partly due to the increase in movement restrictions, particularly the proliferation of security checkpoints, accompanied by increased documentation verifications across northern Rakhine State.²⁶⁰

143. Restrictions on freedom of movement are affecting almost every aspect of the way of life of the Rohingya community. Some recent movement restrictions may be attributable to some extent to the continued conflict between the Tatmadaw and the Arakan Army (AA), discussed below. However, the evidence is that they are targeted specifically at the Rohingya and, predominantly, they are not merely collateral to the AA conflict.

Current restrictions on Rohingya freedom of movement

144. The Government currently restricts the freedom of movement of Rohingya through a combination of local orders, verbal instructions and security checkpoints, soldiers and patrols,²⁶¹ which have the cumulative effect of confining them to their villages and camps.²⁶² The Mission received numerous and consistent accounts that the authorities in Buthidaung Township, and in particular the Tatmadaw, issued verbal instructions and threats, restricting movement of Rohingya even between villages.²⁶³ For inter-township travel, Rohingya have to obtain authorisation (known as a “Form 4”), even though they do not fall into the category of either “foreigners” or “Bengali”. Travel authorisation usually restricts the travel to a prescribed validity period, generally one or two weeks.²⁶⁴ The process to obtain a travel authorisation is expensive and lengthy and involves cumbersome bureaucratic procedures. For travel between villages, Rohingya have to obtain a village departure certificate to travel outside their own village tract and in some cases even for traveling between villages within the same tract.²⁶⁵ Interviewees told the Mission that, for months following the August 2017 “clearance operations”, people could not venture out of their villages.²⁶⁶

145. Rohingya who travel without the necessary documentation risk arrest²⁶⁷ and prosecution under section 188 of the Penal Code or the 1949 Residents of Myanmar Registration Act.²⁶⁸ The latter carries up to six months imprisonment for not producing a registration card when being checked.²⁶⁹ Section 188 of the Penal Code and the Residents Registration Act provide detention sentences of one month to two years for disobeying a public servant’s order. The Mission received information that many of the female prisoners in Buthidaung Prison were serving jail terms for violating the Government’s movement restrictions.²⁷⁰

146. Rohingya who arrived in Bangladesh during the reporting period told the Mission of a notable increase in security checkpoints and presence of soldiers along the roads and waterways across Rakhine State. The increase in checkpoints was coupled with an increase in document-checking, as well as more severe punishment for those who failed to produce a

²⁵⁹ UNHCR, Population Factsheet, available from <https://data2.unhcr.org/en/documents/download/70585>.

²⁶⁰ CI-288, FI-023, FI-024, FI-052, FFFGEN-1-84224, CI-287, CI-306, FI-023, FI-024, FI-025, FI-029, LM-056, RM-010, V-370, see also Australian Strategic Policy Institute, Mapping Conditions in Rakhine State, available from <https://pageflow.aspi.org.au/rakhine-state>.

²⁶¹ FI-007, FI-024, FI-025, FI-035, FI-048.

²⁶² CI-264, CI-267, CI-270, CI-287, CI-306, FI-024, FI-025, RM-010, FFFGEN-1-84224, V-370, <https://pageflow.aspi.org.au/rakhine-state>.

²⁶³ CI-310, FI-024, FI-026, FI-027, FI-028.

²⁶⁴ A/HRC/39/CRP.2, Para 667, FFFGEN-1-84224.

²⁶⁵ FFFGEN-1-84224.

²⁶⁶ CI-229, CI-270, FI-007, FI-010, FI-024, FI-025, FI-027, FI-028, FI-031, FI-035, FI-046.

²⁶⁷ FI-007, FI-024, FI-031, FI-048, FI-052, FFFGEN-1-184224.

²⁶⁸ FFFGEN-1-184223, A/HRC/39/CRP.2, para 511.

²⁶⁹ The Resident of Burma Registration Act, 1949, article 4(2)c and 6 (3), available from http://www.burmalibrary.org/docs12/The_Residents_of_Burma_Registration_Act-1949.pdf

²⁷⁰ FI-016, FI-052.

village departure certificate and/or NVC.²⁷¹ Rohingya passing through these checkpoints regularly encountered harassment,²⁷² extortion,²⁷³ mistreatment,²⁷⁴ mocking and insults²⁷⁵ by security forces, sometimes regardless of travel authorisation.²⁷⁶ As one interviewee stated:

*From Nga Kyin Tauk village to Buthidaung township (approximately 4 km distance), the authorities have established four additional checkpoints—one BGP and three Tatmadaw—making the total number of checkpoints nine: eight Tatmadaw and one BGP. These checkpoints carry out regular documentation checks and searches.*²⁷⁷

147. Authorities at checkpoints forced women to remove their veils; male officers searched their bodies and subjected them to sexual harassment.²⁷⁸

Curfews

148. On 2 April 2019, the Rakhine State administration issued a local order authorizing a curfew in the five ethnic Rakhine dominated townships of Kyauktaw, Ponnagyun, Minbya, Mrauk-U and Rathedaung.²⁷⁹ On 11 April 2019, authorities issued an order extending a curfew that had been in place since June 2012 in Maungdaw and Buthidaung Townships, from where the majority of the Rohingya refugees of 2016 and 2017 came.²⁸⁰ In 2014, Rakhine State authorities lifted curfews in central Rakhine²⁸¹ but in practice, they remain in effect, impeding the ability of Rohingya to move during certain periods.

149. The Government justified the expansion of the curfew in the context of the continuing fighting between the AA and the Tatmadaw,²⁸² However, the Mission has received no evidence of any link between the Rohingya and the AA. Rather the expansion of the curfew is part of the incremental tightening of restrictions on the Rohingya over the past eight years. These additional restrictions have exacerbated the already difficult living conditions for the Rohingya and they have been applied less strictly to non-Rohingya communities.²⁸³

150. While the official curfew applied to Maungdaw and Buthidaung Townships are from 10 pm to 5 am, the Mission found that the authorities do not allow people to be outside their homes between 6 pm and 6 am.²⁸⁴ Interviewees told the Mission that the Village Administrator repeatedly warned residents to observe the curfew strictly from dusk to dawn.²⁸⁵ Villagers have to abide by the instructions and return home by 6 pm. In many instances, the Mission found that Rohingya working outside on farms return home by 4 pm for fear of arrest, physical violence, extortion and even death.²⁸⁶ The curfew is adversely

²⁷¹ FFFGEN-1-84224.

²⁷² FI-024, FI-025, FI-052, FI-053.

²⁷³ FI-024, FI-025, FI-052, FI-053.

²⁷⁴ FI-024, FI-025, FI-052, FI-053.

²⁷⁵ FI-052, FI-053.

²⁷⁶ CI-240, CI-308, FI-024, FI-025, FI-052, FI-053.

²⁷⁷ FI-024.

²⁷⁸ FI-024.

²⁷⁹ FFFGEN-1-81184, Curfew Order Dated 1 April 2019, and an unofficial translation on file with the IIFFMM, V-370, Irrawaddy, Curfew Imposed in 5 Townships in Northern Rakhine, 2 April 2019, Facebook available from <https://www.facebook.com/photo.php?fbid=180961302869533&set=a.112459099719754&type=3&theater>.

²⁸⁰ A/HRC/39/CRP.2, para 509.

²⁸¹ A/HRC/39/CRP.2, Para 681.

²⁸² FFFGEN-1-81184, Curfew Order Dated 1 April 2019, and an unofficial translation on file with the IIFFMM, Irrawaddy, Curfew Imposed in 5 Townships in Northern Rakhine, 2 April 2019, Facebook, <https://www.facebook.com/photo.php?fbid=180961302869533&set=a.112459099719754&type=3&theater>.

²⁸³ FFFGEN-1-84223.

²⁸⁴ FI-007, FI-010, FI-016, FI-024, FI-028, FI-031, FI-035, FI-041, FI-042, FFFGEN-1-84224.

²⁸⁵ FI-007, FI-027.

²⁸⁶ FI-007, FI-010, FI-016, FI-024, FI-028, FI-031, FI-035, FI-041, FI-042.

affecting live-saving services, including healthcare and livelihood activities, especially fishing at the peak night and early morning periods.²⁸⁷

151. In addition, the curfew prohibits gatherings of more than four people at any time in mosques, schools, gardens, streets and other locations.²⁸⁸ The curfew has affected the ability of the Rohingya to perform congregational prayers in mosques, especially the Friday and Eid prayers, which have religious significance for Muslims, or attend burial prayer or funerals.²⁸⁹ Some interviewees had to seek prior authorisation from the authorities for weddings, burials or funerals, which is burdensome and costly and represents major obstacles for community life.²⁹⁰ Such restrictions serve to weaken communal harmony and reduce economic interaction. An interviewee told the Mission:

*After the August 2017 events, the Village Administrator in a meeting announced that curfew should be observed from dusk until dawn and villagers are not allowed to move out of their villages. People are not permitted to get together, not even for prayer, congregation, funeral and burial. Security forces have been ordered to shoot anyone found in breach of these strict measures. These measures only apply to Muslims because they are involved in bad acts.*²⁹¹

Consequences of the movement restrictions

152. The imposition of stringent movement restrictions has had severe adverse effects on access to basic services for Rohingya. The tightening of movement restrictions prevents Rohingya from accessing livelihood activities, such as fishing,²⁹² collecting firewood and/or bamboo from the forest²⁹³ and cultivating land,²⁹⁴ and accessing life-saving health services,²⁹⁵ education²⁹⁶ and food.²⁹⁷ Due to obstacles to accessing livelihood opportunities as a result of the movement restrictions, supply of food has decreased with the resulting spike in food prices.²⁹⁸ Movement restrictions have increased the dependency of Rohingya on humanitarian assistance.

153. The inability to move freely has significantly obstructed access to education in Rakhine State, which already has one of the lowest primary and secondary enrolment rates in the country,²⁹⁹ as well as among the lowest adult literacy rates.³⁰⁰ In most areas, schools remain closed. Where schools are open, children cannot travel or the school administration does not allow Rohingya children to enrol.³⁰¹ Movement restrictions also made access to education beyond primary school for internally displaced Rohingya impossible.³⁰² According to reliable sources, only 892 Muslim students were enrolled in two high schools across the State in 2018.³⁰³

²⁸⁷ A/HRC/39/CRP.2, Para 540.

²⁸⁸ FI-007, FI-010, FI-027, A/HRC/39/CRP.2, Paras, 681-685.

²⁸⁹ FI-007, FI-010, FI-025, FI-027, FI-038.

²⁹⁰ FI-025, FI-027.

²⁹¹ FI-007.

²⁹² CI-229, CI-270, CI-305, CI-310, FI-007, FI-010, FI-024, FI-035, FI-046, FI-048.

²⁹³ CI-270, CI-305, CI-310, FI-007, FI-010, FI-024, FI-025, FI-027, FI-028, FI-035, FI-046, FI-048.

²⁹⁴ FI-038, LI-226.

²⁹⁵ CI-310, FI-026, V-370.

²⁹⁶ FI-035, FFFGEN-1-84224, FFFGEN-1-84223.

²⁹⁷ CI-229, CI-246, FI-028, FI-031, FI-035, FI-046.

²⁹⁸ CI-229, CI-246, FI-024, FI-025, FI-027, FI-028, FI-029, FI-031, V-370, LM-056, Relief Web, Special Report - The 2018 FAO/WFP Agriculture and Food Security Mission to Rakhine State, Myanmar, 12 July 2019, available from <https://reliefweb.int/report/myanmar/special-report-2018-faowfp-agriculture-and-food-security-mission-rakhine-state>.

²⁹⁹ The Government has not developed a strategy to strengthen the Rakhine State's education despite the Rakhine Advisory Commission recommendation. Final Report of the Rakhine Advisory Commission on Rakhine State, recommendation 34.

³⁰⁰ FFFGEN-1555826851-1890.

³⁰¹ FI-010, FI-035, FI-036, FI-045.

³⁰² FFFGEN-1555826851-1890.

³⁰³ Ibid.

154. The continued movement restrictions also have a detrimental impact on the health of the Rohingya. For instance, people are unable to access life-saving treatment in areas of northern Rakhine in particular, where there is a lack of functioning health facilities at the village level, forcing residents to rely on traditional healers or to self-medicate.³⁰⁴ Pregnant women are forced to deliver babies with traditional birth attendees, often in unsafe and unhygienic places, due to movement restrictions and high hospital charges, leaving infants and mothers at risk of death and at times unable to have births registered.³⁰⁵ Newborns are at risk of being excluded from household lists and so of statelessness. This has exacerbated the already precarious health situation for Rohingya, where the maternal mortality rate is higher than in the rest of the country.³⁰⁶

155. Fear of attack by members of the ethnic Rakhine community also drives Rohingya to restrict their own movement, opting not to move out of their villages or beyond a certain radius from their village.³⁰⁷ The fear arises from the involvement of members of the ethnic Rakhine community in the violence in 2012 and in the Tatmadaw's "clearance operations" against the Rohingya in 2016 and 2017,³⁰⁸ the Government's failure to hold those individuals accountable, and new instances of attacks and hostilities.³⁰⁹ Rohingya live in constant fear and do not know when or where they will be attacked and what will happen to them. An interviewee, who arrived in Malaysia in January 2019, told the Mission:

*Residents from the village were afraid of ethnic Rakhine. They were scared to go outside for fear of attacks by ethnic Rakhine following the August 2017 events. They feared that, if they go out, the ethnic Rakhine were going to kill them. The ethnic Rakhine attacked and beat my uncle and cousin when they went for fishing. Their faces were bleeding.*³¹⁰

2. Access to livelihoods

156. Since the "clearance operations" began on 25 August 2017, the Government has severely restricted access to food for Rohingya in Rakhine State, triggering heightened risk of food insecurity with related consequences on health.³¹¹ This lack of access is another major factor Rohingya cite for fleeing from northern Rakhine State to Bangladesh.³¹² Food insecurity is being caused by Government laws and policies, including stringent restrictions on movement³¹³ and the Tatmadaw's use of Rohingya land that prevents them from farming and related activities, both discussed above. This has resulted in significantly higher food prices. The Government's restrictions on access for humanitarian actors are exacerbating the situation.

157. Food insecurity is particularly threatening to Rohingya. The Rohingya community has traditionally provided food for themselves and their families, including farming, especially rice, fishing, livestock rearing and collecting firewood and bamboo from the forest.

158. The 2017 "clearance operations" had such a devastating impact on the food security in Rakhine State that the United Nations human rights mechanisms had to intervene on

³⁰⁴ FI-008.

³⁰⁵ FI-050, LI-226: Such deliveries have also left many children without official birth certificate,

³⁰⁶ The 2018 FAO/WFP agriculture and food security mission to Rakhine State, Myanmar, 12 July 2019, available from <http://www.fao.org/3/ca5330en/ca5330en.pdf>.

³⁰⁷ FI-007, FI-010, FI-024, FI-025, FI-026, FI-027, FI-029, FI-031, FI-035, FI-046, FI-048, CI-229, CI-240, CI-263, CI-270, CI-273, CI-305, CI-310, LI-226, FFFGEN-1-84224.

³⁰⁸ FI-001, FI-002, FI-003, FI-005, FI-008, FI-009, FI-010, FI-012, FI-013, FI-014, FI-022, FI-029, FI-033, FI-043, FI-044, FI-051.

³⁰⁹ CI-261, CI-263, CI-293, FI-007, FI-010, FI-046, FI-048.

³¹⁰ CI-049.

³¹¹ CI-261, FI-007, FI-010, FI-018, FI-029, FI-035, FI-046, V-047, The 2018 FAO/WFP agriculture and food security mission to Rakhine State, Myanmar, 12 July 2019, available from <http://www.fao.org/3/ca5330en/ca5330en.pdf>.

³¹² CI-261, FI-007, FI-010, FI-018, FI-029, FI-035, FI-046.

³¹³ See Chapter IV, section C.1: The situation of the Rohingya; restrictions on movement.

several occasions. In 2017 the Special Procedures mandate-holders of the Human Rights Council issued communications to the Government expressing concerns about the deterioration of food security in northern Rakhine.³¹⁴ In 2019 the Committee on the Elimination of Discrimination against Women concluded that:

*The estimated 600,000 Rohingya remaining in Northern Rakhine State after the security ‘clearance operations’ of 2016 and 2017, are reportedly experiencing conditions of forced starvation, with security forces denying access to the remaining rice fields and markets.*³¹⁵

159. In 2018 the Food and Agriculture Organization (FAO) and the World Food Programme (WFP) conducted a food and agriculture assessment in Rakhine State at the request of the Myanmar Government. The assessment found that the food security situation was “precarious” in the northern part of the State, notably in Maungdaw Township. There were fewer supplies than normal, accompanied by a spike in food prices and restrictive diets with increased risk of nutritional deterioration in pregnant, nursing women and young children.³¹⁶ The assessment found that violence in northern Rakhine exacerbated food insecurity in what historically has been one of the “most vulnerable and chronically food-insecure areas in the country”.³¹⁷ The assessment explains, “food assistance is an essential component of people’s diet”.³¹⁸ The 2019 Humanitarian Needs Overview prepared by Myanmar’s Humanitarian Country Team, consisting of the United Nations and its partners, estimated that 715,000 people in Rakhine State are in need of humanitarian assistance, including 128,000 IDPs, 470,000 non-displaced “stateless” people and 117,000 other vulnerable crisis-affected people.³¹⁹

160. The Mission recognizes that seasonal patterns and natural conditions may at times adversely influence food security in Rakhine State. However, government-caused factors, in particular the movement restrictions exacerbated by the lack of humanitarian access, are the main causes of the current food insecurity. Numerous interviewees from northern Rakhine reported to the Mission that people are running out of food stocks and are unable to produce or purchase supplies, because of the movement restrictions.³²⁰ As described below, some of these restrictions may be due to the conflict this year between the AA and the Tatmadaw. In an effort to “wipe out the insurgents”, an order dated 12 April 2019 by the Kyauktaw Township administration, for instance, provides that, in “townships in Rakhine State, any transfer of rice, food supplies, and medicines from one place to another, within the township, from one township to another, or via trade route or waterway, can only be carried out after having been inspected by the Township Police and with a letter of permission”.³²¹ In the Mission’s view, the conflict between the Tatmadaw and the AA is not however the main driver of food deprivation and insecurity.

Harassment by the Tatmadaw and ethnic Rakhine

161. The Mission found that the security forces and members of ethnic Rakhine communities routinely visit Rohingya villages to confiscate food, including crops and even

³¹⁴ MMR 8/2017, available from <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23297>, and MMR 6/2016, available from <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=22927>.

³¹⁵ CEDAW/C/MMR/EP/CO/1

³¹⁶ The 2018 FAO/WFP agriculture and food security mission to Rakhine State, Myanmar, 12 July 2019, available from <http://www.fao.org/3/ca5330en/ca5330en.pdf>

³¹⁷ Ibid, p. 21.

³¹⁸ Ibid, p. 21.

³¹⁹ Humanitarian Needs Overview 2019, available from https://reliefweb.int/sites/reliefweb.int/files/resources/2019%20Myanmar%20HNO_FINAL.PDF, p. 16.

³²⁰ CI-229, FI-007, FI-024, FI-029, FI-031, FI-035, FI-046, LM-056.

³²¹ Township General Administration Department Kyauktaw Township, Local Order (1/2019), 12 April 2019, on file with the Mission.

humanitarian aid.³²² In some instances, members of the ethnic Rakhine community have sold the stolen materials on the market.³²³

162. An interviewee from Buthidaung Township explained how “the army would often come to the village, search houses for food and steal anything they could find”.³²⁴ The interviewee recounted how this, as well as other causes of food shortages, forced people to limit and share food for survival: *Of the 500 households in my village tract, only a handful remained. Living conditions were difficult and people were surviving from sharing food. We would eat only when we had to. Residents ran out of food and consumed their food stocks.*³²⁵

163. The Tatmadaw and ethnic Rakhine villagers also denied Rohingya people food by deliberately killing or confiscating livestock, including cattle, goats and chickens, without permission or payment, depriving Rohingya both of food and of income-generating opportunities.³²⁶ The military would hunt chickens with slingshots³²⁷ and confiscate cattle for failure to pay bribes. This was in addition to the requirement for Rohingya to register their cattle, sheep, goats, chicken and other animals with the authorities. The requirement to report and register new livestock was accompanied by extortion, confiscation of cattle or financial penalties.³²⁸

164. Food insecurity is made worse in northern Rakhine State by military and members of the ethnic Rakhine communities raiding or confiscating Rohingya-owned and cultivated lands.³²⁹ The military also reportedly leases out farmlands, formerly owned and cultivated by Rohingya, to local members of the ethnic Rakhine communities.³³⁰ In some cases, according to interviewees, the military confiscated land for personal economic benefit and made Rohingya cultivate and harvest the crops without compensation.³³¹ An interviewee who fled Buthidaung Township in late 2018 stated:

*Military, police and members of ethnic Rakhine constantly came to the village and looted everything including food items. The military took away my seven cows that I was grassing in the hillside. I cultivated rice in my land, when it was ready for harvesting; members of ethnic Rakhine snatched the harvest. I was left with nothing except two goats, which I had to offer to the military for my release, as I was unable to pay them 100,000 Kyat. I was arrested at my home and after beating, they demanded 100,000 Kyat.*³³²

165. In some areas, the military ordered villagers not to cultivate their lands.³³³ A Rohingya from Buthidaung Township told the Mission that Rohingya cannot cultivate their lands and that access to food production activities worsened after the Government’s 2017 “clearance operations” explaining:

The military and ethnic Rakhine occupied most of our lands and residents were ordered not to cultivate their lands...residents were starving and were on the brink of famine..

³²² FI-010, FI-026, CI-261, CI-288, CI-306, CI-287, CI-289, FI-031, FI-038.

³²³ FI-010.

³²⁴ FI-007.

³²⁵ FI-007.

³²⁶ CI-261, CI-288, CI-306, FI-010, FI-026.

³²⁷ CI-288.

³²⁸ FI-020, FI-042.

³²⁹ CI-287, CI-289, FI-031, FI-038.

³³⁰ Consultant Myanmar, UEHRD says Rakhine harvest will be returned to owners, available from <https://consult-myanmar.com/2017/11/16/uehrd-says-rakhine-harvest-will-be-returned-to-owners/>, The Irrawaddy, Rakhine Govt Undecided on How to Use Farmland Abandoned by Rohingya Refugees, available from <https://www.irrawaddy.com/news/burma/rakhine-govt-undecided-use-farmland-abandoned-rohingya-refugees.html>.

³³¹ FI-029, FI-031.

³³² FI-007.

³³³ FI-007, FI-010, FI-012, FI-018, FI-024, FI-25, FI-027, FI-028, FI-029, FI-031. FI-036, FI-038, FI-046.

*Rohingya were treated worse than slaves and had control over nothing. They did not have control over their lives, livelihood, property or cattle.*³³⁴

Restrictions to access to markets

166. Rohingya businesses suffered serious losses during and after the 2017 “clearance operations”. In Maungdaw, many markets were either burnt or closed.³³⁵ The few businesses that remain open are at risk of closure due to the loss of customers and reduced supplies.³³⁶ This has also contributed to a spike in food prices.³³⁷ Interviewees told the Mission that food prices have increased many times over.³³⁸ One interviewee said that the price of 1 kg of potatoes has increased by one hundred-fold in price, from 50 or 60 kyats (0.035 USD or 0.042 USD) to 5,000 kyats (4 USD). He said, “As we were starving, I decided to leave”.³³⁹

Restrictions on humanitarian access

167. Government-imposed access restrictions on domestic and international humanitarian organizations are interrupting life-saving assistance to Rohingya communities in need. These organizations provide support for health and nutrition, education, water and sanitation, and food security. As found in the Mission’s 2018 report, the Government suspended or severely restricted humanitarian access to Maungdaw, Buthidaung and Rathedaung Townships after the 2012 violence, further tightened them in June and July 2017, and also did so after the clearance operations in 2016 and 2017. The restrictions left the population without critical lifesaving assistance, including access to food and health services.³⁴⁰ As discussed in more detail below, humanitarian access to northern Rakhine has been further curtailed following the escalation in violence in 2019 between the AA and the Tatmadaw, leaving the population in need of support and assistance.³⁴¹

168. The only international humanitarian organisations permitted access are the World Food Programme (WFP) and the International Committee of the Red Cross (ICRC) and their access is unpredictable and arbitrary. When access is granted, they are hindered by restrictive procedures, including the short validity of travel authorisations and the requirement to provide detailed information on staff, places and dates of visits.³⁴² As of April 2019, only 25 per cent of national staff were authorised to carry out operations and, with exception of food assistance, other life-saving programmes outside urban centres were suspended.³⁴³

169. On 10 January 2019, the Rakhine State Government introduced new access restrictions in five townships, Kyauktaw, Ponnagyun, Buthidaung, Maungdaw and Rathedaung, citing security concerns.³⁴⁴ WFP and ICRC were exempted from these

³³⁴ FI-038.

³³⁵ FI-003, FI-010, The 2018 FAO/WFP Agricultural and Food Security Mission to Rakhine State, 12 July 2019, available from <http://www.fao.org/3/ca5330en/ca5330en.pdf>,

³³⁶ FI-010, The 2018 FAO/WFP Agricultural and Food Security Mission to Rakhine State, 12 July 2019, available from <http://www.fao.org/3/ca5330en/ca5330en.pdf>.

³³⁷ A 2018 FAO/WFP report found rapid increases in food prices in northern Rakhine, where most Rohingya live, in comparison to the rest of the country. Food prices have increased overall by 26 per cent during the first four months of 2018 over the same period in 2017 and by 44 percent over the same period of 2016. The prevalence of chronic malnutrition among children was reported at 37.5 per cent, the third highest in the country. The 2018 FAO/WFP Agricultural and Food Security Mission to Rakhine State, 12 July 2019, available from <http://www.fao.org/3/ca5330en/ca5330en.pdf>.

³³⁸ CI-229, CI-246, FI-010, FI-024, FI-025, FI-027, FI-028, FI-029, FI-031, V-370.

³³⁹ CI-229, FI-007, FI-018, FI-046.

³⁴⁰ A/HRC/39/CRP.2, paras 573-578.

³⁴¹ FFFGEN-1-85647, LM-056, V-370.

³⁴² Report of the United Nations High Commissioner for Human Rights, Situation of human rights of Rohingya in Rakhine State, 11 March 2019, A/HRC/40/37.

³⁴³ FFFGEN-1-84225.

³⁴⁴ Letter on file- FFFGEN-1-86994, Frontier Myanmar, Rakhine aid access ban leaves 95,000 lacking basic services, say INGOs, 2 April 2019, Relief Web, Humanitarian Access in Central Rakhine,

restrictions but their operations were strictly limited to food distribution.³⁴⁵ Other activities, including livelihood activities, agricultural support and other development efforts, which were not directly affected by security concerns, were suspended.³⁴⁶ With the exception of food assistance, other life-saving programmes outside urban centres remain either suspended or subject to unpredictable interruptions.³⁴⁷ At least 95,000 people, who were directly or indirectly benefiting from humanitarian and development support,³⁴⁸ were no longer able to access a number of basic services, including healthcare, education and clean water.³⁴⁹ These newly imposed restrictions are in contrast to the recommendations of the Advisory Commission on Rakhine State that called for full and unimpeded humanitarian access.³⁵⁰

170. Many interviewees told the Mission that the distribution of aid was not regular or the quantity of aid was not adequate, or both.³⁵¹ The process was marred by irregularities and discrimination. In one instance, an interviewee said that the Village Administrator, a non-Rohingya, collected money from villagers in return for the aid.³⁵² The Mission also received credible reports that security forces took relief materials.³⁵³ Non-Rohingya Village Administrators, who receive aid from humanitarian organizations for distribution to the Rohingya communities, gave preference to ethnic Rakhine over Rohingya.³⁵⁴ Some interviewees said that ethnic Rakhine would get double the quantity.³⁵⁵ A man from Buthidaung Township, who sought shelter in Bangladesh in March 2019, explained to the Mission:

*Distribution of humanitarian aid was not regular. The amount of relief materials was not sufficient for a family. Sometimes, villagers would receive aid once a month and sometimes once every 2 or 3 months. Survival became very difficult.*³⁵⁶

3. Conclusions and legal findings

171. The International Covenant on Economic, Social and Cultural Rights (ICESCR) became binding on Myanmar in January 2018. It places obligations on States to recognize and ensure the right to an adequate standard of living, including adequate food,³⁵⁷ and the highest attainable standard of health.³⁵⁸ The Convention on the Rights of the Child (CRC), to which Myanmar is also party, provides similar obligations towards children

March 2019, The Lutheran World Foundation, International NGOs call for unrestricted access to affected populations in Myanmar's Rakhine state, 22 January 2019.

³⁴⁵ FI-024, CM-007, LM-056, FFFGEN-1-84141, Reuters, U.N. calls for 'rapid and unimpeded' aid access to Myanmar's Rakhine, 14 January 2019.

³⁴⁶ FFFGEN-1-84141, Norwegian Refugee Council, Statement of INGOs in Myanmar on the situation in Rakhine, 1 April 2019, Frontier Myanmar, Rakhine aid access ban leaves 95,000 lacking basic services, say INGOs, 2 April 2019.

³⁴⁷ FFFGEN-1-85647.

³⁴⁸ FFFGEN-1-84141, FFFGEN-1-85647, and Frontier Myanmar, Rakhine aid access ban leaves 95,000 lacking basic services say INGOs, 2 April 2019, Norwegian Refugee Council, Statement of INGOs in Myanmar on the situation in Rakhine, 1 April 2019.

³⁴⁹ Frontier Myanmar, Rakhine aid access ban leaves 95,000 lacking basic services, say INGOs, 2 April 2019, Norwegian Refugee Council, Statement of INGOs in Myanmar on the situation in Rakhine, 1 April 2019.

³⁵⁰ Advisory Commission on Rakhine State, Final Report, *Towards a peaceful, fair and prosperous future for the people of Rakhine* (August 2017).

³⁵¹ CI-209, CI-225, CI-226, CI-240, CI-287, CI-289, CI-306, LM-056.

³⁵² FI-024.

³⁵³ FI-024, FI-025, Refugees International, Abuse or Exile: Myanmar's ongoing persecution of the Rohingya, 1 April 2019.

³⁵⁴ CI-209, CI-225, CI-226.

³⁵⁵ CI-225, CI-226, CI-293.

³⁵⁶ CI-289.

³⁵⁷ ICESCR, art. 11.

³⁵⁸ ICESCR, art. 12; For a more detailed discussion of economic, social and cultural rights, see *Legal Framework*.

specifically.³⁵⁹ The Government's movement restrictions, deprivation of food and denial of humanitarian relief are all having severe effects on the right to food and health of Rohingya.

172. The Mission concludes on reasonable grounds that the Government's movement restrictions, deprivation of food, restrictions on land use and denials of humanitarian relief all constitute retrogressive measures that violate its obligations under ICESCR and CRC. The Government's retrogressive measures deny Rohingya access to food and put their health and lives at risk. It is inconceivable that the Government is unaware of these consequences. The Mission also concludes on reasonable grounds that Government-imposed movement, humanitarian and food access restrictions disproportionately affected the Rohingya population due to the Rohingya's particularly vulnerable status after the 2016 and 2017 "clearance operations" and the Government's overall discriminatory treatment of them. The Mission also found that the movement restrictions imposed disproportionately severe penalties.

173. The Government sought to justify the further tightening of restrictions in 2019 as a necessary response to the conflict between the Tatmadaw and the AA. Its 12 April 2019 local order was to stop "the flow of rice and food supplies, medicines and medical supplies, required for the insurgents' long-term livelihood".³⁶⁰ If that was the basis of the restrictions, the applicable rules of international humanitarian law would apply that may under certain circumstances justify the restrictions on the basis that they are necessary to deprive the AA of supplies.

174. The Mission finds, however, that in the majority of cases it documented, the Government's imposition of movement restrictions, deprivation of food and denials of humanitarian relief are not directly connected with the Tatmadaw's conflict with the AA. The Government used movement restrictions and deprived Rohingya of food and humanitarian relief in many different ways and did so long before the conflict between the Tatmadaw and AA intensified in January 2019. Additionally, accounts that the Mission received that relief supplies were distributed in favour of ethnic Rakhine over Rohingya indicate that these restrictions were not done in response to the conflict with the AA. In most cases, the AA would have relied on ethnic Rakhine communities for food. Finally, in instances where the Tatmadaw may have denied Rohingya food either by the theft or destruction of food supplies or by the deprivation of farm land, with the purpose of depriving the AA of food, the anticipated civilian deaths or injuries, including malnutrition, must be assessed under the principle of proportionality under international humanitarian law.³⁶¹

175. To understand the full consequences that Rohingya suffer from the Government's movement restrictions, deprivation of food and denial of humanitarian relief in Rakhine State, the Mission finds it appropriate to assess this issue in combination with its other findings and conclusions. As explained in the report's *Conclusions and legal findings: the impossibility of return*, the Mission concludes on reasonable grounds that these restrictions, deprivations and denials contribute to the Government's continued persecution of the Rohingya people and result in serious or great inhumane suffering, both of which are crimes against humanity. Finally, the manner in which the Government imposes its movement restrictions, deprivation of food and denial of humanitarian relief is one of several indicators that the Mission has identified to infer that the Government continues to harbour genocidal intent and that the Rohingya remain under serious risk of genocide. Finally, the Mission concludes on reasonable grounds that the Government's food restrictions contribute to an overall condition that makes it unsafe, inhumane, unsuitable and impossible for Rohingya to return to their homes and lands.

³⁵⁹ CRC, arts. 24 and 27.

³⁶⁰ See Chapter V, section C.5: The Conflict between the Tatmadaw and the Arakan Army; Humanitarian impacts of the conflict.

³⁶¹ For a more detailed discussion of this issue in the context of the conflict between the Tatmadaw and Arakan Army, see *Humanitarian Impacts of the Conflict*.

D. Security and safety

176. Against the backdrop of legal and physical restrictions on the remaining Rohingya population in Rakhine State, there also continue to be serious concerns about their safety and security.

177. During 2019, concerns for the safety and security of the Rohingya in northern Rakhine State have arisen from the conflict between the Tatmadaw and the AA. That conflict does not involve the Rohingya directly but, because it is most intense in northern Rakhine State, it has had some effect on those Rohingya who remain there and it poses increasing dangers.³⁶² As discussed below, clashes between the AA and the Tatmadaw have intensified since October 2018 and the new spate of attacks in early 2019 marked a significant escalation in hostilities, bringing the conflict into northern Rakhine State on a large scale for the first time. The conflict has affected nine townships, including Maungdaw, Buthidaung and Rathedaung Townships.³⁶³ The AA has stated that they are only in conflict with the Tatmadaw and its operations are not directed at the Rohingya.³⁶⁴ However, some Rohingya have been affected. One interviewee gave the following account to the Mission:

The fighting between the AA and the Tatmadaw has started in my area two months back. All villagers are very afraid of the current situation, even they are afraid to talk about the situation. One day a bomb was dropped on my village. During the time, I was at home. I heard the sound of bombing and, later on, I went to see the place where the bomb was dropped. I saw that one Muslim house and one mogh³⁶⁵ house were burnt to the ground. These houses were next to each other. Another bomb was dropped on the school. The school was destroyed. The bomb was fired from the hill at the east side. As they dropped bomb once, there is a high possibility that it would happen again. I am afraid of bombing. That's why I left.³⁶⁶

178. Interviewees reported that early in the conflict, the Tatmadaw warned Rohingya not to provide support to the AA and to inform the Tatmadaw if they observed any AA movements in and around the villages.³⁶⁷ The Mission received accounts of the arrest of Rohingya in Buthidaung Township on the suspicion of providing support to the AA.³⁶⁸ The use of helicopters by the Tatmadaw in recent attacks has also increased the level of fear among the local Rohingya population.³⁶⁹

179. The Mission heard accounts that the Tatmadaw and BGP have increased patrolling, including in the forest areas where Rohingya often go to collect firewood or cut bamboo.³⁷⁰ In a village in Buthidaung Township, the Village Administrator warned Rohingya to limit their movement within the village because the military had received orders to kill anyone found in violation of these new restrictions.³⁷¹

180. The Mission reiterates its view that the Government's actions targeting the Rohingya are not directly connected with the Tatmadaw's conflict with the AA. The security situation in northern Rakhine State has deteriorated as a result of the conflict but the Mission does not consider that the conflict is the basis of the Government's continued persecution of the Rohingya.

³⁶² CI-289, CI-310, FI-025, CM-004, FM-003, V-370.

³⁶³ CI-289, CI-310, FI-025, CM-004, FM-003, V-370.

³⁶⁴ LI-187, LM-028, LM-035.

³⁶⁵ The term "Mogh" is referred to a person of ethnic-Rakhine ethnicity.

³⁶⁶ CI-289.

³⁶⁷ CI-217, CI-241, CI-291, CI-305, CI-308.

³⁶⁸ CI-205, CI-291.

³⁶⁹ CI-287, CI-289, CI-310.

³⁷⁰ CI-270, CI-310, FI-024, FI-025, FI-027, FI-028, FI-035, FI-046, FI-048.

³⁷¹ FI-007.

E. Forced or compulsory labour

181. In its 2018 report, the Mission documented a consistent pattern of the Tatmadaw using both Rohingya and ethnic Rakhine men, women and children for forced or compulsory labour.³⁷² Since its 2018 report, the Mission found that the use of Rohingya as forced labour continues and has possibly increased. This trend may be related to the conflict between the Tatmadaw and the AA in northern Rakhine.³⁷³ There seems to have been a marked decrease in the use of ethnic Rakhine for forced labour, possibly because the Tatmadaw mistrusts Rakhine labourers.

182. Rohingya arrivals in Bangladesh in late 2018 and 2019, mostly men and boys, cited forced labour as a contributing factor for fleeing northern Rakhine State.³⁷⁴ The Mission documented patterns, similar to those outlined in its 2018 report, of the Tatmadaw physically taking a person when they passed thorough the village,³⁷⁵ or asking the village head to provide specific number of villagers for a certain period of time³⁷⁶ without any prior notice or consultation. The duration of forced labour varied but for most victims it lasted for a period of weeks.³⁷⁷ In some cases, the same person was forced to labour on several occasions.³⁷⁸ One victim from Buthidaung told the Mission that he was made to work in construction sites of new camps, six to seven times. He was beaten with sticks and slapped by the soldiers and it was only after his relatives paid the Tatmadaw 90,000 Kyat (approx. 60 USD) that he was released. However, he was again forced to labour after that.³⁷⁹ Often victims were left hungry due to insufficient and poor quality food provided.³⁸⁰

Forced labour in the construction of camps, security checkpoints and prisons

183. The Mission previously documented forced labour that included portering, farming, maintenance of security camps, clearing of land for military bases, village guard duty and construction work for the Tatmadaw.³⁸¹ During 2019 the Mission observed a new trend of the Tatmadaw forcing Rohingya to work on the construction of new camps that interviewees said were destined for Rohingya IDPs or returnees.³⁸²

184. The interviewees said that, while deprived of their liberty as forced labourers some had to arrange their own food,³⁸³ did not have access to water, were kept in inadequate accommodation, were deprived of sleep and were subjected to violence if they resisted, worked slowly³⁸⁴ or rested.³⁸⁵ The Tatmadaw also extorted money from forced labourers.³⁸⁶ In one case, a victim witnessed the Tatmadaw kill a fellow Rohingya forced labourer. He died as a result of severe beating.³⁸⁷

185. Another interviewee told the Mission that, in December 2018, her cousin had been raped and killed by the Tatmadaw in retaliation for her brother refusing to do “night

³⁷² A/HRC/39/CRP.2, paras. 614-615 and 412-424.

³⁷³ Department of State, 2019 Trafficking in Persons Report: Burma, Available from <https://www.state.gov/reports/2019-trafficking-in-persons-report-2/burma/>.

³⁷⁴ CI-228, FI-037, FI-048.

³⁷⁵ FI-029, FI-037, FI-048.

³⁷⁶ CI-228, CI-288, CI-293.

³⁷⁷ CI-227, CI-228, CI-293, FI-017, FI-026, FI-029, FI-037, FI-048.

³⁷⁸ CI-228, FI-037.

³⁷⁹ CI-228.

³⁸⁰ CI-227, CI-228, CI-240, FI-029, FI-041, FI-042, FI-043.

³⁸¹ CI-214, CI-240, CI-264, CI-288, CI-297, FI-010, FI-017, FI-024, FI-029, FI-036, FI-037, FI-038, FI-048.

³⁸² CI-214, CI-226, CI-227, CI-228, CI-293, CI-306, Reuters, Point of No Return, available from <https://www.reuters.com/investigates/special-report/myanmar-rohingya-return/>, Human Rights Watch, Bangladesh: Halt Rohingya Repatriation Plan, 15 November 2018, FFFGEN-1-84275.

³⁸³ CI-227, CI-240.

³⁸⁴ FI-037.

³⁸⁵ Ibid.

³⁸⁶ CI-228, FI-029.

³⁸⁷ FI-033.

duty”.³⁸⁸ One interviewee explained how in late 2018 he was severely beaten with the butt of a rifle by the Tatmadaw and then forced to carry heavy materials on his wounded shoulder.³⁸⁹ Another explained that in July/August 2018:

*I had to hide in my house when the military came searching for men. They found me and took me forcibly to their base, kept me for 3 days where I was severely beaten with a bamboo stick, was kicked with the boots. I was not given any food during the time. I still carry marks of the beatings. My relatives had to pay 90,000 Kyat (60 USD) to the military for my release.”*³⁹⁰

186. The Mission corroborated forced labour cases from Maungdaw and Buthidaung Townships, although it is likely that Rohingya in Rathedaung Township have also been subjected to forced labour.³⁹¹

187. The Mission received consistent accounts of individuals being forced to work at the new camp construction site in Thein Taung (Ah Twin Hnget Thay), Buthidaung Township.³⁹² A victim from Buthidaung Township told the Mission with respect to an incident that occurred in late 2018:

*I had to flee Myanmar to avoid working in the camp that the Tatmadaw was building for the Rohingya. The military asked the head of my village for 300-400 individuals. I was amongst those selected. I served with them 6 to 7 times in the new camp construction sites. The first round ran for up to six days. I made bamboo partitions, dug lands and assisted with other construction related work. We were not provided food and had to sleep on bare floor at night*³⁹³

188. Interviewees also reported that Rohingya villagers were forced by the Tatmadaw to guard military bases and villages at night against possible attacks by the AA.³⁹⁴ A victim from Buthidaung Township told the Mission that every day in the early evening in February 2019, Tatmadaw soldiers would come to the village and pick around 100 persons to guard their base during the night, which was located on top of a hill. These individuals, he said, had to sit or stand 10 to 15 meters away and they were not allowed to rest, sleep, talk or move away from their designated locations. He recounted how those who the military found resting or sleeping were subjected to beatings. He said that once

*The military found me asleep, they beat me so badly that I could hardly move. I served for 18 consecutive nights without any break, which was overwhelming and took a heavy toll on me. I couldn't bear it further and had to flee Myanmar.*³⁹⁵

189. Interviewees reported that they had heard that Rohingya would be engaged in the new camp construction sites in Gu Dar Pyin village in Buthidaung Township.³⁹⁶

190. The Mission also received accounts of Rohingya prisoners being subjected to physical abuse, including beatings,³⁹⁷ while being compelled to work.³⁹⁸ Interviewees repeatedly referred to Buthidaung Prison, where prisoners were forced to work in brick kilns³⁹⁹ or farms to produce food for either the prison officials or the Tatmadaw.⁴⁰⁰ Prisoners were forced to work in two shifts from 8 am to 12 pm and from 2 pm to 5 pm without compensation.⁴⁰¹ Ethnic Rakhine were exempted from this labour.⁴⁰² Prison

³⁸⁸ FI-037.

³⁸⁹ FI-048.

³⁹⁰ CI-228.

³⁹¹ CI-240.

³⁹² CI-226, CI-227, CI-228.

³⁹³ CI-228.

³⁹⁴ FI-024, FI-037, V-370.

³⁹⁵ FI-037.

³⁹⁶ CI-226, LM-058.

³⁹⁷ CI-297, FI-037.

³⁹⁸ CI-291, CI-297, FI-011, FI-017.

³⁹⁹ FI-011, FI-017, CI-297.

⁴⁰⁰ FI-011, FI-017, CI-297.

⁴⁰¹ CI-297.

officials and ethnic Rakhine, who were appointed to be in charge of Rohingya prisoners, subjected them to physical abuse and violence, including beatings, if they became slow in their work.⁴⁰³ In some cases, prisoners were taken to military compounds, where they were forced to construct buildings, clean and perform other heavy labour.⁴⁰⁴ One interviewee provided the following account:

*I used to be a road construction worker for 10 years. I witnessed Rohingya prisoners forced to work in the paddy fields and brickfields located adjacent to the jail. Sometimes Rohingya prisoners were taken to the forest for collecting or cutting firewood or to the waterfall side to collect rocks for the construction of roads. Prison officials used to bring prisoners in a group of 25-30. Moghs and the police used to guard them. Moghs and police carried sticks in their hands and would often beat prisoners for slowing down.*⁴⁰⁵

Conclusions and legal findings

191. Consistent with the Mission's legal assessment in its 2018 report, the Tatmadaw continued to engage in the practice of forced or compulsory labour contrary to its international legal obligations.⁴⁰⁶ Additionally, the Tatmadaw's beatings of forced labourers and labourers forced to work in prisons⁴⁰⁷ resulted in a severity of pain or suffering that amounts to cruel, inhuman or degrading treatment under international human rights law.⁴⁰⁸ In many cases, this pain was inflicted as a means of punishment and therefore constituted torture.⁴⁰⁹

192. The Mission also assesses that many of the cases of forced labour it documented had a sufficient nexus to the armed conflict between the Tatmadaw and the AA to amount to violations under international humanitarian law.⁴¹⁰ This includes the Tatmadaw exposing forced labourers to the dangers of armed conflict, such as forcing them to perform guard duty at military bases, which violates the rule that parties to a conflict must take all feasible precautions to protect civilians under their control against the effects of attacks.⁴¹¹ The Mission also concludes on reasonable grounds that it documented cases that constitute war

⁴⁰² FI-016.

⁴⁰³ CI-297, FI-037.

⁴⁰⁴ CI-297, FI-011, FI-016, FI-017, F-022, FI-34, FI-047.

⁴⁰⁵ CI-297.

⁴⁰⁶ A/HRC/39/CRP.2, paras. 254-257.

⁴⁰⁷ International law provides rule on the involuntary use of prisoners to conduct work, but such work is not per se prohibited or regarded as "forced labour". See Article 8(3)(b), ICCPR and International Labour Organization Forced Labour Convention 1930 (No. 29) (which Myanmar acceded to in 1955), Article 2(2)(c). The use of torture and other cruel, inhuman and degrading treatment or punishment on prisoners is, however, non-derogable and therefore never permissible.

⁴⁰⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 16. Although Myanmar is not a party to this Convention, the prohibition against cruel, inhuman and degrading treatment is a rule of customary international law and therefore one that Myanmar must respect. See David Weissbrodt and Cheryl Heilman, "Defining Torture and Cruel, Inhuman, and Degrading Treatment", 29 *Law & Ineq.* 343 (2011), pp.361-363. Available at http://scholarship.law.umn.edu/faculty_articles/366.

⁴⁰⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1. Although Myanmar is not a party to this Convention, the prohibition against torture as defined in article 1 is a rule of customary international law and therefore one that Myanmar must respect. See ICTY, *Prosecutor v Furundžija* (IT-95-17/1), Appeals Chamber Judgement, 21 July 2000, para. 111; David Weissbrodt and Cheryl Heilman, "Defining Torture and Cruel, Inhuman, and Degrading Treatment", 29 *Law & Ineq.* 343 (2011), pp.361-363. Available at http://scholarship.law.umn.edu/faculty_articles/366.

⁴¹⁰ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 95 (forced labour) and rule 99 (deprivation of liberty); and Common Article 3(1)(a) and (c) to the four Geneva Conventions.

⁴¹¹ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 22 (principle of precautions against the effects of attacks).

crimes⁴¹² of torture,⁴¹³ cruel treatment for the infliction of severe physical or mental pain or suffering it caused⁴¹⁴ or as outrages upon human dignity for the severity of the humiliation or degradation.⁴¹⁵ All these violations of international human rights law and international humanitarian law must be effectively investigated.

193. In addition to its obligations under international law, Myanmar's Penal Code and the Ward or Village Tract Administration Act adopted in 2012 punish forced labour as a criminal offence. However, authorities have not adequately enforced the law. Adding to impunity, Article 359 of the Constitution, which exempts from the prohibition of forced labour "duties assigned by the Union in accordance with the law in the interest of the public" could be interpreted to exempt the military from the forced labour prohibition. According to the International Labour Organization's Committee on the Application of Standards, Tatmadaw soldiers involved in forced labour have only faced internal disciplinary action, with the exception of one person who the Committee reported was punished under section 374 of the Penal Code.⁴¹⁶

194. Similar to the Mission's other findings, the Mission also concludes on reasonable grounds that the Government's use of forced labour and its unwillingness to address its regular use contribute to an overall condition that makes it unsuitable and unsafe, inhumane, unsustainable and impossible for Rohingya to return to Myanmar.

F. The repatriation process

195. In the aftermath of the "clearance operations" that began on 25 August 2017, the official rhetoric of the Government of Myanmar has been to pursue the repatriation of 912,852 Rohingya refugees, 55 per cent of them children,⁴¹⁷ most of whom were forcibly deported during the 2016 and 2017 "clearance operations".⁴¹⁸ They include 743,016 refugees who have arrived in Bangladesh since the August 2017 violence.⁴¹⁹ On 23 November 2017, only months after the mass exodus of the Rohingya, the Governments of Myanmar and Bangladesh signed a Memorandum of Understanding (MoU) as a preliminary step to begin the repatriation process. A Joint Working Group on repatriation (JWG) was established, consisting of officials from the two Governments pursuant to the

⁴¹² As a matter of international criminal law, the International Criminal Tribunal for the former Yugoslavia (ICTY) has determined that the nexus between the armed conflict and the alleged crime does not have to be causal, but the conflict "must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, [the accused's] decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established...that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict." ICTY, *Prosecutor v. Kunarac* (IT-96-23& IT-96-23/1-A), Appeals Chamber Judgement, 12 June 2002, para. 58. See, also, ICTY, *Prosecutor v. Limaj et al.* (IT-03-66), Trial Chamber Judgement, 30 November 2005, para. 91.

⁴¹³ ICC Rome Statute, Article 8 (2) (c) (i)-4; Elements of Crime, pages 32-33.

⁴¹⁴ ICC Rome Statute, Article 8 (2) (c) (i)-3; Elements of Crime, page 32.

⁴¹⁵ ICC Rome Statute, Article 8 (2) (c) (ii); Elements of Crime, page 33.

⁴¹⁶ International Labour Organization, Observation (CEACR), available from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3957004.

⁴¹⁷ UNHCR, Population factsheet, 31 July 2019, available from <https://data2.unhcr.org/en/documents/download/70585>.

⁴¹⁸ This figure includes 33,956 refugees previously registered and an estimated 74,000 refugees who sought shelter in Bangladesh following the October 2016 violence. See United Nations Office for Coordination of Humanitarian Affairs, Rohingya Refugee Crisis, available from <https://www.unocha.org/rohingya-refugee-crisis>, see also UNHCR report, 3 May 2017, available from <https://www.unhcr.org/news/latest/2017/5/590990ff4/168000-rohingya-likely-fled-myanmar-since-2012-unhcr-report.html>.

⁴¹⁹ UNHCR, situational update, 19 August 2019, available from https://data2.unhcr.org/en/situations/myanmar_refugees.

MoU.⁴²⁰ At the time of writing it had held four rounds of meetings with no breakthrough regarding the question of repatriation.⁴²¹

196. In April 2018 Bangladesh and UNHCR signed another MoU that establishes a bilateral cooperation framework for the voluntary, safe and dignified repatriation of Rohingya refugees to Myanmar.⁴²² A verification team was set up to consolidate a unified database for purposes of protection, identity management, documentation, provision of assistance, population statistics and ultimately to find solutions for almost one million refugees.⁴²³

197. A separate tripartite MoU was signed by the Government of Myanmar, the United Nations Development Programme (UNDP) and the United Nations High Commissioner for Refugees (UNHCR) in June 2018.⁴²⁴ It was renewed on 28 May 2019.⁴²⁵ The MoU has not been officially released but is widely publicly available. It appears to require the Government of Myanmar to work towards a durable solution for the displaced from Rakhine and to ensure that they are able to return to their own households and original places of residence, or to a safe and secure place nearest to it of their choice, based on their well-informed decision.⁴²⁶

198. Under the MoU between the Government of Myanmar, UNHCR and UNDP, the two UN agencies have begun implementing “quick impact projects”,⁴²⁷ but access restrictions on UN agencies remain in place. Following the signing of the MOU, after months of delay, UNHCR and UNDP were allowed to carry out two initial assessments in Rakhine State between September and December 2018, which were limited in scope and in the locations visited,⁴²⁸ prompting the agencies to call on the Government of Myanmar for effective access to Rakhine State.⁴²⁹ Further access restrictions were imposed following the recent

⁴²⁰ Dhaka Tribune, Rohingya repatriation: Joint working group formed, repatriation process to begin by January 23, 19 Decemeber 2017.

⁴²¹ Dhaka Tribune, Rohingya repatriation: 4th JWG meeting in Naypyidaw ends without any breakthrough, 3 May 2019.

⁴²² UNHCR Bangladesh Operational Update, 5 April – 20 April 2018, available from <https://reliefweb.int/report/bangladesh/unhcr-bangladesh-operational-update-5-april-20-april-2018>.

⁴²³ Over 168,000 Rohingya likely fled Myanmar since 2012, with an estimated 74,000 seeking refuge in Bangladesh following the October 2016 violence. See UNHCR report, 3 May 2017, available from <https://www.unhcr.org/news/latest/2017/5/590990ff4/168000-rohingya-likely-fled-myanmar-since-2012-unhcr-report.html>, Joint Bangladesh/UNHCR verification of Rohingya refugees gets underway, available from <https://www.unhcr.org/news/briefing/2018/7/5b3f2794ae/joint-bangladeshunhcr-verification-rohingya-refugees-gets-underway.html>.

⁴²⁴ UNHCR and UNDP Sign a Memorandum of Understanding (MOU) with Myanmar to Support the Creation of Conditions for the Return of Refugees from Bangladesh, available from <http://www.mm.undp.org/content/myanmar/en/home/presscenter/pressreleases/2018/unhcr-undp-sign-mou-myanmar.html>.

⁴²⁵ UNHCR, UNDP and Government of the Union of Myanmar extend MoU, available from <http://www.mm.undp.org/content/myanmar/en/home/presscenter/pressreleases/2019/unhcr-undp-government-of-the-union-of-myanmar-extend-mou.html>.

⁴²⁶ The MoU has never been made public. Versions of the MoU have been published on the internet. However, the Mission is not in a position to assess whether these versions are authentic.

⁴²⁷ Government approves community-based projects in Rakhine State, UNDP, 14 December 2018; FFFGEN-1-85661.

⁴²⁸ UNHCR-UNDP statement: Government approves community-based projects in Rakhine State, available from <https://reliefweb.int/report/myanmar/unhcr-undp-statement-government-approves-community-based-projects-rakhine-state>, See also UNHCR and UNDP complete first assessments in Myanmar’s northern Rakhine, available from <https://www.unhcr.org/news/briefing/2018/9/5b9241dc4/unhcr-undp-say-ready-initial-village-assessments-myanmars-rakhine-state.html>.

⁴²⁹ UNHCR, UNDP say ready to do initial village assessments in Myanmar’s Rakhine State, available from <https://www.mm.undp.org/content/myanmar/en/home/presscenter/articles/2018/unhcr-and-undp-complete-first-assessments-in-rakhine.html>, see also UNHCR, UNHCR, UNDP say ready to do initial village assessments in Myanmar’s Rakhine State, 7 September 2018, available from <https://www.unhcr.org/news/briefing/2018/9/5b9241dc4/unhcr-undp-say-ready-initial-village-assessments-myanmars-rakhine-state.html>, Relief Web, UNHCR-UNDP statement: Government

escalation of the conflict between the Tatmadaw and the AA in Rakhine State. They have impeded the implementation and effectiveness of these “quick impact projects”.⁴³⁰ In March 2019, after almost three months during which activities were suspended, the Government issued a four-week authorisation to UNDP and UNHCR to start the implementation of the “quick impact projects” in Maungdaw and Buthidaung.⁴³¹

199. Alongside these repatriation discussions, Myanmar has said it has undertaken repatriation-related development and infrastructural projects in Rakhine, in particular the establishment of reception and transit centres to receive returnees. It has also said it has identified possible pilot sites for returning refugees to live.⁴³² The Mission is not aware of any independent inspection carried out by humanitarian agencies to ascertain the suitability of the designated sites.

200. In June 2019, ASEAN’s Emergency Response and Action Team (ERAT) was permitted to visit Rakhine State. It produced a “preliminary needs assessment to assess the readiness of Reception and Transit Centres, including potential relocation sites that have been identified by the Government of Myanmar”. However, the report noted that whether or not conditions were in place for return was “beyond the scope” of the assessment.⁴³³ Notwithstanding, the assessment noted that, based on current capacity, the repatriation process can only be completed in six years for a total number of 500,000 displaced persons. The media has reported that the Government has also received bilateral assistance from China and India, including prefabricated housing units for Rohingya returnees.⁴³⁴

201. At the time of writing, Rohingya refugees were not voluntarily returning from Bangladesh to Rakhine State.⁴³⁵ The Mission found that the overwhelming majority of Rohingya refugees in Bangladesh have no confidence in the Myanmar Government’s ability to guarantee their voluntary, safe, dignified and sustainable return. Refugees in Bangladesh repeatedly expressed their desire and willingness to return to their homes only if certain conditions are met.⁴³⁶ Refugees know that conditions are not conducive for return owing to the precarious situation of the remaining Rohingya, including denial of citizenship, the lack of access to livelihood opportunities, fear of arbitrary arrest, movement restrictions, the Myanmar authorities’ failure to implement confidence-building measures inside Rakhine and conflict between the Tatmadaw and the AA.⁴³⁷ They have also

approves community-based projects in Rakhine State, 16 December 2018, available from <https://reliefweb.int/report/myanmar/unhcr-undp-statement-government-approves-community-based-projects-rakhine-state>.

⁴³⁰ FFFGEN-1-85661.

⁴³¹ FFFGEN-1-84225.

⁴³² Reuters, Exclusive: U.N. will not help Myanmar with long-term camps for Rohingya, 13 November 2018; Relief Web, MOFA explains Rakhine Repatriation, available from <https://reliefweb.int/report/myanmar/mofa-explains-rakhine-repatriation>, Myanmar Times, Repatriation to start with the first batch of 2260, 15 November 2018; Xinhuanet, Myanmar, ASEAN reiterate to cooperate in repatriation of displaced persons, 28 May 2019.

⁴³³ Preliminary Needs Assessment for Repatriation in Rakhine State, Myanmar, <https://asean.org/asean-secgen-briefs-diplomatic-corps-preliminary-needs-assessment-repatriation-rakhine-state-myanmar>.

⁴³⁴ Xinhuanet, China donates prefabricated houses for displaced people in Myanmar’s western state, available from http://www.xinhuanet.com/english/2018-10/27/c_137562644.htm, Deccan Herald, India builds houses for Rohingyas in Myanmar, available from <https://www.deccanherald.com/national/india-builds-houses-for-rohingyas-in-myanmar-746326.html>.

⁴³⁵ The Mission is aware that there may have been isolated cases of Rohingya who have decided to return. These are however rare and exceptional cases.

⁴³⁶ FM-007, RM-015, TM-010, A/HRC/40/37, para 49.

⁴³⁷ FM-003, Associated Press, UN aid chief: No progress so Rohingya can return to Myanmar, 30 April 2019, United Nations, Crisis in Rakhine State, Violence Could Derail Gains in Myanmar’s Peace Process, Special Envoy Warns Security Council, Calling for Unimpeded Humanitarian Access, available from <https://www.un.org/press/en/2019/sc13727.doc.htmhttps://www.un.org/press/en/2019/sc13727.doc.htm>.

demanded equal rights and freedoms, recognition as an ethnic group, freedom of movement and guarantees of citizenship⁴³⁸ as minimum preconditions for their return.

1. Historical factors

202. Any assessment of whether the human rights conditions are conducive for return must proceed on the basis of recognition that this is not the first time Myanmar has driven large numbers of Rohingya off their lands and into Bangladesh.⁴³⁹ On the contrary, over the past sixty years there have been repeated periods of extreme violence against the Rohingya in Rakhine State leading to their displacement, indicating the Myanmar Government's deeply rooted antagonism towards them.⁴⁴⁰ In the span of five years from 2012 and 2016, an estimated 168,500 Rohingya fled Myanmar as a result of violence and desperation.⁴⁴¹

203. Bangladesh has hosted Rohingya refugees on each of these occasions in the past. However, each repatriation process has been tainted by reports of involuntary repatriation of Rohingya refugees to unsafe conditions, marred by coercion and violence, to ensure their return to Myanmar. They were returned to the same conditions as they fled and so subsequent displacement back into Bangladesh followed.

204. For example, in 1977, due to military operations in Rakhine State, some 200,000 Rohingya fled to Bangladesh. A bilateral repatriation agreement was signed on 9 July 1978 in Dhaka. The agreement did not have a provision for voluntary return and Myanmar made no commitment in the agreement to guarantee the rights and freedom of returnees.⁴⁴² Refugees objected to their repatriation, arguing that conditions were not conducive for return.⁴⁴³ Bangladeshi security forces reportedly intimidated the refugees, including by restricting food supplies.⁴⁴⁴ Médecins Sans Frontières estimated that some 10,000 refugees died from hunger and malnutrition in Bangladesh.⁴⁴⁵ Despite the conditions not being safe for return of refugees, over 190,000 refugees were forced back to Myanmar at the end of 1979.⁴⁴⁶

205. The two Governments signed another repatriation agreement following the departure of over 260,000 Rohingya from Myanmar to Bangladesh in 1992, following reports of extra-judicial killings, torture, rape and other violations against the Rohingya population in Rakhine.⁴⁴⁷ The two Governments committed to making the repatriation safe, voluntary and dignified.⁴⁴⁸ Once again, however, coercive tactics were reported by human rights

⁴³⁸ FI-051, FM-003, FM-007, RM-015, TM -010, The Guardian, Rohingya Call for Recognition as Myanmar Holds Fresh Repatriation Talks, 28 July 2019; Aljazeera, Myanmar Officials hold repatriation talks with Rohingya leaders, available from 27 July 2019; Relief Web, Rohingya Refugees Disappointed Again: Myanmar Delegation Fails to Make Convincing Case for Safe Return, 31 July 2019.

⁴³⁹ In 1977, 1982, 2012 and 2016 and again in 2017.

⁴⁴⁰ The Daily Star, The Rohingya- a history of persecution, 9 June 2014; The Conversation, the history of persecution of Rohingya, 21 September 2017.

⁴⁴¹ UNHCR, Mixed Movements in South-East Asia, available from <https://unhcr.atavist.com/mm2016>, UNHCR, Over 168,000 Rohingya likely fled Myanmar since 2012, available from <https://www.unhcr.org/news/latest/2017/5/590990ff4/168000-rohingya-likely-fled-myanmar-since-2012-unhcr-report.html>.

⁴⁴² 1978 Repatriation Agreement, available from <https://dataspace.princeton.edu/jspui/bitstream/88435/dsp01th83kz538/1/1978%20Repatriation%20Agreement.pdf>.

⁴⁴³ Gil Loescher and James Milner, Protracted refugee situations: Political, human rights and security implications, Loescher, Milner and Troeller (eds), United Nations University Press, 2009, page 309.

⁴⁴⁴ Ibid.

⁴⁴⁵ Médecins Sans Frontières-Holland, 10 years for the Rohingya refugees in Bangladesh: Past, Present, and Future, March 2002, page 10.

⁴⁴⁶ Gil Loescher et al, supra note 6, page 313, Human Rights Watch, Human Rights Watch, Burma: The Rohingya Muslims Ending a Cycle of Violence?, New York: Human Rights Watch, September 1996.

⁴⁴⁷ E/CN.4/1993/37, Report of the Special Rapporteur on the situation of human rights in Myanmar, 17 February 1993.

⁴⁴⁸ See Joint Statement by the Foreign Ministers of Bangladesh and Myanmar issued at the conclusion of the official visit of the Myanmar Foreign Ministers to Bangladesh from 23-28 April 1992.

organizations who documented Bangladesh government forces beating and intimidating refugees into returning to Myanmar.⁴⁴⁹

2. Current repatriation efforts

206. In October 2018, in an announcement reminiscent of past statements leading to premature repatriation, following the third meeting of the Joint Working Group on repatriation, Bangladesh and Myanmar announced that the repatriation of refugees would start by mid-November 2018.⁴⁵⁰ A total of 485 families consisting of over 2,000 people were identified for the repatriation.⁴⁵¹

207. On 13 and 14 November 2018, at the request of the Government of Bangladesh, UNHCR undertook an “assessment of voluntary return intentions of refugees”.⁴⁵² The assessment was conducted with the families approved for return by Myanmar.⁴⁵³ UNHCR concluded that none of the refugees consulted expressed willingness to return to Myanmar.⁴⁵⁴ UNHCR, OHCHR and the Special Rapporteur on the human rights situation in Myanmar also noted that conditions were not conducive for the voluntary, safe and dignified return of refugees to Rakhine State, warning that the return could put the lives and freedoms of returnees at serious risk.⁴⁵⁵ In an extreme demonstration of their resistance to forced repatriation, several refugees threatened suicide and two elderly men attempted to take their life.⁴⁵⁶ Additionally, most of the individuals who Myanmar identified as potential returnees reportedly went into hiding.⁴⁵⁷ Rohingya refugees in Cox’s Bazar also held a demonstration opposing the planned repatriation, chanting “We won’t go back”.⁴⁵⁸ Bangladesh decided to halt the repatriation programme, emphasising that it was committed to the principle of *non-refoulement* and voluntary repatriation.⁴⁵⁹

208. The fourth meeting of the Joint Working Group on repatriation took place in May 2019, where no agreement was reached in terms of timelines for return. Instead, the Bangladesh delegation proposed that Myanmar “send a team to interact with the Rohingya and persuade them to return to their homes after creating a favourable condition for safe, dignified, and sustainable repatriation”.⁴⁶⁰ On 27 July 2019, a Myanmar Government delegation, consisting of 19 members led by Permanent Secretary of the Ministry of Foreign Affairs, Mr Myint Thu, visited Cox’s Bazar and held discussion with refugees on possible return. During the meeting, refugees insisted on citizenship and freedom of movement as preconditions for their return.⁴⁶¹ Bangladesh continued to position itself in support of repatriation only upon appropriate conditions being put in place for voluntary,

⁴⁴⁹ Human Rights Watch, *The Rohingya Muslims: Ending a Cycle of Exodus?* vol.8, no.8, September 1996.

⁴⁵⁰ Bangladesh, Myanmar to begin repatriating Rohingya in November, 30 October 2018.

⁴⁵¹ Human Rights Watch, *Bangladesh halt Rohingya Repatriation*, 15 November 2018; *Refworld*, *Rohingya repatriation fails amid protests*, 15 November 2018.

⁴⁵² UNHCR, *Operation Update*, available from <https://data2.unhcr.org/en/documents/download/66951>.

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.*

⁴⁵⁵ UNHCR, *Statement by UN High Commissioner for Refugees on the repatriation of Rohingya refugees to Myanmar*, available from <https://www.unhcr.org/news/press/2018/11/5be7c4b64/statement-un-high-commissioner-refugees-repatriation-rohingya-refugees.html>, OHCHR, *Bachelet: Returning Rohingya refugees to Myanmar would place them at serious risk of human rights violations*, 13 November 2018; OHCHR, *Myanmar: UN expert pleads for Rohingya returns to stop, fears repeat abuses may await*, 6 November 2018.

⁴⁵⁶ United Nations, *Terror and panic among Rohingya who may be forced to return to Myanmar – UN rights chief*, 13 November 2018.

⁴⁵⁷ Burma Human Rights Network, *NVC a barrier to Rohingya repatriation*, 11 July 2019.

⁴⁵⁸ *Refworld*, *Rohingya repatriation fails amid protests*, 15 November 2018.

⁴⁵⁹ *The Guardian*, *Bangladesh admits no Rohingya willing to take repatriation offer*, 15 November 2018.

⁴⁶⁰ *Dhaka Tribune*, *Rohingya repatriation: 4th JWG meeting in Naypyidaw ends without any breakthrough*, 3 May 2019.

⁴⁶¹ *The Daily State*, *Myanmar team visit Rohingya camps in Ukhia*, 27 July 2019; *Voice of America*, *Myanmar delegation holds repatriation talks with Rohingya in Bangladesh*, 27 July 2019.

safe, dignified and sustainable return.⁴⁶² Myanmar continued to maintain its position that repatriation should take place in the context of the bilateral agreements between Myanmar and Bangladesh.⁴⁶³

209. In August 2019, the Government of Myanmar agreed to the repatriation of 3,450 Rohingya refugees, who were cleared from a list of approximately 25,000 individuals that the Government of Bangladesh had shared.⁴⁶⁴ The first group of refugees were scheduled for repatriation on 22 August 2019.⁴⁶⁵ The Government of Bangladesh stressed the voluntariness of the process and noted that nobody would be forced to return.⁴⁶⁶ While the Government of Bangladesh made logistical arrangements for their return, none of the selected families agreed to the planned repatriation.⁴⁶⁷ Instead the refugees held protests against the repatriation and demanded accountability, full citizenship rights, return of land and properties.⁴⁶⁸ UNHCR interviewed the refugees who had been cleared for repatriation. On 22 August, UNHCR publicly acknowledged that none of them had indicated a willingness to return.⁴⁶⁹

G. Conclusions and legal findings: the impossibility of return

210. The Mission determined in its 2018 report that the level of oppression faced by the Rohingya was hard to fathom. Over many decades Government laws, policies and practices 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 were added. This occurred through the denial of legal status and identity and the denial of the right to freedom of movement. It occurred through restrictions on access to food, livelihoods, health care, education, humanitarian access and additional restrictions affecting private life. And it occurred through the oppression of arbitrary arrest, detention and other measures.⁴⁷⁰ The State-sanctioned laws, policies and practices occurred in the context of State-sanctioned discriminatory rhetoric. Hateful and divisive language targeted the Rohingya on the basis of their ethnicity, religion and status. The Mission concluded that the severe, systemic and institutionalised oppression, from birth to death, amounted to persecution.⁴⁷¹

211. The Mission also concluded in its 2018 report that there were reasonable grounds for an inference that the Tatmadaw and other security force carried out attacks against Myanmar’s Rohingya population with genocidal intent.⁴⁷² The Mission found there were reasonable grounds to also conclude that members of Myanmar’s security forces, and

⁴⁶² The Daily Star, Bangladesh for early start to Rohingya repatriation, 3 May 2019.

⁴⁶³ Eleven Media Group, Myanmar and Bangladesh highlight increased cooperation in cross-border related issues through existing bilateral mechanisms, 5 May 2019.

⁴⁶⁴ The Guardian, Myanmar and Bangladesh to start sending back thousands of Rohingya, 16 August 2019; Reuters, Exclusive: Myanmar, Bangladesh agree to start Rohingya repatriation next week, 15 August 2019.

⁴⁶⁵ The Daily Star, Rohingya Repatriation: First batch to return Aug 22, 16 August 2019.

⁴⁶⁶ The Daily Star, Rohingya Repatriation: First batch to return Aug 22, 16 August 2019, Dhaka Tribune, Myanmar, Bangladesh agree to start Rohingya repatriation next week, 15 August 2019.

⁴⁶⁷ The Guardian, Rohingya refugees refuse to return to Myanmar without rights guarantee, 21 August 2019; The Guardian, Rohingya refugees refuse to return to Myanmar without rights guarantee, 21 August 2019; The Guardian, Rohingya refugees turn down second Myanmar repatriation effort, 22 August 2019, see also UNHCR Statement on Voluntary Repatriation to Myanmar, 22 August 2019, available from <https://www.unhcr.org/news/press/2019/8/5d5e720a4/unhcr-statement-voluntary-repatriation-myanmar.html>.

⁴⁶⁸ HRW, halt Rohingya repatriation, available from <https://www.hrw.org/news/2019/08/20/myanmar/bangladesh-halt-rohingya-returns>.

⁴⁶⁹ UNHCR Statement on Voluntary Repatriation to Myanmar, 22 August 2019, available from <https://www.unhcr.org/news/press/2019/8/5d5e720a4/unhcr-statement-voluntary-repatriation-myanmar.html>.

⁴⁷⁰ A/HRC/39/CRP.2, paras. 110-147.

⁴⁷¹ A/HRC/39/CRP.2, para. 622.

⁴⁷² A/HRC/39/CRP.2, para. 1441.

members of the Tatmadaw in particular, committed crimes against humanity and war crimes against the Rohingya.⁴⁷³ Based on these findings, the Mission determined that a competent prosecutorial body and court of law should investigate and adjudicate cases against specific persons to determine individual guilt or innocence.⁴⁷⁴

212. Based on its second phase of investigation, the Mission concludes on reasonable grounds that the situation of the Rohingya remains largely unchanged since the Mission's 2018 report. If anything, the situation of the 600,000 Rohingya remaining in Myanmar is worse after another year of living under deplorable conditions.

213. The Mission draws four main conclusions from the final investigation under its mandate:

- Myanmar continues to commit crimes against humanity of inhumane acts that inflict great suffering and of persecution as part of a widespread and systematic attack against the Rohingya population.
- Myanmar incurs State responsibility for committing genocide and is failing in its obligations under the Genocide Convention to investigate and, where appropriate, prosecute genocide. It is also failing to enact effective legislation criminalising and punishing genocide.
- The State of Myanmar continues to harbour genocidal intent and the Rohingya remain under serious risk of genocide.
- Conditions in Myanmar are unsafe, unsustainable and impossible for approximately one million displaced Rohingya to return to their homes and lands.

1. Crimes against humanity of persecution and other inhumane acts

214. Crimes against humanity are among the gravest crimes under international law and the legal threshold for crimes against humanity is high. In its consideration of whether the facts it established amount to crimes against humanity, the Mission relied on the legal analysis from its 2018 report.⁴⁷⁵ Based on that analysis, the Mission concludes on reasonable grounds that, since the publication of the Mission's 2018 report, the Government has committed the crimes against humanity of "other inhumane acts" and "persecution" in the context of a continued widespread and systematic attack against the Rohingya civilian population in furtherance of a State policy to commit such an attack.

215. Under the definition of crimes against humanity, an "attack" does not need to involve a military attack or the use of armed force; it can, for example, encompass mistreatment of the civilian population.⁴⁷⁶ This is the nature of the Government attack being perpetrated against the Rohingya today. Since the end of the 2017 "clearance operations", the Government has continued its widespread and systematic attack on the Rohingya through its denial of fundamental rights, including citizenship, through its laws, policies and regulations; its denial of access to land they once lived and relied on; and its denial of items essential to human survival, in particular food.

216. The Myanmar Government's implementation of laws, regulations and policies, including the 1982 Citizenship Law, the NVC process and the annual household lists that result in the denial of citizenship and other fundamental human rights, is causing the type of serious or great physical or mental suffering to the Rohingya people that constitutes the crime against humanity of "other inhumane acts".⁴⁷⁷ The gravity and impact of

⁴⁷³ A/HRC/39/CRP.2, paras. 1511 and 1513-1517.

⁴⁷⁴ A/HRC/39/64, para. 83. See, also, A/HRC/39/CRP.2, para. 1441.

⁴⁷⁵ A/HRC/39/CRP.2, paras. 1442-1511.

⁴⁷⁶ ICC Elements of Crime, art. 7, para. 3; ICTY, *Prosecutor v. Kunarac et al.*, (IT-96-23 and IT-96-23/1-A), Appeals Chamber Judgement, 12 June 2002, para. 86.

⁴⁷⁷ The war crime of inhumane treatment is related to international armed conflicts; the equivalent for non-international armed conflicts is called cruel treatment; both are considered similar in gravity as another war crime called wilfully causing great suffering or serious injury to body or health. See ICTY, *Prosecutor v. Jelisić* (IT-95-10-T), Trial Chamber Judgement, 14 December 1999, para. 52;

discriminatory laws and policies of this nature were highlighted in the Nuremberg Judgement of *Goering et al*, where the Court found defendants guilty of inhumane acts and persecution for, among other acts, their role in issuing and implementing a series of discriminatory laws which restricted the “family life [of Jews] and their rights of citizenship”.⁴⁷⁸

217. The Mission also concludes on reasonable grounds that the Myanmar Government is continuing its concerted efforts to keep Rohingya off the land from which they were uprooted and forcibly displaced. These efforts cause the type of “serious mental harm” that, in the words of an ICTY Appeals Chamber, invariably occurs in situations of “forced departure from the residence and the community, without guarantees concerning the possibility to return in the future”.⁴⁷⁹ The Mission concludes that Rohingya face suffering and anguish because the Government continues to prevent them from accessing their property and living in their homes. In the Mission’s view, this suffering and anguish are comparable to the suffering caused by the forcible transfer or deportation, both of which are crimes against humanity. It constitutes a crime against humanity of “other inhumane acts” because “other inhumane acts” must be as serious and grave as other crimes against humanity. In other words, the Government’s systematic denial of Rohingya’s return to their lands through destruction, confiscation and construction is causing great mental suffering analogous to forcible transfer or deportation and, therefore, amounts to the crime against humanity of “other inhumane acts”.⁴⁸⁰

218. The cumulative impact of restrictions on movement and denial of humanitarian access is also inflicting great suffering tantamount to a crime against humanity. Their access to food through farming is limited and in some cases nearly eliminated due to movement restrictions and confiscation of property. Government-imposed restrictions on access to humanitarian aid are also depriving the remaining Rohingya population of access to food. This physical and mental distress and suffering is compounded by the continued

ICTY, *Prosecutor v. Naletilić & Martinović* (IT-98-34-T), Trial Chamber Judgement, 31 March 2003, para. 246; ICTY, *Prosecutor v. Gotovina et al.* (IT-06-90-T), Trial Chamber Judgement, 15 April 2011, para. 1791; ICTR, *Prosecutor v. Nyiramasuhuko et al.* (ICTR-98-42-T), Trial Chamber Judgement, 24 June 2011, para. 6127; ICTY, *Prosecutor v. Perišić* (IT-04-81-T), Trial Chamber Judgement, 6 September 2011, para. 111; SCSL, *Prosecutor v. Taylor* (SCSL-03-01-T), Trial Chamber Judgement, 18 May 2012, paras. 418-421; ICTY, *Prosecutor v. Haradinaj et al.* (IT-04-84bis-T), Trial Chamber Judgement, 29 November 2012, para. 422; ICTY, *Prosecutor v. Lukić* (IT-98-32/1-A), Appeals Chamber Judgement, 4 December 2012, para. 631; ICTY, *Prosecutor v. Tolimir* (IT-05-88/2-T), Trial Chamber Judgement, 12 December 2012, para. 853; ICTY, *Prosecutor v. Prlić et al.* (IT-04-74), Trial Chamber Judgement, 29 May 2013, paras. 77 and 148; ICTY, *Prosecutor v. Karadžić* (IT-95-5/18-T), Trial Chamber Judgement, March 24, 2016, para. 504; Extraordinary African Chambers, *Ministère Public v. Habré*, Trial Chamber Judgement, May 30, 2016, paras. 1590-1593; Extraordinary Chambers in the Courts of Cambodia, *Case 002/01* (Case File No. 002/19-09-2007-ECCC/SC), Supreme Court Chamber Appeal Judgement, November 23, 2016, para. 580; ICTY, *Prosecutor v. Mladić*, (IT-09-92-T), Trial Chamber Judgement, November 22, 2017, para. 3233. The situation is slightly different under the ICC Statute where the war crimes of inhumane treatment and cruel treatment have the same level of suffering as torture, namely severe, while the war crime (in international armed conflicts) of willfully causing great suffering had the lower level of suffering, namely great. See the ICC Elements of Crimes under articles 8(2)(a)(ii)-2, 8(2)(a)(iii) and 8(2)(c)(i)-3.

⁴⁷⁸ The United States of America, the French Republic, The United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al. p. 10 and p.78. See also conviction of Frick at page 127: “rick drafted, signed and administered many laws designed to eliminate Jews from German life and economy.... These laws paved the way for the “final solution”.

⁴⁷⁹ ICTY, *Prosecutor v. Krajsnik* (IT-00-39-A), Appeals Chamber Judgement, 17 March 2009, para. 331.

⁴⁸⁰ In *Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”* concerning the situation of Bangladesh and Myanmar similarly suggested that inhumane acts were present; however, the Pre-Trial Chamber relied on the right of return whereas the Mission draws on the same rights as those protected by the crimes against humanity of deportation and forcible transfer. ICC, *Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”*, Pre-Trial Chamber Decision, ICC-RoC46(3)-01/18, 6 September 2018, para. 77.

risk to their physical and mental safety and security through harassment and fear of physical abuse at checkpoints and during searches. The Government's establishment and maintenance of this system that ensures deplorable living conditions for the Rohingya population also amounts to the crime against humanity of "other inhumane acts".

219. In addition, the Mission has reasonable grounds to conclude that the Government has continued to commit the crime against humanity of persecution. Persecution is an act or omission that (i) discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (*actus reus*); and (ii) was carried out deliberately with the intention to discriminate on one of the listed grounds, including race, religion, ethnicity, and culture. See, also, Rome Statute, art. 7(1)(h). (*mens rea*).⁴⁸¹ International courts and tribunals have found that "it is not necessary that every individuals act underlying the crime of persecution ... be of a gravity corresponding to other crimes against humanity: underlying acts of persecution can be considered together".⁴⁸² It is clear from the findings that the Rohingya are the target of the inhumane acts outlined above, all of which include the denial of fundamental rights.

2. Genocide under the rules of State responsibility

Inference of genocide

220. The Mission's 2018 report called for investigations and prosecutions of certain individuals for the crime of genocide under the rules of international criminal law. In this report, the Mission has examined the question of whether Myanmar as a State bears responsibility too. The Mission concludes on reasonable grounds that the evidence supports an inference of genocidal intent and, on that basis, that the State of Myanmar breached its obligation not to commit genocide under the Genocide Convention under the rules of State responsibility. The Mission draws this conclusion based on four main findings that build upon its prior assessment of the crime of genocide under international criminal law. First, the Rohingya constitute a protected people under the Genocide Convention.⁴⁸³ Second, the Rohingya were the victims of numerous underlying acts of genocide, including killing,⁴⁸⁴ serious bodily and mental harm,⁴⁸⁵ and conditions of life calculated to bring about their physical destruction,⁴⁸⁶ and may also have been victims of measure intended to prevent births.⁴⁸⁷ Third, those acts were attributable to the State and committed intentionally.⁴⁸⁸ Finally, the Mission concludes on reasonable grounds that the State engaged in a pattern of conduct with, through inference, the genocidal intent to destroy the Rohingya in whole or in part as a people.⁴⁸⁹

3. State attribution for underlying acts of genocide

221. The rules of State responsibility focus on the acts and intentions of a State through its organs and agents. Under the rules of State responsibility, the State, not the individuals, bears responsibility and must be held to account for its actions. By contrast, international criminal law focuses on individual criminal liability and therefore focuses on the acts and

⁴⁸¹ *Prosecutor v. Šešelj Vojislav* (MICT-16-99-A) para. 159; ICTR, *Prosecutor v. Nahimana et al.* (ICTR-99-52-A), Appeals Chamber Judgement, 28 November 2007, para. 985; ICTY, *Prosecutor v. Kvočka*, Appeals Chamber Judgement, 28 February 2005, para. 320; ICTY, *Prosecutor v. Blaškić*, Appeals Chamber Judgement, 29 July 2004, para. 131. See, also, Rome Statute, art. 7(1)(h).

⁴⁸² ICTY, *Prosecutor v. Popović et al.*, (IT-05-88-A), Appeals Chamber Judgement, 30 January 2015, para. 766.

⁴⁸³ A/HRC/39/CRP.2, paras. 1390-1392.

⁴⁸⁴ A/HRC/39/CRP.2, paras. 1394-1395.

⁴⁸⁵ A/HRC/39/CRP.2, paras. 1396-1399.

⁴⁸⁶ A/HRC/39/CRP.2, paras. 1400-1407.

⁴⁸⁷ A/HRC/39/CRP.2, paras. 1408-1410.

⁴⁸⁸ A/HRC/39/CRP.2, paras. 1390-1410.

⁴⁸⁹ ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of Genocide*, (Croatia v. Serbia), Judgment, 3 February 2015, para. 145; and 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. 373.

intentions of individuals. Under international criminal law the individual, not the State, bears responsibility and must be held to account for the individual's actions.

222. To conclude that a State is responsible for genocide it is sufficient to demonstrate that genocide is attributable to a State organ, such as a ministry or security force, without identifying specific individuals who are responsible for the genocide.⁴⁹⁰ The Tatmadaw is the most notable State organ that engaged in genocidal acts but it is not the only one.⁴⁹¹ The Genocide Convention does not require the entirety of the Myanmar State to be involved in genocide to make a finding of genocide under the rules of State responsibility. However, in the case of the “clearance operations” against the Rohingya beginning on 25 August 2017, the vastness of the State's involvement is inescapable.⁴⁹² The Tatmadaw and the other security forces acted in a planned and organized fashion under a unified chain of command.⁴⁹³ Military vehicles, such as navy vessels⁴⁹⁴ and helicopters,⁴⁹⁵ were reportedly used in the military operations. Soldiers and BGP prepared and launched attacks from government security bases⁴⁹⁶ and security forces tortured people in government detention facilities.⁴⁹⁷ There are strong indications that the State provided its resources and gave directions to members of non-Rohingya ethnic groups and informal armed groups who acted alongside, complementary to, and usually in tandem with, the Tatmadaw and other security forces during attacks.⁴⁹⁸ Local government officials, notably ethnic Rakhine administrators or former administrators, were seen at the sites of many of the attacks, including many of the most serious attacks with heavy loss of life.⁴⁹⁹ Prior to the attacks, government officials relied on discriminatory laws and policies as tools to justify their forthcoming genocidal attacks.⁵⁰⁰ After the attacks, the State adopted and implemented plans and policies that effectively endorsed everything that preceded it, by denying wrongdoing, destroying evidence, refusing to conduct effective investigations and clearing, razing, confiscating and building on land from which it displaced Rohingya,⁵⁰¹ while ensuring that the Rohingya who they forced out of Myanmar would not be able to return.⁵⁰² In sum, State involvement through military and civilian acts, omissions, organs and persons was extensive.

⁴⁹⁰ A finding of genocide should not be precluded, for example, where it is clear that a State organ carried out prohibited acts with genocidal intent, but where the author of a genocidal plan or the perpetrators of genocidal acts are not yet identified.

⁴⁹¹ Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts makes it clear that the Tatmadaw is a “state organ” whose actions are attributable to the State: “(1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. (2) An organ includes any person or entity which has that status in accordance with the internal law of the State.” Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001). The draft articles are generally accepted as authoritative interpretations of international law, including by the International Court of Justice, and also as generally reflecting customary international law. See, generally, Dordeska, Marija. “The Process of International Law—Making: The Relationship between the International Court of Justice and the International Law Commission,” *International and Comparative Law Review*, 2015, vol. 15, no. 1, pp. 7–57.

⁴⁹² A/HRC/39/CRP.2, paras. 1532-1534.

⁴⁹³ A/HRC/39/CRP.2, paras. 1429-1421 and 1526-1527.

⁴⁹⁴ A/HRC/39/CRP.2, para. 1156.

⁴⁹⁵ A/HRC/39/CRP.2, paras. 762 and 1084.

⁴⁹⁶ A/HRC/39/CRP.2, para. 1154 and 1249.

⁴⁹⁷ A/HRC/39/CRP.2, paras. 929, 1162 and 1172.

⁴⁹⁸ A/HRC/39/CRP.2, paras. 1258-1271.

⁴⁹⁹ A/HRC/39/CRP.2, para. 1264.

⁵⁰⁰ See A/HRC/39/CRP.2, paras. 458-498.

⁵⁰¹ A/HRC/39/CRP.2, paras. 1573-1622; See Chapter IV, section B of this report: The situation of the Rohingya; Land clearance, destruction, confiscation and construction.

⁵⁰² See Chapter IV, section B of this report: The situation of the Rohingya; Conclusions and findings, the impossibility of return.

4. Establishing genocidal intent

223. For the Mission to demonstrate that the State of Myanmar harboured the genocidal intent to destroy, in whole or in part, the Rohingya as a group, the Mission must be satisfied either as to the existence of a State plan that expresses that intent or as to evidence that demonstrates a pattern of conduct that reveals or infers such intent.⁵⁰³ There is limited guidance from the case law for assessing what factors are relevant for making a finding of genocidal intent under the rules of State responsibility. The case law from international criminal tribunals, the Mission's review of that case law in its 2018 report⁵⁰⁴ and information the Mission collected during its 2019 investigation all compel the Mission to conclude on reasonable grounds that genocidal intent on the part of the State of Myanmar can be inferred.

224. The Mission has identified seven indicators from which it inferred genocidal intent to destroy the Rohingya people as such, all based on the consideration of indicators of genocidal intent in international case law: first, the Tatmadaw's extreme brutality during its attacks on the Rohingya;⁵⁰⁵ second, the organized nature of the Tatmadaw's destruction;⁵⁰⁶ third, the enormity and nature of the sexual violence perpetrated against women and girls during the "clearance operations";⁵⁰⁷ fourth, the insulting, derogatory, racist and exclusionary utterances of Myanmar officials and others prior, during and after the "clearance operations";⁵⁰⁸ fifth, the existence of discriminatory plans and policies, such as the Citizenship Law and the NVC process, as well as the Government's efforts to clear, raze, confiscate and build on land in a manner that sought to change the demographic and ethnic composition of Rakhine State, the goal being to reduce the proportion of Rohingya;⁵⁰⁹ sixth, the Government's tolerance for public rhetoric of hatred and contempt for the Rohingya;⁵¹⁰ and seventh, the State's failure to investigate and prosecute gross violations of international human rights law and serious violations of international humanitarian law, both as they were occurring and after they occurred.⁵¹¹ These seven indicators also allow the Mission to infer that the State did not object and in fact endorsed the Tatmadaw's "clearance operations" and the manner in which they were conducted.

225. Every one of these indicators is linked to the acts or omissions of Myanmar State organs, including the military, other security forces, ministries, legislative bodies, the UEHRD and other civilian institutions. Collectively they demonstrate a pattern of conduct that infers genocidal intent on the part of the State to destroy the Rohingya, in whole or in part, as a group. For reasons explained in its 2018 report, there is no reasonable conclusion to draw, other than the inference of genocidal intent, from the State's pattern of conduct.⁵¹²

5. Failure to investigate and punish genocide

226. Having concluded on reasonable grounds that the State of Myanmar is responsible for carrying out acts of genocide with genocidal intent, the Mission also concludes that Myanmar is not meeting its obligations under the Genocide Convention to conduct an effective criminal investigation into allegations of genocide.⁵¹³ The Mission draws this conclusion based on the Government's pattern of ignoring compelling evidence that

⁵⁰³ ICJ, Case Concerning Application of the Convention on the Prevention and Punishment of Genocide, (*Croatia v. Serbia*), Judgment, 3 February 2015, para. 145; and 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. 373.

⁵⁰⁴ See, generally, A/HRC/39/CRP.2, paras. 1419-1433.

⁵⁰⁵ A/HRC/39/CRP.2, paras. 1432-1433.

⁵⁰⁶ A/HRC/39/CRP.2, paras. 1428-1431.

⁵⁰⁷ A/HRC/39/CRP.4, paras. 95-97.

⁵⁰⁸ A/HRC/39/CRP.2, paras. 1422-1424.

⁵⁰⁹ A/HRC/39/CRP.2, paras. 1425-1427.

⁵¹⁰ A/HRC/39/CRP.2, paras. 1420-1421.

⁵¹¹ A/HRC/39/CRP.2, paras. 1573-1622; A/HRC/42/50, paras. 94-101.

⁵¹² A/HRC/39/CRP.2, paras. 1434-1438.

⁵¹³ See Chapter IV, section G of this report: The situation of the Rohingya; Conclusions and legal findings: the impossibility of return.

genocide took place on its territory and its failure to put in place investigative mechanisms that are independent, impartial, prompt, thorough, effective, credible and transparent.⁵¹⁴ The Government's failure to reform legislation that promotes impunity,⁵¹⁵ its destruction of evidence⁵¹⁶ and its punishing of those who try to expose the crimes that occurred during the Government's 2017 "clearance operations",⁵¹⁷ all of which the Mission has documented in its other reports, provide additional indications of State responsibility for a failure to investigate.

227. The Mission's 444-page report, publicly released in September 2018, provided sufficient information at that time to trigger Myanmar's obligation to conduct an effective criminal investigation into genocide.⁵¹⁸ The report provided extensive details of the methodology the Mission used to make its findings.⁵¹⁹ The report also explained that the Mission used a "reasonable grounds" standard, consistent with the practice of United Nations fact-finding bodies.⁵²⁰ Numerous reports from other UN mechanisms, civil society, and investigative journalists similarly exposed information that constituted evidence of underlying acts of genocide. Despite this, the State has not undertaken an effective investigation into genocide.⁵²¹

228. The Government of Myanmar clearly had knowledge of the Mission's findings. The Mission's report was provided officially, in advance of its release, to the Myanmar Government through its Permanent Mission in Geneva. Myanmar attended the "interactive dialogue" at the Human Rights Council in September 2018 where the Mission presented its report and States discussed the report's findings. Myanmar's representative made a formal response to the report in the Human Rights Council.⁵²² Myanmar's ambassador to the UN in New York also made a presentation to the Security Council when the Mission briefed the Security Council on the report.⁵²³ The Ministry of Foreign Affairs posted the ambassador's full statement on its Facebook page.⁵²⁴ The Tatmadaw Commander-in-Chief, Senior-General Min Aung Hlaing, who has ultimate say over military justice, made similar statements.⁵²⁵ Myanmar's Parliament discussed the Mission's report(s) several times.⁵²⁶

⁵¹⁴ Both of these issues are discussed below.

⁵¹⁵ See Chapter IV, section G of this report: The situation of the Rohingya; Conclusions and legal findings: the impossibility of return.

⁵¹⁶ A/HRC/39/CRP.2, paras. 1242-1244.

⁵¹⁷ See, for example, A/HRC/42/50, para. 96.

⁵¹⁸ A/HRC/39/CRP.2, para. 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.")

⁵¹⁹ A/HRC/39/CRP.2, paras. 8-32.

⁵²⁰ A/HRC/39/CRP.2, para. 10.

⁵²¹ See Chapter IV, section G of this report: The situation of the Rohingya; Conclusions and legal findings: the impossibility of return.

⁵²² Human Rights Council, "Human Rights Council holds interactive dialogue with the Independent International Fact-Finding Mission on Myanmar", Media Announcement, 18 September 2018, available from

<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23582&LangID=E>

⁵²³ For example, on 24 October 2018, Myanmar's UN ambassador, Hau Do Suan, rejected the Mission's findings at a high-level Security Council briefing. See, United Nations Security Council, Head of Human Rights Fact-Finding Mission on Myanmar Urges Security Council to Ensure Accountability for Serious Violations against Rohingya: Myanmar's Representative Calls Mission Flawed, Biased, Defends Counter-Terrorist Actions by Security Forces in Rakhine State, 8381st Meeting (PM), Meeting Coverage, SC/13552, 24 October 2018, <https://www.un.org/press/en/2018/sc13552.doc.htm> (accessed 17 May 2019).

⁵²⁴ Ministry of Foreign Affairs Myanmar, Facebook Post, 25 October 2018, <https://www.facebook.com/mofamyanmar/posts/myanmar-permanent-representative-to-the-united-nations-delivers-rebuttal-stateme/1007680572765571/> (accessed 17 May 2019).

⁵²⁵ Reuters, Myanmar army chief denies systematic persecution of Rohingya, 15 February 2019, <https://www.reuters.com/article/us-myanmar-rohingya/myanmar-army-chief-denies-systematic-persecution-of-rohingya-idUSKCN1Q416C> (accessed 17 May 2019). See, also, AFP, UN should not 'interfere': Myanmar army chief, September 24, 2018, <https://frontiermyanmar.net/en/un-should-not->

The report received widespread international and domestic media attention. It has been posted on the Mission's webpage since its release.⁵²⁷ The Mission also issued a shorter but official version of the report in Myanmar language.⁵²⁸

229. Statements by the Government of Myanmar claiming that the Government had established effective investigation mechanisms and has undertaken effective investigations are further indications of the Government's knowledge of possible crimes. In August 2019, the Government of Myanmar wrote to the President of the UN Security Council objecting to a meeting on the topic of "mass atrocities" and accountability in Myanmar, saying that the Government "is addressing the issue of accountability by setting up the Independent Commission of Enquiry (ICoE). The Myanmar Armed Forces has also established its own Court of Inquiry to address the allegation of human rights violations in northern Rakhine".⁵²⁹

230. The Government's accountability efforts are woefully inadequate. In its 2019 report to the Human Rights Council, the Mission found a near complete absence of accountability at the domestic level for gross violations of international human rights law and serious violations of international humanitarian law.⁵³⁰ The Prosecutor of the International Criminal Court (ICC), in her *Request for authorisation of an investigation pursuant to article 15*, concluded much the same.⁵³¹

231. The Myanmar Government's ICOE does not constitute an effective independent investigations mechanism. The ICOE lacks a clear mandate. Its chairperson has said that it is not an accountability mechanism. Its methodology is opaque. Its operating procedures are questionable. It is dependent on the Myanmar Government. There is no possibility that its investigations will identify perpetrators, promote accountability and justice, and provide redress to victims.⁵³²

232. The Government's unwillingness to pursue accountability was demonstrated vividly by the release of seven Tatmadaw soldiers in November 2018. The seven soldiers had been convicted and sentenced to 10 years imprisonment for the killings of 10 Rohingya civilians in the village of Inn Din, Maungdaw Township, on 2 September 2017. The Commander in Chief, Senior General Min Aung Hlaing, pardoned them, releasing them after less than one year in detention.⁵³³ By contrast, two Reuters journalists, whose investigation of this

interfere-myanmar-army-chief (accessed 17 May 2019). Article 343(b) of the Constitution makes decisions of the Commander-in-Chief concerning military justice matters "final and conclusive", with no right of appeal.

⁵²⁶ For example, on 22 February 2019, the Parliament formally agreed to discuss a motion calling for a "united approach to counter efforts of the OIC, EU and Human Rights Council", when the Mission's report was discussed. Photos of the presentation are on file with the Mission: FFFGEN-1-79937; FFFGEN-1-79931 ; FFFGEN-1-79933

⁵²⁷ United Nations Human Rights Council, Independent International Fact-Finding Mission on Myanmar, Webpage, <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/Index.aspx> (accessed 17 May 2019).

⁵²⁸ United Nations Human Rights Council, Independent International Fact-Finding Mission on Myanmar, Webpage, <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/Index.aspx> (accessed 17 May 2019).

⁵²⁹ Letter from the Permanent Mission of the Republic of the Union of Myanmar to the United Nations, New York to President of the Security Council, 22 August 2019. Letter on file with the Mission.

⁵³⁰ A/HRC/42/50, paras. 95-101.

⁵³¹ See Office of the Prosecutor to the ICC, *Request for authorisation of an investigation pursuant to article 15*, ICC-01/19, 4 July 2019, para. 235. Available at https://www.icc-cpi.int/CourtRecords/CR2019_03510.PDF.

⁵³² A/HRC/39/CRP.2, para. 1619; A/HRC/42/50, paras. 98-101.

⁵³³ See, Shoon Naing and Simon Lewis, "Exclusive: Myanmar soldiers jailed for Rohingya killings freed after less than a year", Reuters, 27 May 2019. Available at <https://www.reuters.com/article/us-myanmar-rohingya-soldiers-exclusive/exclusive-myanmar-soldiers-jailed-for-rohingya-killings-freed-after-less-than-a-year-idUSKCN1SX007>; Htet Naing Zaw, "Military Chief Pardoned Soldiers Involved in Rohingya Massacre", Irrawaddy, 29 May 2019. Available at <https://www.irrawaddy.com/news/burma/military-chief-pardoned-soldiers-involved-rohingya-massacre.html>; and Htoot Thant, "Tatmadaw defends release of soldiers jailed for Inn Din killings",

incident led to the soldiers' convictions, were imprisoned for 18 months, significantly longer than the time served by the actual perpetrators of the crimes.⁵³⁴ Senior General Min Aung Hlaing is one of the persons recommended by the Mission for investigation and prosecution for crimes against humanity, war crimes and genocide.⁵³⁵

233. In light of the Government's awareness that reasonable grounds existed that genocide occurred on its territory, its continuing failure to initiate effective criminal investigations into genocide or its underlying acts, its continuing failure to reform legislation that promotes impunity, its destruction of evidence relevant to a genocide investigation and its willingness to punish those who try to expose the crimes that occurred during the Government's 2017 "clearance operations", the Mission concludes on reasonable grounds that Myanmar has breached, and is continuing to breach, its obligation under the Genocide Convention to conduct an effective investigation in relation to crimes of genocide.

6. Failure to enact legislation⁵³⁶

234. The Mission also assessed Myanmar's criminal justice system to determine whether it is meeting its obligations under Article V of the Genocide Convention to enact the necessary legislation to give effect to the Convention and, in particular, to provide effective penalties for persons guilty of genocide and persons who incite genocide, attempt to commit genocide and are complicit in genocide.⁵³⁷ The Penal Code has no provisions on the crime of genocide.⁵³⁸ Part of this can be explained by the fact that Myanmar's Penal Code has not been substantially amended since it was first enacted in 1891, well before the term "genocide" was first used in 1943 and before it became part of international criminal law.⁵³⁹

235. At the time of writing, no provisions in Myanmar's Penal Code reflected the substance, object, purpose, letter or spirit of the Genocide Convention. The Penal Code lacks provisions that contain the defining elements of the crime of genocide, including the element of intending to destroy a protected group. It does not contain "ordinary crimes" that could amount to the underlying acts of genocide.

236. Based on this assessment, the Mission concludes on reasonable grounds that Myanmar is failing in its obligation to enact legislation that gives effect to the Genocide Convention. Given that Myanmar does not have legislation proscribing genocide, by extension it also does not provide any penalties for genocide. This means that Myanmar is also breaching its obligation under Article V to "provide effective penalties for persons guilty" of the crime of genocide.

237. Even if Myanmar enacted domestic legislation to give effect to the Genocide Convention, Myanmar's Constitution allows Myanmar military personnel convicted of any

Myanmar Times, 3 June 2019. Available at <https://www.mmmtimes.com/news/tatmadaw-defends-release-soldiers-jailed-inn-din-killings.html>.

⁵³⁴ A/HRC/39/CRP.2, para. 1296; see, also, A/HRC/42/50, para. 73.

⁵³⁵ A/HRC/39/CRP.2, para. 1555.

⁵³⁶ 2742. In making its assessment, the Mission recalls that the Special Rapporteur on the situation of human rights in Myanmar has commented that Myanmar's Penal Code reflects relatively few international human rights standards. Report of the Special Rapporteur on the situation of human rights in Myanmar, A/HRC/31/71, 18 March 2016, paras. 8-17.

⁵³⁷ Genocide Convention, art. V.

⁵³⁸ A/HRC/39/CRP.2, para. 1583. For a list and links to the eight amendments to the penal code since 1861, see International Labour Organization, NATLEX database of national labour, social security and human rights legislation, Myanmar: Criminal and penal law, http://www.ilo.org/dyn/natlex/natlex4.listResults?p_lang=en&p_country=MMR&p_count=117&p_classification=01.04&p_classcount=9. See also Library of Congress, *Burma: Draft Legislation on Revision of Penal Code*, Sept. 15, 2015, <https://www.loc.gov/law/foreign-news/article/burma-draft-legislation-on-revision-of-penal-code/>.

⁵³⁹ 1943 was the first time the term "genocide" was used to describe a crime predicated on the destruction of a protected group. See, Raphael Lemkin, *Axis Rule in Europe: Laws of Occupation, Analysis of Government – Proposals for Redress*, New York, NY: Howard Fertig, 1973 [1944]), p. 79.

crime to be pardoned or potentially protected from prosecution. Article 20(b) of the Constitution gives the military “the right to independently administer and adjudicate all affairs of the armed forces”⁵⁴⁰ and Article 343(b) gives the Commander-in-Chief of the Defence Services the power to make final and conclusive decisions on military justice.⁵⁴¹ Thus, the Commander-in-Chief has the Constitutional authority to pardon a member of the Myanmar military convicted of genocide, even if such a prosecution were possible. The Commander-in-Chief not only has the power to pardon but he has demonstrated his willingness to use it, as he did when he pardoned seven soldiers convicted and sentenced to 10 years imprisonment for the killings of 10 Rohingya civilians in the village of Inn Din.⁵⁴² The Mission therefore considers that Myanmar is also in breach of its Article V obligations because, at this time, Myanmar does not have a justice system capable of ensuring “effective penalties for persons guilty” of the crime of genocide.

7. Continuing genocidal intent

238. The Mission’s second phase of investigation provided further evidence that strengthens the inference of genocidal intent identified in its report in September 2018. The Mission has also concluded on reasonable grounds that there is sufficient evidence for it to infer that the State continues to harbor genocidal intent. This is evident in the Government’s acts and omissions that maintain a system of persecution and other discriminatory treatment against the Rohingya, depriving them of their fundamental rights so that they live in deplorable and inhumane conditions. These acts and omissions include the failure to reform the Citizenship Law, the inhumane use of the NVC process and the annual household listing process. They include the Government’s clearance, destruction, confiscation and building on lands of the forcibly displaced Rohingya. They include the Government’s application of laws and policies that keep Rohingya uprooted and living in inhumane conditions through their inability to return home and the deprivation of items essential to their survival. They include the lack of any accountability and of public condemnation to prevent “clearance operations” from recurring and to end the continuing persecution of Rohingya. They include the Government’s tolerance for public rhetoric of hatred and contempt for the Rohingya. All of these measures embody the discriminatory rationale for the underlying acts of genocide and all of them remain present in Myanmar at the time of writing. The Government is able but unwilling to bring them to an end. This strengthens the inference of genocidal intent in the past and provides the basis for an inference that the State continues to harbor genocidal intent.

8. Serious risk of genocide

239. The Mission’s final assessment of the rules of State responsibility under the Genocide Convention pertains to Myanmar’s obligation to prevent genocide. This obligation is triggered when there is serious risk of genocide.⁵⁴³ There is limited case law to assist the Mission in making its assessment of whether a risk is present and is serious in nature. The Mission made its assessment by comparing the current situation in Rakhine

⁵⁴⁰ Myanmar Constitution (2008), art. 20(b). Available at http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf.

⁵⁴¹ Myanmar Constitution (2008), art. 343(b). Available at http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf.

⁵⁴² See, Shoon Naing and Simon Lewis, “Exclusive: Myanmar soldiers jailed for Rohingya killings freed after less than a year”, Reuters, 27 May 2019. Available at <https://www.reuters.com/article/us-myanmar-rohingya-soldiers-exclusive/exclusive-myanmar-soldiers-jailed-for-rohingya-killings-freed-after-less-than-a-year-idUSKCN1SX007>; Htet Naing Zaw, “Military Chief Pardoned Soldiers Involved in Rohingya Massacre”, Irrawaddy, 29 May 2019. Available at <https://www.irrawaddy.com/news/burma/military-chief-pardoned-soldiers-involved-rohingya-massacre.html>; and Htoot Thant, “Tatmadaw defends release of soldiers jailed for Inn Din killings”, Myanmar Times, 3 June 2019. Available at <https://www.mmtimes.com/news/tatmadaw-defends-release-soldiers-jailed-inn-din-killings.html>.

⁵⁴³ 1948 Convention on the Prevention and Punishment of the Crime of Genocide, art. I.

State with the genocide risk factors identified by the UN Office on Genocide Prevention and the Responsibility to Protect.⁵⁴⁴

240. The UN Office on Genocide Prevention and the Responsibility to Protect has identified eight common risk factors for “atrocities crimes” and two specific risk factors for genocide. All these factors are present in Myanmar at the time of writing. The Mission therefore concludes on reasonable grounds that the risk of genocide continues at the level of “serious” risk.

241. The Mission applied the eight common risk factors to the present situation in Myanmar. It found on reasonable grounds: first, Rakhine is plagued with instability; second, the Tatmadaw has a record of serious violations of international human rights and humanitarian law; third, State structures, in particular civilian oversight of the military and an independent judiciary, are weak; fourth, the Government has motives and incentives to remove the Rohingya and take over their lands; fifth, the Tatmadaw has demonstrated a capacity to commit atrocity crimes; sixth, there is an absence of mitigating factors, including outside pressure from influential third party states; seventh, the Tatmadaw is empowered by strong Constitutional authorities that grant it discretion and freedoms to engage in violations and to make the preparatory actions to do so; eighth, Rakhine State is in a fragile situation where relatively isolated acts, such as intercommunal tensions, protests and criticisms from Rohingya or the use of force by an armed group, could trigger atrocity crimes.⁵⁴⁵ The two risk factors that the UN Office on Genocide Prevention and the Responsibility to Protect identified specifically for genocide are also present: first, intergroup tensions or patterns of discrimination against the Rohingya remain, without abatement; second, signs of an intent to destroy a protected group, in whole or in part, persist.⁵⁴⁶

242. In view of this assessment, the Mission concludes on reasonable grounds that the Rohingya people remain at serious risk of genocide under the terms of the Genocide Convention.

243. Having formed this conclusion, the Mission points out the obligations of *all* States parties, under the Genocide Convention, to prevent genocide.⁵⁴⁷ It is not directly within the Mission’s mandate to assess whether specific States other than Myanmar have failed or are now failing in their obligations to prevent genocide. However, it is appropriate for the Mission to refer States to the *Legal framework* section of this report, in which the Mission observes that the obligation to prevent genocide has a corresponding duty to act that arises when a State “learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed”.⁵⁴⁸ In these circumstances, all States parties to the Genocide Convention have a duty to make use of the means they have available to deter

⁵⁴⁴ UN Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes A tool for prevention*, 2014. Available at https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.49_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf (accessed 29 May 2019).

⁵⁴⁵ UN Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes A tool for prevention*, 2014, available at https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.49_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf (accessed 29 May 2019).

⁵⁴⁶ UN Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes A tool for prevention*, 2014, available at https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.49_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf (accessed 29 May 2019), p. 10-17.

⁵⁴⁷ 1948 Convention on the Prevention and Punishment of the Crime of Genocide, art. I.

⁵⁴⁸ 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. 431.

“those suspected of preparing genocide, or reasonably suspected of harbouring specific intent”.⁵⁴⁹

9. Impossibility of return

244. International law affords persons displaced from their country the right to voluntary, safe, dignified and sustainable return to their country of origin.⁵⁵⁰ These principles are embedded in the obligation of *non-refoulement*. The four elements reflect the basic provisions of international human rights law that protect the humanity and dignity of all people. Return on this basis is also a rule of international humanitarian law.⁵⁵¹ Assisting with voluntary, safe, dignified and sustainable repatriation of refugees was a founding purpose of UNHCR.⁵⁵²

245. The requirement of voluntariness has been interpreted by UNHCR as involving the individual making a free and informed choice.⁵⁵³ Repatriation must also provide individuals with physical, legal and material safety and efforts towards reconciliation, including non-discriminatory access to services, access to means of survival and basic services in early stages of return, the promotion of equity between displaced persons and local residents, and an enabling legal framework to ensure, for example, citizenship, property, registration and documentation.⁵⁵⁴ Voluntariness, safety and reconciliation are critical for ensuring that the return is safe and sustainable and that the Government and neighbouring communities are prepared to accept and facilitate the reintegration of those returning.

246. The Guiding Principles on Internally Displaced Persons (Guiding Principles) provide authoritative guidance on how States should protect people from displacement within their borders and protect people during such displacement. They provide standards for return, resettlement and reintegration.⁵⁵⁵ Though not legally binding, they reflect and are consistent with international human rights law, international humanitarian law and analogous refugee law. They also restate the relevant principles applicable to IDPs, clarify any areas of uncertainty and address the protection gaps.⁵⁵⁶ Similar to human rights, refugee and international humanitarian law, under Principle 28, Myanmar must establish conditions and provide the means that allow IDPs “to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country”. Principle 28 also provides that those authorities must endeavour to facilitate the reintegration of IDPs and should “ensure the full participation” of IDPs in the “planning and management of their return or resettlement and reintegration”.⁵⁵⁷

247. When assessing the situation of the displaced Rohingya inside and outside Myanmar’s borders in the context of the right to voluntary, safe, dignified and sustainable

⁵⁴⁹ 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. 431. See, also, ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Provisional Measures, Order of 8 April 1993, para. 52 (In its provisional measures order, the Court ordered the Federal Republic of Yugoslavia (Serbia and Montenegro) to “take all measures within its power to prevent commission of the crime of genocide.”)

⁵⁵⁰ UNHCR Executive Committee, Conclusion, No. 40 (XXXVI) – 1985 – Voluntary Repatriation. See, also, UNHCR, *Handbook for Repatriation and Reintegration Activities*, May 2004, available at <https://www.refworld.org/docid/416bd1194.html>; UNHCR Executive Committee, Conclusion No. 101 (LV) – 2004 – Legal Safety Issues in the Context of Voluntary Repatriation of Refugees.

⁵⁵¹ See J.M. Henckaerts and L. Doswald-Beck, “Customary International Humanitarian Law. Volume I: Rules” (Cambridge, ICRC/Cambridge University Press, 2005), rule 132 (return of displaced persons).

⁵⁵² General Assembly Res. 428 (V) (14 December 1950).

⁵⁵³ UNHCR, *Handbook for Repatriation and Reintegration Activities*, May 2004, available at <https://www.refworld.org/docid/416bd1194.html>.

⁵⁵⁴ UNHCR, *Handbook for Repatriation and Reintegration Activities*, May 2004, available at <https://www.refworld.org/docid/416bd1194.html>.

⁵⁵⁵ See, generally, E/CN.4/1998/53/Add.2.

⁵⁵⁶ E/CN.4/1998/53/Add.2, para. 9 (Introductory note).

⁵⁵⁷ E/CN.4/1998/53/Add.2, Principle 28.

return, the Mission concludes on reasonable grounds that the necessary conditions for return have not been met and, in fact, cannot be met at this time. Rohingya have repeatedly reaffirmed this when expressing both their desire to return home as soon as possible and their refusal to be forced back because the conditions are appallingly unacceptable. They are fully justified in their refusals. The Mission draws the conclusion that it is unsafe, inhumane, unsustainable and impossible for Rohingya to return on the same bases on which it draws its conclusion that the Rohingya continue to be the victims of crimes against humanity, it infers that the Government harbours genocidal intent and it concludes that the Rohingya are at serious risk of being the victims of genocide.

248. The Government is able but unwilling to change conditions in Rakhine State to ensure the Rohingya are able to enjoy all their human rights. This is perhaps the strongest indication of why Rohingya justifiably insist that they are not prepared to return at this time.

249. The Mission also takes note that Myanmar should comply with the *Principles on housing and property restitution for refugees and displaced persons* (Pinheiro Principles), which apply to the issue of land, home, and property restitution for people displaced due to arbitrary or unlawful deprivation of their homes, lands, properties or places of habitual residence.⁵⁵⁸ The Pinheiro Principles reflect widely accepted principles of international human rights, refugee and humanitarian law and related standards.⁵⁵⁹ Under the principles, everyone who has been arbitrarily or unlawfully deprived of housing, land and/or property should be able to submit a claim for restitution and/or compensation.⁵⁶⁰ The notion of “arbitrariness” under international human rights law is broader than “against the law” and must be interpreted to include elements of inappropriateness, injustice, lack of predictability, due process of law, reasonableness, necessity and proportionality.⁵⁶¹

250. Additionally, the process, including appeals, should be independent and impartial⁵⁶² and should be just, timely, accessible, free of charge, and age and gender sensitive.⁵⁶³ States should also ensure that the restitution claims process is accessible for refugees and IDPs regardless of their location during displacement,⁵⁶⁴ no one should be persecuted or punished for making a restitution claim,⁵⁶⁵ and restitution programmes are carried out with adequate consultation and participation with the affected persons.⁵⁶⁶ Arbitrary and discriminatory laws, as well as statutes of limitations, should not prejudice the restitution process,⁵⁶⁷ and States should immediately repeal laws with discriminatory effect on the enjoyment of the right to housing, land and property restitution.⁵⁶⁸ All refugees and IDPs have the right to full and effective compensation as an integral component of the restitution process.⁵⁶⁹

10. Business and development assistance in Rakhine State

251. The Mission reiterates its view that businesses and development assistance programmes in Rakhine State should take the necessary steps to ensure their actions do not enrich the Tatmadaw or support Government efforts that reshape the demographic

⁵⁵⁸ Principles on housing and property restitution for refugees and displaced persons (Pinheiro Principles), E/CN.4/Sub.2/2005/17, 28 June 2005, principle 1.1, available at <https://www.unhcr.org/protection/idps/50f94d849/principles-housing-property-restitution-refugees-displaced-persons-pinheiro.html>.

⁵⁵⁹ Ibid., para. 8 (Introduction).

⁵⁶⁰ Ibid., principle 13.1..

⁵⁶¹ United Nations Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights on the right to life, 30 October 2018, CCPR/C/GC/36, para. 12.

⁵⁶² Pinheiro Principles, principle 13.1.

⁵⁶³ Ibid., principle 13.2.

⁵⁶⁴ Ibid., principle 13.4.

⁵⁶⁵ Ibid., principle 13.12.

⁵⁶⁶ Ibid., principle 14.1.

⁵⁶⁷ Ibid., principle 19.1.

⁵⁶⁸ Ibid., principle 19.2.

⁵⁶⁹ Ibid., principle 21.1.

composition of Rakhine State through the relegation of Rohingya to inhumane living conditions, by pushing them off their lands and by keeping them off their lands. The Mission concludes on reasonable grounds that ending the Rohingya's human rights crisis requires, among other measures, both accountability and humane investment in "clean" markets and industries that are not tainted by their links to the Tatmadaw. Those considering business or development assistance in Rakhine State need to undertake a comprehensive and effective evaluation of the Government's policies towards Rohingya to ensure that any economic engagement does not directly or inadvertently perpetuate the widespread pain and suffering the Government is causing the Rohingya, the damage the Government has caused to their homes and properties, and the risks that the Government's policies pose to future generations of Rohingya, in particular children, to live with dignity and respect. The Tatmadaw's tight hold on Rakhine State and the continuing persecution of the remaining Rohingya population make it impossible under the current circumstances to undertake business, investment or development there without either enriching the Tatmadaw further or reinforcing both the expulsion of the majority of the Rohingya population and the marginalisation of those who remain. The Mission concludes that a moratorium should be imposed on domestic and international investment and development assistance in Rakhine State at this time. Such moratorium could be ended once the restrictions on the remaining Rohingya population in Rakhine are lifted and they can enjoy rights free from discrimination on the basis of equality with the non-Rohingya population. This, in turn, would allow the Rohingya to benefit from investment and development assistance on an equal footing with the rest of the population in Rakhine State. In implementing a moratorium, due consideration should be given to ensure it does not have adverse socio-economic impacts on Rohingya and other communities in Rakhine State that would result in further harm. The moratorium must not prevent life-saving programmes and services from being provided.

V. The Conflict between the Tatmadaw and the Arakan Army

A. Introduction

252. On 4 January 2019, as Myanmar celebrated its Independence Day, the Arakan Army (AA) launched coordinated attacks on four border police outposts in northern Buthidaung Township, Rakhine State, killing 13 police officers.⁵⁷⁰ On 7 January 2019, the spokesperson of the President's Office reportedly stated that the Myanmar Government had "directed" the military to carry out "counter-insurgent operations".⁵⁷¹ There have been clashes between the AA and the Tatmadaw since 2015, predominantly in Paletwa Township in Chin State, resulting in continuing displacement of Chin communities. The conflict intensified from October 2018. However, 4 January 2019 marked a significant escalation in hostilities, bringing the conflict down into Rakhine state for the first time on a large scale.

253. Since January 2019, the Tatmadaw has been conducting airstrikes with fighter jets, deployed helicopters, and relied on heavy artillery to target AA positions, as well as engaged in gunfire battles, including in and around villages. The Mission documented the Tatmadaw's use of force resulting in loss of civilian life, civilian injury, and damage to civilian objects, including important objects of cultural heritage. In several instances, this was due to the Tatmadaw's use of force in areas close to civilian settlements. In some cases the attacks were conducted with such disregard for civilian life as to constitute

⁵⁷⁰ Global New Light of Myanmar, "AA launches massive coordinated attacks on four border police outposts in Buthidaung Township, leaves 9 injured, 13 police personnel killed" (5 January 2019).

⁵⁷¹ Global New Light of Myanmar, "Coord meeting on international relations, national security held at Presidential Palace" (8 January 2019); Reuters, "Myanmar's civilian, military leaders meet, vow to 'crush' Rakhine rebels" (7 January 2019). See also: The Irrawaddy, "AA must give up goal of confederation: Myanmar military" (18 January 2019), noting that on 18 January 2019 at a press conference, a military spokesman claimed that during the 7 January 2019 meeting Aung San Suu Kyi "instructed us to effectively crush the AA".

indiscriminate attacks or to indicate that the attacks were directed against the civilian population. The Tatmadaw also used other tactics in its military operations that the Mission previously documented in Rakhine, Kachin and Shan States, such as torturing people suspected of being members of, or associated with, the AA, using forced labour, restricting humanitarian access and seizing civilian property, including food and other items indispensable to the survival of the civilian population.

254. The Mission also documented the Tatmadaw's use of schools and religious buildings for military purposes. The conflict between the AA and the Tatmadaw is having devastating consequences for civilians in Rakhine and Chin States. Ethnic Rakhine are the main victims of the conflict, but Chin minority groups and Rohingya who reside in active conflict areas are also severely affected. An estimated 50,000 civilians have been displaced into makeshift temporary displacement sites, many of whom do not have access to adequate humanitarian assistance.

255. The Mission has also received credible reports of at least four ethnic Rakhine villages being burned by the Tatmadaw.⁵⁷² The Mission was unable to verify these reports through satellite imagery due to persistent cloud cover during the rainy season and due to the Government imposed internet shutdown that began on 20 June 2019.⁵⁷³ The Mission is nonetheless concerned about these allegations because the burning of villages is a known tactic of the Tatmadaw.⁵⁷⁴ Further investigations are therefore warranted.

256. The Myanmar Government's response also included a crackdown on fundamental freedoms, which included the internet shutdown. The shutdown creates an information vacuum that makes it difficult to monitor the human rights impact of the Government's military operations. It has consequences for the delivery of humanitarian assistance. The

⁵⁷² **INCIDENT ONE:** Allegations that the ethnic Rakhine village Ah Myet Taung, Rathedaung Township, was burned on 5 July 2019 see: Radio Free Asia, "Rakhine Villagers Say Myanmar Army Burned Houses After Fighting With Ethnic Army (5 July 2019), Min Aung Khine. "Homes Set Ablaze After Fighting in N. Rakhine" (The Irrawaddy, 8 July 2019); See also: <https://burma.irrawaddy.com/news/2019/07/07/197254.html>; <https://burmese.narinjara.com/news/detail/5d1f1cc3a337d1043aa0b3ac>; <http://burmese.dvb.no/archives/335870>; <https://www.vom-news.com/news/2019/07/06/%E1%80%9B%E1%80%81%E1%80%AD%E1%80%AF%E1%80%84%E1%80%B9%E1%80%B1%E1%80%BB%E1%80%99%E1%80%AC%E1%80%80%E1%80%B9%E1%80%95%E1%80%AD%E1%80%AF%E1%80%84%E1%80%B9%E1%80%B8%E1%80%99%E1%80%BD%E1%80%AC-%E1%80%90/>. **INCIDENT TWO:** Allegations that the ethnic Rakhine village Nwar Yone Taung Village, Buthidaung Township, was burned on 13 July 2019. See: <https://www.facebook.com/khitthitnews/posts/686923625078320>; <https://burmese.narinjara.com/news/detail/5d29a6daa337d1043aa0b404>; <https://burmese.narinjara.com/news/detail/5d2ad6f3a337d1043aa0b40c>, <https://burmese.voanews.com/a/4999816.html>; <https://www.rfa.org/burmese/news/butheetaung-fire-07142019080110.html>. **INCIDENT THREE:** Allegations that 8 homes in the ethnic Rakhine village Kyaukmaw Paik Seik Village, Myebon Township, was burned on 23 July 2019. See: Radio Free Asia, "Myanmar Army Denies Burning Fishing Village Near Site of Rebel Attack on Naval Boats". <https://www.omeia.news/%E1%80%90%E1%80%95%E1%80%B9%E1%80%99%E1%80%B1%E1%80%90%E1%80%AC%E1%80%B9%E1%80%B1%E1%80%9B%E1%80%94%E1%80%B2%E1%82%94-aa-%E1%80%90%E1%80%AF%E1%80%AD%E1%80%B9%E1%80%80%E1%80%B9%E1%80%95%E1%80%BC/>. **INCIDENT FOUR:** Allegations that an abandoned ethnic Rakhine village of U Yin Thar village, Buthidaung Township was burned on 4 September 2019, see: <https://burma.irrawaddy.com/news/2019/09/05/203050.html>, https://www.rfa.org/burmese/program_2/ooyintha-village-fire-09052019085202.html, <https://www.rfa.org/burmese/news/uyintha-village-fired-09042019092626.html>, <https://burmese.voanews.com/a/rakhine-conflict/5069288.html>

⁵⁷³ On 1 September 2019, it was reported that Ministry of Transport and Communications lifted the internet ban in Maungdaw, Buthidaung, Rathedaung and Myebon Townships in Rakhine and Paletwa Township in Chin State. See Telenor Group, See: Telenor, "Internet Services Restored in Five Townships in Myanmar" (1 September 2019); The Irrawaddy, "Myanmar Govt Restores Internet Access to Parts of Rakhine, Chin States" (2 September 2019); The other four townships remain under the ban at the time of writing.

⁵⁷⁴ A/HRC/39/CRP.2, paras 959 – 977.

Mission is also concerned with the Government's increasingly unnecessary and disproportionately aggressive response towards those reporting on the military's activities, in particular those highlighting human rights violations.

257. In June 2019, the AA reported that, between January and May 2019, the AA was responsible for 1,144 Tatmadaw casualties,⁵⁷⁵ a figure that the Tatmadaw reportedly disputes.⁵⁷⁶ Credible information indicates nonetheless that Tatmadaw casualties likely number in the several hundred.⁵⁷⁷ Although the AA has not reported on its estimated casualties, credible estimates indicate that they may number over 100.⁵⁷⁸

258. The Mission also verified abuses by the AA, committed predominantly against Chin civilians. These include the AA's use of forced labour, arbitrary deprivation of liberty. The AA also engaged in theft of civilian property. Some of these abuses may amount to war crimes.

259. At the time of writing, the conflict did not appear to be dissipating. To the contrary, the conflict has affected nine townships of Rakhine State and Paletwa Township of Chin State.⁵⁷⁹ The unilateral ceasefire declared by the Tatmadaw in other States on 21 December 2018 and extended until 21 September 2019 appears to have enabled the security forces to focus their attention and resources on Rakhine State. It is estimated that approximately 10,000 Tatmadaw troops are presently in the region.⁵⁸⁰ This includes the deployment of elements of at least eight Light Infantry Divisions (LID), namely LIDs 11, 22, 33, 44, 55, 66, 77 and 99.⁵⁸¹ Some of these LIDs are notorious for their flagrant disregard for international human rights law and international humanitarian law.⁵⁸² The Tatmadaw have also deployed Border Guard Forces from Karen State to support its soldiers in Rakhine.⁵⁸³

260. The Mission remains deeply concerned that the current situation, already grave, could deteriorate further, with wide-reaching and long lasting implications not only for Rakhine and Chin States, but also for the country and the region.

B. The Arakan Army

261. Following its formation in 2009, reportedly as a small group of approximately 20 recruits, the AA grew rapidly in strength and capabilities.⁵⁸⁴ The AA is a well-trained force that operates under a clear command structure. The AA's proclaimed "Commander-in-Chief", Twan Mrat Naing, has overall control of and decision-making authority for the

⁵⁷⁵ LI-187, LM-054, See also: <https://bit.ly/2wOOLBb>

⁵⁷⁶ Min Aung Khine, "Military Reject AA's Casualty Report," (The Irrawaddy, 12 June 2019) See also: <https://burma.irrawaddy.com/news/2019/06/11/194437.html>

⁵⁷⁷ LI-187, LM-054, See also: Anthony Davis, "Why Myanmar is losing the Rakhine War" (Asia Times, 2 July 2019), Min Aung Khine, "Military Reject AA's Casualty Report" (The Irrawaddy, 12 June 2019).

⁵⁷⁸ LI-187, LM-054, Anthony Davis, "Why Myanmar is losing the Rakhine War" (Asia Times, 2 July 2019).

⁵⁷⁹ Confirmed fighting in Maungdaw, Buthidaung, Rathedaung, Ponnagyun, Mrauk-U, Kyauktaw, Minbya, Myebon and Ann Townships, Rakhine State.

⁵⁸⁰ The Irrawaddy, "More than a Dozen Soldiers, Including Captain, Killed in Clash with AA in Chin State" (8 March 2019), Anthony Davis, "Why Myanmar is losing the Rakhine war" (Asia Times, 2 July 2019).

⁵⁸¹ LM-035, LM-054, LM-187. See also: Anthony Davis, "Why Myanmar is losing the Rakhine War" (Asia Times, 2 July 2019); The Irrawaddy, "More than a Dozen Soldiers, Including Captain, Killed in Clash with AA in Chin State" (8 March 2019), The Irrawaddy, "Military Commanders Reshuffled in Restive Rakhine" (28 May 2019), David Scott Mathieson, "A New War Rages in Myanmar" (Asia Times, 15 January 2019); Chin Human Rights Organization, "Tatmadaw Initiate Widespread Forced Labour Demands on Chin Civilians in Effort to Keep Light Infantry Division Stocked with Food Supplies" (News Release, 24 May 2019), The Irrawaddy, "At Least 20 Troops Killed in Paletwa Clashes, AA Says" (27 May 2019).

⁵⁸² In particular the 33rd and 99th LIDs. See A/HRC/39/CRP.2 para. 1555.

⁵⁸³ LI-187, LM-049.

⁵⁸⁴ LI-187, LM-028, LM-035.

group. Up until 2014, the group was largely located in Kachin State, in Kachin Independence Organisation (KIO) controlled territory, where it continues to maintain its headquarters. From 2015, groups of AA fighters slowly started to move into Paletwa Township, Chin State. By 2018, they had started taking up positions in remote parts of northern Rakhine State.⁵⁸⁵

262. The AA has military and political wings.⁵⁸⁶ The military wing is organized hierarchically. Twan Mrat Naing, who has the overall decision-making authority for the group. He is based in Kachin State at the AA headquarters in Laiza.⁵⁸⁷ AA fighters wear military style uniforms with badges showing their ranks,⁵⁸⁸ although in some circumstances fighters do not wear uniforms, especially when carrying out intelligence operations.⁵⁸⁹ The political wing of the AA is the United League of Arakan (ULA). Some leaders of the ULA reside outside Myanmar and often represent the organization, including in political negotiations.⁵⁹⁰

263. Today, the AA, is estimated to have between 7,000 and 10,000 fighters, some of whom remain in Kachin State, but many of whom are now actively deployed in the active conflict areas of Rakhine and Chin States.⁵⁹¹ The AA may also have access to Bangladeshi territory due to the porous nature of the border.⁵⁹² The AA's sustained, sophisticated attacks on the military demonstrate the AA's military capabilities and access to weaponry, which includes sniper rifles, light artillery and improvised explosive devices (IEDs).⁵⁹³ Credible reports indicate that much of their weaponry is obtained from other ethnic armed organisations in northern Myanmar.⁵⁹⁴

264. While attacks by the AA against the Tatmadaw have been taking place since 2015, the NLD decision in 2016 to nominate a NLD candidate for the position of Rakhine State Chief Minister, who was not favoured by the ruling Rakhine political party, coupled with the absence of visible improvements for Rakhine in the months after the NLD party took office, further drove the AA to pursue its goals through military means.⁵⁹⁵

265. In January 2018, government security forces shot and killed seven ethnic Rakhine protesters in Mrauk-U Town.⁵⁹⁶ The impunity that followed, and the jailing of Rakhine

⁵⁸⁵ LI-187, LM-028, LM-049, LM-054. See also: The Irrawaddy, "The Causes and Likely Effects of the Arakan Army's Attacks," (12 January 2019); Angshuman Choudhury, "Decoding the Arakan Army: Emergence and Political Framing (Part-1)," (Institute of Peace and Conflict Studies, 25 February 2019); International Crisis Group, *A New Dimension of Violence in Myanmar's Rakhine State* (January 2019).

⁵⁸⁶ LI-187, DM-022, LM-022, LM-028, LM-035.

⁵⁸⁷ LI-187, LM-022, LM-025, LM-028, Kyaw Linn, "'Way of Rakhita': dream or nightmare?" (Asia Times, 28 February 2019).

⁵⁸⁸ CI-247, CI-248, CI-249, CI-250, CI-259, CI-314, LI-143, LI-145, LI-146, LI-148, LI-150, LI-153, LI-156, LI-160, LI-161.

⁵⁸⁹ CI-248, CI-249, CI-250, LI-187.

⁵⁹⁰ LI-183, LM-022, LM-028, LM-035.

⁵⁹¹ LM-028, LM-049, Anthony Davis, "Why Myanmar is losing the Rakhine War" (Asia Times, 2 July 2019); Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar's Rakhine State*, (May 2019), p. 12; International Crisis Group, *A New Dimension of Violence in Myanmar's Rakhine State* (January 2019).

⁵⁹² The Eurasia Review, "Arakan Army: Myanmar's New Front of Conflict – Analysis" (14 July 2019); The Irrawaddy, "The Causes and Likely Effects of the Arakan Army's Attacks" (12 January 2019).

⁵⁹³ LI-187, LM-028, LM-049; The Irrawaddy, "Analysis: Arakan Army - A Powerful New Threat to the Tatmadaw" (8 January 2019); International Crisis Group, *A New Dimension of Violence in Myanmar's Rakhine State* (January 2019), p. 6. For a definition of EIDs, see *Landmines, improvised explosive devices and explosive remnants of war*.

⁵⁹⁴ LI-187, LM-028, LM-049, LM-054, The Irrawaddy, "Analysis: Arakan Army - A Powerful New Threat to the Tatmadaw" (8 January 2019); The Eurasia Review, "Arakan Army: Myanmar's New Front of Conflict – Analysis" (14 July 2019).

⁵⁹⁵ International Crisis Group, *A New Dimension of Violence in Myanmar's Rakhine State* (January 2019), p. 6; Angshuman Choudhury, "Decoding the Arakan Army: Emergence and Political Framing (Part-1)," (Institute of Peace and Conflict Studies, 25 February 2019).

⁵⁹⁶ A/HRC/39/CRP.2, paras 444 – 453.

political leader Aye Maung on what were criticized as politically motivated charges for high treason, also fuelled the AA's resentment against the Tatmadaw and the Union level government.⁵⁹⁷

266. The AA espouses a political agenda of Rakhine self-determination through a confederacy under which the Rakhine would have autonomy, except in matters of defence, trade regulation and foreign affairs.⁵⁹⁸ The AA refers to the historical Rakhine Kingdom, sometimes referred to as the "Kingdom of Arakan", and to their colonization by the Bamar, as they promote "the way of the *Rakhita*", an ideology focused on self-determination for the Rakhine.⁵⁹⁹ They also claim that Paletwa Township, in Chin State, belongs to the Kingdom of Arakan.⁶⁰⁰ The AA has stated that they are only in conflict with the Tatmadaw, that its operations are not aimed at the Rohingya,⁶⁰¹ and has denied any connection to ARSA.⁶⁰²

267. The AA is a member of the Federal Political Negotiation and Consultative Committee (FPNCC), a bloc of seven ethnic armed groups that have not signed the National Ceasefire Agreement (NCA).⁶⁰³ The FPNCC has put forth alternative principles for negotiations that it expects the Government to consider before its member organizations sign the NCA. The demands include a proposal for a confederate system for Myanmar.⁶⁰⁴

268. In December 2018, the unilateral four month ceasefire, declared by the Tatmadaw in all other States, and currently extended until 21 September 2019,⁶⁰⁵ excluded Rakhine State and therefore the AA. The Northern Alliance, which includes the AA, put out a statement when the ceasefire was announced calling for Rakhine State to be included.⁶⁰⁶ Furthermore, some members of the FPNCC have indicated they would fight alongside the AA in Rakhine State if needed, despite their own areas of operation being covered by the ceasefire.⁶⁰⁷ At the time of writing the Mission has not received information that other EAOs have provided fighters to support the AA in Rakhine State. However, the AA has admitted to joining other

⁵⁹⁷ Nyan Hlaing Lynn, "Rakhine political leader Dr Aye Maung arrested in Sittwe after Mrauk U violence" (Frontier Myanmar, 18 January 2018); International Crisis Group, *A New Dimension of Violence in Myanmar's Rakhine State* (January 2019), p.6; Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar's Rakhine State*, (May 2019), p.11.

⁵⁹⁸ LI-187, LM-035, The Irrawaddy, "Confederation the only option for Arakanese people, AA chief says" (11 January 2019); Nan Lwin Hnin Pwint, "Arakan Army Chief Promises Myanmar Military, Govt Eye For an Eye" (The Irrawaddy, 17 January 2019); Kyaw Linn, "'Way of Rakhita': dream or nightmare?" (Asia Times, 28 February 2019).

⁵⁹⁹ Kyaw Linn, "'Way of Rakhita': dream or nightmare?" (Asia Times, 28 February 2019), Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar's Rakhine State*, (May 2019), p.12.

⁶⁰⁰ LI-160, LI-187, LM-043.

⁶⁰¹ LI-187, LM-028, LM-035, See also: The Irrawaddy, "AA leader dismisses 'ridiculous' claim that his group has ties to ARSA", (11 April 2018).

⁶⁰² Nan Lwin Hnin Pwint, "AA Leader Dismisses 'Ridiculous' Claim that His Group Has Ties to ARSA" (The Irrawaddy, 11 April 2018), Radio Free Asia, "Interview: 'The Government Army's Persecution Is Making us Stronger'" (25 March 2019).

⁶⁰³ LI-187, LM-035, The Irrawaddy, "Confederation the only option for Arakanese people, AA chief says" (11 January 2019).

⁶⁰⁴ The Armed Conflict Location & Event Data Project (ACLED), *Ceasefires and Conflict Dynamics in Myanmar*, (May 2019), The Irrawaddy, "Confederation the only option for Arakanese people, AA chief says", (11 January 2019).

⁶⁰⁵ The Office of the Commander-in-Chief of Defence Services, "Statement on Ceasefire and Eternal Peace" (30 June 2019): <http://cincds.gov.mm/node/3297>; See also, Swe Lei Mon, "Tatmadaw extends ceasefire a second time, to August 31" (Myanmar Times, 02 July 2019); Ministry of Information, Tatmadaw extends ceasefire until 21 September 2019, <https://www.moi.gov.mm/moi:eng/?q=news/1/09/2019/id-18930>.

⁶⁰⁶ The Northern Alliance, "Statement from the Northern Alliance (KIO/KIA, PSLF/TNLA, MNTJP/MNDAA, ULA/AA)" (27 December 2018): <http://archive.is/vVuQv>; See also: Lawi Weng, "Northern Alliance Demands Ceasefire Covers Rakhine State" (The Irrawaddy, 28 December 2018).

⁶⁰⁷ MNTJP/MNDAA, PSLF/TNLA, ULA/AA, "Statement condemning the Myanmar military's acts of war crimes that target the local civilians in Mrauk-U, Rakhine" (19 March 2019), available at: <http://archive.is/GekCp>.

EAOs in an attack on a military academy near Mandalay in northern Shan State on 15 August 2019 as part of the Northern Alliance.⁶⁰⁸

269. There is widespread support and sympathy for the AA among the ethnic Rakhine people. Against the backdrop of perceived persistent discrimination and political disenfranchisement by the Bamar-majority Government, ethnic Rakhine people broadly perceive the AA as a legitimate armed group that represents their interests.⁶⁰⁹ As one Rakhine man said, “The AA is fighting for the freedom of Arakan, as the Arakanese have been oppressed by the Tatmadaw. The Tatmadaw is not our Army. They abuse us.”⁶¹⁰ Popular support for the AA appears to be growing as a result of the heavy-handed Tatmadaw operations⁶¹¹ and bolstered by widespread support for its leader Twan Mrat Naing.⁶¹²

270. Ethnic Rakhine are joining the AA from their villages, from mining areas closer to the AA headquarters in Kachin State and from the diaspora communities across Asia.⁶¹³ The AA recruits both female and male members.⁶¹⁴ The Mission has not received any reports of forced recruitment, although some members of the Chin community feel at risk of being forced to join.⁶¹⁵ The AA claim not to recruit soldiers under the age of 18.⁶¹⁶ The Mission has not found any cases of children being forcibly recruited.

271. The AA maintains a strong and sophisticated social media presence. They have numerous websites and regularly post photographs and semi-professionally produced videos, including promotional materials such as videos of military training demonstrating the group’s fighting abilities and weaponry capacity. The AA has also developed the #ArakanDream2020 hashtag, calling for escalated actions ahead of the 2020 nationwide elections. It has stated its aim of achieving self-determination by the end of 2020.⁶¹⁷ The AA has a dedicated spokesperson who regularly engages with the media and the AA regularly issues public responses, including rebuttals to statements issued by the Tatmadaw.⁶¹⁸

272. On 5 February 2019, Facebook banned the AA from its social media platform alongside three other EAOs that have not signed the NCA, namely the Myanmar National Democratic Alliance Army, Kachin Independence Army and the Ta’ang National

⁶⁰⁸ <https://www.arakanarmy.net/post/၂၃-န-မတ-မ-တ-၃-၆-၂-မန-မ-စတ-တပ-မ-လ-တ-၀-မ-မ-က-နရ-၅-ခ-တ-၀-က-ပ-မ-ဖေ-ပ>, See also: Al Jazeera, “Myanmar rebels kill over a dozen in attack in Shan state” (16 August 2019), See also Section VI. The situation in northern Myanmar; Introduction.

⁶⁰⁹ CI-274, CI-275, CI-276, CI-278, CI-283, CI-284, CI-286, LI-165.

⁶¹⁰ CI-274.

⁶¹¹ LM-048, LM-054, Anthony Davis, “Why Myanmar’s military will win the Rakhine war” (Asia Times, 5 February 2019).

⁶¹² LM-028, LM-047, LM-054, Anthony Davis, “Why Myanmar’s military will win the Rakhine war” (Asia Times, 5 February 2019).

⁶¹³ LM-035, LM-054, International Crisis Group, *A New Dimension of Violence in Myanmar’s Rakhine State* (January 2019), p.6. Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar’s Rakhine State*, (May 2019), p.11, The Irrawaddy, “Analysis: Arakan Army - A Powerful New Threat to the Tatmadaw” (8 January 2019).

⁶¹⁴ LI-187, Radio Free Asia, “Women Are Increasingly Drawn to the Arakan Army’s Fight Against Myanmar’s Central Government” (18 April 2019), Scott Heidler, Myanmar conflict: Arakan violence rises in Rakhine state” (Al Jazeera, 26 August 2019).

⁶¹⁵ CI-252, CI-253, CI-254, CI-255, LI-151, LI-153, LI-155, LI-157.

⁶¹⁶ LI-187, LM-035.

⁶¹⁷ The Eurasia Review, “Arakan Army: Myanmar’s New Front of Conflict – Analysis” (14 July 2019), David Scott Matheison, “Myanmar’s Rakhine Torched Anew by Insurgent Fire” (Asia Times, 3 January 2019), International Crisis Group, *A New Dimension of Violence in Myanmar’s Rakhine State* (January 2019).

⁶¹⁸ LM-028, See for example: BNI Multimedia Group, “Tatmadaw (Myanmar Army) Airstrikes on Arakan Army by two Helicopters in Minbra TSP” (24 June 2019), The Irrawaddy, “Open Lawsuit Kept AA Leaders from Gov’t Peace Talks,” (9 July 2019), Radio Free Asia, “Myanmar Charges Arakan Army Leadership Under Counter-Terrorism Law” (8 July 2019).

Liberation Army.⁶¹⁹ Facebook imposed the ban on the basis that it wanted to prevent offline harm by removing groups it branded “dangerous organisations”, adding it would remove “praise, support and representation” of the groups.⁶²⁰

C. Violations by the Tatmadaw

1. Unlawful Attacks by the Tatmadaw

273. The Mission documented attacks by the Tatmadaw, during its conflict with the AA that have led to loss of civilian life, civilian injury and destruction of civilian property. The Mission assessed these incidents under international human rights law and international humanitarian law.⁶²¹ In making its legal assessment of each attack, the Mission was guided in part by the case law of international criminal law, which takes into account such factors as the means and method used in an attack, the distance between the victims and the attackers, the absence or presence of combat activity at the time and location of the incident, the presence of military activities or facilities in the vicinity that came under attack, and the status of the victims and their appearance.⁶²²

274. The Mission documented a pattern of the Tatmadaw using small arms fire and munitions with wide area effect inside and in close proximity to densely populated civilian areas. Government sources consistently claimed that the AA was present in the towns and villages where attacks have occurred but the AA and villagers consistently denied this.

275. Although it remains difficult for the Mission to verify with certainty whether AA fighters were in a particular village at a particular time, the Mission received corroborating accounts that in many locations the AA was not actively fighting from within the town or village at the time of the Tatmadaw’s attack. In many of the attacks that the Mission documented, it received no information or indication that AA fighters were killed or injured. This implies that AA fighters were not present in the town or village at the relevant time. Witnesses also consistently told the Mission that the military did not provide advance warning to civilians prior to the attacks. Civilian casualties may have been avoided, or at least minimized, if villagers had been given advanced warning of the attack.

276. While the Mission did not seek to undertake a comprehensive count of civilian casualties, credible organizations have estimated that, at the time of reporting, the conflict has resulted in approximately 91 civilian deaths and injuries to over one hundred injuries to others, including the elderly, women, men and children. Casualties have included ethnic Rakhine, Rohingya and members of Chin minorities.⁶²³

277. IEDs and/or landmines have also caused deaths and serious injuries, although the Mission was unable to determine who deployed those weapons.⁶²⁴

⁶¹⁹ LM-051, Facebook, “Banning More Dangerous Organizations from Facebook in Myanmar” (5 February 2019), available at: <https://newsroom.fb.com/news/2019/02/dangerous-organizations-in-myanmar/> (Accessed 15 August 2019). See also Reuters, “Facebook targets ‘dangerous’ armed groups in latest Myanmar bans” (5 February 2019), The Guardian, “‘Overreacting to failure’: Facebook’s new Myanmar strategy baffles local activists” (7 February 2019).

⁶²⁰ Facebook, “Banning More Dangerous Organizations from Facebook in Myanmar” (5 February 2019), available at: <https://newsroom.fb.com/news/2019/02/dangerous-organizations-in-myanmar/> (Accessed 15 August 2019).

⁶²¹ For a more detailed discussion of the rules of international humanitarian law see, A/HRC/39/CRP.2, paras. 50-62.

⁶²² ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-A, Appeals Chamber Judgement 17 July 2008, para. 271. The Appeals Chamber used these factors to assess whether an attack was directed at civilians under international criminal law. The Mission finds the factors helpful and relevant to assessing also whether an attack was indiscriminate under international humanitarian law.

⁶²³ FFFGEN-1555826851-6828.

⁶²⁴ See Chapter V, section G.2: The conflict between the Tatmadaw and the Arakan Army; Threats to Freedom of Expression, Association and the Press; Internet shutdown in Rakhine and Chin States.

278. The Mission investigated six attacks that resulted in the civilian deaths and injuries, including children. Despite the internet shutdown across the region,⁶²⁵ credible reports indicate that attacks following similar patterns continue to occur across the ten affected townships, with arrests, casualties and destruction of property.⁶²⁶

(a) Mrauk-U town and Ywar Haung Taw, Mrauk-U Township - 18 March 2019

279. Mrauk-U, formerly known as Mrohaung, was the capital of the Mrauk-U Kingdom from 1430 to 1785, the first Arakanese Kingdom. The town's temples, stupas, monasteries, pagodas and other monuments and structures have religious, historical and cultural significance. There are over 200 temples and pagodas from the ancient town remaining, spread out over an area of 6 by 7 kilometres. For reasons explained in the conclusions and legal findings to this section, the Mission concludes on reasonable grounds that the ancient town of Mrauk-U and various structures within that area constitute "cultural heritage" as defined and protected under international law.

280. The Government recognizes and promotes the area's cultural significance. It has taken steps to nominate the ancient town of Mrauk-U for recognition as a UNESCO World Heritage Site.⁶²⁷ The area has been on a "tentative list" for recognition under the UNESCO 1972 World Heritage Convention since 1996.⁶²⁸ The Final Report of the Advisory Commission on Rakhine State also noted the cultural significance of Mrauk-U and recommended that steps be taken to ensure its inclusion on the UNESCO list.⁶²⁹

281. On Monday 18 March 2019, two Tatmadaw attacks took place in Mrauk-U Township, one of the largest townships in Rakhine State. The first attack occurred at approximately 7 pm, when a convoy of approximately eight Tatmadaw trucks filled with soldiers drove into Mrauk-U town and opened fire.⁶³⁰ The attack took place while the convoy drove along the road through various wards of Mrauk-U town. The Mission has been informed that many people were out on the streets at the time.⁶³¹ The convoy first passed through Htan Ma Rit and Law Ka Mu wards, with soldiers shooting towards houses, resulting in damage to buildings.⁶³² A KBZ bank opposite a monastery was also damaged by the shooting.⁶³³ The convoy continued along the road, with soldiers shooting towards houses, injuring people and damaging property.⁶³⁴ According to media reports and other information that the Mission received, six people suffered bullet wounds as a result of the attack.⁶³⁵

282. The Mission received credible reports that, when the convoy passed through Let Kauk Zay ward in Mrauk-U Town, soldiers fired towards a monastery, damaging a 500

⁶²⁵ See Chapter V, section G. in this report: The conflict between the Tatmadaw and the Arakan Army; Threats to freedom of expression, association and the press.

⁶²⁶ See for example: Arakan Information Center, *Report of Deaths, Arrests, Refugees, and Military Clashes in Rakhine State, Myanmar, after Internet Shutdown*, (23 July 2019) available at: <https://www.arakan.news/2019/07/report-of-deaths-arrests-refugees-and.html> (Accessed 27 August 2019)

⁶²⁷ AM-003, As an example of steps taken, on 22 July 2019, the Deputy Minister for Religious and Cultural Affairs held a meeting between local and foreign experts to finalize the draft nomination of Mrauk-U ancient town as a cultural heritage zone.

⁶²⁸ AM-003, UNESCO, "Myauk-U Archaeological Area and Monuments", available at: <https://whc.unesco.org/en/tentativelists/824/> (accessed 9 September 2019).

⁶²⁹ Final Report of the Advisory Commission on Rakhine State, p.58.

⁶³⁰ LI-165, LI-183, LI-214, The Irrawaddy, "Reporter's Notebook: On the Ground in Mrauk-U" (1 April 2019), The Irrawaddy, "Six Civilians Injured in Shooting, Shelling in Downtown Mrauk-U" (19 March 2019).

⁶³¹ The Irrawaddy, "Reporter's Notebook: On the Ground in Mrauk-U" (1 April 2019), The Irrawaddy, "Six Civilians Injured in Shooting, Shelling in Downtown Mrauk-U" (19 March 2019).

⁶³² Ibid.

⁶³³ LI-214.

⁶³⁴ LI-183, LI-214, The Irrawaddy, "Reporter's Notebook: On the Ground in Mrauk-U" (1 April 2019).

⁶³⁵ LI-165, LI-214, The Irrawaddy, "Reporter's Notebook: On the Ground in Mrauk-U" (1 April 2019).

⁶³⁶ LI-165, The Irrawaddy, "Six Civilians Injured in Shooting, Shelling in Downtown Mrauk-U" (19 March 2019).

year old pagoda known as the Rakkha Muni Pagoda which is located inside a monastery compound.⁶³⁶ This firing also caused damage to the face, arm and stomach of a Buddha statue located inside the monastery compound.⁶³⁷ Photographs the Mission received of the damaged Buddha are consistent with the testimony.⁶³⁸ It was reported that, on 18 March 2019, the Myanmar Archaeologist Research Association requested that Mrauk-U be declared a no-war zone.⁶³⁹

283. The Mission also received information that the Tatmadaw placed artillery around Mrauk-U in proximity to historical monuments, namely the Nibuzar pagoda, the Shwe Taung pagoda and the Ratanamanaung pagoda.⁶⁴⁰ The positioning of this artillery exposed the ancient town of Mrauk-U and its monuments to AA counter-attacks. The firing of artillery from such close proximity to those monuments also endangered them by producing significant damaging vibrations, according to archaeologists and experts.⁶⁴¹ The media reported that soldiers also damaged historical structures when they “dug up trenches and used stones from ancient monuments as bunkers”.⁶⁴² One resident of Mrauk-U observed in March 2019: “Every day now the Tatmadaw shoot big weapons towards the pagoda. At the moment people cannot pay homage at the pagodas. Some pagodas have been destroyed by the weapons.”⁶⁴³

284. In a series of statements posted on its official website, the Tatmadaw claimed that the shooting in Mrauk-U town on 18 March 2019 was in response to an AA attack from civilian houses and from both sides of the road.⁶⁴⁴ According to the media, earlier in the evening the AA attacked a Tatmadaw convoy on a road from Sittwe to Mrauk-U. However, that attack was approximately 30 kilometres from where the Tatmadaw opened fire on the town of Mrauk-U.⁶⁴⁵ The Mission found no indications of an AA presence in the town of Mrauk-U or that the Tatmadaw came under attack there, including in the wards through which the convoy passed.⁶⁴⁶

285. At approximately the same time that the Tatmadaw convoy opened fire as it drove through Mrauk-U town, security forces also attacked the Rakhine village of Ywar Haung Taw located on the eastern outskirts of Mrauk-U town.⁶⁴⁷ Tatmadaw officials claimed that “AA terrorists attacked a military convoy, while the convoy was marching into Mrauk-U

⁶³⁶ LI-214, BNI Multimedia Group, “Local people in Mrauk-U remain scared after shooting in town” (20 March 2019), Nay Win San, “One Gunshot One Voice” (Development Media Group, 1 April 2019).

⁶³⁷ LI-214, Photographs on file with mission.

⁶³⁸ Ibid.

⁶³⁹ Zeyar Hein, “Archaeologists urge no-fire zone at Mrauk-U site” (The Myanmar Times, 20 March 2019).

⁶⁴⁰ FFFGEN-1555826851-1890.

⁶⁴¹ Radio Free Asia, “Archaeologists Want Myanmar Army to Remove Heavy Guns From Ancient Rakhine Temple Complex” (12 April 2019).

⁶⁴² Ibid.

⁶⁴³ LI-165.

⁶⁴⁴ The Office of the Commander-in-Chief of Defence Services, “Three AA Violent Insurgents Detained in Pan Myaung Village, Mrauk-U Township” (25 March 2019), available at: <http://cincds.gov.mm/node/2255>; The Office of the Commander-in-Chief of Defence Services, “Tatmadaw gave necessary support to local ethnic civilians injured during the attack by the AA violent insurgents to the Tatmadaw columns within ancient cultural region of Mrauk-U town” (25 March 2019), available at: <http://cincds.gov.mm/node/2260>.

⁶⁴⁵ The Irrawaddy, “Reporter’s Notebook: On the Ground in Mrauk-U” (1 April 2019); See also the conflict news from the Arakan Army: <http://archive.fo/h47K6>

⁶⁴⁶ LI-183, LI-214, Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar’s Rakhine State*, (May 2019), p.16, The Irrawaddy, “Reporter’s Notebook: On the Ground in Mrauk-U” (1 April 2019).

⁶⁴⁷ LI-214, PI-167, See also : The Irrawaddy, “Reporter’s Notebook: On the Ground in Mrauk-U” (1 April 2019), The Irrawaddy, “Shelling Injures Two Civilians in N. Rakhine, Villagers Say” (18 April 2019), Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar’s Rakhine State*, (May 2019), p.16.

town for security” and that “AA terrorists took position in civilian houses”.⁶⁴⁸ It was unclear if this was the same AA attack that the Tatmadaw used to justify its convoy opening fire in Mrauk-U town. Villagers denied the presence of AA in the village during the attack.⁶⁴⁹ On 18 March 2019, at around 7 pm, Tatmadaw soldiers shelled the village.⁶⁵⁰ Credible reports indicate that Tatmadaw forces stationed inside Police Regiment No. 31, nearby to the village, or the 540th Light Infantry Battalion based in Mrauk-U fired the munitions.⁶⁵¹

286. As a result, at least six people, including children, sustained injuries.⁶⁵² One house was completely destroyed and other houses were damaged.⁶⁵³

287. A monk who arrived at the village late that night to assist survivors described the scene he encountered:

*Injured people were coming out of their houses and bunkers. Some had been hit in the arms and legs. They were injured because of the artillery. There were no bullet holes, just damage because of the artillery explosions. One private house was on fire and other houses were hit by shrapnel.*⁶⁵⁴

288. Many of the villagers subsequently fled the village and sought refuge in a monastery in Mrauk-U town.⁶⁵⁵ A number of individuals injured in the attack sustained permanent disabilities as a result, including being unable to use their arms properly after injury, resulting in an inability to work.⁶⁵⁶ Some individuals who were wounded and sought treatment at the hospital in Mrauk-U town were later paid compensation by soldiers from the 22nd LID.⁶⁵⁷

Conclusions and legal findings: Indiscriminate and other unlawful attacks

289. The two attacks on 18 March 2019 in Mrauk-U town and Ywar Haung Taw village left twelve people, including children, injured from bullets and shelling. The Mission concludes on reasonable grounds that the attacks were indiscriminate and therefore in violation of international humanitarian law. They were indiscriminate because the attacks did not appear to be directed at a specific military objective.⁶⁵⁸ Instead, the Tatmadaw appeared to target Mrauk-U town and Ywar Haung Taw village as a single military target

⁶⁴⁸ https://myanmar.gov.mm/web/guest/news-media/news/latest-news/-/asset_publisher/idasset354/content/--12, The Irrawaddy, “Military Attacks on N. Rakhine Villages Leaves Locals Wounded, Displaced” (21 March 2019).

⁶⁴⁹ LI-214, PI-167, The Irrawaddy, “Shelling Injures Two Civilians in N. Rakhine, Villagers Say” (18 April 2019), The Irrawaddy, “Reporter’s Notebook: On the Ground in Mrauk-U” (1 April 2019), Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar’s Rakhine State*, (May 2019), p.16.

⁶⁵⁰ LI-214, See also The Irrawaddy, “Reporter’s Notebook: On the Ground in Mrauk-U” (1 April 2019), The Irrawaddy, “Shelling Injures Two Civilians in N. Rakhine, Villagers Say” (18 April 2019), Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar’s Rakhine State*, (May 2019), p.16.

⁶⁵¹ LI-183, PI-167, The Irrawaddy, “Reporter’s Notebook: On the Ground in Mrauk-U” (1 April 2019), The Irrawaddy, “Military Attacks on N. Rakhine Villages Leaves Locals Wounded, Displaced” (21 March 2019).

⁶⁵² LI-214, PI-167, Nay Win San, “One Gunshot One Voice” (Development Media Group, 1 April 2019).

⁶⁵³ LI-214, PI-167, The Irrawaddy, “Military Attacks on N. Rakhine Villages Leaves Locals Wounded, Displaced” (21 March 2019), Nay Win San, “One Gunshot One Voice” (Development Media Group, 1 April 2019).

⁶⁵⁴ LI-214.

⁶⁵⁵ LI-214, PI-167, The Irrawaddy, “Military Attacks on N. Rakhine Villages Leaves Locals Wounded, Displaced” (21 March 2019).

⁶⁵⁶ LI-214, PI-167.

⁶⁵⁷ PI-167, Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar’s Rakhine State*, (May 2019), p.16.

⁶⁵⁸ See J.M. Henckaerts and L. Doswald-Beck, “Customary International Humanitarian Law. Volume I: Rules” (Cambridge, ICRC/Cambridge University Press, 2005), rule 12 (definition of indiscriminate attacks).

without distinguishing between what it was lawfully allowed to attack and what it was prohibited from attacking under the rules of international humanitarian law.

290. The Tatmadaw claimed that it opened fire in these two areas in response to an AA attack on a Tatmadaw convoy that took place 30 kilometres from the village. The military also claimed that the AA took positions in civilian houses, presumably in the areas that the military attacked. The Mission found no evidence of this. The Mission's information also indicates that the Tatmadaw's fire was haphazard and random, as the armed convoys drove through Mrauk-U town and Ywar Haung Taw village, hitting people, houses, a 500 year-old pagoda, a Buddha statue and a bank. The fact that the Mission received no reports or indications of injuries to AA fighters further supports the conclusion that the Tatmadaw's fire was not directed specifically at the AA. Additionally, the type of munitions used in the shelling of the village indicate that the Tatmadaw may have indiscriminately shelled the village.

291. The Mission also concludes on reasonable grounds that, having carried out an indiscriminate attack on Mrauk-U town and Ywar Haung Taw village, the Tatmadaw did not take feasible precautionary measures to avoid, or in any event minimize, the civilian injury and damage to property that it caused, as required under international humanitarian law.⁶⁵⁹

Conclusions and legal findings: Attacks on cultural property

292. The Mission also concludes on reasonable grounds that the Tatmadaw's indiscriminate fire in the ancient town of Mrauk-U was a violation of rules under international law that protect cultural property. The right of access to and enjoyment of all forms of cultural heritage is guaranteed by international human rights law, including the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, to which Myanmar is a party. In its resolution 6/1 on the protection of cultural rights and property in situations of armed conflict, the Human Rights Council reaffirmed that the destruction of or any other form of damage to cultural property may impair the enjoyment of cultural rights, in particular under article 15 of the International Covenant on Economic, Social and Cultural Rights.⁶⁶⁰

293. Additionally, Myanmar is a State party to the 1954 Convention for the Protection of Cultural Property in the Event of an Armed Conflict. The Convention contains rules applicable during a non-international armed conflict⁶⁶¹ that prohibit Myanmar from using cultural property and its immediate surroundings, or of the appliances in use for its protection, for purposes which are "likely to expose it to destruction or damage".⁶⁶² The Convention also prohibits acts of hostility directed against cultural property except in cases of imperative military necessity.⁶⁶³ The Convention obliges States to prohibit, prevent and put a stop to theft, pillage, misappropriation or vandalism directed against cultural property, and absolutely prohibits acts of reprisals directed against cultural property.⁶⁶⁴ The Convention defines cultural property as "property of great importance to the cultural

⁶⁵⁹ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 15 (principles of precautions in attack).

⁶⁶⁰ See Report of the Special Rapporteur in the field of Cultural Rights, "Intentional destruction of cultural heritage", A/71/317.

⁶⁶¹ Convention for the Protection of Cultural Property in the Event of an Armed Conflict, Ratified by Myanmar 31 December 1954, see: 1954 Hague Convention, art 19,

⁶⁶² 1954 Hague Convention, arts 4 (1) and (2).

⁶⁶³ Hague Convention, arts 4 (1) and (2), Further clarified in Articles 1 and 6 of the Second Protocol to the 1954 Hague Convention as only applicable when (i) that cultural property has, by its function, been made into a military objective (meaning an object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage); and (ii) there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective.

⁶⁶⁴ 1954 Hague Convention, art. 4 (4).

heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest...”⁶⁶⁵ The Convention also establishes a system of special heightened protections for cultural property that has been internationally recognized as being culturally significant.⁶⁶⁶ The Convention’s obligations are applicable to each party to the conflict and reflective of customary law.⁶⁶⁷ Customary international law also prohibits the destruction of or wilful damage to cultural property.⁶⁶⁸ Intentionally directing attacks against religious or cultural objects is a war crime provided they are not legitimate military objectives.⁶⁶⁹

294. While Mrauk-U has not yet been listed under the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, it has been recognized, since 1996, as a site of outstanding universal cultural value that is set to be considered for inscription on the World Heritage List. The Government also recognizes Mrauk-U’s cultural significance.⁶⁷⁰ Given the facts of the situation, the Mission regards the ancient capital of Mrauk-U and its various structures to constitute cultural property under international law that should be afforded heightened protection under the 1954 Convention.

295. The 18 March 2019 attack that damaged the Rakkha Muni Pagoda, as well as the artillery positions of the Tatmadaw near the Nibuzar pagoda, the Shwe Taung pagoda and the Ratanamanaung pagoda, are all within the Government-nominated cultural property area of Mrauk-U.⁶⁷¹

296. As such, the Tatmadaw’s positioning of artillery near historical monuments, including the Nibuzar pagoda, the Shwe Taung pagoda and the Ratanamanaung pagoda, as well as its alleged use of stones from ancient monuments, indicate that the Tatmadaw violated the absolute protections that international law affords cultural property from being used for military purposes⁶⁷² and from being wilfully damaged, misappropriated or vandalized.⁶⁷³ The damage that the Tatmadaw’s 18 March 2019 attack on Mrauk-U town

⁶⁶⁵ 1954 Hague Convention, art 1(a).

⁶⁶⁶ See, ICTY, *Prosecutor v. Jokić*, Case No. IT-01-42/1, 18 March 2004, para. 23 and ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, 27 September 2016, para. 80.

⁶⁶⁷ UNESCO, Records of the General Conference, 27th Session, Paris, October–November 1993, available at: <http://unesdoc.unesco.org/images/0009/000956/095621E.pdf>, reaffirming that the rules contained in Articles 3 and 4 of the 1954 Hague Convention could be considered part of international customary law. See also, ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 98 (Appeals Chamber included Article 19 of the 1954 Hague Convention along with the core of Additional Protocol II as being part of customary international law). According to the ICRC study on customary international humanitarian law, parties to armed conflict must take special care in military operations to avoid damaging buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives. The obligation to take “special care” is a high standard and requires Myanmar to exceed the measures it is required to take to avoid damage to civilian objects. Additionally, the use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity. See J.M. Henckaerts and L. Doswald-Beck, “Customary International Humanitarian Law. Volume I: Rules” (Cambridge, ICRC/Cambridge University Press, 2005), rule 38 (attacks against cultural property), and rule 39 (use of cultural property for military purposes).

⁶⁶⁸ See J.M. Henckaerts and L. Doswald-Beck, “Customary International Humanitarian Law. Volume I: Rules” (Cambridge, ICRC/Cambridge University Press, 2005), rule 38 (attacks against cultural property), rule 40 (respect for cultural property).

⁶⁶⁹ *Ibid.*, rule 156 (definitions of war crimes).

⁶⁷⁰ AM-003, The Government has been preparing a first draft nomination of the ancient town of Mrauk-U to be recognized as a UNESCO World Heritage Site for submission in September 2019, and a final nomination dossier by February 2020. As an example of steps taken, on 22 July 2019, the Deputy Minister for Religious and Cultural Affairs held a meeting between local and foreign experts to finalize the draft nomination of Mrauk-U ancient town as a cultural heritage zone.

⁶⁷¹ FFFGEN-1555826851-4965.

⁶⁷² 1954 Hague Convention, Article 4 (1) and (2), Article 9.

⁶⁷³ 1954 Hague Convention, Article 4 (3).

caused to cultural property also indicates that the Tatmadaw violated the protections afforded under international law to cultural property from acts of hostility.⁶⁷⁴ The Mission makes this finding because it concluded on reasonable grounds that the protected objects did not constitute military objects and that there existed no imperative military necessity that justified their use or damage.⁶⁷⁵

(b) Sin Taung, Buthidaung Township — 21-22 March 2019

297. In the afternoon of Thursday 21 March 2019, soldiers from the 22nd LID entered the village of Say Taung in Buthidaung Township,⁶⁷⁶ a village that had been hosting people from other villages displaced by the conflict.⁶⁷⁷ Some soldiers based themselves in a monastery east of the village,⁶⁷⁸ where they rested and ate. The same soldiers also set up a number of large artillery pieces inside the temple complex.⁶⁷⁹ Other soldiers walked around the village during the afternoon, some of whom rested under trees on the other side of the river to the monastery.⁶⁸⁰ Villagers did not regard the soldiers located in and around the village as a threat and the soldiers did not act as if they were in danger of an AA attack. Villagers continued their business as normal. While villagers were surprised at the troop presence, they did not anticipate any violence.⁶⁸¹ As one woman stated:

*When the soldiers arrived in the village, they did not do anything, some just stayed inside the temple, and others walked around, and were sitting under trees in the shade. The soldiers were cooking and eating. Everyone was functioning normally. Since the villagers don't have any real business with the soldiers, there was nothing suspicious, so we, the women, continued to go to the water pump and go about our business.*⁶⁸²

298. After dark, at around 9.30 pm, a commander inside the temple gave an order and soldiers started launching munitions towards the village.⁶⁸³ Tatmadaw soldiers stationed around the village and in the temple also opened fire.⁶⁸⁴ Simultaneously, security forces fired artillery towards the village from the direction of Buthidaung Town.⁶⁸⁵ A man who took shelter in the temple described the situation:

*The Tatmadaw Commander inside the temple had a kind of military communication equipment. He would talk into this machine, and then an artillery would fire from the direction of Buthidaung town. So it seems like the soldier was giving the directions to the military base which allowed them to shoot towards the location.*⁶⁸⁶

299. Once the shelling started, villagers sought shelter in homemade bunkers. One villager, who lost a number of family members that night, described how he and his wife took shelter in a bunker:

⁶⁷⁴ 1954 Hague Convention, Article 4 (1) and (2).

⁶⁷⁵ While Myanmar is not party to the Second Protocol to the 1954 Convention, it nonetheless provides instructive clarification that imperative military necessity can only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of cultural property and another feasible method for obtaining a similar military advantage. See, Second Protocol to the 1954 Hague Convention, art. 6.

⁶⁷⁶ LI-210, LI-211, 212, LI-213, The Irrawaddy, “5 Civilians Killed as Tatmadaw Troops Open Fire on Village in N. Rakhine: Witnesses” (The Irrawaddy, 22 March 2019). Rakhine: Witnesses” (22 March 2019).

⁶⁷⁷ LI-211, Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar's Rakhine State*, (May 2019), p.18.

⁶⁷⁸ LI-210, LI-211, LI-212, LI-213.

⁶⁷⁹ LI-213, LI-214.

⁶⁸⁰ LI-213, LI-214.

⁶⁸¹ LI-213, LI-214.

⁶⁸² LI-214.

⁶⁸³ LI-212, LI-213.

⁶⁸⁴ LI-211, Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar's Rakhine State*, (May 2019), p. 18.

⁶⁸⁵ LI-212, LI-213.

⁶⁸⁶ LI-212.

*My wife and I were in our bunker, our faces were in the dirt. We could barely even breathe. The shooting went on for what felt like hours, then stopped and started again. We thought we would die I was so afraid during the attack. Bullets were raining down.*⁶⁸⁷

300. The gunfire lasted until morning. But when, villagers tried to assess the extent of the casualties and damage, Tatmadaw soldiers started shooting again towards the village, inhibiting relatives from assisting the injured or recovering the bodies of those killed.⁶⁸⁸

301. The attack killed five villagers. Four individuals, all relatives, were found dead in one bunker.⁶⁸⁹ The fifth person, an elderly woman, was found inside her house.⁶⁹⁰ Many others sustained injuries, including wounds from bullets and shrapnel.⁶⁹¹ Houses and farmlands were damaged by shelling.⁶⁹²

302. A statement issued by the Office of the Commander-in-Chief on 22 March 2019 accused the AA of using a civilian settlement as cover⁶⁹³ and said that, in executing its defence strategy, “inevitable loss and injuries may happen”.⁶⁹⁴

303. Villagers denied the presence of, or any attack launched by, the AA from the village at the time of the attack by the Tatmadaw. The Mission did not receive any indications that the monastery from which the Tatmadaw launched its attack sustained damage or that soldiers stationed in the monastery were injured or killed.⁶⁹⁵ This implies that there was no AA attack on the military.

304. The Mission also obtained information that civilian casualties may have been avoided, or at least minimized, if villagers had been given advanced warning of the attack. People said that the Tatmadaw did not give any warning despite being stationed inside the village throughout the day.⁶⁹⁶ A man from the village recalled that, when soldiers were in the village in the afternoon:

*There was no kind of warning that the people should leave. If we would have received a warning that an attack was coming, we would have fled, and then maybe no one would have died.*⁶⁹⁷

Conclusions and legal findings

305. The Mission was unable to determine what triggered the Tatmadaw’s attack on Sin Taung on 21-22 March 2019. However, the Tatmadaw did not appear to aim its fire, which came from the monastery and from the direction of Buthidaung Town, at specific persons or objects. There are also strong indications that the Tatmadaw knew the AA was not

⁶⁸⁷ LI-210.

⁶⁸⁸ LI-213.

⁶⁸⁹ LI-210, LI-211, LI-212. LI-213, Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar’s Rakhine State*, (May 2019), p.16, The Irrawaddy, “5 Civilians Killed as Tatmadaw Troops Open Fire on Village in N. Rakhine: Witnesses” (22 March 2019).

⁶⁹⁰ LI-210, LI-211, Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar’s Rakhine State*, (May 2019), p. 18.

⁶⁹¹ Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar’s Rakhine State*, (May 2019), p. 18.

⁶⁹² LI-210, LI-212.

⁶⁹³ The Office of the Commander-in-Chief of Defence Services, “AA violent insurgent group attacked the Tatmadaw Column carrying out stability of the region and security tasks, with heavy and small weapons” (22 March 2019): <http://cincds.gov.mm/node/2199>

⁶⁹⁴ The Office of the Commander-in-Chief of Defence Services, “AA insurgents lie in wait for Tatmadaw columns near Yaykhaungchaung Village, three bodies of enemy seized” (23 March 2019), available at: <http://cincds.gov.mm/node/2232>.

⁶⁹⁵ LI-213, LI-214.

⁶⁹⁶ LI-210, LI-213, LI-214. For a discussion on the legal requirements of providing advanced warnings of attacks, see Chapter V, section B.1 in this report: The situation in northern Myanmar; Violations by Tatmadaw and Tatmadaw sponsored militia; Tatmadaw attacks and other military operations causing deaths and injury to civilians.

⁶⁹⁷ LI-210.

present in the village at the time of the attack. The soldiers' public manner and amount of time they took to set up camp, place artillery at a monastery, walk around the village and rest under trees before opening fire on Sin Taung indicates that the Tatmadaw was not concerned that the AA was present in the areas, would attack them or could prepare for a counterattack. There are no indications that the monastery, from which the Tatmadaw launched its lengthy attack, sustained any damage or that soldiers stationed in the monastery were injured or killed. This also indicates to the Mission that the Tatmadaw knew that the AA was not present immediately before or during the course of its attack.

306. The Tatmadaw must have known that the village was populated with civilians, who went about their daily activities as they saw the Tatmadaw enter the area. The Tatmadaw also opened fire on the morning of 22 March deterring villagers from collecting and caring for the wounded. With strong indications of the AA's absence and undeniable indications of a civilian presence in Sin Taung, the Mission concludes on reasonable ground that the Tatmadaw's attack on Sin Taung on 21-22 March 2019 was either indiscriminate or may have been directed against civilians, both are violations of international humanitarian law and the latter amounts to a war crime.⁶⁹⁸ The Mission also concludes on reasonable grounds that the Tatmadaw violated its obligation to enable the wounded villagers to be collected and cared for.⁶⁹⁹ The Tatmadaw violated this obligation in two respects. First, the Tatmadaw could and should have collected the wounded and it violated this obligation when it failed to do so.⁷⁰⁰ From all indications, soldiers were available and the AA was absent from the area. Other operational constraints, such as time and distance, did not appear to be constraining factors. Second, even if it was unreasonable for the Tatmadaw itself to collect the wounded, the Tatmadaw violated its general obligation to enable the wounded to be collected and cared for when it fired upon villagers who sought to assist the wounded.⁷⁰¹ Furthermore, given that the Tatmadaw had ample time to warn villagers of an impending attack and that doing so would have had no noticeable negative military repercussions on the Tatmadaw, the Mission concludes on reasonable grounds that, even if the military's attack was directed at the AA, the Tatmadaw failed in its obligation to give effective advance warning to the civilian population under circumstances that permitted it to do so.⁷⁰²

(c) Sai Din Waterfall, Buthidaung Township - 3 April 2019

307. The Mission received credible reports that, on the afternoon of Wednesday 3 April, the Tatmadaw used two helicopters during an attack that resulted in the deaths of at least nine Rohingya.⁷⁰³ More than ten Rohingya, including at least five minors, were seriously injured in the attack.⁷⁰⁴

⁶⁹⁸ J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 11 (indiscriminate attacks), rule 1 (the principles of distinction between civilians and combatants), and rule 156 (definition of war crimes).

⁶⁹⁹ Common Article 3 to the four Geneva Conventions, 3(1)(2). See also J.M. Henckaerts and L. Doswald-Beck, *Ibid.*, rule 109 (search for, collection and evacuation of the wounded, sick and shipwrecked).

⁷⁰⁰ Jean-Marie Henckaerts, eds., *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded in Armies in the Field*, International Committee of the Red Cross, 15 December 2016, *Commentary to Article 3*, paras 751 and 753.

⁷⁰¹ *Ibid.*, para 768 ("In order to protect the wounded and sick, those searching, collecting and caring for them, as well as their transports and equipment, also need to be protected").

⁷⁰² See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 20 (advance warning).

⁷⁰³ CI-287, FI-026, RI-019.

⁷⁰⁴ CI-287, FI-023, FI-026, FI-027. See also, Reuters, "Myanmar villagers, lawmaker say 'helicopter attack' kills five Rohingya, wounds 13" (04 April 2019), UCANEWS, "Six Rohingya killed in Rakhine helicopter attack" Myanmar military claims that Muslim villagers were with Arakan Army members in Buthidaung (05 April 2019), Radio Free Asia, "Myanmar Army Helicopter Attack Kills at Least 10 Rohingya Muslims in Rakhine State" (04 April 2019), The Irrawaddy, "Six Rohingya

308. The attack occurred in the Sai Din (San Goe Taung) mountain areas in Buthidaung Township where Rohingya from surrounding villages were working in the bamboo plantation site near a waterfall and forest.⁷⁰⁵ The Rohingya were from the villages of Phon Nyo Leik, Kin Taung, Dabyu Chaung, Hteik Htoo Pauk and Thaet Pyin.⁷⁰⁶ During the attack, Rohingya men and boys were working in different groups in the area and were cutting and collecting bamboo.⁷⁰⁷ Helicopters flew low and circled before launching the attack.⁷⁰⁸ One interviewee, who was in the area of the attack together with six others, explained:

*While I was making the bundles of bamboo, I noticed two military helicopters started flying over the area. There were many small and big hills. The helicopters flew over the areas 3 to 4 times, and all of a sudden, a helicopter dropped bombs on the ledge of the hills. My brother was working with another villager between the hills and the waterfall. Both of them were killed instantly. He was a little bit far from me. Parts of the bombs hit him and other villagers.*⁷⁰⁹

309. The interviewee also described how the two dead bodies were severely disfigured from the attack. He described one as having his body “*blown apart*”.⁷¹⁰ Photographs that the Mission received of injured villagers were consistent with the severity of injuries described by the victims of the attack.⁷¹¹

310. Major General Tun Tun Nyi, a spokesperson from the military, acknowledged the helicopter attack and stated that it was to deter the AA from firing at Tatmdaw soldiers.⁷¹²

Workers Killed in Army Helicopter Attack” (04 April 2019), Peoples Dispatch, “Myanmar accused of war crimes as airstrike kills civilians in Rakhine region” (04 April 2019).

⁷⁰⁵ CI-287, FI-023, FI-026, FI-027, V-370, Radio Free Asia, “Myanmar Military Acknowledges Deadly Helicopter Attacks on Rohingya Villagers” (05 April 2019), Reuters, “Myanmar villagers, lawmaker say ‘helicopter attack’ kills five Rohingya, wounds 13” (04 April 2019), Myanmar Crimes, “Myanmar Army Helicopter Attack Kills at Least 10 Rohingya Muslims in Rakhine State” (05 April 2019), The Irrawaddy, “Six Rohingya Workers Killed in Army Helicopter Attack” (04 April 2019), Peoples Dispatch, “Myanmar accused of war crimes as airstrike kills civilians in Rakhine region” (04 April 2019), UCANEWS, “Six Rohingya killed in Rakhine helicopter attack” Myanmar military claims that Muslim villagers were with Arakan Army members in Buthidaung (05 April 2019), U.S.News, “Myanmar Villagers, Lawmaker Say ‘Helicopter Attack’ Kills Five Rohingya, Wounds 13” (04 April 2019), Rohingya Human Rights Initiative, “Myanmar army Helicopter Gunship fire on Rohingya villagers, killing 20 and injuring 40” (10 April 2019).

⁷⁰⁶ CI-287, FI-023, FI-026, FI-027, V-370, See also Radio Free Asia, “Myanmar Military Acknowledges Deadly Helicopter Attacks on Rohingya Villagers” (05 April 2019), Reuters, “Myanmar villagers, lawmaker say ‘helicopter attack’ kills five Rohingya, wounds 13” (04 April 2019), Myanmar Crimes, “Myanmar Army Helicopter Attack Kills at Least 10 Rohingya Muslims in Rakhine State” (05 April 2019), The Irrawaddy, “Six Rohingya Workers Killed in Army Helicopter Attack” (04 April 2019), Peoples Dispatch, “Myanmar accused of war crimes as airstrike kills civilians in Rakhine region” (04 April 2019), UCANEWS, “Six Rohingya killed in Rakhine helicopter attack” Myanmar military claims that Muslim villagers were with Arakan Army members in Buthidaung (05 April 2019), U.S.News, “Myanmar Villagers, Lawmaker Say ‘Helicopter Attack’ Kills Five Rohingya, Wounds 13” (04 April 2019), Rohingya Human Rights Initiative, “Myanmar army Helicopter Gunship fire on Rohingya villagers, killing 20 and injuring 40” (10 April 2019).

⁷⁰⁷ CI-287, FI-023, FI-026, FI-027, Reuters, “Myanmar villagers, lawmaker say ‘helicopter attack’ kills five Rohingya, wounds 13” (04 April 2019) Rohingya Vision, “Targeted Attack by Military Helicopter Killed Dozens of Rohingya in Buthidaung” (07 April 2019).

⁷⁰⁸ LM-058, Rohingya Human Rights Initiative, “Myanmar army Helicopter Gunship fire on Rohingya villagers, killing 20 and injuring 40” (10 April 2019).

⁷⁰⁹ CI-287.

⁷¹⁰ CI-287.

⁷¹¹ RI-019, Radio Free Asia, “Myanmar Army Helicopter Attack Kills at Least 10 Rohingya Muslims in Rakhine State” (04 April 2019), Rohingya Human Rights Initiative, “Myanmar army Helicopter Gunship fire on Rohingya villagers, killing 20 and injuring 40” (10 April 2019).

⁷¹² Radio Free Asia, “Myanmar Military Acknowledges Deadly Helicopter Attacks on Rohingya Villagers” (05 April 2019).

He also claimed the victims were with AA fighters.⁷¹³ Another military spokesperson, Brigadier General Zaw Min Tun, was quoted by the media as providing a similar justification for the attack, saying six Rohingya were killed and others were injured because they were “together with the AA”⁷¹⁴ Some injured villagers later admitted to Buthidaung Hospital received compensation from the Myanmar Army.⁷¹⁵

311. The survivors of this incident had difficulties transporting injured people to hospitals, as boat transport was the only means for moving the victims.⁷¹⁶ The ICRC in a statement said that it had visited the wounded in hospital and that they were in “urgent need of surgery”. They offered their support, in case of need, including medical supplies or transfer to Sittwe hospital.⁷¹⁷

312. The Mission did not receive any reports from witnesses who saw, or knew of the AA being, in the immediate area at the time of the attack.⁷¹⁸ The AA spokesperson Khine Thukha denied that the AA was engaged in any fighting in the area on the day of the helicopter attack.⁷¹⁹ From photographs of the victims, reviewed by the Mission, the victims all appeared to be in civilian clothing.

Conclusions and legal findings

313. The Mission concludes on reasonable grounds that the Tatmadaw’s helicopter attack in the Sai Din (San Goe Taung) mountain area on 3 April 2019 constituted an indiscriminate attack that killed and injured civilians, possibly as a result of the Tatmadaw failing to do everything feasible to verify that the people it attacked were civilians. The facts also provide strong indications that the attack may in fact have been directed at Rohingya civilians. These are all violations of international humanitarian law.⁷²⁰ Making civilians the object of attack is also a war crime.⁷²¹ The Mission draws this conclusion from several observations. AA fighters regularly wear identifiable uniforms while operating outside populated areas, whereas the people killed in the attacks wore civilian clothes. The helicopter operators must have been able to observe this distinction when the helicopter

⁷¹³ V-370, The Office of the Commander-in-Chief of Defence Services, “Tatmadaw fought the AA violent insurgents that arrived near War Kaote Chaung village with the intention to intimidate nearby villages in the vicinity, including Buthidaung Town and Wa Kaote Chaung village” (4 April 2019): <http://cincds.gov.mm/node/2371>, Radio Free Asia, “Myanmar Military Acknowledges Deadly Helicopter Attacks on Rohingya Villagers” (05 April 2019), Frontier Myanmar, “Myanmar says six Rohingya killed in attack were ‘with insurgents’ (08 April 2019).

⁷¹⁴ The Office of the Commander-in-Chief of Defence Services, “Tatmadaw fought the AA violent insurgents that arrived near War Kaote Chaung village with the intention to intimidate nearby villages in the vicinity, including Buthidaung Town and Wa Kaote Chaung village” (4 April 2019): <http://cincds.gov.mm/node/2371>; The Irrawaddy, “Six Rohingya Workers Killed in Army Helicopter Attack” (04 April 2019), UCANEWS, “Six Rohingya killed in Rakhine helicopter attack” Myanmar military claims that Muslim villagers were with Arakan Army members in Buthidaung (05 April 2019), Radio Free Asia, “Myanmar Military Acknowledges Deadly Helicopter Attacks on Rohingya Villagers” (05 April 2019).

⁷¹⁵ V-370, <http://cincds.gov.mm/node/2371> (Myawady Daily).

⁷¹⁶ LM-058, V-370, Radio Free Asia, “Myanmar Army Helicopter Attack Kills at Least 10 Rohingya Muslims in Rakhine State” (04 April 2019).

⁷¹⁷ Reuters, “Myanmar villagers, lawmaker say ‘helicopter attack’ kills five Rohingya, wounds 13” (04 April 2019), U.S. News, “Myanmar Villagers, Lawmaker Say ‘Helicopter Attack’ Kills Five Rohingya, Wounds 13” (04 April 2019), Dhaka Tribune, “Helicopter attack kills five Rohingyas, wounds 13” (04 April 2019), The Daily Star “Helicopter attack kills 5 Rohingyas” (05 April 2019), Press TV, “Five killed as Myanmar military chopper attacks Rohingya Muslims” (04 April 2019).

⁷¹⁸ FI-026, UCANEWS, “Six Rohingya killed in Rakhine helicopter attack” Myanmar military claims that Muslim villagers were with Arakan Army members in Buthidaung (05 April 2019).

⁷¹⁹ Radio Free Asia, “Myanmar Army Helicopter Attack Kills at Least 10 Rohingya Muslims in Rakhine State” (04 April 2019), The Irrawaddy, “Six Rohingya Workers Killed in Army Helicopter Attack” (04 April 2019).

⁷²⁰ See J.M. Henckaerts and L. Doswald-Beck, “Customary International Humanitarian Law. Volume I: Rules” (Cambridge, ICRC/Cambridge University Press, 2005), rule 11 (indiscriminate attacks), rule 16 (target verification), and rule 1 (the principles of distinction between civilians and combatants).

⁷²¹ Ibid, rule 156 (definition of war crimes).

flew low and circled the attack point several times before firing on the group. The attack did not result in any known AA casualties, indicating they were not in the vicinity of the attack. Finally, the Mission has received no indications of Rohingya joining or supporting the AA in a manner that would make them lawfully targetable under international humanitarian law. Based on these factors, the Tatmadaw could not have reasonably had a serious or genuine belief that the civilian Rohingya were taking a direct part in hostilities in support of the AA.⁷²²

(d) Baung Dut, Mrauk-U Township - 17 April 2019

314. On Wednesday 17 April 2019, Tatmadaw soldiers from Battalions 377 and 378⁷²³ stationed in the hills surrounding the village of Baung Dut Village in Mrauk-U Township came out of their base at approximately 9pm and started shooting directly into the village.⁷²⁴ The village is located approximately three kilometres south of Mrauk-U's urban centre.

315. Witnesses described the shooting as continuous and directed towards and around the village.⁷²⁵ One man who sought shelter in his bunker explained: "They were shooting toward the village, towards the houses. They were firing consistently."⁷²⁶ Shells also landed in the village, causing injuries and damaging property".⁷²⁷

316. Two elderly men died in the attack. One of them was killed instantly; the second died later at a hospital.⁷²⁸ Another man was injured inside his house after a bullet grazed his face, resulting in permanent disfigurement. A bullet also injured his fourteen year-old daughter, hitting her arm and causing permanent disability.⁷²⁹

317. The next morning, when the shooting and shelling subsided, those injured sought treatment at Mrauk-U Hospital.⁷³⁰ Local charity organizations assisted the injured father and daughter with medical bills, as the Government provided no compensation or assistance.⁷³¹ Villagers displaced from the village due to the attack sought shelter in an *ad hoc* displacement site located inside a monastery.⁷³²

318. The Commander-in-Chief of the Tatmadaw claimed that the AA had ambushed a military base in the area from a government-run school on that same evening. The statement made no reference to deaths, injuries or damage to property.⁷³³ Villagers denied that there were any AA fighters inside the village or any kind of attack launched by the AA from within the village that day.⁷³⁴

⁷²² The Mission received no information that the Rohingya were targeted as such in this attack.

⁷²³ LI-215, LI-217, LI-218, The Irrawaddy, "Shelling Injures Two Civilians in N. Rakhine, Villagers Say" (19 April 2019).

⁷²⁴ LI-217, LI-218, The Irrawaddy, "Shelling Injures Two Civilians in N. Rakhine, Villagers Say" (19 April 2019).

⁷²⁵ Ibid., See also: <https://www.rfa.org/burmese/news/one-villager-from-baungdok-village-05152019065340.html>

⁷²⁶ LI-217.

⁷²⁷ LI-218.

⁷²⁸ LI-215, LI-217, LI-218, The Irrawaddy, "Shelling Injures Two Civilians in N. Rakhine, Villagers Say" (19 April 2019).

⁷²⁹ LI-217, The Irrawaddy, "Shelling Injures Two Civilians in N. Rakhine, Villagers Say" (19 April 2019), <https://www.rfa.org/burmese/news/weapon-hit-two-people-injure-04182019083402.html>.

⁷³⁰ LI-215, LI-217, The Irrawaddy, "Shelling Injures Two Civilians in N. Rakhine, Villagers Say" (19 April 2019).

⁷³¹ Ibid.

⁷³² LI-215, LI-217.

⁷³³ The Office of the Commander-in-Chief of Defence Services, "The AA violent insurgents took diffused positions inside the village and attacked the regional Tatmadaw headquarters near Mrauk-U Town and Baung Dote village" (18 April 2019), <http://cincds.gov.mm/node/2490>.

⁷³⁴ LI-217, LI-218.

Conclusions and legal findings

319. Based on the harm caused to civilians and damage to civilian property, the manner in which witnesses described the attack to the Mission and reports of the AA not being in the village at the time of the attack, the Mission concludes on reasonable grounds that the attack may have been directed at civilians, was indiscriminate or was not proportionate. The Tatmadaw may also have failed to take appropriate precautionary measures to verify military targets or avoid, or at least minimize, loss of civilian life, civilian injury or damage to civilian objects. All of these acts are violations of international humanitarian law.⁷³⁵ Attacks directed against civilians are war crimes.⁷³⁶

(e) Ywar Haung Taw, Mrauk-U Township –13 June 2019

320. When villagers from Ywar Haung Taw returned to their homes weeks after fleeing the 18 March 2019 attacks,⁷³⁷ Ywar Haung Taw was subject to a second attack, on Thursday 13 June 2019.⁷³⁸ Many had returned to protect their land and property.⁷³⁹

321. In the afternoon of 13 June 2019 at around 3.30pm, a Tatmadaw convoy was travelling on a road near Ywar Haung Taw when there was an explosion nearby. Upon hearing the explosion, the soldiers⁷⁴⁰ stopped their vehicles, disembarked and entered the village on foot, shooting and launching rocket propelled grenades towards the village.⁷⁴¹ A monk who was visiting the village described the soldiers as shooting “*at everything*”.⁷⁴² Three people were injured in the attack, including a boy who was near a school compound.⁷⁴³ The school was also damaged.⁷⁴⁴

322. Villagers told the Mission and the media that the AA was not present in the village at the time of the attack. The AA made similar denials.⁷⁴⁵

323. The Myanmar Government claimed that the AA had attacked a military convoy with explosives earlier in the week. It further claimed that the “troops fired back in response [to the explosion against the convoy], but in the opposite direction from the village”, adding that government soldiers were not to blame for injuries sustained by villagers during the battle.⁷⁴⁶

324. Villagers arranged for the injured to be transported to the hospital for treatment, with no assistance from the soldiers who departed the village immediately.⁷⁴⁷

⁷³⁵ See J.M. Henckaerts and L. Doswald-Beck, “Customary International Humanitarian Law. Volume I: Rules” (Cambridge, ICRC/Cambridge University Press, 2005), rule 1 (the principles of distinction between civilians and combatants), rule 11 (indiscriminate attacks), rule 14 (proportionality in attack), rule 15 (principle of precautions in attack) and rule 16 (target verification).

⁷³⁶ Ibid., rule 156 (definition of war crimes).

⁷³⁷ See section above on the Ywar Haung Taw incident.

⁷³⁸ LI-214, PI-167, Radio Free Asia, “Five Villagers Injured, 25 Detained in New Fighting in Myanmar’s Rakhine,” (14 June 2019), The Irrawaddy “Civilians Injured, School Shelled in Army Response to Mrauk-U Ambush” (14 June 2019).

⁷³⁹ LI-214, The Irrawaddy “Civilians Injured, School Shelled in Army Response to Mrauk-U Ambush” (14 June 2019).

⁷⁴⁰ Ibid.

⁷⁴¹ LI-214, Radio Free Asia, “Five Villagers Injured, 25 Detained in New Fighting in Myanmar’s Rakhine,” (14 June 2019).

⁷⁴² LI-214, The Irrawaddy “Civilians Injured, School Shelled in Army Response to Mrauk-U Ambush” (14 June 2019).

⁷⁴³ Ibid.

⁷⁴⁴ LI-214; See below section on military use of schools and religious sites.

⁷⁴⁵ LI-214, The Irrawaddy “Civilians Injured, School Shelled in Army Response to Mrauk-U Ambush” (14 June 2019).

⁷⁴⁶ Radio Free Asia, “Five Villagers Injured, 25 Detained in New Fighting in Myanmar’s Rakhine,” (14 June 2019).

⁷⁴⁷ LI-214, PI-167.

Conclusions and legal findings

325. The Mission concludes that the Tatmadaw's 13 June 2019 attack on Ywar Haung Taw village may have been indiscriminate and therefore a violation of international humanitarian law.⁷⁴⁸ After soldiers in a Tatmadaw convoy heard a nearby explosion, they disembarked and fired on the village in a random and indiscriminate manner. As one villager described, the soldiers were shooting "at everything".⁷⁴⁹ The attack injured three people, including a boy, and damaged a school. Based on the interviews the Mission conducted, the Mission concluded that the Government's claim that the Tatmadaw soldiers were not to blame for the injuries lacks credibility.

(f) Overall conclusions and legal findings on Tatmadaw attacks

326. The Mission concludes on reasonable grounds that the Tatmadaw's attacks on Mrauk-U town and Ywar Haung Taw village on 18 March 2019, on Sin Taung on 21-22 March 2019 and on Sai Din Waterfall on 3 April 2019 violated several rules of international humanitarian law, in particular the rule prohibiting indiscriminate attacks. The attacks on Baung Dut, Mrauk-U Township, on 17 April 2019 and on Ywar Haung Taw village on 13 June 2019 may also have violated international humanitarian law. The Mission finds that these violations also constitute violations of the right to life under international human rights law.

327. The Mission takes note that the International Criminal Tribunal for the former Yugoslavia (ICTY) has held that indiscriminate attacks under certain circumstances may qualify as direct attacks against civilians.⁷⁵⁰ International humanitarian law prohibits direct attacks against civilians.⁷⁵¹ Such attacks constitute war crimes.⁷⁵² The Mission concluded that in some instances the manner in which the Tatmadaw conducted its indiscriminate attacks may infer that those attacks were directed at civilians. In the conclusions of its investigation, the Mission found that the attack on Sin Taung and the helicopter attack at Sai Din may have been directed at civilians. The Mission also concluded on reasonable grounds that the Tatmadaw's attacks and other military operations in the ancient capital of Mrauk-U violated the rules under international law that protect cultural property. Under both international human rights law and international humanitarian law, the Government of Myanmar has an obligation to conduct effective investigations into these violations, including criminal investigations especially when the violations amount to war crimes.

2. Military use of and damage to schools and religious sites

328. In the course of its military operations against the AA, the Tatmadaw has used schools and monasteries as military bases and living quarters. The military has also used schools as detention and interrogation facilities. Using these locations for military purposes has increased their exposure to the conflict and negatively affected the ability of children to receive education and of people to practise their religion. In several cases, schools and places of worship were damaged during attacks by the Tatmadaw and/or the AA.

(a) Schools

329. The impact of the conflict on schools and access to education requires further investigation. Based on the Mission's initial assessment, the conflict has resulted in many

⁷⁴⁸ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 11 (indiscriminate attacks).

⁷⁴⁹ LI-214, The Irrawaddy "Civilians Injured, School Shelled in Army Response to Mrauk-U Ambush" (14 June 2019).

⁷⁵⁰ ICTY, *Prosecutor v. Galic*, Case No. IT-98-29-T, Trial Chamber Judgement, 5 December 2003, para. 57 ("attacks which employ certain means of combat which cannot discriminate between civilians and civilian objects and military objectives are tantamount to direct targeting of civilians").

⁷⁵¹ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 1 (the principles of distinction between civilians and combatants).

⁷⁵² *Ibid.*, rule 156 (definition of war crimes).

schools in the region being closed and otherwise negatively affecting the access to education of children irrespective of ethnicity.⁷⁵³ In Rakhine and Chin villages Tatmadaw soldiers install themselves in schools and use them as barracks where they sleep and cook.⁷⁵⁴ One Chin woman from Paletwa Township explained: “Since the Tatmadaw soldiers arrived, the school has been closed”.⁷⁵⁵

330. The Tatmadaw also used schools as detention and interrogation sites, in particular for ethnic Rakhine villagers accused of supporting the AA.⁷⁵⁶ One ethnic Rakhine man described how he and a fellow villager were detained by soldiers of the 55th LID in a school on grounds of supporting the AA. “They kept us in the hot sun at a school compound, and we were beaten with the barrel of a gun by Tatmadaw soldiers of the 55th LID.”⁷⁵⁷

331. In the village of Kyauk Tan in Rathedaung Township, the Tatmadaw used a school to detain and interrogate ethnic Rakhine villagers for weeks. As detailed below, the Tatmadaw opened fire on the detainees, killing seven and injuring eight others.⁷⁵⁸

332. The Tatmadaw’s use of schools may also contribute to them being the object of attacks by the AA. During a clash between the AA and Tatmadaw in and around the Chin village of Auk Pyin Wa in Paletwa Township, a Chin villager described how heavy AA gunfire damaged a school in her village and said the AA may have targeted the school because they thought the Tatmadaw was inside: “I cannot say exactly how many bullet holes in the school, but the whole side wall, and the top of the roof, there were holes everywhere”.⁷⁵⁹

333. Tatmadaw attacks have also damaged schools.⁷⁶⁰ As detailed above, on 13 June 2019, in the village of Yraw Haung Taw in Mrauk-U Township, the Tatmadaw fired munitions that damaged a school and injured at least one student inside the school’s premises.⁷⁶¹

(b) Religious sites

334. Tatmadaw soldiers have also set up bases in monasteries and temples from which they have carried out military operations and attacks.⁷⁶² One villager described how, on 4 March 2019, hundreds of Tatmadaw soldiers wearing the badge of the 22nd LID entered a temple in Hpa Ywar Gyi village in Mrauk-U Township:

⁷⁵³ While the Mission has not documented the Tatmadaw’s use of Rohingya schools and madrassas, credible reports indicate that this may be taking place in Rohingya villages as well. See for example: Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar’s Rakhine State*, (May 2019) p.30; FFFGEN-1555826851-1890; CI-319, CI-320. See, also, Myanmar Peace Monitor, “Peace Monitoring Dashboard: June 2019”, available at: <http://www.mmpeacemonitor.org/2050> (accessed 9 September 2019).

⁷⁵⁴ LI-142, LI-207, FFFGEN-1555826851-1890, See also Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar’s Rakhine State*, (May 2019), p. 30, UNICEF, “UNICEF Myanmar calls for the urgent protection of children in Rakhine State as schools re-open soon” (Press Release, 28 May 2019) available at: <https://www.unicef.org/press-releases/unicef-myanmar-calls-urgent-protection-children-rakhine-state-schools-re-open-soon>.

⁷⁵⁵ LI-142.

⁷⁵⁶ LI-166, LI-179, LI-202, LI-203, LI-204, See also: Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar’s Rakhine State*, (May 2019) p.30.

⁷⁵⁷ LI-179.

⁷⁵⁸ See section above on the Kyauk Tan incident. See also LI-202, LI-203, LI-204

⁷⁵⁹ LI-158. See Chapter V, section D in this report: the Tatmadaw conflict with the Arakan Army; Abuses by the Arakan Army.

⁷⁶⁰ CI-275, LI-214, See also: The Irrawaddy “Civilians Injured, School Shelled in Army Response to Mrauk-U Ambush” (14 June 2019).

⁷⁶¹ LI-214, see also: Khaing Roe La, “Four people injured by Tatmadaw gunfire” (Development Media Group, 13 June 2019, The Irrawaddy “Civilians Injured, School Shelled in Army Response to Mrauk-U Ambush” (14 June 2019).

⁷⁶² LI-165, LI-175, LI-210, LI-211, LI-212, LI-214, LI-215, LI-216.

*I knew the soldiers had set themselves up inside the temple in my village that day. It was possible to see the firing as well as the sound of the artillery - it was all coming from the temple.*⁷⁶³

335. A monk who confirmed the presence of the soldiers in the temple to the Mission saw the soldiers setting up artillery inside the compound. When the monk returned to the village later to request the soldiers to vacate the temple, the soldiers refused:

*I went to speak to the military officer and told him to move out of the temple. However, the high-ranking officer of the army refused the request. That man was wearing a military uniform and, he was clearly wearing the 22 badge. There were about 150-200 soldiers still inside the temple at that time.*⁷⁶⁴

336. The Tatmadaw also used a monastery and its temple as a military base to position heavy artillery for its 21 March 2019 attack in Sin Taung, Buthidaung Township.⁷⁶⁵ A man described to the Mission how the temple was “full of soldiers ... and they were firing their big guns, shells and launchers and also were shooting guns nonstop from inside the Monastery”.⁷⁶⁶

337. Another man described how military soldiers had installed themselves in a pagoda near U Gar village in Rathedaung Township, since January 2019. He commented: “As the military are staying in the pagodas, the villagers cannot go there to pray”.⁷⁶⁷ As a result of the military use of the temple in Hpa Yuar Gyi, Mrauk-U, all the monks from the temple were forced to leave the monastery, including the chief monk, who was 85 years old.⁷⁶⁸

338. In all three cases monks and temple-goers were denied access to their places of worship as a result of the Tatmadaw’s military use of the temples and pagoda.

339. The Mission verified two Tatmadaw attacks that caused significant damage to religious sites, in addition to civilian casualties.

Sa Par Htar, Minbya Township – 3 June 2019

340. On 3 June 2019, there was heavy fighting between the Tatmadaw and the AA near the village of Sa Par Htar in Minbya Township.⁷⁶⁹ Some villagers sought shelter in bomb-shelters in their own houses they had dug for their own safety. Hundreds of other villagers sought shelter in the local monastery.⁷⁷⁰

341. Shelling and shooting continued for several hours without break. Weapons were fired once every couple of minutes from a Tatmadaw temporary base set up along the riverside of Mrauk-U town.⁷⁷¹

342. In the early afternoon, sometime between 2 and 3 pm, shells hit the monastery.⁷⁷² The area was covered with smoke and villagers could hardly see each other.⁷⁷³ At least four people were killed in the monastery as a result of the shelling. A further two villagers,

⁷⁶³ LI-216.

⁷⁶⁴ LI-215.

⁷⁶⁵ See section above on the Sin Taung incident.

⁷⁶⁶ LI-212.

⁷⁶⁷ LI-175.

⁷⁶⁸ LI-215.

⁷⁶⁹ CI-321, CI-322, CI-323, *See also*, Frontier Myanmar, “Seven killed in Myanmar monastery shelling: witnesses” (04 June 2019), Myanmar Peace Monitor, “The unheeded casualties of war” (03 July 2019).

⁷⁷⁰ *Ibid.*, *See also*: EFE, “Shelling kills at least seven people in Myanmar’s Rakhine State” (05 June 2019).

⁷⁷¹ CI-321, CI-322, CI-323, CI-324; Myanmar Peace Monitor, “The unheeded casualties of war” (03 July 2019).

⁷⁷² CI-321, CI-322, Frontier Myanmar, “Seven killed in Myanmar monastery shelling: witnesses” (04 June 2019), The Irrawaddy, “Five Civilians Killed by Artillery Shelling in N. Rakhine” (03 June 2019), Radio Free Asia, “Four Villagers Killed, Six Injured in New Fighting in Myanmar’s Rakhine State” (03 June 2019).

⁷⁷³ CI-321, CI-323, Myanmar Peace Monitor, “The unheeded casualties of war” (03 July 2019).

including a minor, died later from their injuries in a hospital in Minbya Town. At least eight others, including women and a minor, were seriously injured.⁷⁷⁴

343. One interviewee explained how his niece's backside was severely injured in the attack and how she was taken to the hospital.⁷⁷⁵ Another witness gave the following account:

*We all fled to the monastery for safe shelter, immediately after the fighting broke out between the Tatmadaw and the Arakan Army in the morning. I was upstairs in the monastery. Around 2 pm, a shell dropped on the monastery. Everything became dark; we were not able to see.*⁷⁷⁶

344. The monastery suffered severe damage as a result of the shelling and shooting, in particular its walls, windows and roof.⁷⁷⁷

345. Witnesses confirmed that neither the Tatmadaw nor the AA were present in the village during the attack.⁷⁷⁸ The spokesperson of the Tatmadaw's Western Regional Command, Colonel Win Zaw Oo, stated in an interview that "no artillery was fired by the Tatmadaw across the river and that the AA fired the artillery first, prompting Tatmadaw soldiers to fire back".⁷⁷⁹

346. Villagers who had remained inside their houses ran to the monastery soon after the munitions hit. They assisted transporting the injured to a hospital in Mrauk-U.⁷⁸⁰

Myauk Taung, Kyauktaw Township - 19 June 2019

347. On 19 May 2019, a 10-year-old-girl, Athein Chay, was killed while walking alongside her 14-year-old brother on her way back to her village of Myauk Taung. They had been visiting a monk in a nearby monastery to donate goods from the family.⁷⁸¹

348. At around 5 pm, before the sun had set and as the children were leaving the monastery on foot, a military convoy stopped along the highway and opened fire. Athein Chay was killed by a bullet that struck the back of her head.⁷⁸² Her brother was able to escape.

349. There was continuous gunfire, including the sound of shelling, and military presence throughout the night. Some shells landed in the village, some of which were unexploded. The Mission received photographs of mortars that villagers claimed to have been found in the village following the attack, consistent with the testimony.⁷⁸³

350. Artillery shells also fell near the monastery and pagoda, causing damage to the temple. Shelling also affected a neighbouring village, Marlar Taung, injuring two more people, one of whom was a child.⁷⁸⁴

⁷⁷⁴ CI-321, CI-322, CI-323, *See also* Frontier Myanmar, "Seven killed in Myanmar monastery shelling: witnesses" (04 June 2019), The Irrawaddy, "Five Civilians Killed by Artillery Shelling in N. Rakhine" (03 June 2019), EFE, "Shelling kills at least seven people in Myanmar's Rakhine State" (05 June 2019), Radio Free Asia, "Four Villagers Killed, Six Injured in New Fighting in Myanmar's Rakhine State" (03 June 2019), Myanmar Peace Monitor, "The unheeded casualties of war" (03 July 2019).

⁷⁷⁵ CI-322.

⁷⁷⁶ CI-323.

⁷⁷⁷ CI-321, CI-322, CI-323.

⁷⁷⁸ CI-321, CI-322, CI-323.

⁷⁷⁹ Video available on YouTube : <https://www.youtube.com/watch?v=TmFVqbZJ67E>.

⁷⁸⁰ CI-321, CI-322, CI-323.

⁷⁸¹ LI-205, The Irrawaddy "Ten-Year-Old Shot Dead in Restive Rakhine State" (20 May 2019), Radio Free Asia, "Girl Killed, Villagers Hurt by Myanmar Army Gunfire in Rakhine State" (20 May 2019).

⁷⁸² LI-205, The Irrawaddy "Ten-Year-Old Shot Dead in Restive Rakhine State" (20 May 2019).

⁷⁸³ Photographs on file with Mission.

⁷⁸⁴ LI-205, Radio Free Asia, "Girl Killed, Villagers Hurt by Myanmar Army Gunfire in Rakhine State" (20 May 2019).

351. The following morning, the deceased girl's father went with other villagers to collect her body. A bullet had penetrated her skull from behind. Colonel Win Zaw Oo, spokesperson for the military's Western Regional Command, commented in public statements to the media that government forces engaged in a firefight with the AA after AA soldiers attacked a Tatmadaw convoy with mines and fired on troops from within Myauk Taung village. The Tatmadaw reportedly stated they "couldn't be sure who shot the bullet".⁷⁸⁵ Villagers and the AA deny that the AA was inside the village.⁷⁸⁶

(c) Conclusions and legal findings

352. Schools are civilian objects under international humanitarian law. As such, they must not be the object of direct attack or the object of indiscriminate attacks and are afforded the protections of precautionary measures unless and for such time as they become legitimate military objects.⁷⁸⁷ International humanitarian law also requires the Tatmadaw, to the extent feasible, to avoid locating military personnel and objects in schools when they are within or near densely populated areas.⁷⁸⁸ The purpose of this rule is to guard civilians from the dangers of conflict.

353. The Mission shares the United Nations Security Council's concerns that a military's use of schools in contravention of applicable international law "may render schools legitimate targets of attack, thus endangering children's and teachers' safety as well as children's education".⁷⁸⁹ The Safe Schools Declaration, which at the time of writing 95 States endorsed,⁷⁹⁰ similarly recognizes that educational facilities used by parties to armed conflict "expose students and education personnel to harm, deny large numbers of children and students their right to education and so deprive communities of the foundations on which to build their future".⁷⁹¹ The Declaration has guidelines that instruct parties to armed conflict not to use functioning schools and universities in support of their military efforts.⁷⁹² The guidelines also instruct parties not to use schools and universities that have been abandoned or evacuated because of the dangers of conflict for any purpose that supports the military effort, except in extenuating circumstances when they are presented with no viable alternative.⁷⁹³

354. The Mission demands that the military cease its use of schools. It calls on the Government of Myanmar to endorse and implement the Safe Schools Declaration fully as a matter of urgency. The Tatmadaw should also always assess the necessity of using schools for military purposes and determine whether alternative options are available to ensure the protection of children, teachers, education and schools. When a school is in a densely populated area, the military is obligated to do this.

355. Similarly to schools, places of worship receive general protections of international humanitarian law as civilian objects. This means they cannot be the object of attack, are

⁷⁸⁵ <https://burma.irrawaddy.com/news/2019/05/20/191927.html>, <http://burmese.dvb.no/archives/328285>, <https://burmese.voanews.com/a/rakhine-conflict-kyauk-taw/4924427.html>, <https://www.bbc.com/burmese/burma-48346351>, <https://www.rfa.org/burmese/news/kyauktaw-shooting-05202019072127.html>.

⁷⁸⁶ LI-205, The Irrawaddy "Ten-Year-Old Shot Dead in Restive Rakhine State" (20 May 2019).

⁷⁸⁷ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 10 (civilian objects' loss of protection from attack).

⁷⁸⁸ Ibid., rule 23 (location of military objectives outside densely populated areas).

⁷⁸⁹ UNSC Res. S/RES/2427 (2018).

⁷⁹⁰ Global Coalition to Protect Education from Attack, Safe Schools Declaration Endorsements, available at <https://ssd.protectingeducation.org/endorsement/>

⁷⁹¹ Safe School Declaration. available at:

http://www.protectingeducation.org/sites/default/files/documents/safe_schools_declaration-final.pdf

⁷⁹² Guidelines for Protecting Schools and Universities from Military Use During Armed Conflict.

Available at http://www.protectingeducation.org/sites/default/files/documents/guidelines_en.pdf

⁷⁹³ Ibid.

protected from indiscriminate attack and enjoy the protections of precautionary measures.⁷⁹⁴ International humanitarian law requires the Tatmadaw, to the extent feasible, to avoid locating military personnel and objects in places of worship that are within or near densely populated areas.⁷⁹⁵ Depending on the historical and cultural significance of the religious sites that the Tatmadaw used or damaged, international law may also afford them the protections of cultural property.⁷⁹⁶ The Tatmadaw's use of places of worship denies people their right to worship and can make places of worship legitimate targets of attack.

356. The incidents that the Mission investigated, that left temples damaged and civilians dead and injured, may have been indiscriminate. Further information is required. The military should always assess the necessity of using places of worship for military purposes and determine whether alternative options are available to ensure the protection of civilians and their right to worship. When a place of worship is in a densely populated area, the military is obligated to do this.

3. Torture, arbitrary detention and deaths in custody

357. The Mission documented a pattern of Tatmadaw soldiers moving into ethnic Rakhine villages and rounding-up groups of ethnic Rakhine men for collective questioning. The interrogations often took place inside or just outside the village. The Mission received many accounts of the Tatmadaw beating the men and insulting them verbally.⁷⁹⁷

358. One Rakhine man described to the Mission how in his village near Mrauk-U town soldiers beat and kicked him and a group of men whom they questioned about the AA. The Tatmadaw gathered both men and women in one place, and then took approximately 40 men to a location outside the village. There, the soldiers forced the group to strip naked, lie on the ground and do jumping exercises under threat of being shot. The man also described how the soldiers "kicked us with their boots and slapped our faces and pointed their guns at us. They beat us badly."⁷⁹⁸

359. In other cases, Tatmadaw soldiers violently forced ethnic Rakhine men into military vehicles and drove them to formal detention sites, including military bases and police stations, where they were subjected to brutal beatings, psychological abuse and verbal threats.⁷⁹⁹ A man who was arrested with three fellow ethnic Rakhine villagers told the Mission what happened when nine soldiers came to his cell immediately after they were placed there:

*They blindfolded us and started interrogating us about our involvement with the AA. While asking questions, the soldiers beat us using a bamboo rod, kicked us with their hard boots, and punched us.*⁸⁰⁰

360. In another case, an ethnic Rakhine man described how Tatmadaw soldiers from the 55th LID, which he identified by their badge, tied him and a fellow ethnic Rakhine villager up because they were not in possession of their identity documents. The soldiers detained the two in the yard of the village school for several hours in the hot sun, accused them of belonging to the AA, beat them with the barrels of their guns, kicked them and threatened that they would shoot them. They were eventually released without any charges.⁸⁰¹

⁷⁹⁴ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 1 (the principles of distinction between civilians and combatants), rule 11 (indiscriminate attacks) and rule 14 (proportionality in attack).

⁷⁹⁵ Ibid., rule 23 (location of military objectives outside densely populated areas).

⁷⁹⁶ See section above in this Chapter on: Unlawful attacks by the Tatmadaw.

⁷⁹⁷ CI-275, CI-285, CI-286 LI-166, LI-179, LI-216.

⁷⁹⁸ LI-166.

⁷⁹⁹ CI-277, CI-281, LI-170, LI-174.

⁸⁰⁰ CI-277.

⁸⁰¹ LI-179.

361. Detainees were often unaware of the location of their detention, were not informed about the charges laid against them and were unable to contact relatives or obtain legal representation. Often men after suffering beatings in detention were released without charge, sometimes upon payment of a bribe.⁸⁰²

362. Some ethnic Rakhine men who were detained have never returned to their village. Relatives and friends reported to the Mission that they have had no news from these individuals and presume that they remain in detention and have been charged. These relatives have not been able to find out where they are detained or what charges have been filed against them.⁸⁰³

363. The Mission also received reports of Tatmadaw soldiers rounding up Rohingya men and subjecting them to similar physical and verbal abuse while asking them about AA activities or accusing them of assisting the AA.⁸⁰⁴ After beatings and interrogations, some of the Rohingya villagers were released⁸⁰⁵ while others were used for forced labour.⁸⁰⁶

364. The Mission verified two incidents that involved a significant number of deaths in custody, as well as torture and other ill-treatment of ethnic Rakhine men.

(a) Let Ka, Mrauk-U Township, April 2019

365. On 9 April 2019, during an armed clash between the Tatmadaw and the AA it was reported that the AA attacked No. 31 Police Regiment in Mrauk-U.⁸⁰⁷ The following morning, there was additional fighting between the Tatmadaw and the AA near the Rakhine village of Let Ka in Mrauk-U Township.⁸⁰⁸ After the gunfire subsided at around 11 am, approximately 150 Tatmadaw soldiers, some of whom were wearing the badges from the 22nd and 55th LIDs, entered Let Ka village.⁸⁰⁹ The soldiers were armed and entered shooting.⁸¹⁰ Villagers tried to seek shelter, some hiding in bunkers inside their homes.⁸¹¹

366. The soldiers ordered all the villagers—adults, the elderly and children—to gather in the yard of a large compound inside the village. The soldiers kept the villagers for several hours under the hot sun and subjected them to verbal harassment and intimidation.⁸¹²

367. Some armed soldiers guarded the villagers, while others searched the villagers' houses, taking some of their belongings.⁸¹³ During the search, soldiers found a list of names of men who had been designated by village elders to carry out sentry duty of the village due to the proximity of fighting between the Tatmadaw and the AA in the area.⁸¹⁴ The soldiers claimed that it was a list of AA members and called for all those named on the list and any male visitors in the village to come forward. The group totaled 27 and included a number of men from other villages and at least one minor.⁸¹⁵

368. The Tatmadaw soldiers led the group away from the others, forced them to lie on the ground, tied their hands behind their backs and beat them. They also threatened to shoot them.⁸¹⁶ They were taken by the soldiers to the highway and transported in military vehicles to a Tatmadaw base in Sittwe where they remained detained for several weeks. During that time they endured severe beatings and other treatment that resulted in visible

⁸⁰² CI-276, CI-277, CI-281, CI-285, CI-286, LI-168, LI-170, LI-175.

⁸⁰³ CI-274, CI-275, LI-137, LI-169, LI-172, LI-180.

⁸⁰⁴ CI-291, LI-166.

⁸⁰⁵ CI-276, CI-277, LI-166.

⁸⁰⁶ CI-281, LI-170, LI-224, See Chapter IV. Sections E: The situation of the Rohingya; Forced and compulsory labour.

⁸⁰⁷ The Irrawaddy "AA Kills 20 Soldiers in N. Rakhine's Ancient Capital Mrauk-U" (10 April 2019).

⁸⁰⁸ LI-206, LI-208.

⁸⁰⁹ LI 206, LI-208.

⁸¹⁰ LI-206; LI-208.

⁸¹¹ LI-206, LI-208.

⁸¹² LI-206, LI-208.

⁸¹³ LI-206, LI-208.

⁸¹⁴ LI-206, LI-208.

⁸¹⁵ LI-206, LI-208, LI-219.

⁸¹⁶ LI-208.

scars and injuries.⁸¹⁷ Two persons told the Mission that the Tatmadaw tied up one detainee, put a rope around his neck and dragged him along a rough road.⁸¹⁸ Detainees were denied food and water for a number of days and were forced to drink their own urine.⁸¹⁹

369. The Mission received credible information that three of the men died in detention from beatings.⁸²⁰ Detainees described to their relatives how they heard soldiers beating one of the detainees to force him to sign a confession that he was a member of the AA. When he refused, detainees heard a sound of “a cracking, like an iron bar”.⁸²¹ Then they heard “the sound of someone falling, then silence”.⁸²² Other detainees reportedly decided to sign confessions in fear of similar treatment.⁸²³

370. The Myanmar military denied responsibility for the deaths, claiming that one died of respiratory problems, another of drug addiction and the third of suicide and that autopsies were performed on the bodies.⁸²⁴ Credible media reports indicate however that the bodies were cremated without consent of the families.⁸²⁵

371. Family members of the deceased have not received any official confirmation of the deaths of their relatives, copies of the alleged autopsy reports or the ashes of their relatives.⁸²⁶ A widow of one of the deceased stated:

*I never got anything from the government, not my husband's ashes, not even his clothing. I don't even really know if his body was cremated. I have no real information. Sometimes I think maybe he is still alive. It is hard to believe anything. My life has been destroyed.*⁸²⁷

372. While the men were in the Tatmadaw's custody, relatives and fellow villagers were not informed of their whereabouts, despite efforts to find them.⁸²⁸

373. In early May, following the issuance of arrest warrants by a District Court, the remaining 24 detainees were transferred to police custody and charged with terrorism-related offenses.⁸²⁹ The Mission was informed that the detainees were unable to secure legal representation immediately.⁸³⁰ The Mission also received credible information that while in

⁸¹⁷ LI-206, LI-207, LI-209, LI-219.

⁸¹⁸ LI-207, LI-208.

⁸¹⁹ LI-207, LI-208.

⁸²⁰ LI-206, LI-207.

⁸²¹ LI-207, LI-208.

⁸²² LI-207, LI-208.

⁸²³ LI-219.

⁸²⁴ The Office of the Commander-in-Chief of Defence Services, "Questions from news media were answered during Tatmadaw Press Conference" (3 May 2019): <https://cincds.gov.mm/node/2670>. See also interview with the spokesman from the Tatmadaw True News Information Team, Brig-Gen Zaw Min Tun stating "one person died of heart disease, another used his own lungyi to hang himself, and another one was a drug addict", available at: <https://burmese.voanews.com/a/rakhine-3-civilian-dead-/4890978.html>

⁸²⁵ Radio Free Asia, "Myanmar Army Denies Torturing 3 Rakhine Men, But Swift Cremation Raises Suspicions" (26 April 2019), The Irrawaddy "Men Died in Army Detention, Cremated without Families' Knowledge (26 April 2019). See also: MCN TV News Channel, "MCN Daily News 9 May 2019" (9 May 2019), available at: <https://www.youtube.com/watch?v=HmEiOZMaZS0&feature=youtu.be&t=297>, where U Aung Kyaw Zen, Minister of Electricity, Transport and Communications from Rakhine State Government Group, explained to the Rakhine State Parliament that "while the 3 people were experiencing bad health, they were sent in time to the Sittwe Hospital, and when they died, the families were notified. However, because the families did not get back in touch in time, the bodies were cremated at the Sittwe Town Cemetery according to the permission from the 'Development Committee' (under the control of Ministry of Border Affairs)".

⁸²⁶ LI-207, LI-209.

⁸²⁷ LI-209.

⁸²⁸ LI-207, LI-219.

⁸²⁹ LI-207, LI-219, Radio Free Asia, "Hearing Begins for 23 Detained Villagers from Myanmar's Rakhine State" (21 June 2019).

⁸³⁰ LI-207, LI-219.

police custody the prisoners were refused access to medical care to treat injuries and illness related to their treatment and detention conditions.⁸³¹

(b) Kyauk Tan, Rathedaung Township, April/May 2019

374. In the morning of 30 April 2019, a large group of armed security forces, including soldiers from the 22nd LID and 357th LIB⁸³² and members of the BGP,⁸³³ entered the ethnic Rakhine village of Kyauk Tan in Kyauk Tan Village Tract in Rathedaung Township. The security forces were looking for AA members who had reportedly escaped from a nearby AA base in Pyon Nyo Leik, Buthidaung Township.⁸³⁴

375. Soldiers ordered all male villages to gather in the school compound⁸³⁵ and threatened them with violence if they did not comply.⁸³⁶ The group numbered in the hundreds and was confined all day under the sun without access to food or water.⁸³⁷ At around 5 pm, the security forces released all boys under 15 year old and men 50 years old and above.⁸³⁸ Approximately 275 men and boys remained detained inside the school under armed guard by the security forces.⁸³⁹ They were interrogated about being members of the AA.⁸⁴⁰

376. On the second night, at approximately 2 am, soldiers fired indiscriminately into the group from all sides⁸⁴¹ after a detainee with a mental health condition⁸⁴² made a commotion.⁸⁴³ The gunfire killed six detainees and wounded eight others.⁸⁴⁴ One man described the incident: "The soldiers switched off the light and just started shooting from all sides. People were screaming and running. I saw people with bullet wounds in the chest and leg."⁸⁴⁵

⁸³¹ LI-219.

⁸³² LI-188, LI-202, LI-203.

⁸³³ LI-202, LI-203.

⁸³⁴ The Office of the Commander-in-Chief of Defence Services, "Investigations are carried out to charge those related to the AA violent insurgents, according to the law" (1 May 2019), available at: <http://cincds.gov.mm/node/2632>.

⁸³⁵ LI-202, LI-203, The Irrawaddy, "Army Says 6 Villagers Shot Dead in Detention in N. Rakhine" (2 May 2019).

⁸³⁶ LI-202, The Irrawaddy, "Army Says 6 Villagers Shot Dead in Detention in N. Rakhine" (2 May 2019).

⁸³⁷ LI-202, LI-203.

⁸³⁸ LI-202, The Irrawaddy, "Army Says 6 Villagers Shot Dead in Detention in N. Rakhine" (2 May 2019).

⁸³⁹ LI-202, The Office of the Commander-in-Chief of Defence Services, "As the security forces were violently attacked while investigating those related to the AA violent insurgents, inevitable shooting took place to control and disperse the crowd" (2 May 2019): <http://cincds.gov.mm/node/2640>, The Irrawaddy, "Army Says 6 Villagers Shot Dead in Detention in N. Rakhine" (2 May 2019).

⁸⁴⁰ LI-202, Radio Free Asia, "Myanmar Human Rights Commission Backs Army's Story of Kyauktan Shootings" (13 June 2019), The Irrawaddy, "Army Says 6 Villagers Shot Dead in Detention in N. Rakhine" (2 May 2019).

⁸⁴¹ LI-202.

⁸⁴² LI-202, Radio Free Asia, "Myanmar Human Rights Commission Backs Army's Story of Kyauktan Shootings" (13 June 2019), The Irrawaddy, "Army Says 6 Villagers Shot Dead in Detention in N. Rakhine" (2 May 2019).

⁸⁴³ LI-202, Radio Free Asia, "Myanmar Human Rights Commission Backs Army's Story of Kyauktan Shootings" (13 June 2019), The Irrawaddy, "Army Says 6 Villagers Shot Dead in Detention in N. Rakhine" (2 May 2019); Min Aung Khine, "Villagers Who Were Shot Dead in Custody Denied Funeral Rites, Locals Say" (The Irrawaddy, 6 May 2019).

⁸⁴⁴ LI-202, LI-188, The Office of the Commander-in-Chief of Defence Services, "AA violent insurgents and those related to them are investigated, those unrelated are released" (3 May 2019): <http://cincds.gov.mm/node/2652>; See also: The Irrawaddy, "Army Says 6 Villagers Shot Dead in Detention in N. Rakhine" (2 May 2019).

⁸⁴⁵ LI-202.

377. During the afternoon of 2 May 2019, the injured were transported to hospital, one of whom later died because of his injuries.⁸⁴⁶

378. Family members of those killed were given compensation of 300,000 Kyat (about 200 USD). Many did not want to accept the money but felt pressured to do so in the hope that it would lead to the immediate release of the other men.⁸⁴⁷ One widow stated: “I didn’t want to take their money. I felt like yelling and screaming. My husband’s life is not worth 300,000 Kyat. But I couldn’t do this. They had guns.”⁸⁴⁸

379. The entire village remained under military lockdown for two weeks. Villagers were unable to leave and there was limited access to food, medicine and livelihoods.⁸⁴⁹ Groups of men and older boys were progressively released from the school during this time. Those who remained detained continued to have limited access to food and lived in poor sanitary conditions.⁸⁵⁰ As of 14 May 2019, all but eight detainees were released from the school; the remaining eight men were charged with terrorism-related offenses.⁸⁵¹

380. The Government announced that there would be a military investigation into the killing.⁸⁵² At the time of writing no further details had been publicized.

381. The Myanmar National Human Rights Commission undertook a separate inquiry. The Commission’s conclusions accepted the Tatmadaw’s version of the incident: that villagers launched a coordinated attack on the troops and tried to grab their guns as they were being held in a school compound.⁸⁵³ The statement of a military spokesperson, however, cast doubt on the Commission’s independence when he reportedly announced that “The Human Rights Commission member’s trip is assisted by the military”.⁸⁵⁴

382. Kyauk Tan villagers criticized the Commission for not giving more weight to the many credible eyewitness accounts of villagers who refuted the claim that people in the school compound tried to take guns from soldiers.⁸⁵⁵ As one villager stated:

*Under the name of the Myanmar National Human Rights Commission I hoped that the abuses of rights our people would be exposed. However when their report came out I felt so sad and hopeless. There is no justice, and no one protects our rights.*⁸⁵⁶

383. The Tatmadaw announced that from July 2019 it would carry out a further investigation into the deaths by constituting a “court of inquiry”.⁸⁵⁷ Since this announcement there has been no public information about the status of these investigations.

(c) Conclusions and legal findings

Deaths in custody

⁸⁴⁶ LI-202, Nan Lwin Hnin Pwint, “MNHRC Investigating Villager Deaths in Military Custody,” (The Irrawaddy, 30 May 2019).

⁸⁴⁷ LI-203, LI-204.

⁸⁴⁸ LI-204.

⁸⁴⁹ LI-203, The Irrawaddy, “Army Says 6 Villagers Shot Dead in Detention in N. Rakhine” (2 May 2019); Agence France Press, “Myanmar village in army lockdown ‘running out of food’” (5 June 2019).

⁸⁵⁰ LI-202, LI-203.

⁸⁵¹ LI-202, LI-203.

⁸⁵² Radio Free Asia, “Myanmar Army Investigates Kyauk Tan Shooting as Villagers Dispute Military Account” (5 June 2019).

⁸⁵³ Myanmar National Human Rights Commission, “Media Statement 3/2019 regarding the incident in Kyauk Tan village, Rathedaung Township, Rakhine State” (13 June 2019), available at: <http://www.mnhrc.org.mm/s-3-2019/>.

⁸⁵⁴ Radio Free Asia, “Villagers Demand Answers as Myanmar Rights Commission Visits Rakhine Shooting Site” (31 May 2019).

⁸⁵⁵ LI-202, LI-203, LI-204, Myanmar National Human Rights Commission, “Media Statement 3/2019 regarding the incident in Kyauk Tan village, Rathedaung Township, Rakhine State” (13 June 2019): <http://www.mnhrc.org.mm/s-3-2019/>.

⁸⁵⁶ LI-202.

⁸⁵⁷ The Office of the Commander-in-Chief of Defence Services, “A Court of Inquiry will be formed to investigate some deaths in custody” (3 May 2019): <http://cincds.gov.mm/node/3453>.

384. International human rights law prohibits the arbitrary deprivation of life. Although Myanmar is not a party to the ICCPR, Myanmar must respect this prohibition because it is a rule of customary international law.⁸⁵⁸ The Human Rights Committee has interpreted the right to life to include a “heightened duty of care” to protect the lives of individuals deprived of their liberty since States assume a responsibility to care for the life and bodily integrity of people it detains.⁸⁵⁹ In situations of armed conflict, the Geneva Conventions also prohibit violence to life and person, and murder in particular, of people taking no active part in hostilities, including those in a Government’s custody.⁸⁶⁰ Collectively, these rules prohibit the use of lethal force against a person deprived of liberty when a person who is not taking an active part in hostilities presents no threat of imminent death or serious injury.⁸⁶¹ In a situation where a person deprived of liberty does manage to take an active part in hostilities, Myanmar must nonetheless respect other rules of international humanitarian law, including the prohibition on indiscriminate attacks and the rule of proportionality.⁸⁶² While it is a general rule of international human rights law that all deaths at the hands of authorities must be investigated,⁸⁶³ there is a heightened obligation for effective investigations where a person dies in State custody.⁸⁶⁴ These investigations must be independent, impartial, prompt, thorough, effective, credible and transparent.⁸⁶⁵ Prosecutions must occur where appropriate.⁸⁶⁶ In addition, accountability encompasses measures to realize the right to know the truth, the right to reparation and guarantees of non-recurrence.⁸⁶⁷ Under international humanitarian law, violence to life and person, in particular murder, is a war crime that also requires criminal investigation.⁸⁶⁸

⁸⁵⁸ United Nations Human Rights Committee, General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 8.

⁸⁵⁹ Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, para. 25.

⁸⁶⁰ The four Geneva Conventions, Common Article 3(1)(a). For a discussion of acts and omissions other than murder that can constitute violence to the life of a person, see Jean-Marie Henckaerts, eds., *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded in Armies in the Field*, International Committee of the Red Cross, 15 December 2016, *Commentary to Article 3*, paras. 591-593.

⁸⁶¹ Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, para. 12.

⁸⁶² See J.M. Henckaerts and L. Doswald-Beck, “Customary International Humanitarian Law. Volume I: Rules” (Cambridge, ICRC/Cambridge University Press, 2005), rule 1 (the principles of distinction between civilians and combatants), rule 11 (indiscriminate attacks) and rule 14 (proportionality in attack).

⁸⁶³ 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, Basic Guideline and Principle, principle 4; the Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Minnesota Protocol). Available at <https://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf>, para 16.

⁸⁶⁴ The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Minnesota Protocol). Available at <https://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf>, para 17.

⁸⁶⁵ E.g., Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, paragraph 28.

⁸⁶⁶ 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, Basic Guideline and Principle, principle 4; the Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Minnesota Protocol). Available at <https://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf>, para. 24.

⁸⁶⁷ Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), 2005, principle 1.

⁸⁶⁸ See, J.M. Henckaerts and L. Doswald-Beck, “Customary International Humanitarian Law. Volume I: Rules” (Cambridge, ICRC/Cambridge University Press, 2005), rule 156 (definition of war crimes).

385. The Mission collected information concerning at least nine deaths in custody of ethnic Rakhine detained on suspicion of being connected to the AA. Three of the deaths appear to have been the result of torture and six others due to gunfire. Credible reports indicate that the number of deaths could be much higher.⁸⁶⁹ In both cases that the Mission investigated, these people died while in the custody of the Government. Based on the facts that the Mission gathered, the nine deaths occurred in circumstances where victims appeared to have posed no threats that would have made the Government's use of force justifiable under international human rights law or international humanitarian law. That is to say, those who died did not present a threat of imminent death or serious injury and were not at the time of death taking an active part in hostilities.

386. Under these circumstances all the deaths must be the subject of an effective investigation into arbitrary deprivation of life under international human rights law and into the war crimes of violence to life and murder under international humanitarian law. Prosecutions must occur where appropriate. In response to the Government's claim that three of the men in its custody died of respiratory problems, drug addiction and suicide, the Government nonetheless had a responsibility for their care and an investigation remains warranted to determine if the State could have prevented deaths from such causes. In response to the Government's claim that soldiers opened fire on the group of villagers detained in a school because the villagers tried to grab their guns, the Government nonetheless has a responsibility to investigate whether the soldiers' gunfire was indiscriminate or lacked proportionality under the rules of international humanitarian law.

387. The Mission concludes on reasonable grounds that, at the time of writing, the steps the Government has taken to investigate the 2 May 2019 shooting of detainees did not constitute an effective investigation and, therefore, violated the right of victims and their families to an effective investigation.

Torture

388. The Mission also concludes on reasonable grounds that, as part of its conflict with the AA, the Tatmadaw engaged in a pattern of rounding up and interrogating male villagers, including minors, accusing them of belonging to the AA and then often subjecting them to violent interrogations that inflicted severe pain or suffering.⁸⁷⁰ These men and boys were predominantly ethnic Rakhine, although sometimes they belonged to members of other ethnic groups, including the Rohingya. They were often detained in areas with continuing or recent clashes between the military and the AA. The Tatmadaw interrogated these men and boys about the AA or about their alleged involvement with the AA.⁸⁷¹ This practice has been more prevalent since the beginning of 2019.

389. Although Myanmar is not a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Myanmar Government is prohibited from committing acts of torture as a peremptory norm of customary international law.⁸⁷² Under customary international law, "torture" generally means any act that is intentionally inflicted on a person when the act causes severe pain or suffering, whether physical or mental, for such purposes as obtaining information or a confession, for punishment, for intimidation or coercion or for any reason based on discrimination of any kind.⁸⁷³ To constitute torture under international human rights law the pain or suffering

⁸⁶⁹ FFFGEN-1-88144, Min Aung Khine, "Detainee Deaths Mount in N. Rakhine" (The Irrawaddy, 2 July 2019), Radio Free Asia, "Rights Groups Hit Myanmar Military Over Mounting Rakhine Deaths in Custody" (3 July 2019).

⁸⁷⁰ CI-275, CI-276, CI-277, CI-281, CI-285, CI-286, LI-166, LI-170, LI-171, LI-174, LI-175.

⁸⁷¹ CI-201, CI-274, CI-275, CI-276, CI-277, CI-278, CI-281, CI-285, CI-286, LI-136, LI-137, LI-166, LI-170, LI-171, LI-174, LI-179, LI-180, LI-216.

⁸⁷² ICTY, *Prosecutor v Furundžija* (IT-95-17/1), Appeals Chamber Judgement, 21 July 2000, para. 111; David Weissbrodt and Cheryl Heilman, "Defining Torture and Cruel, Inhuman, and Degrading Treatment", 29 *Law & Ineq.* 343 (2011), pp.361-363.

⁸⁷³ ICTY, *Prosecutor v Furundžija* (IT-95-17/1), Appeals Chamber Judgement, 21 July 2000, para. 111 (referring to art. 1. of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

must have been inflicted with the involvement of a public official or other person acting in an official capacity. Such involvement can be through that person's instigation, consent or acquiescence.⁸⁷⁴ Customary international law also prohibits "other cruel, inhuman or degrading treatment or punishment"⁸⁷⁵ which has a similar definition to "torture" but without the purposive element. Myanmar is also prohibited from committing acts of torture, cruel treatment and outrages upon personal dignity under international humanitarian law when the acts have a connection with an armed conflict.⁸⁷⁶ These acts also constitute war crimes under international humanitarian law.⁸⁷⁷ Under international criminal law, torture and cruel treatment are defined as the infliction of severe physical or mental pain or suffering.⁸⁷⁸ Outrages upon personal dignity require a severity in the humiliation or degradation.⁸⁷⁹ Torture requires a purposive element, such as obtaining information or a confession, punishment, intimidation or coercion or any reason based on discrimination of any kind.⁸⁸⁰ Under both international human rights law and international humanitarian law, the Government of Myanmar has an obligation to conduct effective investigations into these violations, including criminal investigations especially when the violations amount to war crimes.⁸⁸¹

390. The Mission concludes on reasonable grounds that the treatment it documented of people detained in the custody of the Tatmadaw in the context of its conflict with the AA constituted a pattern of torture or other cruel, inhuman or degrading treatment or punishment under international human rights law. The Mission also concludes on reasonable grounds that the treatment that the Tatmadaw subjected people to in its custody constituted violations of international humanitarian law and rose to the level of war crimes of torture, cruel treatment or outrages upon personal dignity due to the connection they had to the armed conflict between the AA and the Tatmadaw.⁸⁸² These acts must therefore be further investigated, including as war crimes of torture, cruel treatment and outrages upon personal dignity.

391. Finally, the Mission concludes on reasonable grounds that the Myanmar Government, the military side of the Government in particular, engaged in arbitrary or unlawful detention.⁸⁸³ The Mission draws this conclusion because the Government detained people and often placed them into its criminal justice system while failing to inform detainees why they were detained, denied them legal representation, blocked access to

⁸⁷⁴ CAT, art. 16.

⁸⁷⁵ David Weissbrodt and Cheryl Heilman, "Defining Torture and Cruel, Inhuman, and Degrading Treatment", 29 *Law & Ineq.* 343 (2011), pp.361-363.

⁸⁷⁶ The International Criminal Tribunal for the former Yugoslavia (ICTY) has determined that the nexus between the conflict and the crime does not have to be causal, but the conflict "must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, [the accused's] decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established...that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict." ICTY, Kunarac Appeals Chamber Opinion para. 58, See, also, ICTY, Limaj et al. (IT-03-66), para. 91.

⁸⁷⁷ J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 156 (definition of war crimes).

⁸⁷⁸ ICC Elements of Crime, Article 8 (2) (c) (i)-4 (War crime of torture) and Article 8 (2) (c) (i)-3 (War crime of cruel treatment).

⁸⁷⁹ ICC Elements of Crime, Article 8 (2) (c) (ii) (War crime of outrages upon personal dignity).

⁸⁸⁰ ICC Elements of Crime, Article 8 (2) (c) (i)-4 (War crime of torture).

⁸⁸¹ 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, Basic Guideline and Principle 4.

⁸⁸² ICTY, Kunarac Appeals Chamber Opinion para. 58, See, also, ICTY, Limaj et al. (IT-03-66), para. 91.

⁸⁸³ For a detailed discussion of what constitutes unlawful or arbitrary deprivation of liberty, see Human Rights Committee, General comment No. 35 on Article 9 (Liberty and security of person), CCPR/C/GC/35, paras 10-12.

family members, refused to provide families with information about the location and safety of the detainees,⁸⁸⁴ and took bribes in exchange for the release of detainees.

4. Forced Labour

392. The Mission's 2018 report documented the Tatmadaw's widespread use of civilians for forced labour.⁸⁸⁵ In the context of the continuing conflict between the Tatmadaw and the AA, the Mission concludes on reasonable grounds that this practice is also taking place across Rakhine State and Paletwa Township in Chin State. It takes many forms and affects people from various ethnic groups. It also appears that, while the practice of forced labour of ethnic Rakhine was most notable in 2018 and early 2019, due to the escalation of conflict with the AA, the Tatmadaw may be reducing their reliance on ethnic Rakhine as a source of forced labour, and engaging in more aggressive forced labour practices against Rohingya civilians.⁸⁸⁶ The Mission has identified several locally based Tatmadaw battalions and Light Infantry Divisions that have subjected villagers to forced labour.⁸⁸⁷

393. The Tatmadaw has subjected ethnic Rakhine,⁸⁸⁸ Rohingya⁸⁸⁹ and ethnic Chin⁸⁹⁰ to forced labour in carrying food and other goods and supplies, including weapons, for the Tatmadaw. Individuals from these ethnic groups, predominantly men, but also some Rakhine and Chin women,⁸⁹¹ described to the Mission the arduous conditions under which they were forced to work, including being denied access to sufficient food and water⁸⁹² and being forced to work long hours and to carry heavy loads while being subjected to physical⁸⁹³ and verbal abuse and threats.⁸⁹⁴

394. The Mission also received numerous reports of Tatmadaw soldiers commandeering villagers' boats and forcing Chin, Rakhine and Rohingya to guide and transport them through waterways.⁸⁹⁵ The Tatmadaw also forced Rohingya villagers to perform sentry duty at night to guard and inform the Tatmadaw about AA sightings.⁸⁹⁶

395. In addition to the often harsh working and living conditions, the forced labour exposed people to the dangers of the conflict. Both ethnic Rakhine and Chin villagers described to the Mission the extreme fear they had of being the target of an attack, caught in crossfire or injured by a land mine.⁸⁹⁷ Chin and Rakhine villagers described to the Mission how they were injured or narrowly escaped injury from attack while performing forced labour.⁸⁹⁸ One ethnic Rakhine man described how Tatmadaw soldiers forcibly commandeered his boat and forced him and another Rakhine villager to sail it with them onboard. The AA shot at it. During the attack, the other villager was shot in the thigh.⁸⁹⁹ Another Rakhine man described how he was forced to porter for the Tatmadaw when he

⁸⁸⁴ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 99 (deprivation of liberty), Rule 100 (fair trial guarantees); Human Rights Committee, General comment No. 35 on Article 9 (Liberty and security of person), CCPR/C/GC/35.

⁸⁸⁵ A/HRC/39/CRP.2., paras 253 – 273, 412-424, 614-615.

⁸⁸⁶ See Chapter IV, section E in this report: The situation of the Rohingya; Forced or compulsory labour.

⁸⁸⁷ CI-280, LI-169, LI-173, LI-177.

⁸⁸⁸ CI-281, CI-284, CI-286, LI-167, LI-169, LI-170, LI-173.

⁸⁸⁹ LI-137, FI-029, FI-048 Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar's Rakhine State*, (May 2019), p. 29; See Chapter IV, section E in this report: The situation of the Rohingya; Forced or compulsory labour.

⁸⁹⁰ CI-247, CI-248, CI-250, CI-252, CI-255, CI-260, LI-143, LI-145, LI-146 LI-147, LI-151, LI-158.

⁸⁹¹ LI-182, LI-151, LM-043.

⁸⁹² CI-252, CI-260, CI-284, CI-286, FI-029, LI-143, LI-173, LI-176, LI-177 LI-224.

⁸⁹³ CI-286, FI-048, LI-170, LI-173, LI-177, LI-224.

⁸⁹⁴ CI-280, LI-173, LI-176, LI-177.

⁸⁹⁵ CI-248, CI-280, LI-145, LI-146, LI-147, LI-148, LI-158, LM-058.

⁸⁹⁶ FI-024, FI-037, LM-058, see also: Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar's Rakhine State*, (May 2019), p. 31.

⁸⁹⁷ LI-143, LI-146, LI-147, LI-151, LI-158, LI-170, LI-172, LI-176.

⁸⁹⁸ CI-250, CI-281, LI-170.

⁸⁹⁹ CI-280.

was caught in the middle of an exchange of gunfire between the AA and Tatmadaw soldiers. He was fortunate to escape without injury.⁹⁰⁰

396. Despite being aware of the risks posed by landmines laid by the AA, the Tatmadaw has forced both Rakhine and Chin villagers to porter for them in areas where they are at risk of landmine explosions.⁹⁰¹ The Mission also received reports of ethnic Rakhine and Chin men being forced to serve as guides for the Tatmadaw, requiring them to walk at the front of the patrol in what could amount to purposeful or *de facto* minesweeping.⁹⁰² An elderly ethnic Rakhine man described how he and another elderly man were forced to walk at the front of a group of Tatmadaw soldiers through the jungle. The man described how a commander ordered, “all of you follow behind the old men”.⁹⁰³ Another ethnic Rakhine man recalled how three villagers had to walk at the front of a military column after having carried heavy goods. As they did so there was an explosion that was consistent with a landmine explosion.⁹⁰⁴

397. The Myanmar Government has denied allegations of forced labour, claiming the Tatmadaw pays civilians for their work.⁹⁰⁵ Despite these claims, the Mission notes that the practice of non-payment for work remains widespread.⁹⁰⁶ Both Chin and Rakhine villagers who performed forced labour told the Mission that they received no compensation for their work.⁹⁰⁷ In some cases, payment was received but it was insufficient and inadequate.⁹⁰⁸ One Chin man stated: “*For the Tatmadaw, sometimes they pay us for this work, but they do not really pay the real price. But we just have to accept whatever they give us*”.⁹⁰⁹ Even when paid, the work is compulsory. Even when the work puts them at grave risk, villagers are unable to refuse to undertake the tasks that soldiers order them to do.⁹¹⁰

(a) Conclusions and legal findings

398. The International Labour Organization’s Forced Labour Convention 1930 (No. 29), which Myanmar acceded to in 1955, defines forced or compulsory labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”. The Mission provided a legal assessment of forced labour in its 2018 report.⁹¹¹ In summation, international human rights law prohibits forced or compulsory labour. Prohibitions to that effect feature in the International Covenant on Economic, Social and Cultural Rights⁹¹² and the Convention on the Rights of the Child,⁹¹³ to both of which Myanmar is a party. Forced labour is also prohibited under the Universal Declaration of Human Rights, as a form of slavery.⁹¹⁴ It also amounts to *de facto* deprivation of liberty under international human rights law. As such, people used in forced labour must be treated in a manner that respects their inherent

⁹⁰⁰ LI-170.

⁹⁰¹ CI-247, CI-250, LI-143, LI-216.

⁹⁰² LI-136, LI-137, LI-173, LI-216, CI-281.CI-255, Chin Human Rights Organization, *Stable and Secure: An Assessment on the Current Context of Human Rights for Chin People in Burma/Myanmar* (October 2018).

⁹⁰³ LI-136.

⁹⁰⁴ CI-281.

⁹⁰⁵ <https://www.facebook.com/rfaburmese/videos/426566111529609/>, See also ILO, C.App./Myanmar/C29 (June 2019).

⁹⁰⁶ See e.g. ILO Governing Body decision, adopted in March 2019 and ILO Committee on the Application of Standards, Myanmar, June 2019 C.App./Myanmar/C29.

⁹⁰⁷ CI-260, LI-143, LI-146, LI-150, LI-151.

⁹⁰⁸ LI-146, LM-043, Chin Human Rights Organization, “Tatmadaw Initiate Widespread Forced Labour Demands on Chin Civilians in Effort to Keep Light Infantry Division Stocked with Food Supplies” (News Release, 24 May 2019).

⁹⁰⁹ LI-146.

⁹¹⁰ CI-247, CI-248, CI-250, CI-252, CI-255, LI-143, LI-146, LI-147, LM-043.

⁹¹¹ A/HRC/39/CRP.2, paras. 254-257.

⁹¹² ICESCR, art. 6.1. Myanmar signed the ICESCR in July 2015 and became a party to it on 6 October 2017.

⁹¹³ CRC, art. 32.

⁹¹⁴ UDHR, art. 4

dignity⁹¹⁵ and must be provided with basic necessities, including adequate food, water, clothing, shelter and medical attention.⁹¹⁶ Depending on its purpose and the severity of pain and suffering that accompanies forced labour, it may amount to torture, or cruel, inhuman or degrading treatment.⁹¹⁷ Depending on the dangers to which the forced labour exposes people, it may also constitute a violation of the right to life.⁹¹⁸

399. In situations of armed conflict, including the non-international armed conflicts in Myanmar, international humanitarian law prohibits uncompensated or abusive forced labour.⁹¹⁹ Similarly to international human rights law, forced labour also constitutes the prohibited act of arbitrary deprivation of liberty and, as such, places obligations towards respecting victims' dignity⁹²⁰ and providing them with basic necessities.⁹²¹ The ICTY has found that forcing civilians to dig trenches and placing detainees in a life-threatening situation in the context of an armed conflict can constitute the war crime of cruel or inhumane treatment.⁹²² Using civilians in forced labour activities that expose them to the dangers and harms of armed conflict is also prohibited by international humanitarian law under the rule that parties to a conflict must take all feasible precautions to protect civilians under their control against the effects of attacks.⁹²³

⁹¹⁵ ICCPR, Article 10.

⁹¹⁶ See, generally, United Nations Standard Minimum Rules for the Treatment of Prisoners (revised), A/RES/70/175, 17 December 2015.

⁹¹⁷ For more discussion on legal requirements for torture see Conclusions and legal findings in Section V. C. 3: The conflict between the Tatmadaw and the Arakan Army; Torture, arbitrary detention and deaths in custody.

⁹¹⁸ Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, paragraph 7.

⁹¹⁹ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 95 (forced labour).

⁹²⁰ *Ibid.*, rule 87 (humane treatment).

⁹²¹ *Ibid.*, rule 118 (provision of basic necessities to persons deprived of their liberty).

⁹²² See, ICTY, *Prosecutor v. Blaškić*, Trial Judgement, Case No. IT-95-14-T, 3 March 2000, para 700.

⁹²³ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 22 (principle of precautions against the effects of attacks). See, also, Common Article 3 to the four Geneva Conventions.

400. The Mission concludes on reasonable grounds that the Tatmadaw forced Chin, Rakhine and Rohingya villagers to perform various tasks that amounted to forced labour. All the cases that the Mission documented were connected with the armed conflict between the AA and the Tatmadaw. For that reason, the Mission also concludes on reasonable grounds that Myanmar violated the prohibition against forced labour and arbitrary deprivation of liberty under both international human rights law and international humanitarian law. While international law permits some exemptions to the general prohibition of forced labour,⁹²⁴ the cases of forced labour that the Mission investigated do not fall within those exemptions. The conditions to which the Tatmadaw exposed these civilians failed to meet the basic dignity that Myanmar is obligated to afford to anyone it deprives of liberty, such as adequate food, water and other necessities. Some were subjected treatment or punishment that amounted to torture or was cruel, inhuman, or degrading.⁹²⁵ The manner in which the Tatmadaw exposed forced labourers to the dangers of the armed conflict, including exposing them to gunfire and landmines, contravened the right to life under international human rights law and was a violation of international humanitarian law under the prohibition of exposing civilians under its control to the effects of attack. Under both international human rights law and international humanitarian law, the Government of Myanmar has an obligation to conduct effective investigations into these violations, including criminal investigations especially when they amount to war crimes of torture, cruel treatment or outrages upon personal dignity.⁹²⁶

401. The Mission emphasizes to all parties to the conflict that, in situations where a party breaches the prohibition on forced labour, civilians who are forced to carry out labour for armed forces do not lose their civilian status or protections, unless and for such time as they take a direct part in hostilities. Absent taking a direct part in hostilities, civilians engaging in forced labour cannot be the object of attack, must not be the subject of indiscriminate attacks, and must be afforded the protections of precautionary measures.

5. Humanitarian impacts of the conflict

402. Ethnic Rakhine, Rohingya and Chin civilian villagers have borne the brunt of the conflict between the Tatmadaw and the AA.

403. Official statistics from OCHA from August 2019 indicate that the conflict between the AA and the Tatmadaw may have displaced around 28,000 people in northern Rakhine and southern Chin states.⁹²⁷ Given the fluidity around displacement, and the fact that official statistics only count those displaced in recognised displacement sites, the true number may in fact be much higher, with reports at the time of writing indicating as many as 60,000 persons displaced, predominantly ethnic Rakhine.⁹²⁸ Many of those displaced are now residing in makeshift temporary displacement sites, including monasteries and temporary tent-structures with minimal access to basic services. In the absence of signs of the conflict abating, the Mission fears that displacement may continue to increase.

404. The situation for IDPs has been exacerbated as a result of restrictions imposed by the Myanmar authorities. This includes the restrictions on humanitarian access to Kyauktaw, Ponnagyun, Buthidaung, Maungdaw and Rathedaung Townships for UN agencies and other humanitarian organizations, with the exception of the WFP and the

⁹²⁴ A/HRC/39/CRP.2, para. 256.

⁹²⁵ CI-284, CI-286, LI-170, LI-173, LI-176, LI-177, LI-224.

⁹²⁶ 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, Basic Guideline and Principle 4.

⁹²⁷ OCHA, "Myanmar: New Displacement in Rakhine State" (13 May 2019). See also OCHA, Asia and the Pacific: Weekly Regional Humanitarian Snapshot (30 July - 5 August 2019), 5 August 2019.

⁹²⁸ The Irrawaddy, "Arakan Army Raids Myanmar Military Base in Northern Rakhine" (28 August 2019); Joint statement by the AA, TNLA, MNDAA, 12 August 2019, available at: <http://www.pslftnla.org/wp-content/uploads/2019/08/JPG-1-724x1024.jpg>.

ICRC.⁹²⁹ Furthermore, since early May, the Government has imposed a rice-import ban in Paletwa Township, with limitations on how much rice can be purchased per person, contributing to insufficient food supplies. This is having a disproportionate impact on Chin communities.⁹³⁰ A large coalition of humanitarian organisations active in Myanmar warned that the impact of the restrictions will be felt by displaced civilians and others affected by the conflict.⁹³¹

405. To reduce the hardships and humanitarian shortfalls that the restrictions are causing, *ad hoc* community based assistance is being provided to IDPs. Community groups, including monks, facilitate donation drives at the community level and then try to distribute assistance to those in need.⁹³² However, these groups often need to operate secretly, putting themselves at risk.⁹³³ One Rakhine man described delivering aid provided by the community to displaced IDPs when his car was stopped by the Tatmadaw and his group was forced to sign documents that they were not delivering food to the AA. Upon returning to the village three members of the volunteer delivery group were arrested.⁹³⁴ “After the leaders were arrested we could not do any more collection. We became too scared,” he commented.⁹³⁵

406. The humanitarian impact of the conflict is disproportionately felt by women, as many women are left behind by spouses who have been detained or fled due to the increased insecurity and many of them become displaced with their children.⁹³⁶

(a) Impact on livelihoods and food security

407. The conflict is having a severe impact on the ability of Rakhine, Rohingya and Chin villagers who reside in and near areas of active hostilities to carry out their agrarian livelihood activities. Given the predominantly agrarian economy of the region and the large number of subsistence farmers, the Mission is concerned that the situation imposes risks to food security for years to come.

408. On 2 April 2019, the Rakhine State Government imposed a curfew, under Tatmadaw control, between 9 pm and 5 am in the townships of Kyauktaw, Ponnangyun, Rathedaung, Minbya and Mrauk-U.⁹³⁷

⁹²⁹ Nyan Lynn Aung “Aid groups barred from Rakhine conflict zones” (The Myanmar Times, 14 January 2019) In the following discussions in Rakhine State Parliament on 2 May and 10 May 2019, it was mentioned that on 10 January 2019, the Rakhine State Government has directed an order to ban humanitarian and development aids, except ICRC and WFP:

<https://www.facebook.com/rakhinestatenews/posts/1283046778499832>;

<https://www.facebook.com/rakhinestatenews/posts/1288319534639223>.

⁹³⁰ LM-048, See also : BNI Multimedia Group, “Army Rice Restrictions Add to Suffering of Paletwa Villagers, IDP” (29 May 2019).

⁹³¹ “Statement of INGOs in Myanmar on the situation in Rakhine” (Press Statement, 1 April 2019) available at: <https://www.nrc.no/news/2019/april/statement-of-ingos-in-myanmar-on-the-situation-in-rakhine/> (accessed August 2019). See also: US Embassy in Burma, “U.S. Embassy Statement of Concern about Conflict and Humanitarian Access in Myanmar” (2 April 2019) (noting that: “Access restrictions on humanitarian and development organizations have prevented at least 95,000 additional civilians from receiving essential services, such as health care, education, and clean water, in five Rakhine State townships since January 2019”), available at: <https://mm.usembassy.gov/us-statement-of-concern-about-conflict-and-humanitarian-access-in-myanmar/>

⁹³² CI-316, CI-317, LI-140, LI-171, LI-214, LI-215, LI-225, LM-024.

⁹³³ LI-140, LI-171, LI-215.

⁹³⁴ LI-171.

⁹³⁵ LI-171.

⁹³⁶ See Chapter V, section E in this report: The conflict between the Tatmadaw and the Arakan Army; Gender impacts.

⁹³⁷ Notice number 597/3/6-1 (Lone Chone)/Ah Pha Ya (Rakhine), dated 1 April 2019, signed by Colonel Phone Tint, minister of security and border affairs, on behalf of the Rakhine State Minister, is on file with the Mission. See also: Radio Free Asia, “Nighttime Curfew Imposed in Five Townships in Myanmar’s Rakhine State” (2 April 2019).

409. The imposition of curfews has had an immediate negative impact on villagers' ability to harvest rice, farm, cut bamboo and fish. The inability to conduct livelihood activities is exacerbated by villagers' fear of accessing farmlands due to the proximity of fighting⁹³⁸ and the dangers of mines and unexploded ordinance.⁹³⁹ Villagers have also expressed their reluctance to access farmlands for fear of encountering Tatmadaw soldiers and being subjected to forced portering.⁹⁴⁰ The livelihoods of Chin farmers, who largely practise crop rotation, often have their farmlands far from their villages, and therefore are particularly affected by these factors.⁹⁴¹ Ethnic Rakhine have a particularly well-founded fear of being detained, arrested or tortured.⁹⁴²

410. These curfews and movement restrictions are affecting the population as a whole, but also disproportionately impact the Rohingya whose situation is compounded by their lack of legal documentation or NVCs and by their confinement to IDP camps or their villages, as explained in this report's section on the situation of the Rohingya.

411. Further exacerbating the food insecurity is the fact that, since early 2019, villagers have been required to obtain authorisation from security forces to bring larger quantities of food items and medical supplies to their villages, affecting their ability to support themselves or others.⁹⁴³ The humanitarian restrictions is purportedly for security reasons and is consistent with the Government's "four-cuts" strategy to limit the AA's access to food supplies. In practice the restrictions have heightened food insecurity for IDPs and vulnerable populations, as well as lack of access to basic services.

412. Tatmadaw soldiers involved in the conflict with the AA have taken part in the widespread seizure of villagers' property, including food and other items indispensable to the survival of the civilian population. The pattern of the Tatmadaw taking civilian supplies in times of conflict has been well documented, including by this Mission.⁹⁴⁴ Depriving ethnic Rakhine villagers of food and other goods indispensable to their survival is consistent with the use of its "four cuts" policy designed to deprive armed groups of supplies by targeting civilian populations that the Tatmadaw perceives as supporting those groups. On 12 April 2019 the General Administration Department of Kyauktaw Township issued a local order that ratified this approach, authorizing the Township Police to inspect and require a letter of approval for "any transfer of rice, food supplies, and medicines from one place to another, within the township, from one township to another, or via trade route or waterway".⁹⁴⁵

413. In the majority of cases, Tatmadaw soldiers have directly demanded goods from villagers without payment, including confiscation of food rations as well as domestic and farm animals. This has largely occurred either when taking up temporary residence inside a village or when passing through a village.⁹⁴⁶

414. Tatmadaw soldiers have also confiscated civilian property during and after military operations. In ethnic Rakhine villages, villagers who fled when they saw the Tatmadaw entering their village returned to find their belongings taken.⁹⁴⁷ Other times, villagers witnessed Tatmadaw soldiers seizing their property.⁹⁴⁸ An ethnic Rakhine man who stayed

⁹³⁸ CI-274, CI-279, CI-285, LI-171, LI-0173, LI-181.

⁹³⁹ CI-320, LI-186.

⁹⁴⁰ CI-279, CI-280, LI-146, LI-157, LI-173, LI-181.

⁹⁴¹ CI-248, CI-249, CI-256, CI-258, CI-320, LI-145, LI-146, LI-159.

⁹⁴² CI-279, CI-280, LI-173, LI-181.

⁹⁴³ CI-319, CI-320, LI-159, See also: UNICEF Myanmar Humanitarian Situation Report #7 (July 2019), Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar's Rakhine State*, (May 2019), p.32.

⁹⁴⁴ See e.g. A/HRC/39/CRP.2, paras. 345-347.

⁹⁴⁵ Township General Administration Department Kyauktaw Township, Local Order (1/2019), 12 April 2019, on file with the Mission.

⁹⁴⁶ LI-143, LI-147, LI-156, LI-157, LI-160, LI-207.

⁹⁴⁷ CI-324, LI-207, LI-213.

⁹⁴⁸ CI-324, LI-207, LI-213

behind in his village of Sin Taung, Buthidaung Township,⁹⁴⁹ described how he witnessed the systematic confiscation of property in his village by soldiers after the attack there on 21 to 22 March 2019:

*During the days following the attack, the Tatmadaw was regularly passing through the village. As most of the villagers had left for the IDP camps, the soldiers stole things, and our cows and pigs were missing. Goods from entire shops were taken away by the soldiers.*⁹⁵⁰

415. Another ethnic Rakhine villager described how the Tatmadaw's 22nd and 55th LID detained 27 men in the village of Let Kar in April 2019.⁹⁵¹ The soldiers continued over a period of days and weeks to systematically take livestock, goods and other belongings. He observed: "Now there are no chickens, ducks or pigs left".⁹⁵²

416. Another ethnic Rakhine man returned to his village Sa Pha Thar⁹⁵³ the night of the attack there on 3 June 2019, to try to locate stray cattle. He described how the next day he saw soldiers moving around the village, searching each house and taking away belongings of the villagers. He commented: "When the villagers returned to the village, each household found something missing from their house".⁹⁵⁴

417. Additionally, in a number of Chin villages in Paletwa Township, villagers have been forced to provide food for Tatmadaw soldiers stationed in or near their villages.⁹⁵⁵ A Chin man commented: "The Tatmadaw soldiers take food from the people. If they ask villagers for supplies, the villages have to give them whatever they have."⁹⁵⁶

418. The Tatmadaw's confiscation of property also contributed to the displacement of local populations who are forced to leave their villages due to loss of access to livestock, foodstuffs and other sources of sustenance and livelihood.

(b) Conclusions and legal findings

419. The Mission concludes on reasonable grounds that the Tatmadaw's seizure of food and the Government's humanitarian relief restrictions in relation to the conflict with the AA are resulting in a serious deterioration of the humanitarian situation for the ethnic Rakhine and Chin civilian populations. The Mission also concludes that these actions are in large part due to the Government's policy to deprive the AA of those same supplies. Focusing on the civilian population as a primary provider of those supplies is consistent with the Tatmadaw's "four cuts" policy and reflected in the 12 April 2019 Local Order to stop "the flow of rice and food supplies, medicines and medical supplies, required for the insurgents' long-term livelihood".⁹⁵⁷

420. This conclusion has bearing on the Mission's assessment of the rules of international law pertaining to humanitarian relief restrictions and denying civilians goods, such as food, that are indispensable to their survival. These rules include respecting the right to adequate food and the right to life.⁹⁵⁸ Under international humanitarian law, humanitarian relief and goods indispensable to the survival of the civilian population are generally regarded as civilian objects and are therefore protected from being the object of an attack and from indiscriminate attack.⁹⁵⁹ Their incidental destruction in an attack must also comply with the

⁹⁴⁹ See above: Sin Taung incident.

⁹⁵⁰ LI-213.

⁹⁵¹ See above: Let Kar incident.

⁹⁵² LI-207.

⁹⁵³ See above: Sa Pha Thar incident.

⁹⁵⁴ CI-324.

⁹⁵⁵ CI-247, CI-248, LI-143, LI-145, LI-146, LI-157, LI-160.

⁹⁵⁶ LI-143.

⁹⁵⁷ Township General Administration Department Kyauktaw Township, Local Order (1/2019), 12 April 2019, on file with the Mission.

⁹⁵⁸ ICESCR, art. 11, ICESCR, art. 12, ICCPR, art. 6.

⁹⁵⁹ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 54 (attacks against objects

principles of proportionality due to the anticipated loss or injury to civilian life that could result from denying people humanitarian relief, food and other related items.⁹⁶⁰ Under international humanitarian law, parties must allow and facilitate rapid and unimpeded passage of humanitarian relief, including medicine, food and other survival items, which is impartial in character and conducted without any adverse distinction, subject to their right of control.⁹⁶¹ Arbitrary restriction of humanitarian relief and assistance is impermissible.⁹⁶² International humanitarian law also prohibits starvation as a means of warfare against the civilian population, which amounts to a war crime.⁹⁶³ To the disadvantage of the civilian population, international humanitarian law allows warring parties to deny civilian populations food and other items as a means of preventing those supplies from getting to an enemy force,⁹⁶⁴ provided that doing so does not breach other overriding rules of international humanitarian law or other applicable international law more generally.

421. On the basis of these various rules of international law, the context in which the restrictions on relief and denial of food is occurring, and the information available to the Mission, the Mission assessed the situation through the rules of proportionality under international humanitarian law.⁹⁶⁵ The rule of proportionality under international humanitarian law prohibits attacks which may be expected to cause incidental loss of civilian life and injury to civilians which would be excessive in relation to the concrete and direct military advantage anticipated.⁹⁶⁶ The loss of life and injury that a party is responsible for taking into account does not need to have a direct relationship to the attack, but it needs to be “expected”. The rule of proportionality must take into account reverberating and repercussive effects that an attack has on a civilian population.⁹⁶⁷

422. Due to the Government’s refusal to grant the Mission access to Myanmar and the restrictions it places on humanitarian agencies, the Mission was unable to draw any conclusions in its legal assessment as to what, if any, legitimate military advantage the Tatmadaw gained from seizing food and livestock from civilians during attacks. The Mission was also unable to draw any conclusions on associated civilian deaths or injuries. It

indispensable to the survival of the civilian population). See also, rule 56 (freedom of movement of humanitarian relief personnel).

⁹⁶⁰ See *Prosecutor v. Prlic* ICTY, *Prosecutor v. Prlic*, Case No. IT-04-74-T, Trial Chamber Judgement, 29 May 2013, para. 1582.

⁹⁶¹ See J.M. Henckaerts and L. Doswald-Beck, “Customary International Humanitarian Law. Volume I: Rules” (Cambridge, ICRC/Cambridge University Press, 2005), rule 55 (access for humanitarian relief to civilians in need) and rule 56 (freedom of movement of humanitarian relief personnel). See, also, United Nations Group of Eminent International and Regional Experts, Situation of human rights in Yemen, including violations and abuses since September 2014, A/HRC/39/43, 17 August 2018, para. 46.

⁹⁶² See J.M. Henckaerts and L. Doswald-Beck, “Customary International Humanitarian Law. Volume I: Rules” (Cambridge, ICRC/Cambridge University Press, 2005), rule 55 (access for humanitarian relief to civilians in need) and rule 56 (freedom of movement of humanitarian relief personnel).

⁹⁶³ *Ibid.*, rule 53 (starvation as a method of warfare).

⁹⁶⁴ *Ibid.*, See, also, ICTY, *Prosecutor v. Prlic*, Case No. IT-04-74-T, Trial Chamber Judgement, 29 May 2013, para. 1582.

⁹⁶⁵ Assessing the restrictions and deprivation of items indispensable to the survival of the civilian population under the rule of proportionality should not preclude an assessment of the facts under other rules of international law if additional facts emerge.

⁹⁶⁶ See J.M. Henckaerts and L. Doswald-Beck, “Customary International Humanitarian Law. Volume I: Rules” (Cambridge, ICRC/Cambridge University Press, 2005), rule 14 (proportionality in attack).

⁹⁶⁷ See, ICTY, *Prosecutor v. Prlic*, Case No. IT-04-74-T, Trial Chamber Judgement, 29 May 2013, paras. 1583-1584. (While noting that a bridge that came under attack was a legitimate military object, the Chamber “noted that the destruction of the Old Bridge put the residents of Donja Mahala, the Muslim enclave on the right bank of the Neretva, in virtually total isolation, making it impossible for them to get food and medical supplies resulting in a serious deterioration of the humanitarian situation for the population living there”. The Chamber therefore held that “although the destruction of the Old Bridge by the HVO may have been justified by military necessity, the damage to the civilian population was indisputable and substantial. It therefore holds by a majority, with Judge Antonetti dissenting, that the impact on the Muslim civilian population of Mostar was disproportionate to the concrete and direct military advantage expected by the destruction of the Old Bridge”).

notes, however, that the deprivation of food and livestock in combination with humanitarian relief restrictions is resulting in a serious deterioration of the humanitarian situation for the displaced civilian population. Further investigation is required. Given that international human rights law and international humanitarian law both apply in situations of armed conflict, the Mission notes that any violation of the rules of proportionality under international humanitarian law would, at a minimum, also mean that the Government violated the right to food, health and life under international human rights law, particularly under the International Covenant on Economic, Social and Cultural Rights and the Conventions on the Rights of the Child, both to which Myanmar is a party.⁹⁶⁸

D. Abuses by the Arakan Army

423. The Mission documented patterns of human rights abuses and violations of international humanitarian law by the AA, predominately against non-ethnic Rakhine communities, most notably Chin minorities, including patterns of forced labour and arbitrary deprivation of liberty, intimidation and theft. As a party to a non-international armed conflict with the Tatmadaw, the AA must respect and ensure respect for international humanitarian law. Members of the AA are also criminally liable for acts prohibited under international criminal law, in particular war crimes.

424. The Mission's investigation into AA-related human rights abuses and violations of international humanitarian law was hampered by the cumulative effect of the Myanmar Government's refusal to respond to requests for information about the AA, its refusal to grant the Mission access to the country, its imposed internet shutdown from 21 June and was partially lifted on 31 August 2019,⁹⁶⁹ and the reluctance of ethnic Rakhine to provide information to the Mission that might reflect negatively on the AA. AA fighters have also engaged in intimidating practices, threatening Chin villagers with violence if they share any information on AA movements with the Tatmadaw.⁹⁷⁰

1. Forced Labour

425. The Mission received credible reports that the AA took Chin civilians for forced labour without warning or giving notice to their family for days and then returned once the labour was carried out. During the labour, those abducted were not paid and they were unable to leave at will.⁹⁷¹ Villagers have also been required to pay money to the AA in return for Chin villagers who the AA abducted.⁹⁷² As one Chin villager stated: "The AA has arrested some people from the villages and said: if you want people back, you have to give this amount of money and if not the person will not live".⁹⁷³

426. Sometimes, Chin villagers were forced to guide the way for AA fighters through jungle areas.⁹⁷⁴ One man from Paletwa Township noted how he was forced to be a guide for three consecutive days and was not paid for his work.⁹⁷⁵ Sometimes when accompanying the AA, Chin villagers were forced to porter for the AA fighters, including carrying their belongings, foodstuffs and other large sacks, some of which they believed could contain weapons.⁹⁷⁶

⁹⁶⁸ ICESCR, which Myanmar ratified on 6 October 2017. The CRC was ratified by Myanmar on 15 October 1991.

⁹⁶⁹ Telenor Group, "Internet Services Restored in Five Townships in Myanmar, (Media Statement, 01 September 2019), available at: <https://www.telenor.com/internet-services-restored-in-five-townships-in-myanmar-01-september-2019/>; Al Jazeera, "Myanmar partially lifts internet blackout in Rakhine, Chin states" (1 September 2019).

⁹⁷⁰ CI-247, CI-248, CI-250, CI-256, LI-140, LI-142, LI-143, LI-160.

⁹⁷¹ CI-254, CI-256, LI-142, LI-144, LI-147, LI-158, LI-160.

⁹⁷² CI-249, LI-143, LI-151.

⁹⁷³ LI-143.

⁹⁷⁴ CI-248, CI-254, CI-259, LI-142, LI-144.

⁹⁷⁵ LI-254.

⁹⁷⁶ CI-254, LI-158, LI-160.

427. In other instances, AA fighters have demanded that Chin villagers transport them using their boats through the waterways.⁹⁷⁷ The Mission also learned of cases where Chin villagers were taken to AA bases and forced to work there.⁹⁷⁸ At times, the forced labour was accompanied by violent threats by the AA fighters when villagers failed to comply with their orders.⁹⁷⁹

428. Chin villagers told the Mission of their extreme fear of being the subject of Tatmadaw reprisals for assisting or supporting the AA in any way. As one man noted: “I am always scared when the AA is in my boat, because the Tatmadaw might find out. Because of both sides, we are so scared.”⁹⁸⁰

2. Abductions and deprivation of liberty

429. The Mission also received allegations of the AA abducting Chin villagers who were never seen again.⁹⁸¹ This included Chin village administrators,⁹⁸² some of whom never returned.⁹⁸³ The Mission was told that family members of these village administrators assume that their relatives have been targeted and killed by the AA for their role as village administrator, which meant they had close dealings with the Tatmadaw.⁹⁸⁴ As one Chin villager said: “Soldiers kicked open the door and took him. They said arrest that man, arrest that man.”⁹⁸⁵

430. The Mission also received credible reports that early in April 2019 the AA abducted a group of construction workers, including people from ethnic Rakhine and Chin minorities.⁹⁸⁶ The AA claimed the workers were military spies,⁹⁸⁷ an allegation that the Tatmadaw denies.⁹⁸⁸ Reports indicate that the construction workers were released in August 2019.⁹⁸⁹

⁹⁷⁷ CI-256, LI-147.

⁹⁷⁸ LI-144, LI-181.

⁹⁷⁹ LI-142, LI-144.

⁹⁸⁰ LI-147.

⁹⁸¹ CI-247, CI-254, LI-158.

⁹⁸² CI-247 CI-254, LI-160.

⁹⁸³ CI-247, CI-254.

⁹⁸⁴ CI-247, CI-254.

⁹⁸⁵ CI-254.

⁹⁸⁶ CI-319, See also: BNI Multimedia Group, “Chin Man Included in Eight Workers Detained by Arakan Army” (9 April 2019), Nan Lwin Hnin Pwint “AA Says Construction Company Employees it Abducted Were Military Spies” (The Irrawaddy, 4 April 2019), Chan Thar “Arakan Army detains eight construction workers” (Myanmar Times, 4 April 2019).

⁹⁸⁷ Arakan Army, “Interview with the Commander-in-Chief of AA (Part 2)” (10 May 2019): <https://www.arakanarmy.net/amp/aa-%E1%80%85%E1%80%85-%E1%80%A6-%E1%80%85-%E1%80%81-%E1%80%95-%E1%80%84-%E1%80%90-%E1%82%95%E1%80%86-%E1%80%99-%E1%80%99%E1%80%94-%E1%80%81%E1%80%84-%E1%80%A1%E1%80%95-%E1%80%84-%E1%81%82>

⁹⁸⁸ Radio Free Asia, “Nighttime Curfew Imposed in Five Townships in Myanmar’s Rakhine State” (2 April 2019); Radio Free Asia, “Interview with Brig-Gen Zaw Min Tun” available at: <https://www.rfa.org/burmese/news/military-responds-to-aa-statement-on-suhtoosan-04032019073341.html> (wherein the Brig-Gen states “it is possible that some employees of the construction company used to be Tatmadaw Intelligence members. Intelligence group and Tatmadaw are not very closely affiliated anymore. So this is just an excuse, to bring down the whole [construction] project”)

⁹⁸⁹ <https://twitter.com/KThwey/status/1162938213033340932>
<https://www.arakanarmy.net/post/%E1%80%96%E1%80%99-%E1%80%86-%E1%80%91-%E1%80%94-%E1%80%9E-%E1%80%99-%E1%80%91-%E1%80%9E-%E1%80%99-%E1%80%91-%E1%80%99-%E1%80%85%E1%80%85-%E1%80%98%E1%80%80-%E1%80%84-%E1%80%99%E1%80%9E%E1%80%80-%E1%80%86-%E1%80%84-%E1%80%9E-%E1%80%99-%E1%80%A1-%E1%80%9C-%E1%80%90-%E1%80%95-%E1%81%BF%E1%80%95-%E1%80%96%E1%80%85-%E1%81%BE%E1%80%80-%E1%80%84-%E1%80%91-%E1%80%90-%E1%80%95%E1%80%94-%E1%81%BE%E1%80%80-%E1%80%84-%E1%80%81-%E1%80%80>

431. The Mission also takes note of a group of 54 Chin-Kumi civilians from Kin Ta Lin village in Paletwa Township who were taken by the AA on 2 February 2019.⁹⁹⁰ The AA told the group they were being evacuated for their safety due to nearby fighting.⁹⁹¹ Half of the village had already left the village days previously.⁹⁹² The AA first took the villagers to a temporary camp close to the Bangladesh border and then to an AA base.⁹⁹³ The Mission received credible reports that the group were subjected to forced labour.⁹⁹⁴ During their time under AA custody, villagers were unable to contact their families. The AA confirmed that the villagers were in its custody but it stated that they were not arbitrarily detained but kept at the base for their own protection.⁹⁹⁵ Reports indicate that on 1 August 2019 all the villagers were handed over to the Chin Village Administrator.⁹⁹⁶

432. The Mission is also aware of reports that in April 2019 the AA detained seven family members of Myanmar police officers, including three children. The AA detained them during an attack on a police base that resulted in three people being killed, including the wife of one police officer.⁹⁹⁷ The media reported that Twan Mrat Naing, the head of the AA, admitted detaining the family members of the police officers and noted that they were being properly treated, kept in safety and would be released soon.⁹⁹⁸ The seven were reportedly released on 12 April 2019.⁹⁹⁹ The Mission was unable to verify the content of these reports.

3. Seizure of property and extortion

433. AA fighters have regularly seized goods from Chin villagers, predominantly in Paletwa Township, Chin State. For the most part, this involved the AA taking foodstuffs, including rice, but also livestock, such as chickens and pigs, and other rations.¹⁰⁰⁰ In some cases, AA fighters have demanded money from Chin villagers.¹⁰⁰¹ At times, AA fighters entered Chin villages in groups and convened meetings where they made their demands.¹⁰⁰² At other times, individual or small groups of AA fighters came into or near villages at night, during which “collections” were coordinated through a village leader, with local

⁹⁹⁰ LI-181, LI-182, See also: Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar's Rakhine State*, (May 2019), p.36; <https://www.myanmar-now.org/mm/news/2019?fbclid=IwAR0Y0754FKcSZbns122OJ>; Khumi Affairs Consultative Council (KACC), “Statement by KACC” (2 April 2019) available at: <https://www.facebook.com/342452573283770/photos/a.342503386612022/342888343240193/>; Radio Free Asia, “Chin Ethnic URGES Arakan Army to Free Villagers; AA Warns of Severe Fighting With Myanmar Army” (29 April 2019); Khonumthung News, “KACC asked for the release of over 50 Khumi Chin ethnic people taken by the AA” (1 May 2019); <https://khonumthung.org/?p=7764>; Radio Free Asia, “Four Villagers Killed, Six Injured in New Fighting in Myanmar's Rakhine State, Villagers still held” (3 June 2019).

⁹⁹¹ LI-181.

⁹⁹² CI-201, LI-182.

⁹⁹³ LI-182, Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar's Rakhine State*, (May 2019).

⁹⁹⁴ LI-182, LI-225 (Note all other sources on this lead back to the individual source).

⁹⁹⁵ FFFGEN-1-83522, FFFGEN-1-83524, FFFGEN-1-83526, FFFGEN-1-83528, FFFGEN-1-83530, See also: Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar's Rakhine State*, (May 2019). p.36.

⁹⁹⁶ Radio Free Asia, “Arakan Army Releases 52 Villagers Held For Six Months in Western Myanmar” (1 August 2019).

⁹⁹⁷ Global New Light of Myanmar, “AA attacks Security Police HQ in Mrauk-U, takes families hostage” (10 April 2019).

⁹⁹⁸ <https://www.facebook.com/watch/?v=288463552068484>; Nan Lwin Hnin Pwint, “Arakan Army to Release Relatives of Police Officers” (The Irrawaddy, 11 April 2019).

⁹⁹⁹ Nan Lwin Hnin Pwint, “Arakan Army to Release Relatives of Police Officers” (The Irrawaddy, 11 April 2019).

¹⁰⁰⁰ CI-247, CI-248, CI-249, CI-252, CI-255, CI-256, CI-258, CI-314, LI-140, LI-142, LI-143, LI-147, LI-148, LI-149, LI 150, LI-153, LI-158, LI-160.

¹⁰⁰¹ CI-247, CI-252, CI-254, CI-255, LI-140, LI-142, LI-143, LI-153, LI-156, LI-158.

¹⁰⁰² CI-247, CI-248, CI-250, CI-252, LI-140, LI-143, LI-146.

families being forced to contribute what they could.¹⁰⁰³ These demands were sometimes accompanied by threats of violence if villagers did not comply.¹⁰⁰⁴

434. These demands on Chin villagers, who were also often subject to similar demands for food supplies from the Tatmadaw,¹⁰⁰⁵ have put them at heightened risk of food insecurity, as they are forced to provide rice and other goods from their own subsistence supplies to both parties.¹⁰⁰⁶ As one Chin woman stated: “The Tatmadaw and the AA – both parties come to the village frequently. We are facing problems as both sides take food from us.”¹⁰⁰⁷

4. Conclusions and legal findings

435. The Mission concludes on reasonable grounds that the AA has subjected ethnic Chin to forced labour¹⁰⁰⁸ in violation of international humanitarian law.¹⁰⁰⁹ The AA has also abducted and deprived Chin civilians and others of their liberty.¹⁰¹⁰ Some abductions appear to have been connected to the AA’s use of forced labour which, by its nature, constitutes a violation of the prohibition against arbitrary deprivation of liberty.¹⁰¹¹ Further investigation into the AA’s conduct and its compliance with international humanitarian law is warranted.

E. Gendered Impacts

436. To date, the Mission has not found evidence of the Tatmadaw engaging in widespread mass sexual violence against ethnic Rakhine women as a part of its military strategy to combat the AA. This is in striking contrast to the widespread and systematic sexual violence perpetrated against Rohingya during the 2017 “clearance operations”.¹⁰¹² The highest levels of command appear to be able to control when their troops do or do not use sexual violence during attacks on civilians and civilian populations.

437. Nevertheless, there is a complex gender dimension to the conflict with the AA. Men and boys of all ethnicities are particularly subject to being taken for forced labour by the Tatmadaw, and they are often subjected to torture or ill-treatment. Ethnic Rakhine men are at particular risk of being rounded up, beaten and arrested on charges of supporting AA. As a result of this risk, many Rakhine men, as well as Chin men, are fleeing Rakhine and Chin States, leaving behind women and children and the elderly, with many female-headed households. These women in many senses are bearing the brunt of the humanitarian crisis.

438. Ethnic Rakhine women who have been left to care for their families have reported difficulties in sustaining themselves and their children.¹⁰¹³ Similarly, ethnic Chin women are also impacted by the conflict between the Tatmadaw and the AA. With an increased number of Chin men fleeing abroad due to fear of being forced to porter for the Tatmadaw

¹⁰⁰³ CI-247, CI-248, CI-249, CI-252, CI-254, CI-255, CI-256, CI-314, LI-142, LI-143, LI-148, LI-149, LI-150, LI-153, LI-154, LI-160.

¹⁰⁰⁴ CI-249, LI-142, LI-149, LI-150.

¹⁰⁰⁵ See Chapter V, section C, 5 of this report: The conflict between the Tatmadaw and the Arakan Army; Violations by the Tatmadaw; Humanitarian impacts of the conflict.

¹⁰⁰⁶ LI-143, CI-258.

¹⁰⁰⁷ CI-258.

¹⁰⁰⁸ CI-247, CI-248, CI-250, CI-252, CI-255, CI-260, LI-143, LI-145, LI-146, LI-147, LI-151, LI-158.

¹⁰⁰⁹ See J.M. Henckaerts and L. Doswald-Beck, “Customary International Humanitarian Law. Volume I: Rules” (Cambridge, ICRC/Cambridge University Press, 2005), rule 95 (forced labour).

¹⁰¹⁰ CI-247, CI-249, CI-254, CI-319, LI-143, LI-153, LI-158.

¹⁰¹¹ See J.M. Henckaerts and L. Doswald-Beck, “Customary International Humanitarian Law. Volume I: Rules” (Cambridge, ICRC/Cambridge University Press, 2005), rule 95 (forced labour) and rule 99 (deprivation of liberty).

¹⁰¹² See also A/HRC/39/CRP.2. Hallmarks of the Tatmadaw operations: Sexual Violence, paras. 347-348. See also A/HRC/42/CRP.4, Sexual and gender-based violence and the gendered impact of Myanmar’s ethnic conflicts.

¹⁰¹³ LI-180, LI-203, LI-204, LI-206.

or conscripted into the AA,¹⁰¹⁴ women and the elderly are left behind to fend for themselves.

F. Landmines

439. The Mission has learnt of a number of deaths and injuries of civilians¹⁰¹⁵ due to landmines, including both Chin¹⁰¹⁶ and ethnic Rakhine.¹⁰¹⁷ The Mission was unable to verify which party was responsible for laying the mines. The number of mine-related deaths and injuries as a result of the armed conflict between the Tatmadaw and the AA is also difficult to estimate.¹⁰¹⁸ Whatever the number may be, the fear of landmines is significant. Internally displaced persons and refugees have stated that landmines were one of the factors preventing them from returning to their villages.¹⁰¹⁹

440. Many of the cases the Mission investigated related to people killed or injured by mines when cultivating and farming.¹⁰²⁰ One Chin woman described how her aunt's daughter was killed in 2018 as a result of a mine explosion: "She was just on her way back from the farm. She was carrying the paddy and stepped on a mine and died. She was approximately 30 years old."¹⁰²¹

441. The presence of landmines causes severe fear¹⁰²² and has a significantly adverse impact on villagers' livelihoods. Chin farmers, in particular, many of whom rely on rotational crop farming for their subsistence needs, told the Mission how the risk of landmines has impacted their farming activities.¹⁰²³ As one woman stated: "Now is the season for rice planting. But as there are mines planted nearby the forest area, people are afraid to go over there and so we cannot do our farming."¹⁰²⁴

442. Credible information indicates that both the Tatmadaw and the AA use landmines.¹⁰²⁵ The Tatmadaw and the AA are therefore subject to the rules of international human rights law and international humanitarian law that regulate the use, recording and removal of mines. These rules are aimed at ensuring the protection of civilians and the civilian population which, in Myanmar, have suffered extensively in terms of physical injury, displacement, and lack of access to farmlands and economic activities. International law prohibits the Tatmadaw and the AA from using landmines to direct attacks against

¹⁰¹⁴ LI-144.

¹⁰¹⁵ It should be noted that while the Mission did not receive first-hand information about deaths of Rohingya as a result of landmines or IEDs, credible reports indicate that some Rohingya have also been victim. See: Amnesty International, *No one Can Protect Us: War Crimes and Abuses in Myanmar's Rakhine State*, (May 2019), Fortify Rights, "Myanmar: Protect Civilians Trapped in Armed Conflict in Rakhine State, Ensure Humanitarian Access" (News Release, 4 June 2019), The Irrawaddy, "Rohingya Man, 8-Year-Old Son Killed in Blast in Northern Rakhine" (22 May 2019), Arkan Times "A Rohingya killed in landmine explosion in Buthidaung" (4 April 2019), Khin Maung Naing, "Rohingya Father and Son Killed in IED Explosion in Kyauktaw" (Rohingya Today, 23 May 2019).

¹⁰¹⁶ CI-247, CI-250, CI-256, CI-257, CI-319, CI-320, LI-140, LI-146, LI-150, LI-151, LI-153, LI-158, LM-030, LM-043, Chin Human Rights Organization, *Stable and Secure: An Assessment on the Current Context of Human Rights for Chin People in Burma/Myanmar* (October 2018), p.17.

¹⁰¹⁷ CI-280, CI-281, LI-137, LI-216, LM-039.

¹⁰¹⁸ It should be noted that this section does not include injuries and deaths by landmines that were planted as part of the 2017 "Clearance Operations". See A/HRC/39/CRP.2, paras. 912 – 914, and 1205 – 1214.

¹⁰¹⁹ CI-255, CI-320.

¹⁰²⁰ CI-256, CI-259, LI-146, LI-158.

¹⁰²¹ LI-158.

¹⁰²² LI-137, LI-150.

¹⁰²³ CI-246, CI-255.

¹⁰²⁴ CI-320.

¹⁰²⁵ CI-247, CI-250, CI-256, CI-257, CI-319, CI-320, LI-146, LI-150, LI-151, LI-153, LI-158, See also: Chin Human Rights Organization, *Stable and Secure: An Assessment on the Current Context of Human Rights for Chin People in Burma/Myanmar* (October 2018), Radio Free Asia, "Mine Explosion Kills Two Police Officers in Myanmar's Rakhine State" (28 February 2019).

civilians,¹⁰²⁶ using them in ways that amount to indiscriminate attacks¹⁰²⁷ and using them where their incidental harm to civilians may not be proportionate.¹⁰²⁸ Particular care must be taken to minimize the indiscriminate effects of landmines.¹⁰²⁹ Parties that use landmines should also record their placement, as far as possible,¹⁰³⁰ and, at the end of active hostilities, they must remove or otherwise render them harmless to civilians or facilitate their removal.¹⁰³¹ Myanmar is not a party to international treaties that impose stronger obligations but numerous EAOs have committed themselves to a total ban on anti-personnel mines; to cooperate in and undertake stockpile destruction, mine clearance, victim assistance, mine awareness and other forms of mine action; and to allow the monitoring of their compliance with those commitments by independent international and national organizations.¹⁰³²

443. The impact of landmines on civilians and the civilian population requires further investigation. Investigations are also required into which parties to armed conflicts are using which types of these weapons, how and where. The potential long-term economic consequences of the contamination in their areas of use also require further research. The Tatmadaw and the AA should minimize their use of landmines to limit their short, medium and long-term effects on the civilian population. They must mark and inform civilians of the location of landmines that no longer serve a lawful military purpose. The Mission makes additional recommendations at the end of this report.

G. Threats to freedom of expression, association and the press

444. The Myanmar Government placed significant restrictions on freedom of expression, information and assembly in response to the conflict between the AA and the Tatmadaw. This included a crackdown on local media and an internet shutdown. These restrictions not only affected fundamental freedoms but also blocked the media from reporting on the AA

¹⁰²⁶ See, J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 1 (the principles of distinction between civilians and combatants).

¹⁰²⁷ Ibid., rule 81 (restrictions on the use of landmines).

¹⁰²⁸ Ibid., rule 14 (proportionality in attack).

¹⁰²⁹ Ibid., rule 81 (restrictions on the use of landmines).

¹⁰³⁰ Ibid., rule 82 (restrictions on the use of landmines).

¹⁰³¹ Ibid., rule 83 (restrictions on the use of landmines).

¹⁰³² See, Arakan Rohingya National Organisation/Rohingya National Army (ARNO/RLA), *Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action*, 17 October 2003, available at: http://theirwords.org/media/transfer/doc/sc_mm_arno_rla_2003_02-38d8ba37802633e9da6c6d2b215dd838.pdf; National United Party of Arakan/Arakan Army (NUPA/AA), *Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action*, 17 October 2003, available at: http://theirwords.org/media/transfer/doc/sc_mm_nupa_aa_2003_03-46624f4e6a94a49b8e1e1c0970d32a88.pdf; Lahu Democratic Front (LDF), *Deed of Commitment under Geneva Call for Adherence to a total Ban on Anti-personnel Mines and for Cooperation in Mine Action*, 16 April 2007, available at: http://theirwords.org/media/transfer/doc/sc_mm_ldf_2007_21-4ed0eb17fb6c940b15ce82f746244ea9.pdf; Palaung State Liberation Front (PSLF), *Deed of Commitment under Geneva Call for Adherence to a total Ban on Anti-personnel Mines and for Cooperation in Mine Action*, 16 April 2007, available at: http://theirwords.org/media/transfer/doc/sc_mm_pslf_2007_23-40ba30b4693fd4182df389522f7ee628.pdf; Pa'O Peoples' Liberation Organisation/Pa'O Peoples' Liberation Army (PPLO/PPLA), *Deed of Commitment under Geneva Call for Adherence to a total Ban on Anti-personnel Mines and for Cooperation in Mine Action*, 16 April 2007, available at: http://theirwords.org/media/transfer/doc/sc_mm_pplo_ppla_2007_25-cada96759703657a6735fd5ba8c975a7.pdf. See, also, National Democratic Front (NDF), *Position Statement by NDF on Landmine Use*, 29 January 2007, available at: http://theirwords.org/media/transfer/doc/1_mm_ndf_2007_04-0c86d6574dd452a98a61c70eac96bf75.pdf.

and Tatmadaw conflict and reporting on the situation of the Rohingya in Rakhine. They also prevented civil society, victims and witnesses of human rights violations and abuses communicating their concerns to the outside world. They hampered the ability of humanitarian agencies to evaluate the humanitarian conditions and needs of people affected by the conflict and others in the region. The shutdown also made it difficult for the government and other actors to disseminate information to communities in conflict areas, including information about clashes, which could be vital for the safety and protection of the civilian population.

445. The Mission is also concerned about reports of restrictions on freedom of assembly in Rakhine State. In response to protests connected to deaths in custody and allegations of torture against Rakhine detained on charges of belonging to AA, ethnic Rakhine protesters have been sought after by police, with charges reportedly being laid against them.¹⁰³³

1. Freedom of expression, and crack-down on local media

446. The media in Myanmar have traditionally faced heavy restrictions and censorship. These restrictions lessened during the period from 2012 to 2015. However, there was a marked increase in restrictions on the media in Rakhine State after the “clearance operations” of October 2016 against the Rohingya.¹⁰³⁴ Following the 2017 “clearance operations”, media access, in particular to the northern Rakhine Townships, remained restricted to visits organised well in advance, orchestrated by the Government and under Government control.¹⁰³⁵

447. These restrictions have not abated. To the contrary, following the escalation of hostilities between the AA and the Tatmadaw in early 2019, the Government has barred journalists from reporting from conflict affected areas in Rakhine. Journalists are only able to access those areas in visits organized by the Ministry of Information.¹⁰³⁶

448. Hostility and intolerance towards local media reporting on the conflict have increased in 2019. In April and May 2019, editors and publishers of three Myanmar publications that published articles on the Tatmadaw’s conflict with the AA were charged with criminal offenses.

449. One case involved editors of “The Irrawaddy”¹⁰³⁷ who were charged with “online defamation” under section 66(d) of the 2013 Telecommunications Law.¹⁰³⁸ If found guilty, the accused face up to two years in prison.¹⁰³⁹

450. A second case involved charges against the editors of Radio Free Asia (RFA) that were similarly filed under section 66(d) of the 2013 Telecommunications Law in April 2019. The charges have reportedly been dropped.¹⁰⁴⁰ A third case involved charges against Aung Marm Oo, the editor of the Development Media Group. In early May 2019, Aung

¹⁰³³ The Irrawaddy, “‘Rakhine Life Matters’ Protesters Sought by Police in Sittwe” (4 July 2019); DVB, “Police Force investigated the home of one of the Rakhine youth who asked for justice”, (3 July 2019); <http://burmese.dvb.no/archives/335399>.

¹⁰³⁴ Joe Freeman, “Myanmar Journalists Grapple With Lack of Access, Legal Fears” (VOA News, 6 July 2017).

¹⁰³⁵ LM-019, LM-022, Radio Free Asia, “Myanmar Keeps Media Away From Rakhine Conflict Zone” (5 November 2019)

¹⁰³⁶ FFFGEN-1555826851-1890. See also for example: Jonathan Head, “Rohingya crisis: Villages destroyed for government facilities” (BBC, 10 September 2019).

¹⁰³⁷ LI-183, LI-188, The Irrawaddy, “Military sues the Irrawaddy for ‘Unfair’ Coverage of Rakhine Conflict” (22 April 2019), International Federation of Journalists, “Myanmar: The Irrawaddy targeted under draconian Article 66(d)” (Press Release, 23 April 2019), Committee to Protect Journalists, “Myanmar military sues The Irrawaddy for criminal defamation over conflict coverage” (25 April 2019).

¹⁰³⁸ LI-183, LI-188.

¹⁰³⁹ s.66(d) of the 2013 Telecommunications Law

¹⁰⁴⁰ Htet Naing Zaw, “Press Council Requests Role in Case Against Journalists” (The Irrawaddy, 26 June 2019) <http://myanmarpresscouncil.org/activities-mpc/statements-mpc/333-statements8-3my19.html>

Marm Oo learned that he was being investigated under section 17/2 of the Unlawful Associations Act, a charge that carries a penalty of up to five years of incarceration.¹⁰⁴¹

451. The Tatmadaw stated that the cases were opened because the media organizations' coverage of the Rakhine conflict was unfair. The military said it preferred to use criminal offences rather than the media law, because the penalties for breaches of the media law were not harsh enough.¹⁰⁴² Collectively, these measures resulted in a chilling effect on the on the media.¹⁰⁴³

452. The Mission concludes on reasonable grounds that the use of the Telecommunications Law and Unlawful Associations Act against these three editors contravenes the right to freedom of expression. The Mission's 2018 report provided an analysis of section 66(d) of the Telecommunications Law and the Unlawful Associations Act.¹⁰⁴⁴ The Mission reiterates its recommendation that they should be repealed or, at a minimum, amended to conform with international human rights standards.¹⁰⁴⁵

2. Internet Shutdown in Rakhine and Chin States

453. On 20 June 2019, Myanmar's Ministry of Transport and Communications instructed all mobile operators in Myanmar to suspend internet services in Ponnangyun, Kyauktaw, Maungdaw, Buthidaung, Rathedaung, Mrauk-U, Minbya and Myebon townships in Rakhine State and Paletwa Township in Chin State.¹⁰⁴⁶ The shutdown was authorised under section 77 of the 2013 Telecommunications Law, which allows for services to be suspended in an "emergency situation" when doing so is "in the public interest".¹⁰⁴⁷ The shutdown went into effect at 10 pm on 21 June 2019, Myanmar time. The shutdown did not include voice and SMS services. It affected more than one million residents, many of whom may have lost access to the internet given its widespread use in Myanmar. This is the first instance of the application of Article 77 of the 2013 Myanmar Telecommunication Law.¹⁰⁴⁸ The Ministry of Transport and Communications is under the control of the civilian side of the Myanmar Government.

454. The ten township-wide shutdown lasted for over two months. On 31 August 2019, midnight local time, the Ministry partially lifted the shutdown in Buthidaung, Maungdaw, Rathedaung and Myebon Townships in Rakhine State and in Paletwa Township in Chin State.¹⁰⁴⁹ At the time of writing, the shutdown remained in place in the four remaining townships. It has been one of the longest internet shutdowns in history and has had severe and varied effects on the civilian population.¹⁰⁵⁰

¹⁰⁴¹ LI-221, LI-222, Amnesty International, "Rakhine Journalist in Hiding, Facing Charges" (ASA 16/0580/2019 Myanmar, 24 June 2019), Fortify Rights, "Myanmar: Drop Case Against Rakhine Journalist Aung Marm Oo" (News Release, 21 May 2019), Committee to Protect Journalists "Myanmar journalist Aung Marm Oo in hiding as police seek his arrest" (13 May 2019).

¹⁰⁴² The Irrawaddy, "Media's Unfair Coverage Exhausts Military's Patience: Spokesperson" (30 April 2019).

¹⁰⁴³ LI-188, JM-003

¹⁰⁴⁴ A/HRC/39/CRP.2, para. 1294.

¹⁰⁴⁵ A/HRC/39/CRP.2, para 1686(a).

¹⁰⁴⁶ Telenor, "Network shutdown in Myanmar, 21 June 2019" (Media Statement, 21 June 2019)

¹⁰⁴⁷ Myanmar Telecommunications Law (2013), s.77.

¹⁰⁴⁸ Free Expression Myanmar, *Internet Shutdown in Rakhine and Chin States*, (24 June 2019), available at: <http://freeexpressionmyanmar.org/internet-shutdown-in-rakhine-and-chin-states/>

¹⁰⁴⁹ Telenor Group, "Internet Services Restored in Five Townships in Myanmar" (Media Statement, 1 September 2019), available at: <https://www.telenor.com/internet-services-restored-in-five-townships-in-myanmar-01-september-2019/>; Al Jazeera, "Myanmar partially lifts internet blackout in Rakhine, Chin states", 1 September 2019.

¹⁰⁵⁰ Article 19, *Briefing Paper: Myanmar's Internet Shutdown in Rakhine and Chin States*, 2 August 2019, available at: <https://www.article19.org/wp-content/uploads/2019/08/2019.08.01-Myanmar-Internet-Shutdown-briefing-.pdf>, Free Expression Myanmar, *Internet Shutdown in Rakhine and Chin States*, (24 June 2019).

455. According to a media interview given by a representative of the Ministry of Transport and Communications at the time the directive was announced, the shutdown was intended “to maintain the stability and law and order in these areas”.¹⁰⁵¹ Directly following the shutdown on 21 June 2019, Telenor Group, one of the mobile operators, published a statement that the Ministry of Transport and Communications had directed all telecommunications companies to “temporarily” suspend internet services, citing “disturbances of peace and use of internet activities to coordinate illegal activities”.¹⁰⁵² In a later statement, the Government stated that the shutdown was imposed to “reduce racial hatred”, purportedly to stem Bamar-Rakhine hate speech brewing on social media.¹⁰⁵³

456. At the outset of the shutdown, the permanent secretary of the Ministry of Transport and Communications, U Soe Thein, stated that the directive did not specify when access to the internet would be restored in the ten townships.¹⁰⁵⁴ On 9 July 2019, the President’s Office indicated that there would be no timeframe for the end of the shutdown.¹⁰⁵⁵ Rakhine State parliament passed a resolution to restore the internet in Rakhine State on 24 June 2019¹⁰⁵⁶ and Rakhine law-maker Daw Khin Saw Way submitted a proposal to the lower house parliament in Naypyitaw to the same effect on 17 July 2019. The proposal was rejected on 18 July 2019 by the Speaker of the Parliament.¹⁰⁵⁷ Then on 31 August 2019 access was restored in five of the nine affected townships.¹⁰⁵⁸ There has been no indication when it will be restored in the remaining four townships.

(a) Impact of the shutdown on documenting and reporting on human rights abuses

457. The Government’s internet shutdown has created an information vacuum in a region where, as documented by the Mission, the Tatmadaw has committed gross violations of international human rights law and serious violations of international humanitarian law. The internet is essential for documenting and sharing information on Tatmadaw violations and violations by the AA. Without internet access, people revert to telephone calls and text messages, which operate at heightened risk of surveillance and arrest. The Special Rapporteur on Freedom of Expression has noted the pattern of repression and State-sanctioned violence in the wake of network disruptions.¹⁰⁵⁹

458. Human rights monitors have observed the impact of the shutdown on their work. As one monitor observed: “This shutdown leaves us behind in the darkness. Our monitors on the ground are delayed and hindered in their work. It is paralyzing our work.”¹⁰⁶⁰ A researcher documenting human rights abuses in Rakhine State further elaborated:

Journalists and both local and international media outlets have found it really difficult to get and send information including photos and video footages from the affected conflict areas that has contributed to significant delays in reporting of the

¹⁰⁵¹ <https://www.bnionline.net/mm/news-66228>.

¹⁰⁵² Telenor Group, “Internet Services Restored in Five Townships in Myanmar,” (Media Statement, 1 September 2019).

¹⁰⁵³ <https://burma.irrawaddy.com/news/2019/06/24/195854.html>.

¹⁰⁵⁴ Free Expression Myanmar, *Internet Shutdown in Rakhine and Chin States*, (24 June 2019); <http://7daydaily.com/story/159228>.

¹⁰⁵⁵ Myat Thura, “Official: No time limit for Rakhine internet cut” (The Myanmar Times, 9 July 2019).

¹⁰⁵⁶ Rakhine State News (the official Facebook page of the Rakhine State Parliament), “Urgent motion passed to call for the restoration of internet connection in 8 conflict-torn townships in Rakhine State as soon as possible” (26 June 2019), available at: <https://www.facebook.com/rakhinestatenews/posts/1324070034397506/>; Min Aung Khine, “Lawmakers Submit Urgent Proposal to Resume Internet Services in N. Rakhine” (The Irrawaddy, 25 June 2019).

¹⁰⁵⁷ Myat Thura, “Parliament speaker rejects motion to restore Rakhine internet access” (Myanmar Times, 19 July 2019).

¹⁰⁵⁸ Telenor Group, “Internet Services Restored in Five Townships in Myanmar, 01 September 2019” (Media Statement, 1 September 2019); Al Jazeera, “Myanmar partially lifts internet blackout in Rakhine, Chin states” (1 September 2019).

¹⁰⁵⁹ A/HRC/35/22, para 12.

¹⁰⁶⁰ LI-221.

*news. Furthermore, we have seen more human rights abuses in the areas affected after the mobile data usage has been banned since 21 June 2019.*¹⁰⁶¹

(b) Impact of the shutdown on delivery of humanitarian assistance

459. The Mission has been told that the shutdown is also having an impact on humanitarian assistance across the region. Humanitarian workers have said that they are unable to receive information and carry out monitoring as effectively, with reduced access to information about new sites of displacement, the needs of IDPs and other factors that they need to know to deliver humanitarian relief effectively and efficiently.¹⁰⁶² They have said that telephone services have not provided an adequate alternative means of communication.

460. Some humanitarian actors have been affected more than others. The ICRC has publically stated that the shutdown has not affected its work.¹⁰⁶³ However, UNICEF reported that the internet shutdown “threatens to further limit access and reporting capabilities in coming months and is impacting an estimated one million people.”¹⁰⁶⁴

461. The Mission’s investigation also found that smaller relief organizations have been more severely affected by the shutdown. Due to pre-existing access restrictions for many humanitarian actors,¹⁰⁶⁵ smaller community based actors have been playing a pivotal role filling the void in the humanitarian space.¹⁰⁶⁶ They have done this through ad hoc collections of donations from community members and locally coordinated distribution to those in need. This work has been particularly important for a large number of IDPs who are not located in formal sites for displaced persons and who often rely solely on community based donations. For example, one man who runs a locally-based charity organization in Chin State explained to the Mission that his group usually receives video clips or photographs of people who are ill or injured and is thus able to assess the emergency needs and respond by bringing in appropriate supplies. Without the internet, the organization is unable to carry out this type of work as efficiently as before.¹⁰⁶⁷

462. Lack of internet has also affected local assistance, often provided by family members to affected individuals and communities, including through sending money to relatives, as well as the receipt of remittances from relatives abroad, all of which are largely sent by web-based apps.¹⁰⁶⁸

463. Telenor Myanmar, one of the nation’s largest cellular providers and subject to the internet shutdown, noted in a statement issued directly after the shutdown was announced, that “freedom of expression through access to telecoms services should be maintained for humanitarian purposes, especially during times of conflict”.¹⁰⁶⁹

3. Conclusions and legal findings

464. The internet is a powerful technological medium to users of which international human rights law affords protections under the right to freedom of opinion and expression. The right includes freedom to hold opinions without interference and to seek, receive and

¹⁰⁶¹ LI-221.

¹⁰⁶² UNICEF, “UNICEF Myanmar Humanitarian Situation Report No.6” (July 2019); Amnesty International “Myanmar: End Internet Shutdown In Rakhine, Chin States” (Public Statement, 25 June 2019); Fortify Rights “Myanmar: Lift Internet-Blackout in Rakhine and Chin States” (News Release, 22 July 2019).

¹⁰⁶³ Naw Betty Han, “Rakhine in the dark: life after the internet blackout” (Frontier Myanmar, 16 July 2019); UNICEF, UNICEF Myanmar Humanitarian Situation Report No.6 (July 2019).

¹⁰⁶⁴ UNICEF Myanmar Humanitarian Situation report #6, January-June 2019.

¹⁰⁶⁵ See section above on Humanitarian impacts of the conflict.

¹⁰⁶⁶ CI-316, LI-140, LI-171, LI-225.

¹⁰⁶⁷ LI-225.

¹⁰⁶⁸ Radio Free Asia, “Rakhine Internet Shutdown Makes Relief Efforts More Difficult, Refugees and Aid Workers Say” (1 July 2019).

¹⁰⁶⁹ Telenor Group, “Internet Services Restored in Five Townships in Myanmar, 01 September 2019”, (Media Statement, 1 September 2019).

impart information and ideas regardless of frontiers.¹⁰⁷⁰ The right to freedom of opinion and expression is enshrined in the 1948 Universal Declaration of Human Rights (UDHR), whose adoption Myanmar (then called Burma) supported in the General Assembly. The UDHR is considered a “common standard of achievement for all peoples and all nations”¹⁰⁷¹ and it sets out the fundamental human rights that are to be universally protected. Although the UDHR was not intended at the time to be a legally binding document, it is generally considered as an authoritative interpretation of the human rights provisions in the legally binding United Nations Charter and reflective of international customary law.¹⁰⁷² This means that Myanmar is bound by the norms declared in its provisions, including the right to freedom of opinion and expression, regardless of Myanmar’s refusal to ratify other treaties, such as the ICCPR, that codify a similar right to freedom of expression.¹⁰⁷³

465. The scope of the right to freedom of opinion and expression under customary international law is not clear. The Mission is guided by the consistent and rich case law on this issue under Article 19 of the ICCPR. It takes the view that Myanmar must, at a minimum, not actively deprive people of their right to freedom of opinion and expression, or restrict the right, in a widespread and systematic manner unless any restriction is provided by law, necessary for the protection of national security or of public order (*ordre public*), or of public health or morals, and proportionate to the need to be served.¹⁰⁷⁴ Under the ICCPR, States may also derogate from their Article 19 obligations in exceptional circumstances when a situation amounts to a public emergency which threatens the life of the nation, in which case the State must have officially proclaimed a state of emergency.¹⁰⁷⁵ Restrictive measures must also be limited to the extent strictly required by the exigencies of the situation. The United Nations Human Rights Committee has explained that this requirement relates to the “duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency”.¹⁰⁷⁶ Additionally, derogations must be proportionate and limited to what is strictly required by the exigencies of the situation.¹⁰⁷⁷

466. Given its global importance and ability to allow people to seek, receive and impart information, permissible restrictions may include restrictions on incitement to violence and to discrimination and on hateful speech. The Mission documented these kinds of impermissible content against Rohingya in its 2018 report. That report documented the extensive roles that Facebook and other social media platforms played in distributing such speech, including through language, cartoons, memes or graphic content that fueled social attitudes, intolerance and violence against Rohingya.¹⁰⁷⁸ This report repeats its calls the Mission made in its 2018 report to the Government of Myanmar, including the civilian authorities and the Tatmadaw as relevant, to take immediate credible action to combat hate speech, in particular where it amounts to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.¹⁰⁷⁹ This report also repeats the calls made to Facebook and other social media to enhance their capacity to

¹⁰⁷⁰ UDHR, art. 19.

¹⁰⁷¹ UDHR, Preamble.

¹⁰⁷² See O. De Schutter, *International Human Rights Law*, 2nd ed. (Cambridge, Cambridge University Press, 2014), p. 63 (and references listed there).

¹⁰⁷³ Myanmar has ratified the Convention on the Rights of the Child which provides in its Article 13 for the right of children to freedom of expression in almost identical terms to Article 19 of the ICCPR.

¹⁰⁷⁴ ICCPR, art. 19(3).

¹⁰⁷⁵ ICCPR, art. 4; see, also, United Nations Human Rights Committee, General Comment No. 29 to Article 4: Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 2.

¹⁰⁷⁶ ICCPR, art. 4; see, also, United Nations Human Rights Committee, General Comment No. 29 to Article 4: Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 4.

¹⁰⁷⁷ Ibid.

¹⁰⁷⁸ A/HRC/39/CRP.2, paras. 1312-1360, in particular 1342-1354.

¹⁰⁷⁹ A/HRC/39/CRP.2, para. 1686.

combat the use of their platforms for the spread and promotion of threats and of hate speech and for the incitement to violence, hostility and discrimination.¹⁰⁸⁰

467. The Mission has applied the same international human rights legal standards to the Government's internet shutdown in 2019 as it applied to hate speech in its 2018 report. These legal standards ensure that restrictions on the internet that safeguard the right to freedom of expression also protect the right of people to be free from hatred and violence by requiring that domestic laws that restrict the internet are formulated with sufficient precision, are accessible to the public, do not confer unfettered discretion on the authorities vested with the power to restrict the internet and provide sufficient guidance to authorities to ascertain what sorts of expression can be properly restricted and what sorts cannot.¹⁰⁸¹ Laws that restrict internet access and the implementation of those laws must also conform to the tests of necessity and proportionality.¹⁰⁸² For a restriction to be proportionate it must not be overly broad.¹⁰⁸³ This means that it must be appropriate to achieve its necessary function; it must be the least intrusive restriction among those which might achieve that necessary function; and it must be proportionate to the interest being protected.¹⁰⁸⁴ The internet must never be restricted to silence advocacy of human rights and of the full promotion and protection of human rights.¹⁰⁸⁵ Additionally, any restriction should be subject to review by an independent court or other adjudicatory body to determine its consistency with international human rights obligations.¹⁰⁸⁶

468. Based on these principles, the Mission concludes on reasonable grounds that the internet shutdown has been based on a law that is incompatible with international human rights law and that the shutdown has been administered in a disproportionate manner.

469. The Mission acknowledges that the internet shutdown is provided for by Myanmar law. Article 77 of the Telecommunications Law grants the Ministry of Communications and Information Technology of the Union Government (Telecommunications Ministry) the power "not to operate any specific form of communication ... and to temporarily control the Telecommunications Service and Telecommunications Equipments" in the name of "public interest" when an "emergency situation" arises.¹⁰⁸⁷ However, the law does not define "emergency situation", provides no guidance as to who has the authority to declare an emergency situation and grants the Ministry vague and broad discretionary powers to shut down the internet with no limitations or, oversight. It is also unclear whether the law's chapter on dispute resolutions provides an effective remedy for appealing the shutdown.¹⁰⁸⁸ For all these reasons, Article 77 of the Telecommunications Law fails to meet the human rights requirements that must be part of any law that grants Myanmar authorities the power to place restrictions on the internet.

470. The Mission also assessed the lawfulness of the internet shutdown by considering how the Government implemented the law and the impact it has had across Myanmar. The

¹⁰⁸⁰ A/HRC/39/CRP.2, para. 1722, and more generally paras. 1718-1726. In follow-up to the findings it made in 2018 regarding hate speech and incitement, the Mission also maintained a dialogue with Facebook to discuss curtailing the spread of hate speech and deterring incitement to violence in Myanmar. See A/HRC/A/42/50, para. 13.

¹⁰⁸¹ UN Human Rights Committee, General comment No. 34 Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para. 24-25.

¹⁰⁸² Ibid., para. 22.

¹⁰⁸³ Ibid., para. 34.

¹⁰⁸⁴ Ibid., para. 34.

¹⁰⁸⁵ Ibid., para. 23.

¹⁰⁸⁶ UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Freedom of Expression and responses to conflict situations*, para. 4(a). Available: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15921&LangID=E>.

¹⁰⁸⁷ Telecommunications Law, article 77.

¹⁰⁸⁸ Telecommunications Law, chapter XIV (Dispute Resolution).

Mission acknowledges that the Government justified its internet shutdown on the grounds that it was intended “to maintain the stability and law and order”¹⁰⁸⁹ and to “reduce racial hatred”, purportedly to stem Bamar-Rakhine hate speech on social media.¹⁰⁹⁰ The Mission accepts that these are legitimate purposes. The Mission also acknowledges that the internet shutdown was geographically restricted to Ponnangyun, Kyauktaw, Maungdaw, Buthidaung, Rathedaung, Mrauk-U, Minbya, and Myebon townships in Rakhine State and Paletwa Township in Chin State. On 31 August 2019 the shutdown was limited to four of these nine townships. The Mission nonetheless concludes on reasonable grounds that the manner in which the internet shutdown was applied exceeded what was necessary and proportionate to achieve the legitimate purpose given by the Government.

471. First, the Government’s justification that it shut down the internet to “reduce racial hatred” is questionable in the context of its failure to address hate speech against the Rohingya. The Mission continued to monitor anti-Rohingya hate speech on the internet and found no apparent action from the Government to remove and prevent it. If the Government was now sincerely concerned with this issue, the Mission would have observed the Government taking steps to address this issue on the internet across the country and not only in relation to Bamar-Rakhine relations.¹⁰⁹¹ Second, the Government did not impose tailored restrictions that corresponded to legitimate concerns it may have had about specific individuals, accounts or social media platforms promoting insecurity or disseminating hate speech. Rather than imposing restrictions on parts of the internet and on some users of the internet and taking the least restrictive means to achieve the stated purpose of the shutdown, the Government imposed a blanket shutdown on everyone in a wide geographic area with a population of approximately one million people. It did this knowing the negative consequences it would have on freedom of expression and information, especially in relation to human rights violations, and on humanitarian coordination and the provision of humanitarian relief and family assistance. Confining the shutdown to four townships did not bring the shutdown into compliance with international human rights law, as it remains an indiscriminate, insufficiently precise, untailored and disproportionate restriction on freedom of opinion and expression. The Mission’s position finds additional support from the Human Rights Council,¹⁰⁹² the Human Rights Committee,¹⁰⁹³ UN Special Rapporteur on the right to freedom of expression,¹⁰⁹⁴ and the May 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations,¹⁰⁹⁵ all of which have articulated strong concerns and condemnation of internet shutdowns under international human rights law.

VI. The situation in northern Myanmar

A. Introduction

472. Since June 2011, the protracted conflicts in Kachin and Shan States have escalated and have been characterized both by intensifying fighting between the Tatmadaw and the

¹⁰⁸⁹ <https://www.bnionline.net/mm/news-66228>.

¹⁰⁹⁰ <https://burma.irrawaddy.com/news/2019/06/24/195854.html>.

¹⁰⁹¹ See A/HRC/39/CRP.2, p. 320-322.

¹⁰⁹² See, Human Rights Council, *The promotion, protection and enjoyment of human rights on the Internet*, A/HRC/RES/32/13. See also A/HRC/RES/38/7, para. 4; and A/HRC/RES/39/6, para. 6.

¹⁰⁹³ Human Rights Committee, *General Comment No. 34 to Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34, para. 43.

¹⁰⁹⁴ See, A/HRC/35/22; UN expert urges DRC to restore internet services, 7 January 2019, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24057&LangID=E>.

¹⁰⁹⁵ UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Freedom of Expression and responses to conflict situations*, para. 4(a). Available: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15921&LangID=E>.

ethnic armed organizations¹⁰⁹⁶ (EAOs) and by EAOs fighting each other.¹⁰⁹⁷ The complexities of the conflicts in northern Myanmar have been further heightened by the proliferation of militias, including ones sponsored by the Tatmadaw.¹⁰⁹⁸ Attempts to sign an inclusive peace agreement with all EAOs operating in Kachin and Shan States have so far failed.¹⁰⁹⁹ Despite a unilateral ceasefire declared by the Tatmadaw in December 2018 and now extended until 21 September 2019,¹¹⁰⁰ the Mission found that hostilities continue with adverse effects on the civilian populations.¹¹⁰¹

473. As noted by the Mission in its 2018 report,¹¹⁰² several EAOs operating in northern Myanmar have clear leadership and command structures; headquarters; regular recruitment efforts and training; uniforms; a demonstrated ability to procure arms; an ability to plan, coordinate and carry out military operations (jointly or separately); and an ability to exercise some level of territorial control in their respective operational areas. These EAOs include, but are not necessarily limited to, the Kachin Independence Army (KIA),¹¹⁰³ the Shan State Army – South (SSA-S),¹¹⁰⁴ the Shan State Army – North (SSA-N),¹¹⁰⁵ the Ta’ang National Liberation Army (TNLA),¹¹⁰⁶ the Arakan Army (AA)¹¹⁰⁷ and the Myanmar National Democratic Alliance Army (MNDAA).¹¹⁰⁸ The limited information available to the Mission indicates that the United Wa State Army (UWSA)¹¹⁰⁹ also shares many of these characteristics. The Tatmadaw’s unilateral ceasefire covers five regional commands in the east and north of the country and effectively includes areas of conflict that involve the KIA, the MNDAA and the TNLA,¹¹¹⁰ none of which have signed the National Ceasefire Agreement (NCA) of 2015.

474. In its 2018 report, the Mission focused on the situation in Kachin and Shan States and provided information on other areas, such as Kayah and Kayin States.¹¹¹¹ This section provides an update on the situation in northern Myanmar.

475. During the reporting period, the Mission continued to document human rights violations and abuses, as well as violations of international humanitarian law, in Kachin and Shan States. Although the unilateral ceasefire initially resulted in a marked reduction in

¹⁰⁹⁶ The EAOs operating in this area are: Kachin Independence Army (KIA), the Myanmar National Democratic Alliance Army (MNDAA), the Ta’ang National Liberation Army (TNLA), Shan State Army-South (SSA-S, the armed wing of the Restoration Council of Shan State (RCSS)), and Shan State Army-North (SSA-N, the armed wing of the Shan State Progress Party (SSPP)). The Arakan Army (AA) is also operating in this area, although its principal operations are now in northern Rakhine State and southern Chin State.

¹⁰⁹⁷ Notably between the SSA-S and the TNLA and between the SSA-S and SSA-N.

¹⁰⁹⁸ Tatmadaw-sponsored militias, commonly referred to as “Pyi Thu Sit” in the Myanmar language, include among others the Lisu militia and Kachin Defence Army (KDA), see A/HRC/39/CRP.2 para. 155, 170 and 312. See also J. Buchanon, *Militias in Myanmar* (The Asia Foundation, July 2016).

¹⁰⁹⁹ Despite attempts to sign peace agreements with some of the EAOs since 1961, several groups have been ostracized from the peace process, and hostilities have continued even with some parties to the National Ceasefire Agreement (NCA). The NCA was signed on 12 October 2015 with eight EAOs. Groups that have not signed include the KIA, the MNDAA, the TNLA and the Arakan Army (AA). Among the groups currently involved in hostilities in Kachin and Shan States, only the SSA-S signed the NCA but clashes continue between it and the Tatmadaw, parallel to the peace process. The SSA-N has not yet signed the NCA; A/HRC/39/CRP.2, para. 107; A/HRC/42/50, para. 57-58.

¹¹⁰⁰ Including the KIA, MNDAA and TNLA; 2393, 2394, 2395, 2396, 2397, 2398; Myanmar Times, “Tatmadaw extends ceasefire a second time, to August 31” (2 July 2019).

¹¹⁰¹ A/HRC/42/50, para. 57-66.

¹¹⁰² A/HRC/39/CRP.2, para. 53.

¹¹⁰³ Armed wing of the Kachin Independence Organisation (KIO).

¹¹⁰⁴ Armed wing of the Restoration Council of Shan State (RCSS).

¹¹⁰⁵ Armed wing of the Shan State Progressive Party (SSPP).

¹¹⁰⁶ Armed wing of the Palaung State Liberation Front (PSLF).

¹¹⁰⁷ The United League of Arakan (ULA) is the political component of the AA.

¹¹⁰⁸ Armed wing of the Myanmar National Truth and Justice Party (MNTJP).

¹¹⁰⁹ Armed wing of the United Wa State Party (UWSP).

¹¹¹⁰ The AA, the MNDAA, the KIA and the TNLA collaborate as the Northern Alliance; A/HRC/39/CRP.2, para. 108.

¹¹¹¹ A/HRC/39/CRP.2 para. 113.

hostilities in Kachin State, the consequences of the conflict, such as long-lasting displacement and landmine contamination, continued to affect the lives of civilians. Fighting between the Tatmadaw and EAOs, as well as among EAOs, has continued in northern Shan State throughout the unilateral ceasefire, severely affecting civilians in government and non-government controlled areas. Northern Myanmar remains heavily militarized,¹¹¹² contributing to a climate of insecurity for the population. In Shan State, fighting has continued between the SSA-S and the TNLA. However, there has been a marked decrease in hostilities between the SSA-S and the SSA-N since May 2019, when both sides agreed to cease hostilities after talks aimed at promoting unity among Shan.

476. Throughout the unilateral ceasefire the Tatmadaw has appeared to devote much of its attention to Rakhine and Chin States in its conflict with the AA.¹¹¹³ However, hostilities between the Tatmadaw and EAOs significantly escalated in northern Shan State in the second half of August 2019.

477. On 15 August 2019, the “Brotherhood Alliance”, comprising the AA, the MNDAA and the TNLA,¹¹¹⁴ conducted simultaneous attacks on government facilities, including the national defence academy, in five locations in Mandalay Region and Shan State. In the following weeks, fighting between the Tatmadaw and the three EAOs significantly escalated in several townships of northern Shan State, resulting in displacement, civilian casualties, damage to civilian property and infrastructure, and restrictions on freedom of movement.¹¹¹⁵

478. At the time of writing, hostilities continued. On 31 August 2019, heavy weapons were fired on Maw Heik village, Kuktai Township, in Shan State, killing five Kachin civilians: two women, one infant, and two other children, injuring an additional three, including one girl.¹¹¹⁶ The information received by the Mission indicates that seven of the eight victims were inside a civilian house at the time of the incident.¹¹¹⁷ The Mission was unable to determine which party to the conflict was responsible for the casualties.

479. The Mission has received unconfirmed reports that between 13 and 17 civilians have been killed, an additional 18 to 27 have been injured,¹¹¹⁸ and at least 5,500 have been displaced since 15 August 2019.¹¹¹⁹

480. A number of civilian casualties resulting from landmines in northern Myanmar were also reported.¹¹²⁰ Several civil society organizations, humanitarian actors and human rights groups expressed concerns regarding the impact of the continuing conflict on civilians, the entrapment of civilians in conflict areas and the continued denial of access to humanitarian relief.¹¹²¹

¹¹¹² V-352, V-373.

¹¹¹³ See Chapter V on: The conflict between the Tatmadaw and the Arakan Army.

¹¹¹⁴ The AA, the MNDAA, and the TNLA are not part of the NCA, and are three of the four members of the Northern Alliance.

¹¹¹⁵ FFFGEN-1555826851-4879.

¹¹¹⁶ FFFGEN-1555826851-4830, FFFGEN-1555826851-4812, FFFGEN-1555826851-5608, and FFFGEN-1555826851-5576.

¹¹¹⁷ FFFGEN-1555826851-4812, FFFGEN-1555826851-5608, and FFFGEN-1555826851-5576.

¹¹¹⁸ FFFGEN-1555826851-4789, FFFGEN-1555826851-4790; See also, Statement by the Resident and Humanitarian Coordinator a.i., June Kunugi, on the situation in northern Shan State, 4 September 2019; FFFGEN-1555826851-4879

¹¹¹⁹ FFFGEN-1555826851-4879, V-374, V-396, V-396.

¹¹²⁰ GM-021.

¹¹²¹ FFFGEN-1555826851-4879, FFFGEN-1555826851-4831, V-372, V-374, V-375.

B. Violations committed by the Tatmadaw and Tatmadaw-sponsored militia

1. Tatmadaw attacks and other military operations causing death and injury of civilians

481. The Mission corroborated two incidents of Tatmadaw attacks in northern Myanmar during the reporting period that resulted in injury and the loss of civilian life.

482. In February 2019, in Kuktai Township of northern Shan State, Tatmadaw soldiers opened fire on two Ta'ang civilians, wounding an 18 year old man who later died from his injuries.¹¹²² Information received by the Mission indicates that the Tatmadaw had entered the village earlier that evening, during a local festival, and shot at the two men who were fleeing out of fear upon seeing the soldiers.¹¹²³ The Tatmadaw later paid compensation of 200,000 Kyat (135 USD) to the victim's family.¹¹²⁴

483. In June 2018, Tatmadaw soldiers belonging to 88th LID fired into civilian populated areas in Kuktai Township of northern Shan State.¹¹²⁵ The attack took place early in the morning, at a time when most villagers were still asleep. It resulted in the killing of an 8 year old Ta'ang boy, the injuring of an additional seven Ta'ang civilians, including a 7 year old boy, and damage to civilian property.¹¹²⁶ The Tatmadaw assisted the injured and paid compensation to the affected families after the incident.¹¹²⁷ The Mission received reports that, while a large group of TNLA fighters had been present in the village on the previous day, only two fighters remained in the village at the time of the attack.¹¹²⁸

484. The Mission identified other Tatmadaw attacks in Shan State, that require further investigation, as it was unable to verify the information received in the time available to it.¹¹²⁹ They include the following.

485. The Mission received information that in August 2019, the Tatmadaw shelled and conducted airstrikes on civilian populated areas in the northeast of Lashio, resulting in the killing of at least one civilian, damage to civilian property and displacement of civilians.¹¹³⁰

486. The Mission received information about other instances in which the Tatmadaw used aerial attacks and heavy weapons on or near civilian populated areas in northern Shan State in its hostilities with the AA, the TNLA, and the MNDAA between 15 August and 2 September 2019.¹¹³¹

487. The Mission also received information about a Tatmadaw attack in March 2019 on SSA-N positions in Hsipaw Township of Shan State. The Tatmadaw reportedly conducted airstrikes near civilian populated areas, which resulted in the injury of a Shan woman and the displacement of at least 500 other civilians.¹¹³² Sources reported that no warning was given to civilians that an attack was imminent,¹¹³³ similarly to other cases investigated by the Mission.¹¹³⁴

¹¹²² PI-118, PI-119, V-352, V-376, 1609.

¹¹²³ PI-118, PI-119.

¹¹²⁴ PI-118, PI-119.

¹¹²⁵ PI-120, PI-121, PI-122, 1610, and row 28.06.18 of Doc ID 2143

¹¹²⁶ PI-120, PI-121, PI-122, V-347 1610, FFFGEN-1-83425.

¹¹²⁷ PI-122.

¹¹²⁸ PI-120, PI-121, PI-122.

¹¹²⁹ GI-033, GI-058, V-347, V-352, V-377, V-378, V-379, FFFGEN-1-89710, FFFGEN-1-86925 and rows 10.05.18 and 12.05.18 of Doc ID 2143.

¹¹³⁰ V-380.

¹¹³¹ FFFGEN-1555826851-4879, FFFGEN-1555826851-4831.

¹¹³² GM-018, 1414, V-381, V-382, V-383, V-384, V-385, V-386.

¹¹³³ 1414.

¹¹³⁴ GI-009, GI-033, GI-056, GI-058, PI-161.

Other activities in the context of hostilities

488. According to the 2019 Report of the Secretary-General on Children and Armed Conflict, the United Nations verified that seven children had been recruited and another 64 had been used by the Tatmadaw in 2018.¹¹³⁵ The same report notes:

*Though efforts are under way, full compliance is yet to be achieved and aggravated cases of new recruitment occurred in 2018, with no progress on accountability. However, 75 children and young people recruited as children were released from the Tatmadaw in 2018 and there has been steady progress in addressing the backlog of cases from previous years.*¹¹³⁶

489. The Mission also received several consistent accounts indicating that Tatmadaw soldiers continued to use civilian houses, schools and places of worship as temporary bases.¹¹³⁷ Information received by the Mission in relation to previously identified patterns of Tatmadaw presence in civilian populated areas in northern Shan suggests that in some areas the Tatmadaw intentionally located military objectives in or near civilian populated areas to reduce the likelihood of attacks by EAOs.¹¹³⁸ The Mission received reports that in Kachin State a hospital was used as a military base for several days, impairing the local population's access to it.¹¹³⁹ The Mission received accounts of instances where Tatmadaw soldiers used civilian houses to conduct interrogations of suspected EAO members.¹¹⁴⁰

490. The Mission received many reports that the Tatmadaw continued to threaten, intimidate and harass civilians and extort civilian property during the reporting period, including in the civilians' houses and at checkpoints on main roads used by civilians.¹¹⁴¹ For example, in March 2019, in Kuktai Township, Shan State, Tatmadaw soldiers affiliated with the 99th LID stopped a civilian bus and demanded some 300,000 Kyat (approx. 200 USD) from its passengers, threatening to burn the vehicle if they failed to provide them with the money.¹¹⁴² Information received by the Mission indicates that such conduct, compounded by increased militarization,¹¹⁴³ resulted in civilians being frightened of moving between villages and restricted their movement in contested areas, including when needing access to essential medical assistance for conflict-related injuries.¹¹⁴⁴ For example, a civilian woman who was shot and injured during fighting between the Tatmadaw and the KIA in Shan State in 2018 told the Mission that she reached a health care facility 11 hours after she was shot even though the hospital was only two hours away.¹¹⁴⁵ She explained that she was too frightened to travel to the hospital before nightfall due to the presence of Tatmadaw checkpoints on the way.¹¹⁴⁶

Conclusions and legal findings

491. The Mission identified the Tatmadaw's February 2019 attack in Shan State as requiring further investigation to determine whether the military failed to take precautionary measures, including failing to do everything feasible to verify that targets

¹¹³⁵ A/73/907-S/2019/509 para 126.

¹¹³⁶ A/73/907-S/2019/509 para 136.

¹¹³⁷ GI-009, 1078, GI-034, GI-035, GI-048, GI-056, GI-057, GI-058, PI-166, PI-168, V-380; See also A/73/907-S/2019/509 para 131.

¹¹³⁸ GI-023.

¹¹³⁹ FFFGEN-1-83712.

¹¹⁴⁰ 1078, GI-34, GI-35.

¹¹⁴¹ FFFGEN-1555826851-6767, V-352, rows 12.12.18 and 25.05.18 of 2143, GI-020, GI-021, GI-35 and 34, GI-045, V-347, Rows 196, 180, 73, 29, 44, 45, 173, 117 of FFFGEN-1-85769, V-378, V-387, V-388, V-389, and V-390.

¹¹⁴² 1336, 1337.

¹¹⁴³ V-352.

¹¹⁴⁴ GI-009, 1335, 1414.

¹¹⁴⁵ 1335.

¹¹⁴⁶ 1335.

were military objectives, under the rules of international humanitarian law.¹¹⁴⁷ The Mission also identified the Tatmadaw's June 2018 attack in Shan State as requiring further investigation to determine whether it was indiscriminate or disproportionate under the rules of international humanitarian law. The investigations are warranted based on the Tatmadaw's use of force in civilian populated areas, the harm it caused to civilians and the nature of the two attacks. With respect to the August 2019 attack northeast of Lashio, the August/September 2019 attacks in northern Shan State and the March 2019 attack in the Hsipaw Township of Shan State, the Mission also suggests further verification of the facts and investigations into these incidents.

492. The Mission expresses the same concerns it articulated with respect to the military use of schools in this report's section on the armed conflict between the Tatmadaw and the Arakan Army.¹¹⁴⁸ It shares the United Nations Security Council's concerns regarding the military use of schools "in contravention of applicable international law, recognizing that such use may render schools legitimate targets of attack, thus endangering children's and teachers' safety as well as children's education".¹¹⁴⁹

493. The Mission has similar concerns with the Tatmadaw's use of places of worship and a hospital as a military base in Kachin State, that latter of which requires an investigation into the harm caused to civilians who lost access to medical care and services. Reports that the Tatmadaw intentionally uses civilian buildings to deter attacks from EAOs raised serious concerns that the Tatmadaw may be using civilians as human shields in violation of international humanitarian law. Human shields have been defined as "utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations".¹¹⁵⁰

494. Finally, the Mission concludes on reasonable grounds that the Tatmadaw has harassed and instilled such fear in the civilian population that civilians are deterred from accessing essential goods and services, including medical care, and that the Tatmadaw has done this with no discernible military purpose. The Mission also concludes on reasonable grounds that this harassment and fear violate the Tatmadaw's obligation to take constant care to spare the civilian population.¹¹⁵¹

2. Torture and other cruel, inhuman or degrading treatment or punishment

495. Throughout its unilateral ceasefire, the Tatmadaw has continued its practice of inflicting severe pain or suffering on men and boys detained on suspicion of supporting or being members of EAOs. In the great majority of cases investigated by the Mission, Tatmadaw soldiers hit victims on their heads with the ends of firearms, knives or sticks.¹¹⁵² Other mistreatment included kicking, punching and other forms of beatings, tying up hands with ropes, tying victims to trees, jabbing of the victims' skin with knives and forced nudity.¹¹⁵³ Tatmadaw soldiers also used sexual violence against women.¹¹⁵⁴

¹¹⁴⁷ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 15 (principle of precautions in attack) and rule 16 (target verification).

¹¹⁴⁸ See Chapter V, section C. 2.: The conflict between the Tatmadaw and the Arakan Army: the use of and damage to schools and religious sites.

¹¹⁴⁹ UNSC Res. S/RES/2427 (2018).

¹¹⁵⁰ The use of human shield is a war crime in a non-international armed conflict. See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 97 (human shields) and rule 156 (definition of war crimes).

¹¹⁵¹ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 15 (principle of precautions in attack).

¹¹⁵² GI-024, GI-028, GI-035, GI-045, GI-046.

¹¹⁵³ GI-024, GI-028, GI-030, GI-034, GI-035, GI-045, GI-046, GI-051, PI-164.

496. In some of the cases, victims suffered long-lasting health issues, including mental health conditions, teeth loss and hearing impairments.¹¹⁵⁵ In several cases investigated by the Mission, sources reported that those responsible for these or other injuries failed to provide medical treatment to the victims while the victims were in their custody.¹¹⁵⁶

497. Victims were predominantly men and boys perceived as being of fighting age and belonging to the same ethnic group as an EAO that the Tatmadaw was fighting.¹¹⁵⁷ Information gathered by the Mission indicates that victims were often detained for the purpose of obtaining confessions or information on the movements of fighters, or on suspicion of being supporters or members of EAOs or relatives of fighters in EAOs.¹¹⁵⁸

498. A survivor told the Mission that while he was being punched and kicked by the Tatmadaw, a soldier told him “*You Ta’ang people are very small and there are not many of you, you cannot win*”.¹¹⁵⁹ Tatmadaw soldiers had arrested him on suspicion of affiliation to the TNLA.¹¹⁶⁰ After being asked if he was Ta’ang at the time of arrest, he was punched in the face and asked if he wanted to fight, whether he was in contact with the TNLA and how many fighters the TNLA had.¹¹⁶¹ The victim lost teeth as a result of the Tatmadaw beating him in the face.¹¹⁶²

499. In some cases these acts were committed in the presence or with the active participation of Tatmadaw officers who held positions of authority within the military units responsible for the abuse.¹¹⁶³ A Shan man explained how a Tatmadaw commander, present while he was repeatedly hit by soldiers during an interrogation, said to him, “*Don’t make the soldiers angry, or you will be beaten*”.¹¹⁶⁴ The victim told the Mission that he had been arrested by the Tatmadaw for having provided water to SSA-S fighters who had stopped at his village. The Tatmadaw hit the man on his face and chest with the end of their guns and punched and kicked him while asking him why he had talked to the Shan fighters.¹¹⁶⁵

500. In most cases documented by the Mission, the Tatmadaw inflicted severe pain or suffering on men and boys during interrogations conducted at the time of or shortly after, their capture.¹¹⁶⁶ When a number of suspects were captured simultaneously, often without being told why, they were separated and violently interrogated individually, in different but close-by locations.¹¹⁶⁷

501. The Mission received information that, in July 2018, in Kachin State, Tatmadaw soldiers detained three Kachin men on suspicion of affiliation to the KIA.¹¹⁶⁸ A source indicated that the victims were not carrying any weapons at the time of their arrest.¹¹⁶⁹ Credible information received by the Mission indicates that the three men were tied up, interrogated separately, subjected to death threats and beaten until they confessed to being KIA fighters.¹¹⁷⁰ Sources reported that the confessions obtained from the victims during the

¹¹⁵⁴ See section on sexual and gender-based violence in this Chapter.

¹¹⁵⁵ GM-019, GI-028, GI-043, GI-041, PI-126, PI-164, PI-165.

¹¹⁵⁶ GI-028, GI-045, GI-046, PI-164.

¹¹⁵⁷ GI-028, GI-030, GI-045, GI-046, GI-024, GI-034, GI-035, GI-051, PI-126, PI-164, PI-165, PI-166, FFFGEN-1-85854, FFFGEN-1-85853, rows 106, 99, 68, 129 and 199 of FFFGEN-1-85769, V-389, V-391.

¹¹⁵⁸ GI-023, GI-024, GI-034, GI-046, PI-126, PI-164, PI-165, PI-166, V-392.

¹¹⁵⁹ PI-126.

¹¹⁶⁰ PI-126.

¹¹⁶¹ PI-126.

¹¹⁶² PI-126.

¹¹⁶³ GI-024, GI-034, GI-035, GI-045, GI-046.

¹¹⁶⁴ GI-024.

¹¹⁶⁵ GI-024.

¹¹⁶⁶ GI-028, GI-034, GI-035, PI-126, GI-046.

¹¹⁶⁷ GI-028, GI-034, GI-035, GI-045, GI-046.

¹¹⁶⁸ GI-028, GI-030, GI-051.

¹¹⁶⁹ GI-051.

¹¹⁷⁰ GI-028, GI-030, GI-051.

torture were used in court against them¹¹⁷¹ and that in December 2018 they were sentenced to two years imprisonment for “unlawful association”.¹¹⁷²

502. The Mission also documented various forms of severe mental pain or suffering inflicted by the Tatmadaw upon their victims, including through death threats.¹¹⁷³ The Mission received credible information that, in March 2019, in northern Shan State, Tatmadaw soldiers placed a grenade in the mouth of a Kachin man and threatened to kill him if he did not confess to being a KIA fighter.¹¹⁷⁴ In another case investigated by the Mission in northern Shan State, Tatmadaw soldiers placed a plastic bag over the head of a victim, in a mock execution by asphyxiation, to extract a confession.¹¹⁷⁵ A survivor told the Mission: “*They told me 'you have to speak the truth if you want to see your wife and children again, otherwise we will make you dig your own grave, and will kill you'.*”¹¹⁷⁶ The survivor added that they pointed at a plot of land, which he understood as being the place where they were going to make him dig his own grave.¹¹⁷⁷

503. Several of the male victims in the cases investigated by the Mission were detained while on their way to or from livelihood-related activities such as farming, fishing, or gathering vegetables, fruit, and firewood.¹¹⁷⁸ They were subsequently interrogated and physically or psychologically abused. This indicates the risks civilians face in undertaking livelihood activities in the current climate of insecurity. Women and girls, especially heads of households,¹¹⁷⁹ are particularly vulnerable to attack when engaged in livelihood-related activities, including sexual and gender-based violence.¹¹⁸⁰

504. While some victims were released after a few hours and allowed to return to their homes, others were detained for longer periods to work as porters or guides or in other functions, often in conditions amounting to forced labour, while being subjected to cruel, inhuman or degrading treatment.¹¹⁸¹

505. In March 2019, in a village in Kuktai Township, northern Shan State,¹¹⁸² Tatmadaw soldiers belonging to the 99th LID detained two Kachin men on suspicion of having affiliations with the KIA.¹¹⁸³ The two men were on their way back from gathering food in the area at the time of capture. They were interrogated, kicked, punched and threatened with death and injury with knives. They were released later on the same day.¹¹⁸⁴

506. In another case investigated in Kachin State, sources told the Mission that Tatmadaw soldiers initially tied up, punched and kicked three Kachin men on suspicion of affiliation to the KIA. They subsequently forced the men to work as porters and guides for almost a month before handing them over to the police.¹¹⁸⁵ The Mission received information that, by the time the victims were transferred to the police, the physical signs of the torture, such as bruising, had healed, rendering it more difficult for the victims to prove the acts occurred.¹¹⁸⁶

507. In another case investigated by the Mission in northern Shan State, a Kachin man was initially hit on his head, kicked in other parts of his body and subjected to a mock

¹¹⁷¹ GI-051.

¹¹⁷² 2155, 2156, 2157, 2158, 2159.

¹¹⁷³ GI-028, GI-034, GI-035, PI-126.

¹¹⁷⁴ GI-034.

¹¹⁷⁵ GI-045.

¹¹⁷⁶ 1337.

¹¹⁷⁷ 1337.

¹¹⁷⁸ PI-126, GI-028, PI-164, GI-034, GI-035, GM-019, and V-390.

¹¹⁷⁹ A/HRC/42/CRP.4, para. 65 and 99.

¹¹⁸⁰ See A/HRC/42/CRP.4, para. 122-130 and 228 for more details; PI-069, PI-136.

¹¹⁸¹ GI-024, GI-045, GI-046.

¹¹⁸² Name of village withheld.

¹¹⁸³ GI-035, GI-034.

¹¹⁸⁴ GI-035, GI-034.

¹¹⁸⁵ GI-051, GI-030, GI-028, FFFGEN-1-85853.

¹¹⁸⁶ GI-030.

execution by asphyxiation with a plastic bag.¹¹⁸⁷ After being interrogated about his suspected affiliation to the KIA, he was further detained by Tatmadaw soldiers for almost three months and forced to work in construction.¹¹⁸⁸ A 14 year old year old Kachin boy who was with him was blindfolded, hit on the head with guns and threatened with knives by Tatmadaw soldiers who were seeking information from him on another Kachin man suspected of being a member of the KIA.¹¹⁸⁹ The Tatmadaw discontinued the questioning after discovering his age.¹¹⁹⁰

508. A Shan man who was beaten by Tatmadaw soldiers in Shan State in August 2018 told the Mission:

*I asked the soldiers to stop, I begged them, I asked them to have mercy on me, and I even joined my hands together as if I was worshiping and that's when they stopped beating me. I told them I was a weak person and just a civilian, and that we could only survive if they had mercy for us ... They searched the house and made a mess, and they took anything they wanted.*¹¹⁹¹

509. After the beating, the Tatmadaw forced him and three other men from the same village to act as porters, guides and cooks until they reached their camp.¹¹⁹²

510. Similarly, a Kachin man who was beaten by Tatmadaw soldiers in Shan State in March 2019 told the Mission:

*I don't know how to express my feelings, but when I was arrested, I felt as if my eyes couldn't open, and I felt very confused because they tried to blame us even if we are not KIA ... we couldn't say anything, even if we knew we were in the right. I couldn't respond, we just had to do what they said.*¹¹⁹³

511. A Kachin man whose son was tortured by Tatmadaw soldiers in 2018 said: “It is difficult to talk about this, but I want justice and want to share what is happening to us Kachin people. I also don't want other families to go through this”.¹¹⁹⁴

512. The Mission established that, in at least one case during the reporting period, the Tatmadaw used rape as a tactic of war that constituted torture.¹¹⁹⁵

513. The Mission also received credible accounts of men detained by the Tatmadaw whose whereabouts remain unknown at the time of writing.¹¹⁹⁶ For example, a Kachin man, who was last known to have been arrested by Tatmadaw soldiers in Puta-O Township, Kachin State, in March 2018, is reported to remain missing at the time of writing.¹¹⁹⁷ His disappearance has had a severe impact on the lives and mental health of his relatives.¹¹⁹⁸

514. A woman told the Mission she felt unsafe after her husband disappeared in Mogaung Township, Kachin State in May 2018:¹¹⁹⁹

*I feel less safe now since my husband disappeared. My husband did not allow me to sell vegetables and go in the forest by myself to fetch leaves. Now I have to do it to survive and it exposes me to risks.*¹²⁰⁰

515. A Kachin village administrator told the Mission:

¹¹⁸⁷ GI-045.

¹¹⁸⁸ GI-045, GI-046.

¹¹⁸⁹ GI-046.

¹¹⁹⁰ GI-046.

¹¹⁹¹ 1078.

¹¹⁹² 1078.

¹¹⁹³ 1337.

¹¹⁹⁴ 1159.

¹¹⁹⁵ See section on sexual and gender-based violence in this Chapter.

¹¹⁹⁶ GI-019, GI-039, GI-040, PI-162, PI-164, V-378.

¹¹⁹⁷ GI-019, GI-039, GI-040.

¹¹⁹⁸ 1341, PI-162.

¹¹⁹⁹ A/HRC/39/CRP.2, paras. 145 and 185.

¹²⁰⁰ PI-162.

We want them [the Tatmadaw] to tell us openly if they arrest people from the village. They can discuss with me openly, but they do not. These disappearances are not good, and this affects us. If they have the responsibility to control an area, they should exercise such control properly.... There is a law called 17/1,¹²⁰¹ but we don't know what is in this law, and we need someone to explain it to us. This makes me confused, because if we have good relations with KIA, we risk being arrested under the 17/1. We want to have some clarity about what this is.¹²⁰²

Tatmadaw-sponsored militias

516. In its 2018 report, the Mission documented the involvement of Tatmadaw-sponsored militias, also known as Pyi Thu Sit ("People's Army"), working in support of the Tatmadaw operations.¹²⁰³ They are a means of dividing ethnic minorities by setting one minority, or one part of a minority, against another. Some of these patterns continued during the reporting period.

517. In April 2019, in Namhkan Township of Shan State, elements affiliated with Tatmadaw-supported militia stopped a 16 year old Ta'ang boy who was on his way to farm and took him to an isolated area.¹²⁰⁴ The boy was questioned by a person believed to be in a position of authority within the group, who accused him of being a TNLA fighter and asked him how many TNLA fighters were present in his village.¹²⁰⁵ The boy's hands were tied and he was kicked, beaten with sticks, threatened with death, knives and firearms, before being released.¹²⁰⁶ The man who interrogated the boy told him: "*If I were not so tired you could have died*". There had been fighting between the Tatmadaw and the TNLA in the area surrounding the village of the victim in the days preceding the incident.¹²⁰⁷

518. The Mission received credible reports that, between February and April 2019, the same group beat another three civilian Ta'ang men living in the same area.¹²⁰⁸ All victims belonged to the same ethnic group as the opposing EAO the militia was fighting.

Conclusions and legal findings

519. The Mission concludes on reasonable grounds that Tatmadaw soldiers inflicted severe pain or suffering on men and boys in northern Shan State that constituted a pattern of torture in violation of international human rights law. The Mission draws this conclusion because of the consistency of cases where the Tatmadaw inflicted severe pain or suffering to obtain information. The Mission also concludes on reasonable grounds that the torture constituted violations of international humanitarian law, and amounted to war crimes, because the acts were committed in connection with armed conflicts between the Tatmadaw and EAOs operating in the region.¹²⁰⁹ The Mission's information further indicates that in some cases Tatmadaw commanding officers participated in, were present for, had knowledge of, or acquiesced or consented to acts of torture. International law requires that alleged perpetrators of these acts and those with command responsibility are criminally investigated and, where appropriate, prosecuted.¹²¹⁰ The Mission also concludes on reasonable grounds that in at least one case militia inflicted severe pain or suffering on a boy that would amount to the war crime of torture. Under both international human rights law and international humanitarian law, the Government of Myanmar has an obligation to

¹²⁰¹ This refers to the Unlawful Associations Act.

¹²⁰² 1342.

¹²⁰³ A/HRC/39/CRP.2, Paras. 108, 155, 170 and 231.

¹²⁰⁴ PI-164, PI-165.

¹²⁰⁵ PI-164.

¹²⁰⁶ PI-164.

¹²⁰⁷ PI-164, PI-165, 1611.

¹²⁰⁸ PI-164, PI-165, FFFGEN-1-83587, 1611.

¹²⁰⁹ ICTY, Kunarac Appeals Chamber Opinion para. 58, See, also, ICTY, Limaj et al. (IT-03-66), para. 91. For a detailed discussion of the elements of torture, see Chapter IV. On the Conflict between the Tatmadaw and the Arakan Army; section C.2: Torture, arbitrary detention and deaths in custody.

¹²¹⁰ For a detailed discussion on the requirements of conducting effective investigations, see Legal findings and conclusions: the impossibility of return in Chapter IV. The Situation of the Rohingya.

conduct effective investigations into these violations, including criminal investigations especially when the violations amount to war crimes.¹²¹¹

3. Forced or compulsory labour

520. In its 2018 report the Mission found a pattern of systematic use of men, women and children for forced labour across Kachin and Shan States, throughout the reporting period.¹²¹² During this reporting period, the Mission documented a continued pattern of forced labour by the Tatmadaw against men and boys of several ethnic groups.¹²¹³ The types of forced labour documented included portering, construction work, serving as messengers, scouts, cooks and guides, and performing other tasks for the Tatmadaw, including in areas of active conflict.¹²¹⁴ The Mission received credible information from northern Shan State that, regardless of official policies, Tatmadaw soldiers understood that commanders supported the use of unpaid 'local guides' when on the move between locations in conflict areas.¹²¹⁵

521. A Shan man told the Mission: *"I am civilian, so when armed people come and tell us to do something, we have no choice, we have to do what they ask. Even if we want to refuse, we cannot."*¹²¹⁶

522. The Mission received accounts of individuals being kicked, punched or otherwise beaten, subjected to derogatory language, or threatened with death, while portering or while being forced to act as guides for the Tatmadaw.¹²¹⁷ Survivors told the Mission that soldiers provided them with insufficient food and water, made them sleep on the ground, forced them to carry heavy loads for long periods and had them prepare their food.¹²¹⁸ For example, at the end of April 2018, in Kachin State, Tatmadaw soldiers stopped three Kachin boys, aged between 15 and 17 years old, who were coming back from farming and, after asking them about their ethnic background and village of origin, forced them to carry their supplies.¹²¹⁹ For the three following days, soldiers forced the boys to carry heavy loads that exceeded their physical capacity, threatened them with death many times and repeatedly hit them.

523. One of the boys told the Mission: *"I cannot count how many times [the Tatmadaw] kicked us or punched us"*.¹²²⁰ Another boy described how the soldiers would check on him at night by kicking him in his sleep. After falling on the ground while carrying a load that was too heavy for him, the Tatmadaw soldier told him: *"You Jinghpaw [Kachin]"*¹²²¹ *can't even carry this load, we will kill you"*.¹²²²

524. The Mission also received information that the Tatmadaw exposed forced labourers to the dangers of the conflict, including attacks and landmines, similarly to what the Mission documented in Rakhine State.¹²²³

¹²¹¹ 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, Basic Guideline and Principle 4.

¹²¹² A/HRC/39/CRP.2, para 258.

¹²¹³ The Mission has also documented a pattern of women and girls being subjected to sexual violence in the context of forced labour since 2011 in its 2018 report; A/HRC/42/CRP.4, para. 131-137.

¹²¹⁴ GI-005, GI-004, 1078, 1337, PI-149, GI-048, GI-058, rows 71, 29, 41, 48, and 66 of FFFGEN-1-85769, V-378, FFFGEN-1555826851-4879.

¹²¹⁵ GI-023.

¹²¹⁶ GI-048.

¹²¹⁷ GI-004, GI-005, 1078.

¹²¹⁸ GI-004, GI-005, 1078.

¹²¹⁹ GI-004, GI-005.

¹²²⁰ GI-005.

¹²²¹ The peoples of Kachin State include the Jinghpaw (representing the majority and commonly referred to as the "Kachin"), Shan, Ruwang, Lisu, Zaiwa, Lawngwaw, Lachyit, Rakhine and Bamar. Jinghpaw people are also amongst the peoples of Shan State.

¹²²² GI-004.

¹²²³ See Chapter V. section F: The conflict between the Tatmadaw and the Arakan Army; Landmines.

525. Consistent with its previous findings that some victims of forced labour were made to walk at the front of Tatmadaw soldiers to act as “human mine sweepers”,¹²²⁴ the Mission corroborated a similar case during the reporting period. In this incident, Tatmadaw soldiers forced five men in their custody to walk in front of the first soldier while moving between locations in a forest area likely to have been contaminated with landmines.¹²²⁵ The Mission also received credible information that in another case a Shan civilian man was killed and another was injured by the detonation of a landmine while being forced to act as a messengers for the Tatmadaw in an area that the soldiers knew to be contaminated.¹²²⁶

526. The Mission also received information that in another case Tatmadaw soldiers forced a Kachin civilian man to go to a nearby village to verify the potential presence of EAO fighters under the threat that one of his relatives would be killed if he did not return.¹²²⁷

*Conclusions and legal findings*¹²²⁸

527. The Mission concludes on reasonable grounds that these cases of forced labour and physical abuse add to a widely documented Tatmadaw practice that contravenes international human rights law and international humanitarian law.¹²²⁹ In addition to violating the prohibition against forced labour, the practice violated the prohibitions against arbitrary detention and cruel, inhuman or degrading treatment or punishment. In cases involving children, it also violated the Convention on the Rights of the Child. The cases of cruel, inhuman or degrading treatment or punishment also rise to the level of the war crimes of cruel treatment or outrages upon personal dignity, given their connection to the armed conflict.¹²³⁰ While international law permits some exemptions to the general prohibition of forced labour,¹²³¹ the cases that the Mission investigated do not fall within those exemptions. The manner in which the Tatmadaw exposed forced labourers to the dangers of the armed conflict, including exposing them to landmines, contravened the right to life under international human rights law and was a violation of international humanitarian law under the prohibition of exposing civilians under its control to the effects of attack. Under both international human rights law and international humanitarian law, the Government of Myanmar has an obligation to conduct effective investigations into these violations, including criminal investigations especially when they amount to war crimes of cruel treatment or outrages upon personal dignity.¹²³²

4. Sexual and gender-based violence¹²³³

528. In its 2018 report and more recently in its 2019 thematic report on sexual and gender-based violence,¹²³⁴ the Mission found credible and consistent accounts of a pattern of sexual violence against men, women and girls in Kachin and Shan States perpetrated by security forces.¹²³⁵ Despite the ceasefire, heavy militarization and the continuing hostilities have exposed women and girls to conflict-related sexual violence in both Kachin and Shan

¹²²⁴ A/HRC/39/CRP.2, para. 266.

¹²²⁵ 1058, 1059.

¹²²⁶ 1414, GI-058.

¹²²⁷ 1337.

¹²²⁸ See also chapter IV, section E: The situation of the Rohingya; forced and compulsory labour.

¹²²⁹ See also chapter IV, section E: The situation of the Rohingya; forced and compulsory labour.

¹²³⁰ ICTY, Kunarac Appeals Chamber Opinion para. 58, See, also, ICTY, Limaj et al. (IT-03-66), para. 91.

¹²³¹ A/HRC/39/CRP.2, para. 256.

¹²³² 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, Basic Guideline and Principle 4.

¹²³³ The Mission produced a comprehensive conference room paper on sexual and gender-based violence and the gendered impact of its ethnic conflicts encompassing trends and patterns in northern Myanmar since 2011. All cases referred to in this reporting period are detailed in that report. A/HRC/42/CRP.4.

¹²³⁴ Ibid.

¹²³⁵ A/HRC/39/CRP.2, para. 164 et s., and 188-219.

States. The Mission found that Tatmadaw soldiers subjected women and, in one case, a girl¹²³⁶ to sexual violence, including rape, gang rape and attempted rape, as well as forced nudity, leading to ostracism by their communities and government authorities.¹²³⁷ In cases reported to the Mission, complaints were lodged before authorities against the perpetrators but they did not result in investigation or sanctions against them.¹²³⁸ The following cases are drawn from the 2019 thematic report as examples of sexual violence experienced in northern Myanmar during the reporting period.

529. The Mission received credible reports of a Kachin woman killed in Kuktai Township, Shan State, on 3 July 2019. Photos assessed by the Mission indicate that the woman may have been raped before being killed. She was murdered at her shop.¹²³⁹ Sources available to the Mission and the area of operations of specific Tatmadaw military units, as well as media reports, suggest that the murder and possible rape were perpetrated by soldiers belonging to a military unit with the number 261, which has been stationed in the village since 2016.¹²⁴⁰

530. The Mission also verified the rape and torture of an ethnic Ta'ang woman by two Tatmadaw soldiers on 10 May 2019 in Namhsan Township, Shan State.¹²⁴¹ Sources available to the Mission and media reports suggest that Tatmadaw soldiers from LIBs 258, 252 and 522, commanded by LID 101, were stationed in or around the village at the time of the rape.¹²⁴² The incident took place in an area bordering TNLA-controlled territory where the Tatmadaw has been fighting since 2011¹²⁴³ and where clashes took place after the December 2018 unilateral ceasefire.¹²⁴⁴ The soldiers abducted the woman while she was farming alone on a tea plantation. They dragged her down the valley while asking her in the Myanmar language, which she barely understood, how many TNLA fighters were in the area.¹²⁴⁵ The two men ripped off some of her clothes and took turns raping her.¹²⁴⁶ According to another source, the Tatmadaw said it would "take responsibility" if the gang rape resulted in a pregnancy.¹²⁴⁷ The woman lodged an official complaint with the Namhsan police shortly after the incident, after which the police collected the survivor's clothing as evidence. The police provided no additional follow-up information to the survivor more than a month after the complaint was lodged. The woman left her village out of fear of reprisals from the Tatmadaw and due to the stigma attached to being a known rape survivor.¹²⁴⁸

531. A Kachin woman told the Mission that in April 2018, during ground operations and house searches conducted by the Tatmadaw in Tanai Township, Tatmadaw soldiers forced her to undress in front of her family. The victim understood the forced nudity as being a rape threat perpetrated to obtain information from her family on KIA movements.¹²⁴⁹ She also reported that, after a battle with the KIA and house searches, the Tatmadaw conducted patrols around the perimeter of the village and raped at least four women and girls who were trying to flee the area.¹²⁵⁰

532. During the reporting period, the Mission verified the rape of a 70 year old Shan woman in Monghpyak village, Tachilek Township, Shan State, on 2 April 2018.¹²⁵¹

¹²³⁶ PI-141.

¹²³⁷ PI-166.

¹²³⁸ GI-014, GI-006, PI-136, PI-141, PI-166, V-330

¹²³⁹ V-359, 2137, 2138.

¹²⁴⁰ V-359, 2137, 2138.

¹²⁴¹ PI-166, V-354, V-355, 2615.

¹²⁴² PI-166, V-354, V-355, 2615.

¹²⁴³ PI-101.

¹²⁴⁴ A/HRC/42/50, paras. 57-58.

¹²⁴⁵ PI-166.

¹²⁴⁶ PI-166, 2615.

¹²⁴⁷ 2615.

¹²⁴⁸ 2615.

¹²⁴⁹ GI-006.

¹²⁵⁰ GI-006.

¹²⁵¹ GI-002, GI-014, PI-136, V-356, V-357, V-358.

Hundreds of Tatmadaw soldiers were deployed in the area of a proposed mineral exploration project operated by a Singapore company with Australian management, Access Asia Mining. This raised concerns for civil society that human rights violations may take place in that area.¹²⁵² The area has a population of about 6,000 civilians. Such a large military-civilian ratio produces constant fear among local residents, particularly women.¹²⁵³ Sources available to the Mission and the area of operations of specific Tatmadaw military units, as well as media reports, suggest that the responsible soldier was serving in LIB 329 or LIB 330, commanded by Military Operations Command 18 (MOC-18).¹²⁵⁴ The soldier abducted the woman while she was collecting vegetables in the forest close to her home. He stabbed her ear lobes with a knife while stealing her earrings, squeezed her neck, beat her on the face and raped her vaginally, causing her to lose consciousness. The military paid for her hospital fees and medicine but the survivor was not given an opportunity to provide a statement. Reports suggest that police have only filed a case of slashing and robbery, not rape, and that the perpetrator would be brought before a court martial.¹²⁵⁵

533. Girls face heightened risks of sexual violence in heavily militarized areas in Kachin and Shan States.¹²⁵⁶ A 17 year old year old Kachin girl was raped in Bhamo Township, Kachin State, on 9 December 2018. She was coming home from a shop when she was apprehended from behind by at least two men and knocked unconscious. When she woke up on the road, she was partly naked and felt acute pain in her genital area. The survivor could not identify the rapists as she immediately lost consciousness. The Mission has reasonable grounds to conclude they were Tatmadaw soldiers. At the time there was a heightened presence of soldiers in the village, which lies in the frontline area near the KIA headquarters in Laiza. In addition, the road where the girl was raped was regularly used by soldiers.¹²⁵⁷ The survivor lodged a complaint with the police in her district, but nothing has happened since the incident due to what the police told the survivor was a lack of evidence.¹²⁵⁸

Conclusions and legal findings

534. The Mission reaffirms its conclusion that rape and other forms of sexual and gender-based violence committed in Kachin and Shan State, as documented in its 2018 report and more recently in its 2019 thematic report on sexual and gender-based violence,¹²⁵⁹ continue to be perpetrated by the Tatmadaw. The Mission reaffirms on reasonable grounds that these acts constitute gross violations of international human rights law. All of these acts also amount to violations of international humanitarian law due to the fact that they took place in connection with a non-international armed conflict.¹²⁶⁰ Additionally, many of the acts amounted to war crimes of rape, sexual violence, torture, cruel treatment, outrages upon personal dignity and sexual slavery. They must therefore be criminally investigated and, where appropriate, prosecuted.¹²⁶¹

¹²⁵² Access Asia Mining responded to these concerns, available at <https://www.business-humanrights.org/sites/default/files/documents/Access%20Asia%20Mining%20Response%2015%20May%202018.pdf>. See also, Shareholder Update (2 March 2018) available at http://accessasiamining.com/pdf/shareholders/AAM_Shareholder%20Update%20020318.pdf.

¹²⁵³ V-356.

¹²⁵⁴ PI-136, V-356, V-357, V-358.

¹²⁵⁵ V-356, V-357, V-358.

¹²⁵⁶ PI-037, PI-063, PI-141, PI-144.

¹²⁵⁷ PI-141, 2400.

¹²⁵⁸ PI-141, 2400.

¹²⁵⁹ A/HRC/42/CRP.4.

¹²⁶⁰ ICTY, Kunarac Appeals Chamber Opinion para. 58, See, also, ICTY, Limaj et al. (IT-03-66), para. 91.

¹²⁶¹ For a detailed discussion on the requirements of conducting effective investigations, see Chapter IV, section G: The Situation of the Rohingya; conclusions and legal findings.

C. Patterns of abuses by EAOs

535. The Mission received credible but limited information that some EAOs were responsible for violence against civilians, arbitrary deprivation of liberty, restrictions on freedom of movement and failure to protect the civilian population under their control from the effects of attacks. The Mission received information on the persecution of members of the Christian minority by the UWSA, as well as reports of forced recruitment of men, women, and children by some EAOs operating in northern Myanmar.

1. EAO attacks

536. Hostilities during the reporting period, including between EAOs, resulted in civilian casualties and large-scale displacement of civilians.¹²⁶²

537. On 15 August 2019, the TNLA, the AA and the MNDAA¹²⁶³ (jointly known as the “Brotherhood Alliance”)¹²⁶⁴ launched a series of coordinated attacks in five locations in Nawnghkio Township, Shan State, and Pyinoolwin, Mandalay Region. In a joint statement issued on 12 August, the three EAOs had threatened that there would be consequences if the Tatmadaw did not cease hostilities in Rakhine and northern Shan State.¹²⁶⁵ These EAOs are large professional armed groups with chains of command and their fighters are well trained and well-armed. Their threats, therefore, constituted serious threats of significant violence.

538. Among the targets of the 15 August attacks were the Myanmar Military Defence Services Technological Academy,¹²⁶⁶ a tollgate and a narcotic inspection gate.¹²⁶⁷ The attack on the academy was especially significant as it is located in Mandalay Region, well away from the EAOs’ usual areas of operation, and is a very prestigious, well-guarded military establishment.¹²⁶⁸ On the same day, the EAOs also intentionally damaged a bridge affecting the road transportation of civilians and goods on the Mandalay-Lashio-Muse axis for several days.¹²⁶⁹ The location of the bridge in relation to the EAOs’ other attacks that day suggests it may have been targeted to give them a military advantage. The Mission was unable to verify reports that at least two civilians were killed and an additional 10 were injured as a result of this initial attack.¹²⁷⁰

539. Fighting between the Tatmadaw and the Brotherhood Alliance continued in the weeks following the 15 August attacks in several townships in northern Shan State, including Lashio and Kuktai, and was continuing at the time of writing. In addition to civilian casualties from the fighting, an increasing number of civilian casualties resulting from landmines in the context of these hostilities have also been reported.¹²⁷¹

540. The Mission received information that, following the initial attacks of 15 August, the EAOs intentionally damaged two additional bridges between Theinni and Kun Lone Townships of Shan State and that one additional civilian was injured in crossfire in Kuktai Township.¹²⁷² Information indicates that, between 15 August and 2 September 2019, a total

¹²⁶² V-352, Rows 07.12.18, 23.11.18, 29.09.18, 04.09.18, and 09.07.18 of 2143, rows 95, 155, 104, 103, 165, 162, 122, 107, 101, 49, 167, 127, 126, 121, 120, 115, 110, 109, and 108 of FFFGEN-1-85769, FFFGEN-1-86938, FFFGEN-1-86942, FFFGEN-1-86944.

¹²⁶³ Three of the four members of the Northern Alliance, calling themselves the ‘Brotherhood Alliance’.

¹²⁶⁴ For more information on the ‘Brotherhood Alliance’, please see <http://www.pslftnla.org/wp-content/uploads/2019/08/JPG-1-724x1024.jpg>

¹²⁶⁵ <http://www.pslftnla.org/wp-content/uploads/2019/08/JPG-1-724x1024.jpg>

¹²⁶⁶ FFFGEN-1555826851-1999

¹²⁶⁷ V-393.

¹²⁶⁸ <https://www.janes.com/article/90498/myanmar-military-academy-comes-under-rebel-attack>; <https://www.bangkokpost.com/world/1730811/myanmar-insurgents-attack-army-college-police-post>;

¹²⁶⁹ FFFGEN-1555826851-1999, V-393, V-394

¹²⁷⁰ FFFGEN-1555826851-1999, V-393, V-394, V-395

¹²⁷¹ GM-021

¹²⁷² GM-022, and FFFGEN-1555826851-1999.

of four bridges were damaged in northern Shan State¹²⁷³ and that interruption of transportation in some areas resulted in an increase in prices of food and other life sustaining items.¹²⁷⁴

541. The Mission received reports indicating that the EAOs used heavy weapons during the attacks¹²⁷⁵ and that, in Lashio Township, their targeting of Tatmadaw positions located near civilian populated areas resulted in injury to at least two civilians, including an infant, and damage to civilian property.¹²⁷⁶

542. Additional unverified reports received by the Mission indicate that Brotherhood Alliance fighters restricted the movement of civilians in the areas affected by the conflict and set fire to several civilian vehicles on 29 and 30 August 2019.¹²⁷⁷ The Mission received information of civilians trapped in conflict areas and unable to flee.¹²⁷⁸

543. The Secretary-General's latest report on Children and Armed Conflict reported on eight attacks in 2018, five against schools and three against hospitals. Six of the attacks were in Kachin State and two were in Shan State. The report attributed two of the attacks to the KIA and one to the SSA-S.¹²⁷⁹

2. Putting civilians in harm's way

544. The Mission received reports that the KIA,¹²⁸⁰ the SSA-S,¹²⁸¹ the SSA-N¹²⁸² and the TNLA¹²⁸³ placed military objects and fighters in and around civilian populated areas. Information received by the Mission indicates that at least one of the SSA-S's headquarters is located near an educational facility.¹²⁸⁴ The Mission also received several accounts of EAO fighters using civilian houses as places to rest and eat while on the move¹²⁸⁵. Information also indicates that EAO fighters with or without uniforms and weapons regularly visited villages or IDP camps in areas under their control to procure supplies, participate in local celebrations or attend religious services.¹²⁸⁶ A source told the Mission that EAO fighters use schools in remote villages as places to sleep.¹²⁸⁷

545. According to accounts received by the Mission, the KIA has a policy by which fighters are not allowed to wear uniforms or carry weapons when in civilian populated areas, including IDP camps. Some witnesses told the Mission that KIA fighters would only enter civilian populated areas in civilian clothes.¹²⁸⁸

546. The Mission documented cases in which the proximity of EAO fighters, wearing uniforms and carrying weapons, to civilians, coupled with the opposing force's known disregard for the principles of precaution and distinction, was likely responsible for severe harm to civilians. For example, in October 2018, in Kuktai Township, Shan State, a woman was injured as a result of shooting by Tatmadaw soldiers belonging to the 99th LID in a civilian populated area.¹²⁸⁹ The Mission received information that, at the time of the incident, KIA soldiers wearing uniforms and carrying weapons were present in the village

¹²⁷³ FFFGEN-1555826851-4879.

¹²⁷⁴ FFFGEN-1555826851-1999.

¹²⁷⁵ V-397, V-398, V-420.

¹²⁷⁶ FFFGEN-1555826851-1999.

¹²⁷⁷ FFFGEN-1555826851-4879, V-419.

¹²⁷⁸ V-372, V-374.

¹²⁷⁹ A/73/907-S/2019/509 para 130.

¹²⁸⁰ 1059, 1063, 1074, 1335, 1378, PI-156, PI-161, PI-162, V-347 pag.28, V-348 pag. 41

¹²⁸¹ 1078, PM-010, V-347 pag.28, V-348 pag. 41

¹²⁸² 1414, V-347 pag.28, V-348 pag. 41

¹²⁸³ PI-165, V-347 pag.28, V-348 pag. 41, PI-121, PI-123, PI-164, FFFGEN-1-85853.

¹²⁸⁴ PM-010.

¹²⁸⁵ 1335, 1414, 1378, GI-57, PI-156, PI-161, 1063, GI-020, 1059, PI-165, PI-122, PM-010.

¹²⁸⁶ 1335, 1414, 1378, GI-57, PI-156, PI-161, 1063, GI-020, 1059, PI-165, PI-122, PM-010, V-347 p.28, V-348 p. 41.

¹²⁸⁷ PM-010.

¹²⁸⁸ 1059, GI-009, PI-161, GI-020.

¹²⁸⁹ GI-033, 2143.

and in civilian houses and were the target of the Tatmadaw attack that resulted in the civilian casualty.¹²⁹⁰

3. Treatment of Christian minorities

547. The Mission received credible reports that, in the second half of 2018, the United Wa State Army (UWSA)¹²⁹¹ engaged in a widespread campaign of persecution against members of Christian minorities in areas of Shan State under its control.¹²⁹² Specifically, the Mission received information that religious leaders, missionaries, Bible school teachers and their students, and faith-based groups were targeted in mass “arrests”.¹²⁹³ Although uncorroborated due to the high risk of reprisals in UWSA-controlled territory, the Mission received reports that the UWSA detained around 150 to 200 Christians.¹²⁹⁴ Captives were held in overcrowded small quarters in unhygienic conditions.¹²⁹⁵ They were reportedly chained during the night and subjected to forced labour during the day, during which they were not allowed to talk to each other.¹²⁹⁶ During captivity, religious leaders were prohibited from praying and were told to refrain from preaching once released.¹²⁹⁷ Reportedly, victims were told that they would be released if they signed a declaration renouncing their faith.¹²⁹⁸

548. In addition, approximately 50 Christian places of worship and Bible schools were forcibly closed and at least three other religious structures damaged or destroyed.¹²⁹⁹ According to information received by the Mission, the stated purpose of the campaign was to eradicate “religious extremism” and counter acts perceived as detrimental to the Wa culture and traditions.¹³⁰⁰

549. The Mission received information that, while the vast majority of the captives were released by the end of 2018 and some places of worship were allowed to reopen, a few religious leaders remained in captivity or were under “house arrest” at the time of writing.¹³⁰¹

4. Forced recruitment

550. The Mission received information consistent with previously identified patterns¹³⁰² of forced recruitment of men and women¹³⁰³ by the TNLA,¹³⁰⁴ the UWSA,¹³⁰⁵ the SSA-S,¹³⁰⁶

¹²⁹⁰ GI-033, 2143.

¹²⁹¹ The UWSA is the armed wing of the United Wa State Party, ruling the Wa Self-Administered Division. It is politically, economically and culturally aligned with China (V-400, V-401, V-399). The UWSA is also known for its involvement in drug trafficking along Myanmar's north-eastern border. The Tatmadaw and the UWSA have been allied in fighting Shan EAOs and are believed to share proceeds of trafficking of narcotics in the region.

¹²⁹² GI-049, GI-015, GM-014, GM-016, V-360, 2131, rows 100, 98, 92, 81, 77, 76 of FFFGEN-1-85769, V-402 p. 24, V-403

¹²⁹³ GI-049, GI-015, GM-014, GM-016, 2131, rows 100, 98, 92, 81, 77, 76 of FFFGEN-1-85769, V-402 Pp. 24, V-403 .

¹²⁹⁴ GM-016, and V-402 p. 24.

¹²⁹⁵ 2131.

¹²⁹⁶ 2131.

¹²⁹⁷ GI-049, GI-015, GM-014, GM-016, 2131, V-403.

¹²⁹⁸ GM-16, 2131, V-403.

¹²⁹⁹ GI-049, GI-015, GM-014, GM-016, 2131 Rows 100, 98, 92, 81, 77, 76 of FFFGEN-1-85769, V-402 PAG 24, V-403.

¹³⁰⁰ GM-016, V-402 p. 24, V-403.

¹³⁰¹ GI-049, GI-015, GM-014, GM-016, 2131, V-403, V-404.

¹³⁰² A/HRC/39/CRP.2 paras 333-354.

¹³⁰³ The Mission found that EAOs recruitment practices are not gender neutral. In non-government controlled areas, women are underrepresented in leadership roles and so they are de facto excluded from representing EAOs' political wings in the peace process. Their absence can be explained by the prerequisite of possessing combat experience, to which they do not have access due to gender discriminatory EAO policies ; A/HRC/42/CRP.4, para. 66 and 201.

¹³⁰⁴ PI-101, PI-123, PI-165, 1460, 1461, PM-010.

¹³⁰⁵ GI-049, GI-015, GM-014, GM-016, Rows 100, 98, 92, 81, 77, 76 of FFFGEN-1-85769, V-403.

the KIA¹³⁰⁷ and the MNDAA,¹³⁰⁸ indicating that these patterns persisted during the reporting period.¹³⁰⁹ An interviewee told the Mission:

*“SSA-S fighters arrived to my village and at first they asked for money, around 20,000 Kyat per household. My family and I couldn’t afford to pay, so we had to give them a person instead, but I didn’t want to join”.*¹³¹⁰

551. When asked whether villagers were in a position to refuse to join the KIA, another witness told the Mission:

*“People can refuse to join, but if they don’t want to go they have to provide [the KIA with] another person”.*¹³¹¹

552. The Mission received credible information that the TNLA continued its policy of mandatory recruitment,¹³¹² by which a person is conscripted from each two-parent household with at least two sons.¹³¹³

553. The Mission also received credible information that the TNLA purportedly discontinued its practice of “detention for family offenses” by which the TNLA would abduct relatives of those who refused to join its ranks.¹³¹⁴ However, information received by the Mission suggests that the implementation of this decision remains deficient, with the discontinuation of the practice not implemented consistently by recruiters.¹³¹⁵ The Mission also received limited but credible information that the TNLA, the KIA and the SSA-S forcibly recruited people affected by drug dependence and in some cases subjected them to cruel treatment as part of the forced rehabilitation process prior to military training.¹³¹⁶

5. Child recruitment

554. In 2018 the Mission had collected information on child recruitment, mainly of boys, by the TNLA, KIA, SSA-S and UWSA.¹³¹⁷ In his 2019 report on children and armed conflict, the Secretary-General listed the UWSA, the KIA and the SSA¹³¹⁸ among the parties responsible for recruitment and use of children in Myanmar.¹³¹⁹ According to the same report, in 2018 the United Nations verified nine incidents of recruitment and use of children attributed to the KIA and one to the TNLA.¹³²⁰ Two additional incidents were documented involving the UWSA.¹³²¹ The United Nations engaged with all listed armed groups, except for UWSA, and commitments were being sought from RCSS/SSA,¹³²² among others, to end child recruitment.¹³²³

555. The Mission received limited but credible information indicating an increase in the number of children recruited or used by the KIA during the reporting period.¹³²⁴ The information gathered suggests that the KIA’s practices regarding age verification expose children to a heightened risk of being recruited or used.¹³²⁵ The Mission received varying

¹³⁰⁶ 1076, 2143, 1460, 1461.

¹³⁰⁷ FFFGEN-1-88352, GI-009, GI-011, GI-020, PI-158, 1378, PI-156, PM-010.

¹³⁰⁸ FFFGEN-1-86925, FFFGEN-1-82867.

¹³⁰⁹ PM-010, GM-006.

¹³¹⁰ GI-022.

¹³¹¹ 1378.

¹³¹² A/HRC/39/CRP.2 para. 336.

¹³¹³ PI-101, PM-010.

¹³¹⁴ PI-101.

¹³¹⁵ PM-010.

¹³¹⁶ PM-010, GI-057.

¹³¹⁷ A/HRC/39/CRP.2, paras. 346-354.

¹³¹⁸ The Secretary-General’s report refers to SSA but the Mission understands this to refer to SSA-S.

¹³¹⁹ A/73/907-S/2019/509.

¹³²⁰ A/73/907-S/2019/509 para. 127.

¹³²¹ A/73/907-S/2019/509 para. 127.

¹³²² As per wording in the Secretary-General’s report.

¹³²³ A/73/907-S/2019/509 para. 135.

¹³²⁴ PM-009, PM-010, FFFGEN-1-83712.

¹³²⁵ PM-010, GI-020, PI-158, GI-009.

accounts regarding the KIA's child recruitment policies. A source told the Mission that, although the KIA verifies the age of potential new recruits, the minimum age for recruitment is 16.¹³²⁶ Another witness told the Mission that the KIA has a policy of prohibiting the recruitment of children younger than 15.¹³²⁷ The Mission was also told that the KIA uses recruits under 18 in support functions and not in direct participation in hostilities.¹³²⁸ Other sources told the Mission that no age verification process was conducted by the KIA recruiters and that potential recruits were identified based on their physical appearance.¹³²⁹

556. A 16 year old boy, who fled his home to avoid KIA recruitment in 2018, told the Mission:

*The KIA put pressure on me... They came to see me two or three times ... It would not have been good for me to tell them that I did not want to join, because we need to volunteer for the cause of our identity and our rights. For this reason, it was not good for me to refuse, but I did not want to carry weapons. I cannot say that I could not have told them that I did not want to join, but I couldn't talk back to them, I just kept silent and decided to leave.*¹³³⁰

557. The KIA had previously attempted to recruit the boy's adult brother, who told the Mission that, after he refused to join the KIA, the fighters told him "If you do not join us, we will make your brother join us".¹³³¹ He added that there is a KIA policy by which, in households with two or more sons, at least one son should join the KIA. He also stated that his childhood friends who had joined the KIA had to discontinue their education and missed their civilian life.¹³³²

6. Abductions, deprivation of liberty and cruel treatment

558. Abductions by EAOs continued to affect the protection of civilians.¹³³³ During the reporting period, in Shan State, SSA-S fighters were responsible for the abduction and arbitrary deprivation of liberty of at least 12 Ta'ang civilian men.¹³³⁴ The Mission received credible reports that some of the victims were tied up and beaten but the Mission was unable to corroborate the purpose and severity of the treatment.¹³³⁵ The Mission received information that, while some of the captives were released after varying periods of time, at least four people remained unaccounted for at the time of writing.¹³³⁶ Unverified information received by the Mission suggests that SSA-S fighters suspected some of the victims of having affiliations with the TNLA, based on their ethnic backgrounds,¹³³⁷ and that at least one of the abductees was forcibly recruited into the SSA-S forces.¹³³⁸

559. The Mission also received reports, but was unable to verify, that in March 2019 KIA fighters abducted four Lisu civilians, including a boy, in Hpakant Township, Kachin State.¹³³⁹ Reportedly, the KIA stopped the victims while they were on their way back from gathering food in the forest. Unverified information the Mission received indicates that,

¹³²⁶ PM-010.

¹³²⁷ PI-158.

¹³²⁸ GI-009.

¹³²⁹ GI-020, PI-158.

¹³³⁰ 1074.

¹³³¹ 1248.

¹³³² 1248.

¹³³³ V-352.

¹³³⁴ GI-057, GI-056, GI-047, PI-101, V-347 pag. 23 and 24, V348 P.41, FFFGEN-1-85853, FFFGEN-1-83533, V-406, V-407.

¹³³⁵ GI-047, V-347 p. 23 and 24, 2143, FFFGEN-1-85853, FFFGEN-1-83533.

¹³³⁶ GI-057, GI-056, GI-047, V-347 p. 23 and 24, V-421.

¹³³⁷ GI-047, V-347 p. 23 and 24.

¹³³⁸ GI-056, GI-057.

¹³³⁹ V-350, V-351.

while one of the victims escaped, the other three died while under the control of the KIA.¹³⁴⁰

560. The Mission received additional reports of alleged abductions by the TNLA¹³⁴¹ and the KIA¹³⁴² and physical or psychological abuses and killings by the SSA-S¹³⁴³ and the TNLA.¹³⁴⁴

7. Sexual and gender-based violence

561. The Mission received limited information regarding sexual and gender-based violence by EAOs during the reporting period. An explanation lies in the misconception and misunderstanding of sexual and gender-based violence in northern Myanmar. Sexual and gender-based violence is widely understood as relating solely to rape committed by Tatmadaw soldiers.¹³⁴⁵

562. Nonetheless, the Mission received credible information that members of EAOs have committed acts of sexual and gender-based violence. These reports included incidents of women and girls being sexually harassed, intimidated and assaulted, sometimes on a daily basis, by members of EAOs.¹³⁴⁶ While some EAOs have publically committed themselves to refrain from acts of sexual violence through “deeds of commitments”, EAOs operating in northern Myanmar have not.¹³⁴⁷ The normalization of gender discrimination and gender inequality in northern Myanmar contributes to the commission of sexual and gender-based violence in non-government controlled areas.¹³⁴⁸

563. The Mission was informed that some EAO court systems that address allegations of sexual and gender-based violence contain written procedures, but do not have written laws. Those court systems have applied Myanmar’s laws or, on an exceptional basis, international law. There are no laws or guidelines regarding sentencing in KIO courts.¹³⁴⁹ When survivors decide to present their grievances before traditional community leaders, who are generally men, cases are commonly resolved by imposing “bunglat hka”, or “blood money”, to compensate the female victim for the harm committed and to restore peace in the community.¹³⁵⁰ In these cases the male perpetrator does not appear to receive any punishment.

8. Conclusions and legal findings

564. The Government’s refusal to grant the Mission access to the country and to respond to the Mission’s requests for information limited the Mission’s ability to gather first-hand information on human rights abuses and violations of international humanitarian law by EAOs. Abuses and violations perpetrated by EAOs remain generally under-reported by civil society organizations operating in northern Myanmar belonging to the same ethnic group as the EAOs.¹³⁵¹ Nonetheless, the Mission received credible allegations of human rights abuses and violations of international humanitarian law by EAOs, and draws the following conclusions.

¹³⁴⁰ V-350, V-351.

¹³⁴¹ V-408, V-421.

¹³⁴² V-352, Row 181 of FFFGEN-1-85769, V-409.

¹³⁴³ V-352, and rows 27.10.18 and 15.08.18 of Doc ID 2143.

¹³⁴⁴ Row 16.09.18, 06.07.18 of 2143.

¹³⁴⁵ PM-010, PM-011.

¹³⁴⁶ PM-010, PM-011.

¹³⁴⁷ For example, the Karen National Union/Karen National Liberation Army, party to the 2015 NCA, signed a deed of commitment under Geneva Call for the prohibition of sexual violence in situations of armed conflict and towards the elimination of gender discrimination, available at http://theirwords.org/media/transfer/doc/knu_sexual-6bffd0548f5219cf14fa5acb9ad52479.pdf.

¹³⁴⁸ PM-010, PM-011, PM-012.

¹³⁴⁹ 2160.

¹³⁵⁰ PM-011, 2160.

¹³⁵¹ PM-010.

565. The Mission notes that all EAOs engaged in armed conflict in Myanmar are bound by international humanitarian law under Common Article 3 of the four Geneva Conventions and customary international law. Directing attacks against civilians, indiscriminate attacks and attacks that are not proportionate are violations of international humanitarian law.¹³⁵² EAOs must also comply with the obligations under international humanitarian law to take precautionary measures to spare civilians and civilian objects.¹³⁵³ Further investigation is warranted to come to a determination as to whether the August 2019 attacks by the TNLA, the AA and the MNDAA constituted such violations, given that civilians were killed, civilian property was damaged and the destruction of the bridge may have had deleterious effects on the civilian population.

566. The Mission also has concerns with the EAOs' location of military objects and fighters in and around civilian areas in a manner that increases civilian exposure to the dangers of conflict, although it was unable to draw specific findings at the end of its investigation. The Mission strongly encourages EAOs to review their practices. It also emphasizes that civilians do not lose their civilian status or protections, unless and for such time as they take a direct part in hostilities.¹³⁵⁴ in situations where an EAO breaches its international humanitarian law obligations, including its obligations to take all feasible precautions to protect civilians and civilian objects under its control against the effects of an adversary's attacks¹³⁵⁵ and, to the extent feasible, to avoid locating military objectives within or near densely populated areas.¹³⁵⁶

567. International humanitarian law also prohibits acts of rape, sexual violence, torture, cruel treatment and outrages upon a person's human dignity.¹³⁵⁷ Many of these acts constitute war crimes and must be criminally investigated and, where appropriate, prosecuted.¹³⁵⁸ The Mission concludes on reasonable grounds that SSA-S fighters in Shan State inflicted severe pain or suffering on a group of Ta'ang men that constituted cruel treatment or outrages upon their human dignity. The Mission was unable to determine if the treatment constituted torture. The Mission also finds additional investigation warranted into the alleged deaths of three Lisu civilians after the KIA took them into its custody in March 2019 and into uncorroborated allegations of physical or psychological abuses torture and killings by the SSA-S and the TNLA.

¹³⁵² See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 1 (the principles of distinction between civilians and combatants), rule 11 (indiscriminate attacks) and rule 14 (proportionality in attack).

¹³⁵³ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 15 (principles of precautions in attack).

¹³⁵⁴ See International Criminal Tribunal for the Former Yugoslavia (ICTY), *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgment (Appeals Chamber), 30 November 2006, para. 194 (the failure of a party to abide by these obligations do not "relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack".)

¹³⁵⁵ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 22 (principle of precautions against the effects of attack).

¹³⁵⁶ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 23 (location of military objectives outside densely populated areas). See, also, Toni Pfanner, *Military uniforms and the law of war*, International Review of the Red Cross, No. 853, March 2004, p. 122.

¹³⁵⁷ See, Common Article 3 to the four Geneva Conventions; See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 90 (torture and cruel, inhuman or degrading treatment) and rule 93 (rape and other forms of sexual violence).

¹³⁵⁸ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 156 (definition of war crimes).

568. International law does not entitle EAOs to recruit adults on a compulsory or forced basis or to recruit children on any basis.¹³⁵⁹ EAOs must also not allow children to take part in hostilities.¹³⁶⁰ Although there is not yet a uniform practice regarding the minimum age for recruitment or participation in hostilities under international law, the minimum age must not be less than 15 years.¹³⁶¹ The most protective international human rights treaty prohibits recruit and participation in hostilities of persons under 18 years.¹³⁶² The prohibition on recruitment implicitly protects children from engaging in armed group training and support functions that do not constitute participation in hostilities. The Mission notes that several armed groups in Myanmar have signed commitments not to recruit or use children under the age of 18 years.¹³⁶³ The Mission encourages other EAOs operating in northern Myanmar to do the same. It strongly encourages EAOs to refrain from recruiting children under the age of 18 years or using them in hostilities. When there is doubt as to whether a person is a child, EAOs should treat the person as such.

569. The Mission received reliable but unconfirmed information regarding sexual and gender-based violence by EAOs in Kachin and Shan States. The Mission concludes on reasonable grounds that sexual and gender-based violence by EAO fighters has been less than that perpetrated by government security forces. Nor have EAO fighters committed sexual and gender-based violence with the same intent of targeting the civilian population.¹³⁶⁴ However, further investigation is required. The Mission is concerned, on the basis of cases it has investigated, that EAO justice systems are inadequate in addressing allegations of sexual and gender-based violence.

570. The Mission finds that further investigation is warranted to determine whether the UWSA's mass detention and abuse of Christian minorities constitutes persecution as a crime against humanity. Based on preliminary information available to the Mission, the large number of arrests and detentions, as well as the destruction of property targeting Christian people and Christian sites, appear indicative of a widespread attack on a civilian population on the basis of religion. Denial of physical liberty and ability to practice one's religion amount to intentional and severe deprivations of fundamental rights. Furthermore, based on the information collected by the Mission, the intent and purpose of the detentions were to prevent people from practicing Christianity, and therefore, discriminatory in nature.

¹³⁵⁹ A/HRC/39/CRP.2, para. 327; see, also J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 136 (recruitment of child soldiers).

¹³⁶⁰ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 137 (participation of child soldiers in hostilities). For further discussion of this issue see, A/HRC/39/CRP.2, para. 327.

¹³⁶¹ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 136 (recruitment of child soldiers) and rule 137.

¹³⁶² Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, art. 4.

¹³⁶³ See, for example, Karenni National Progressive Party/Karenni Army (KNPP/KA), Deed of Commitment, 13 April 2007, available: http://theirwords.org/media/transfer/doc/sc_mm_knpp_ka_2007_10-185315c26ac6de1e465dd6108b6d732c.pdf; New Mon State Party/Mon National Liberation Army (NMSP/MNLA), Deed of Commitment under Geneva Call for the Protection of Children from the Effects of Armed Conflict, 2 August 2012, available: http://theirwords.org/media/transfer/doc/sc_mm_nmnp_mnla_2012_28-1a6fca6425a9058d2c50e22e71e871a6.pdf; Chin National Front/Chin National Army (CNF/CNA), Deed of Commitment, 10-3-2009, available: http://theirwords.org/media/transfer/doc/mm_cnf_cna_2009_05-5d9f8e63936f9d1dd82b23797c05be93.pdf; and Karen National Union/Karen National Liberation Army (KNU/KNLA), Deed of Commitment, 4 march 2007, available: <http://theirwords.org/media/transfer/doc/20130729111527281-7a4e58e463562a88d6e1087e98031ea8.pdf>.

¹³⁶⁴ A/HRC/39/CRP.2, para. 370; PM-012.

D. Landmines, improvised explosive devices¹³⁶⁵ and explosive remnants of war

571. Northern Myanmar is heavily contaminated with landmines, improvised explosive devices (IEDs), and explosive remnants of war (ERWs), including unexploded ordnances and abandoned explosive ordnances.¹³⁶⁶ All of them have the potential to inflict death and serious injury on civilians. They affect the safety and security of the population, their freedom of movement and access to basic economic, social and cultural rights, including their right to health, food and education. Landmines, IEDs and ERWs are also hindering the safe return of IDPs.

572. According to UNICEF, between January and June 2019, there were “121 casualties (33 people killed) from 77 incidents of landmines and explosive remnants of war (ERW) countrywide. Shan State accounts for 40% of the total casualties from 22 incidents and followed by 24% in Kachin (...). Shan has the highest rate of children casualties, representing 42% of casualties from the State.”¹³⁶⁷ There were 21 landmine incidents in northern Shan State in the first six months of 2019, killing 12 people, of whom six were children, and injuring 31 people, of whom 13 were children. During the same period, Kachin State also accounted for 24 per cent of all landmine-associated deaths and injuries and 24 per cent of incidents countrywide.¹³⁶⁸

573. The risks that landmines, IEDs and ERWs pose disproportionately affect children.¹³⁶⁹ They are estimated to be the leading cause of conflict-related child casualties in 2018, in a country-wide sample of cases verified by a reliable source.¹³⁷⁰ UNICEF estimates that every one in four casualties of landmine incidents in Myanmar is a child.¹³⁷¹ The Mission received reports of several individual incidents in which landmines or other explosive devices killed or injured many children during the reporting period.¹³⁷²

574. The Mission received information that, by August 2018, following hostilities in Tanai Township,¹³⁷³ the Tatmadaw left behind abandoned explosive ordnances, including heavy weapons rounds and grenades.¹³⁷⁴ The unexploded ordnances were found in the immediate proximity of a place of worship that had been used by the Tatmadaw during the hostilities, located in an area populated by civilians before the offensive.¹³⁷⁵

575. The Mission received information that the parties to the conflict,¹³⁷⁶ including the Tatmadaw,¹³⁷⁷ the KIA,¹³⁷⁸ the SSA-S¹³⁷⁹ and the SSA-N,¹³⁸⁰ continue to lay landmines and use IEDs. In particular, the Mission’s information indicates that the parties to the conflict used landmines or IEDs primarily for defensive purposes in the areas leading to, or

¹³⁶⁵ The United Nations International Ammunition Technical Guidelines define an IED as “a device placed or fabricated in an improvised manner incorporating explosive material, destructive, lethal, noxious, incendiary, pyrotechnic materials or chemicals designed to destroy, disfigure, distract or harass. They may incorporate military stores, but are normally devised from non-military components”. United Nations Office for Disarmament Affairs (UNODA), International Ammunition Technical Guideline, ATG 01.10C (2nded.), 2 January 2015.

¹³⁶⁶ See also A/HRC/39/CRP.2. Paras 386-388, V-352, V-348

¹³⁶⁷ <https://www.unicef.org/myanmar/media/2476/file/UNICEF.pdf>

¹³⁶⁸ V-353.

¹³⁶⁹ V-410, V-411, and <https://www.unicef.org/myanmar/media/2476/file/UNICEF.pdf>

¹³⁷⁰ FFFGEN-1-83712.

¹³⁷¹ <https://www.unicef.org/myanmar/media/2476/file/UNICEF.pdf>

¹³⁷² GI-038, V-366, V-410, FFFGEN-1-85473, FFFGEN-1-83712, FFFGEN-1-83594.

¹³⁷³ Hostilities took place in Tanai Township from November 2017 to April 2018 between the Tatmadaw and the Northern Alliance, see also paras. 307-315 of A/HRC/39/CRP.2.

¹³⁷⁴ GI-009.

¹³⁷⁵ GI-009. See also A/HRC/39/CRP.2 paras. 307-315.

¹³⁷⁶ GM-009.

¹³⁷⁷ GI-037.

¹³⁷⁸ GI-037.

¹³⁷⁹ GI-057, GI-056.

¹³⁸⁰ GI-048, GI-058.

surrounding, their camps or bases.¹³⁸¹ The Mission received accounts of civilians killed or injured by landmines and IEDs located in the immediate proximity of civilian populated areas, next to roads or in areas where civilians move for livelihood-related purposes.¹³⁸²

576. The Mission was informed of instances in which cattle, on which civilians depended for their survival, were killed by landmines.¹³⁸³ Several interviewees told the Mission that the current contamination increasingly frightened villagers and farmers in their communities from going to gather water, fruit, vegetables and firewood in the forest or from taking care of animals and crops in areas located outside their villages.¹³⁸⁴

577. One man's foot was amputated after he stepped on a landmine located next to the road while on his way to attend to his cow in Mogaung Township, Kachin State, in 2018. He told the Mission: *"Even though [the villagers] became afraid of landmines after what happened to me, people had to go back and farm, otherwise they would have had nothing to eat"*.¹³⁸⁵

578. Although sources reported that in some areas EAOs had warned civilians about the presence of landmines or IEDs,¹³⁸⁶ the Mission received evidence from victims that contaminated areas were not effectively marked.¹³⁸⁷ For example, a child, who was severely injured by the detonation of an explosive device while looking for firewood in March 2019, told the Mission:

"The object was round and white The other children took it, and I just followed them ... I did not notice anything saying that that area was dangerous".¹³⁸⁸

579. Landmines continue to deter IDPs displaced by the conflict from returning to their villages and lands.¹³⁸⁹ The Mission was told that the presence of landmines near villages generates fear among IDPs, leading to their reluctance to return.¹³⁹⁰ A displaced woman told the Mission: *"I want to go back to my village, but I cannot. It is not safe to go back ... and I am worried that there may be landmines around the village, and that is why I am afraid to go back"*.¹³⁹¹ The Mission received information that in some instances the Tatmadaw conducted some landmine clearance operations. However, sources expressed concerns regarding the lack of thoroughness and the quality of clearances, as well as the limited extent of the areas covered.¹³⁹²

1. Conclusions and legal findings

580. The Mission concludes on reasonable grounds that the Tatmadaw and EAOs use landmines, and IEDs and have left them and other ERWs behind after hostilities. The Tatmadaw and EAOs are therefore subject to the rules of international human rights law and international humanitarian law that regulate the use, recording and removal of these objects. These rules are aimed at ensuring the protection of civilians and the civilian population which, in Myanmar, have suffered extensively from physical injury, displacement and lack of access to farm lands and economic activities. International law prohibits the Tatmadaw and EAOs from using landmines and IEDs to direct attacks against civilians,¹³⁹³ using them in ways that amount to indiscriminate attacks¹³⁹⁴ and using them

¹³⁸¹ GI-023, GI-048, GI-056, GI-057.

¹³⁸² GI-054, GI-055, GI-053, GI-037, GI-038.

¹³⁸³ GI-053.

¹³⁸⁴ V-410, GI-055, GI-054, GI-037, GI-038, GI-053.

¹³⁸⁵ 1435.

¹³⁸⁶ GI-033, GI-37, GI-053.

¹³⁸⁷ GI-038, GI-048, GI-053, GI-054, GI-055 GI-056, GI-057.

¹³⁸⁸ 1340.

¹³⁸⁹ FFFGEN-1-88351, V-348, GM -019.

¹³⁹⁰ FFFGEN-1-88353.

¹³⁹¹ 1436.

¹³⁹² PM-009, FFFGEN-1-88349.

¹³⁹³ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 1 (the principles of distinction between civilians and combatants).

where their incidental harm to civilians may not be proportionate.¹³⁹⁵ Particular care must be taken to minimize the indiscriminate effects of landmines.¹³⁹⁶ Parties using landmines should also record their placement, as far as possible,¹³⁹⁷ and at the end of active hostilities they must remove or otherwise render them harmless to civilians or facilitate their removal.¹³⁹⁸ The removal of ERWs is the most reliable way of eliminating the risks they pose to civilians.¹³⁹⁹

581. Myanmar is not a party to international treaties that impose the strongest obligations in relation to landmines and IEDs. Several EAOs have committed themselves to a total ban on anti-personnel mines; to cooperate in and undertake stockpile destruction, mine clearance, victim assistance, mine awareness and other forms of mine action; and to allow the monitoring of their compliance with those commitments by independent international and national organizations.¹⁴⁰⁰ The Tatmadaw has not made these or similar commitments.

582. The impact that landmines, IEDs and ERWs have on civilians and the civilian population requires further investigation, as do issues of which parties to armed conflict are using which types of these weapons, how and where. The potential long-term economic consequences of the contamination in northern Myanmar also require further research. Nonetheless, Tatmadaw should have cleared the explosive ordnance that remained after its August 2018 attack in Tanai Township if it had control over the area, especially because the

¹³⁹⁴ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 81 (restrictions on the use of landmines).

¹³⁹⁵ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 14 (proportionality in attack).

¹³⁹⁶ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 81 (restrictions on the use of landmines).

¹³⁹⁷ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 82 (recording of the placement of landmines).

¹³⁹⁸ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 82 (removal or neutralization of landmines).

¹³⁹⁹ ICRC, Explosive Remnants of War, December 2014, p. 8, available at https://shop.icrc.org/les-restes-explosifs-de-guerre.html?__store=default&_ga=2.147221111.1782786223.1566837041-393792907.1554963273

¹⁴⁰⁰ See, Arakan Rohingya National Organisation/Rohingya National Army (ARNO/RLA), *Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action*, 17 October 2003. Available: http://theirwords.org/media/transfer/doc/sc_mm_arno_rla_2003_02-38d8ba37802633e9da6c6d2b215dd838.pdf; National United Party of Arakan/Arakan Army (NUPA/AA), *Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action*, 17 October 2003. Available: http://theirwords.org/media/transfer/doc/sc_mm_nupa_aa_2003_03-46624f4e6a94a49b8e1e1c0970d32a88.pdf; Lahu Democratic Front (LDF), *Deed of Commitment under Geneva Call for Adherence to a total Ban on Anti-personnel Mines and for Cooperation in Mine Action*, 16 April 2007, Available: http://theirwords.org/media/transfer/doc/sc_mm_ldf_2007_21-4ed0eb17fb6c940b15ce82f746244ea9.pdf; Palaung State Liberation Front (PSLF), *Deed of Commitment under Geneva Call for Adherence to a total Ban on Anti-personnel Mines and for Cooperation in Mine Action*, 16 April 2007. Available: http://theirwords.org/media/transfer/doc/sc_mm_pslf_2007_23-40ba30b4693fd4182df389522f7ee628.pdf; Pa'O Peoples' Liberation Organisation/Pa'O Peoples' Liberation Army (PPLO/PPLA), *Deed of Commitment under Geneva Call for Adherence to a total Ban on Anti-personnel Mines and for Cooperation in Mine Action*, 16 April 2007. Available: http://theirwords.org/media/transfer/doc/sc_mm_pplo_ppla_2007_25-cada96759703657a6735fd5ba8c975a7.pdf. See, also, National Democratic Front (NDF), *Position Statement by NDF on Landmine Use*, 29 January 2007. Available: http://theirwords.org/media/transfer/doc/1_mm_ndf_2007_04-0c86d6574dd452a98a61c70eac96bf75.pdf

ordnance was in an area that civilians populated before the offensive. The Mission is concerned about reports that some demining operations conducted by the Tatmadaw may have failed to meet relevant quality standards¹⁴⁰¹ and did not include agricultural land surrounding residential areas.¹⁴⁰² The Mission concludes on reasonable grounds that the use of landmines by all parties in areas where civilian could be present raises serious concerns about their indiscriminate effects, given that the landmines are unable to distinguish between civilians and military objects. The Mission also concludes on reasonable grounds that all parties should minimize their use of landmines and IEDs to limit their short, medium and long-term effects on the civilian population and must mark and inform civilians of the location of landmines that no longer serve a lawful military purpose.

E. Displacement, livelihoods and land

583. By the end of May 2019 there were over 106,500 IDPs living in 169 locations in 20 townships in Kachin and Shan States. Of those, 36 per cent were located in 19 sites in areas beyond government control where international agencies have had no access since June 2016.¹⁴⁰³ Women and children together made up 76 per cent and 78 per cent of the displaced populations in camps in Kachin and Shan States, respectively.¹⁴⁰⁴ The Mission received reports that renewed fighting in northern Shan State that began in the second half of August 2019 has resulted in significant displacement of civilians. In a statement issued on 21 August 2019, 11 civil society organisations and activists from northern Shan State called for the urgent prioritization of humanitarian relief for the populations affected by the recent hostilities, in particular, the elderly, young women, children and people living with disabilities in conflict-affected areas and IDP camps.¹⁴⁰⁵

584. Although there has been an improvement in humanitarian access to some government-controlled areas of Kachin State and parts of Shan State in July 2019,¹⁴⁰⁶ restrictions on humanitarian access in northern Myanmar persisted during the reporting period.¹⁴⁰⁷ The Government has not permitted United Nations agencies, funds and programs to deliver assistance in contested areas since June 2016, while access to others even in government-controlled areas continues to decline.¹⁴⁰⁸ Effective humanitarian access has not been granted to 55 per cent of IDPs as the Government either failed to approve travel authorizations for contested areas or approved them with significant restrictions and only with respect to the main towns in government-controlled areas.¹⁴⁰⁹ Reports received by the Mission indicate that the procedures for humanitarian agencies to request government travel authorizations are increasingly cumbersome.¹⁴¹⁰ While national humanitarian actors do not require travel authorizations, reports indicate that bureaucratic procedures have reduced and challenged their access too.¹⁴¹¹

585. The existing government restrictions on humanitarian access increasingly affect the displaced population's access to food, education and health care.¹⁴¹²

¹⁴⁰¹ FFFGEN-1-88349, PM-009, GM-019, V-412.

¹⁴⁰² FFFGEN-1-88349, V-412

¹⁴⁰³ A/HRC/39/CRP.2, para. 295-305; Gender Profile for Humanitarian Action, and across the Humanitarian-Peace-Development Nexus (Rakhine, Kachin and Northern Shan Myanmar) January 2019; FFFGEN-1-86992.

¹⁴⁰⁴ Gender Profile for Humanitarian Action, and across the Humanitarian-Peace-Development Nexus (Rakhine, Kachin and Northern Shan Myanmar) January 2019.

¹⁴⁰⁵ V-375.

¹⁴⁰⁶ <https://reliefweb.int/sites/reliefweb.int/files/resources/UNICEF%20Myanmar%20Humanitarian%20Situation%20Report%20%237%20-%20July%202019.pdf>.

¹⁴⁰⁷ FFFGEN-1-88346, FFFGEN-1-86992, PM-009.

¹⁴⁰⁸ FFFGEN-1-86992 and A/73/907-S/2019/509 para. 133.

¹⁴⁰⁹ FFFGEN-1-86992.

¹⁴¹⁰ PM-009, FFFGEN-1-86992.

¹⁴¹¹ FFFGEN-1-86992.

¹⁴¹² FFFGEN-1-86992.

586. The Mission received information that, in several areas across Kachin State, the financial situation of displaced families significantly deteriorated as a result of their displacement and the shrinking access to humanitarian assistance. IDPs face significant challenges in meeting the financial burden associated with their children's education, such as tuition fees, which increases the likelihood of school dropout.¹⁴¹³ A Kachin man told the Mission:

*"There are over 50,000 youth ... The younger generations living in camps are uneducated, and there are a lot of drug problems.... It has already been eight years, and this is heart breaking for us."*¹⁴¹⁴

587. Reduced access to assistance, compounded by existing poverty, limited livelihood opportunities and the lack of documentation, has heightened the vulnerability of internally displaced people to a wide range of risks arising from landmines, ERWs, checkpoints and from sexual and gender-based violence. The risks are especially great when they are looking for food, farming or conducting other life sustaining activities outside their villages or camps.¹⁴¹⁵

588. For example, in March 2019, an internally displaced Kachin woman living in an IDP camp in Kachin State was injured and subsequently lost a leg as a result of the detonation of an explosive or unexploded ordnance. She was injured while looking for plants in the forest to make baskets for sale to generate income for her family.¹⁴¹⁶ She told the Mission:

*"I have two children, a boy and a girl, and after my injury I cannot support my family as I used to, which is why now we rely on the support we receive from others After my incident, no-one from the IDP camp dared to go back to the forest again."*¹⁴¹⁷

589. The deteriorating living conditions of displaced populations, compounded by the limited availability of livelihood opportunities, also increases risks of undocumented migration to neighboring countries and further deprivation of human rights.¹⁴¹⁸ Prevailing insecurity and poverty have exposed women and girls to trafficking, notably into Thailand and Malaysia for labour or for the sex industry¹⁴¹⁹ and into China for forced marriage and childbearing.¹⁴²⁰ Women are vulnerable to trafficking by means of fraud or deception, particularly from people claiming to arrange a traditional marriage with female Kachin on the Chinese side of the border or to arrange for their employment.¹⁴²¹ While the Mission's investigation did not cover these issues, the Mission recognizes their importance as a consequence of the humanitarian situation on the ground and recommends that further investigation is warranted to address the root causes of this reported phenomenon.

¹⁴¹³ FFFGEN-1-88353.

¹⁴¹⁴ 1333.

¹⁴¹⁵ GI-008, GM-019, GI-029, GI-034, 1337, GI-044, PM-009, GI-054, GI-055, GI-056, PI-161, FFFGEN-1-88352, V-348 p. 63, Gender Profile for Humanitarian Action, and across the Humanitarian-Peace-Development Nexus (Rakhine, Kachin and Northern Shan Myanmar) January 2019.

¹⁴¹⁶ GI-054, GI-055.

¹⁴¹⁷ GI-054.

¹⁴¹⁸ FFFGEN-1-88351, V-348 p. 64, Gender Profile for Humanitarian Action, and across the Humanitarian-Peace-Development Nexus (Rakhine, Kachin and Northern Shan Myanmar) January 2019.

¹⁴¹⁹ PI-002, Gender Profile for Humanitarian Action, and across the Humanitarian-Peace-Development Nexus (Rakhine, Kachin and Northern Shan Myanmar) January 2019.

¹⁴²⁰ Johns Hopkins Bloomberg School of Public Health's Center for Humanitarian Health and Kachin Women's Association of Thailand, Estimating trafficking of Myanmar women for forced marriage and childbearing in China (December 2018); Human Rights Watch, "Give Us a Baby and We'll Let You Go" Trafficking of Kachin "Brides" from Myanmar to China (21 March 2019).

¹⁴²¹ Women head of households seek work in China where wages are higher and then are sold as brides to Chinese men and subjected to sexual slavery to have children; Human Rights Watch, "Give Us a Baby and We'll Let You Go" Trafficking of Kachin "Brides" from Myanmar to China (21 March 2019); Gender Profile for Humanitarian Action, and across the Humanitarian-Peace-Development Nexus (Rakhine, Kachin and Northern Shan Myanmar) January 2019.

590. Decades of protracted armed conflict in Kachin and Shan States, resulting in prolonged displacement, new displacement and repeated displacement, renewed outbreaks of violence and increasingly restricted humanitarian access, have compounded marginalization and vulnerabilities across ethnic communities, especially for women and girls.¹⁴²² Women in many instances have become heads of households, caring for children and farming land to survive.¹⁴²³

591. Women bear the brunt of the conflict and the resulting humanitarian crisis.¹⁴²⁴ They care for the land and children left behind¹⁴²⁵ and have become the protectors of their ethnic and religious communities. They have also been exposed to insecurity and attacks, and targeted for sexual and gender-based violence by all parties to the conflict.¹⁴²⁶

592. The consequences of the conflict for women and girls are particularly severe, especially for those displaced and for those who lost a spouse or father in the violence.¹⁴²⁷ Many face dire economic situations, having lost the main breadwinners in their families, and are once again vulnerable to violations, including sexual and gender-based violence.¹⁴²⁸

1. Return of IDPs

593. The Mission received reports that, despite the unilateral ceasefire and the Government's commitment to close IDP camps, including through the draft National Strategy on Camp Closure, few camps have closed and few IDPs have returned to their land.¹⁴²⁹ Information received by the Mission indicates that fear of a resumption of hostilities, landmine contamination and the lack of infrastructure and services are among the key impediments to safe and voluntary return. In Shan State, fighting between the Tatmadaw and EAOs intensified in the second half of August 2019, resulting in renewed displacement of civilians, dimming further prospects of return for those who have been displaced long-term.

594. An interviewee expressed concern about IDPs returning to areas that, although under government control, are close to territory controlled by EAOs, and where civilians may be directly exposed to the effects of hostilities.¹⁴³⁰

595. In 2019, a survey of IDPs in Kachin State conducted by humanitarian actors found that most IDPs had a strong preference to return to their places of origin, with 65 per cent of respondents expressing their intent to return home.¹⁴³¹ However, 94 per cent of respondents stated that they were currently unable to return to their places of origin. They identified lack of predictable and sustainable physical security and a lack of freedom of movement as the key barriers.¹⁴³² According to the survey, the strong desire to return, coupled with the lack of ability to do so, indicates that large-scale solutions will remain out of reach for the vast majority of IDPs in the absence of a substantial reduction in fighting and progress towards durable peace.¹⁴³³

596. According to the same survey, the scale of local integration¹⁴³⁴ or resettlement solutions,¹⁴³⁵ for which IDPs expressed significantly lower levels of interest, is likely to

¹⁴²² Gender Profile for Humanitarian Action, and across the Humanitarian-Peace-Development Nexus (Rakhine, Kachin and Northern Shan Myanmar) January 2019.

¹⁴²³ A/HRC/42/CRP.4, paras. 62, 199-200.

¹⁴²⁴ A/HRC/42/CRP.4.

¹⁴²⁵ PM-011.

¹⁴²⁶ A/HRC/42/CRP.4.

¹⁴²⁷ A/HRC/42/CRP.4, paras. 227-228.

¹⁴²⁸ A/HRC/42/CRP.4, paras. 227-228.

¹⁴²⁹ PM-009, V-412, <https://www.unicef.org/myanmar/media/2476/file/UNICEF.pdf>

¹⁴³⁰ GM-019.

¹⁴³¹ FFFGEN-1-88351.

¹⁴³² FFFGEN-1-88351.

¹⁴³³ FFFGEN-1-88351.

¹⁴³⁴ Settlement of IDPs in the area where they have taken refuge.

¹⁴³⁵ Settlement of IDPs elsewhere in the country other than their place of origin and the area where they have taken refuge.

remain limited as a result of several challenges, including the identification of suitable land in safe locations.¹⁴³⁶ The survey further identified the right to restitution for housing, land and property as one of the cross-cutting issues that must be addressed to ensure that solutions for return are sustainable.¹⁴³⁷

597. According to a UNICEF Humanitarian Situation Report covering January to June 2019, in Kachin State *“the total number of returnees remains small and movements are generally uncoordinated and often to places that are still considered unsafe due to landmine contamination or proximity to military establishments. Humanitarian agencies struggle to respond to such cases because they have not been involved in the returnee process and are unable to verify the principles guiding the returns.”*¹⁴³⁸

2. The Vacant, Fallow and Virgin Lands Management Act

598. The enactment of the Law Amending the Vacant, Fallow and Virgin Lands Management Law (VFV Law) in September 2018 has exacerbated pre-existing tensions related to land tenure in ethnic areas in northern Myanmar. The amended law required those occupying or using VFV lands without permits to register the land within six months¹⁴³⁹ or potentially face eviction, imprisonment and/or fines.¹⁴⁴⁰ The six month period expired on 11 March 2019.

599. The Mission received information about farmers who have been sued for not having registered their lands under the VFV Law before the expiry of the six month period. For example, the Mission received information that at the end of March 2019, in Shan State, four villagers were sued for using lands not registered under the VFV Law.¹⁴⁴¹

600. Under the Constitution of Myanmar, the Union is the “ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere” (section 37). The 1894 Land Acquisition Act provides the framework for land acquisition for public purposes. The VFV Law regulates a range of lands including unused plots and abandoned lands.¹⁴⁴²

601. IDPs, civil society organizations and networks, political parties and other stakeholders opposed the implementation of the 2018 Amendment Law and called for it to be repealed or boycotted. Many expressed concerns that the amendments would enable land-grabbing and affect the livelihoods of ethnic communities, fuel conflict, weaken customary land tenure and negatively impact the peace process.¹⁴⁴³

602. The Government has estimated that approximately 50 million acres qualify as VFV land, 82 per cent of which is in ethnically-populated States.¹⁴⁴⁴ Access to land and livelihoods has long been considered one of the main drivers of Myanmar’s ethnic conflicts. Some commentators have pointed out that the amendment to the VFV Law legalizes land grabbing in ethnic areas by failing to recognise the customary title of farmers and *de facto* criminalizes the actions of thousands of farmers across the country who continue to use their traditional but now unregistered land.¹⁴⁴⁵

603. Other interlocutors interviewed by the Mission noted that limited consultations were carried out before the adoption of the amendment. They expressed concern that the short six month window for registration was insufficient. They also feared that the law would have disproportionate effects on women and on those who could not read, speak or write

¹⁴³⁶ FFFGEN-1-88351.

¹⁴³⁷ FFFGEN-1-88351.

¹⁴³⁸ See <https://www.unicef.org/myanmar/media/2476/file/UNICEF.pdf>

¹⁴³⁹ Amended Section 22 of the Vacant, Fallow and Virgin Lands Management Law.

¹⁴⁴⁰ Amended Section 27 of the Vacant, Fallow and Virgin Lands Management Law.

¹⁴⁴¹ GI-050.

¹⁴⁴² A/HRC/39/CRP.2, para. 428.

¹⁴⁴³ V-365, V-367, V-369, V-413, V-414, V-415, V-416, V-418.

¹⁴⁴⁴ V-367.

¹⁴⁴⁵ V-365, V-367, V-369, V-413.

Burmese, as they would effectively be prevented from registering.¹⁴⁴⁶ In many of the ethnic communities in northern Myanmar, women face barriers inheriting or owning land under customary practices,¹⁴⁴⁷ with the 2018 amendment potentially having the effect of excluding women further and compounding economic disenfranchisement.

604. In February 2019, a month before the end of the registration period, a prominent legal network conducted a survey to explore whether and to what extent farmers knew about the 2012 VFV Law and its 2018 amendment.¹⁴⁴⁸ The survey involved 290 participants from one Region and three States, including three townships in Shan State.¹⁴⁴⁹ The key findings of the survey indicate that smallholder farmers and subsistence livestock breeders in ethnic rural areas had limited awareness of the Law and its 2018 amendment.¹⁴⁵⁰ Those who were aware of them had little understanding of their substance, deadlines, registration procedures and exemptions.¹⁴⁵¹ The survey's findings are consistent with accounts received by the Mission.¹⁴⁵²

605. Section 30 (a) of the 2018 amendment exempts particular types of land from the provisions of the VFV Law, including "*customary lands designated under traditional culture of the local ethnic people*" and "*the lands currently used for religious, social, education, health, and transportation purposes of the public and ethnic people*".

606. This may be positive for protecting land from being designated as VFV land. However, in mid-February, according to the survey, only one per cent of the 290 farmers surveyed were aware that customary land is excluded from the definition of VFV land.¹⁴⁵³ Moreover, the amended law fails to provide a clear definition of what constitutes customary lands and how lands could be formally recognized as such.¹⁴⁵⁴ Further reports received by the Mission indicate that, in some areas, local level orders on the registration process failed to mention the exemption clauses¹⁴⁵⁵ and that those who were aware of the exemptions did not know whether they needed to register the land they used or whether the land was covered by the exemption.¹⁴⁵⁶

607. The Mission received information that the 2012 Law and its 2018 amendment have been used recently by the Tatmadaw to affirm and legitimize their control over lands they had previously seized.¹⁴⁵⁷

608. With the boundaries of the VFV lands being undetermined, and in the absence of a clear legal framework on what constitutes customary lands, administrative entities appear to have the discretion to determine which lands would be covered by the exemption clause. Some feared this may result in inconsistent, arbitrary or corrupt decisions.¹⁴⁵⁸

609. Reports received by the Mission indicate that the Law and its amendments were perceived by many in northern Myanmar as illegitimate, as they entailed classifying their land as VFV and longstanding owners relinquishing customary rights in exchange for potential 30-year land use concessions within a government-controlled land management

¹⁴⁴⁶ 2183, GM-020.

¹⁴⁴⁷ Namati, *Gendered Aspects of Land Rights in Myanmar II: Evidence from Paralegal Case Work* (June 2019); Gender Profile for Humanitarian Action, and across the Humanitarian-Peace-Development Nexus (Rakhine, Kachin and Northern Shan Myanmar) January 2019; Woods, Kevin. "A Political Anatomy of Land Grabs." *Transnational Institute*, March 2014; Faxon, Hilary. "The Praxis of Access: Gender in Myanmar's Land Use Policy." *Conference Paper No. 17, Chiang Mai University*, May 2015, pp.7-8.

¹⁴⁴⁸ 2183.

¹⁴⁴⁹ 2183.

¹⁴⁵⁰ 2183, GM-019, GM-020, GM-017.

¹⁴⁵¹ 2183.

¹⁴⁵² GM-018, GM-019, GM-020, GI-056, GI-055, GI-053, GI-052.

¹⁴⁵³ 2183.

¹⁴⁵⁴ 2183, V-369, V-367.

¹⁴⁵⁵ GM-018.

¹⁴⁵⁶ GM-20, V-415.

¹⁴⁵⁷ GM-018, GM-020, GI-050, V-414.

¹⁴⁵⁸ V-416, V-367.

system.¹⁴⁵⁹ Several ethnic organizations and stakeholders reported that there is no vacant land in their communities.¹⁴⁶⁰ According to the survey:

*Farmers find the implication that their land is seen as VFV and they only qualify for a concession insulting - 27% of respondents responded that they will not apply for VFV registration because they do not consider their land as VFV. Interviewers also repeatedly heard from farmers that it is insulting to have to request a 30-year concession on their own land which they feel is theirs.*¹⁴⁶¹

610. The land use concessions, in addition to being temporary, cannot be sold or transferred to others, including family members, without Government permission,¹⁴⁶² resulting in children potentially having no rights to the land that their parents worked.¹⁴⁶³

3. Effects on IDPs

611. The amended law disproportionately affects IDPs in northern Myanmar due to the concentration of ethnic communities dependent on communal land use and IDPs' inability to assert their claim to their lands due to their displacement.¹⁴⁶⁴ IDPs are both at risk of losing their land in their places of origin and facing fines or imprisonment for using land in the places to which they have been displaced. Displaced women are acutely affected, due to the high prevalence of female-headed households, coupled with the discriminatory social customs denying their right to access, inherit or own land in many of these ethnic communities.¹⁴⁶⁵

612. Reports received by the Mission indicate that the lack of physical proximity to their properties, compounded by the absence of freedom of movement, lack of property documentation, limited access to administrative services and the centralization of the process determining the status of the land, negatively affected the ability of IDPs to register their land.¹⁴⁶⁶ Civilians, including residents in the IDP camps, reported they feared being arrested if they left to register their lands with the authorities.¹⁴⁶⁷

613. In March 2019, days before the 11 March deadline for registering land under the amended VFV Law, 17 national and international NGOs supporting conflict-affected communities in Kachin and northern Shan State stated:

*“Not having been able to return to their lands, the vast majority of IDPs have not had the opportunity to protect their own land rights, particularly within the short 6-month time period.”*¹⁴⁶⁸

They added,

¹⁴⁵⁹ 2180, 2181, 2183, GM-017, GM-018, GM-020, GI-056, V-367.

¹⁴⁶⁰ GM-018, V-413.

¹⁴⁶¹ 2183.

¹⁴⁶² V-416.

¹⁴⁶³ GM-018, V-415.

¹⁴⁶⁴ V-368, V-369, GI-050. See also: <https://www.bnionline.net/en/news/idps-worried-land-will-be-grabbed-under-new-law>

¹⁴⁶⁵ Men and women have equal rights to inherit and own land under Myanmar Law. However, the cultural norm is that they have distinct but complementary roles in society, which ultimately impact land ownership. Namati, Gendered Aspects of Land Rights in Myanmar II: Evidence from Paralegal Case Work (June 2019); Gender Profile for Humanitarian Action, and across the Humanitarian-Peace-Development Nexus (Rakhine, Kachin and Northern Shan Myanmar) January 2019; Woods, Kevin. “A Political Anatomy of Land Grabs.” Transnational Institute, March 2014; Faxon, Hilary. “The Praxis of Access: Gender in Myanmar’s Land Use Policy.” Conference Paper No. 17, Chiang Mai University, May 2015, pp.7-8.

¹⁴⁶⁶ GM-018, GI-050, GI-052, V-348, V-365, V-418.

¹⁴⁶⁷ PI-136, PI-161, PM-009, Gender Profile for Humanitarian Action, and across the Humanitarian-Peace-Development Nexus (Rakhine, Kachin and Northern Shan Myanmar) January 2019.

¹⁴⁶⁸ <https://reliefweb.int/report/myanmar/ngos-call-halting-implementation-vfv-land-law-amendment-protect-rights-displaced>

*Through consultations, IDPs have stated that the VFV land law amendment is a factor pushing them to return to their places of origin before they believe those areas are safe. However, with limited access to land administration services or legal guidance, such returns are extremely unlikely to result in successful regularisation of their land use. Further, premature returns carry significant risks: humanitarian organisations have received reports of IDPs being injured by landmines when visiting their villages of origin to explore the possibility of return.*¹⁴⁶⁹

614. According to reports the Mission received, many view the implementation of the amended law as a tool to make land available for investment projects,¹⁴⁷⁰ enabling the central Government to make land concessions to investors¹⁴⁷¹ and making “*political and business elites who have been able to lease so-called government land*” the primary beneficiaries of the amendment.¹⁴⁷²

615. Reports received by the Mission raised concerns regarding the granting of concessions to investors to use land classified as “vacant” or “fallow” that may be owned by IDPs or under customary tenure or left fallow deliberately based on traditional agricultural practices.¹⁴⁷³

616. Access to land and livelihoods remains a crucial element in the sustainability of potential returns of IDPs.¹⁴⁷⁴ In a statement issued in November 2018, representatives of IDPs from Kachin and northern Shan States said that the amendment to the law threatens land security of IDPs. They expressed concerns about the fact that companies were coming and working the land they had left behind for banana and other plantations.¹⁴⁷⁵ They called on the Government to protect their lands and property so that they can return to their places of origin.¹⁴⁷⁶

617. A joint statement issued in November 2018 by two civil society networks and later endorsed by some 346 civil society organizations across Myanmar labelled the law “*unjust*” because it “*prioritizes the creation of a land market for investors to come in the name of development*”.¹⁴⁷⁷ The letter assessed the law as making “*millions of people into landless criminals; and it eliminates their livelihoods, culture, identity, and social status*”.¹⁴⁷⁸

618. Some civil society networks called for a moratorium on the allocation of VFV land to private sectors entities.¹⁴⁷⁹ Article 16 of the VFV Law stipulates that those who acquired the right to cultivate or use vacant, fallow or virgin land under the law should develop it within four years. Although some exceptions are included in Article 16 (b), such as natural disasters and insecurity, displacement is not explicitly mentioned in the law as being one of these exceptions.

619. A report issued in May 2018 by a consortium of organizations regarding conflict-affected communities and their land of origin in Kachin State¹⁴⁸⁰ indicated

“legal or administrative procedures are being used in a way that undermines the rights of those displaced by conflict and ignores the exceptional circumstances of displacement.... Even when conditions are eventually met for those displaced to safely and voluntarily return to their land of origin, their inability to reclaim their

¹⁴⁶⁹ <https://reliefweb.int/report/myanmar/ngos-call-halting-implementation-vfv-land-law-amendment-protect-rights-displaced>

¹⁴⁷⁰ V-365, GM-019.

¹⁴⁷¹ GM-020, V-369, V-365, V-414.

¹⁴⁷² V-365.

¹⁴⁷³ V-348, V-415.

¹⁴⁷⁴ V-348.

¹⁴⁷⁵ V-413.

¹⁴⁷⁶ V-413.

¹⁴⁷⁷ V-369.

¹⁴⁷⁸ V-369.

¹⁴⁷⁹ V-365.

¹⁴⁸⁰ V-417.

*land from third parties is likely to undermine peace, reconciliation and development efforts.*¹⁴⁸¹

4. Conclusions and legal findings

620. Myanmar has obligations under the ICESCR and the CRC to recognize and ensure the right to an adequate standard of living, including adequate food and housing, and the highest attainable standard of health.¹⁴⁸² The Special Rapporteur on the right to food has explained that access to land is essential to ensure the enjoyment of the right to food and housing,¹⁴⁸³ notably in rural areas or for indigenous people.¹⁴⁸⁴ While these rights are to be progressively realised, Myanmar must take immediate action, irrespective of its resources, to eliminate discrimination and refrain from retrogressive measures that would decrease the enjoyment of the treaties' rights unless there are strong justifications for doing so.¹⁴⁸⁵ These obligations do not cease in situations of armed conflict or humanitarian crisis.¹⁴⁸⁶ Violations of the right to food can occur, for example, through the prevention of access to humanitarian food aid.¹⁴⁸⁷ Additionally, under international humanitarian law, parties must allow and facilitate rapid and unimpeded passage of humanitarian relief, including medicine, food and other survival items, which is impartial in character and conducted without any adverse distinction, subject to their right of control.¹⁴⁸⁸ Arbitrary restriction of humanitarian relief and assistance is impermissible.¹⁴⁸⁹

621. The Mission also looked to the *Principles on housing and property restitution for refugees and displaced persons* (Pinheiro Principles), which apply to the issue of land, home, and property restitution for people displaced due to arbitrary or unlawful deprivation of their homes, lands, properties or places of habitual residence.¹⁴⁹⁰

¹⁴⁸¹ V-417 p. 5.

¹⁴⁸² ICESCR, art. 11 and art. 12; CRC, arts. 24 and 27.

¹⁴⁸³ Report of the Special Rapporteur on the right to food, A/65/281, 11 August 2010, para. 4. See, also, Office of the United Nations High Commissioner for Human Rights, Early warning of violence and conflict: land and human rights in South East Asia Expert Group Meeting, Bangkok, 16-18 November 2015.

¹⁴⁸⁴ See, Office of the United Nations High Commissioner for Human Rights and UN Habitat, The Right to Adequate Housing: Fact Sheet No. 21/Rev.1, 2009, p. 8.

¹⁴⁸⁵ OHCHR, Frequently Asked Questions on Economic, Social and Cultural Rights: Fact Sheet No. 33, 2008, <https://www.ohchr.org/Documents/Issues/ESCR/FAQ%20on%20ESCR-en.pdf>, p. 15-17. The Committee on the Rights of the Child also interprets the CRC as placing an obligation on States, irrespective of resources, "not to take any retrogressive steps that could hamper the enjoyment of children's right to health". United Nations Committee on the Rights of the Child, General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24) CRC/C/GC/15, 17 April 2013, para. 27.

¹⁴⁸⁶ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106. See, also, *Legal Framework*.

¹⁴⁸⁷ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The right to adequate food* (Art. 11), E/C.12/1999/5, 12 May 1999, para. 19; Committee on the Rights of the Child, General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24) CRC/C/GC/15, 17 April 2013, para. 40.

¹⁴⁸⁸ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005) rule 55 (access for humanitarian relief to civilians in need) and rule 56 (freedom of movement of humanitarian relief personnel). See, also, United Nations Group of Eminent International and Regional Experts, Situation of human rights in Yemen, including violations and abuses since September 2014, A/HRC/39/43, 17 August 2018, para. 46.

¹⁴⁸⁹ See J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 55 (access for humanitarian relief to civilians in need) and rule 56 (freedom of movement of humanitarian relief personnel).

¹⁴⁹⁰ Principles on housing and property restitution for refugees and displaced persons (Pinheiro Principles), E/CN.4/Sub.2/2005/17, 28 June 2005, principle 1.1, available at <https://www.unhcr.org/protection/idps/50f94d849/principles-housing-property-restitution-refugees-displaced-persons-pinheiro.html>. See a discussion the Pinheiro Principles, see *Conclusions and legal findings: the impossibility of return*.

622. The Mission is concerned about the cumulative toll and disproportionate impact on ethnic communities in northern Myanmar of the Government's deprivation of land through the VFV Law. The Mission concludes on reasonable grounds that the VFV Law and its amendment violates the ICESCR and CRC because of the potential it has to deprive ethnic communities of their lands in a manner that constitutes an unjustified retrogressive measure against people's economic, social and cultural rights and because it does so in an arbitrary and discriminatory manner. The Mission's finding is consistent with the seven Special Procedures mandate-holders of the UN Human Rights Council who in 2019 expressed serious concerns that the law could result in the dispossession of land without adequate notice, loss of livelihoods and adequate food and that it could drive people into poverty.¹⁴⁹¹

623. The retrogressive nature of the VFV Law and its amendment is marked by its devastating potential to allow the Government to appropriate large swaths of land from ethnic communities. The law has the purpose of allowing the Government to unilaterally confiscate and manage land that it made vacant, often through its own unlawful actions, and then made it impossible or challenging for people to register or return to that land. For these reasons the Mission concludes on reasonable grounds that the VFV Law and its amendment is not based on the "strong justifications" that international human rights law requires for the retrogressive measures of land confiscation. Instead, it is a *de facto* land grabbing land dispossession scheme that violates the rights that people of northern Myanmar have to adequate food and housing.

624. The Mission also concludes on reasonable grounds that, despite the VFV Law being part of Myanmar's domestic law, it is an arbitrary law that lacks the precision required under international human rights to give the people of northern Myanmar a clear understanding of how it is interpreted and applied. The VFV Law as amended fails to meet the requirements of international human rights law in other ways. The VFV Law is susceptible to being applied arbitrarily in corrupt and discriminatory ways, in particular to the disadvantage of ethnic communities. Additionally, any protections the law might afford are either unclear, to the point of being meaningless, or inaccessible, due to the insecurity and fear people have to leave their homes to register their lands or to their inability to do so because of their displacement. The VFV Law is also contrary to the Pinheiro Principles due to its discriminatory effect, its arbitrary interference with a person's home and land, and the manner in which it discourages or makes it impossible for people to register their lands for purposes of restitution.

625. The Mission also assessed the human rights conditions of return of IDPs affected by Myanmar's security forces and EAOs. The Rohingya section of this report sets out the international rules and standards for the prevention, protection and safe return of IDPs.¹⁴⁹² What is essential is that the Government has a responsibility to establish conditions and provide the means that allow IDPs to return voluntarily and in safety and with dignity, or to resettle voluntarily in another part of the country. Authorities must also endeavour to facilitate the reintegration of IDPs and should ensure their full participation in the planning and management of their return or resettlement and reintegration. Land restitution should be implemented in line with the Pinheiro Principles.

626. When assessing the situation of IDPs in northern Myanmar, the Mission concludes on reasonable grounds that the necessary conditions are not met for IDPs who do not wish to return. IDPs have repeatedly reaffirmed this point when expressing their desire to return home while listing myriad reasons return is not suitable. The concerns arise from a

¹⁴⁹¹ The Special Rapporteur on the situation of human rights in Myanmar; the Special Rapporteur on the right to food; the Special Rapporteur on the rights of indigenous peoples; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Special Rapporteur on the human rights of internally displaced persons; the Special Rapporteur on minority issues and the Special Rapporteur on extreme poverty and human rights. MMR 5/2018, available from <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24275>, Myanmar: New land law could have disastrous impact on ethnic minorities, Available from <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24296&LangID=E>.

¹⁴⁹² See Chapter IV, G: The situation of the Rohingya; conclusions and legal findings.

combination of a lack of security, including due to landmine contamination that poses serious risk of death and maiming, and the stripping of lands through the VFV Law that makes it impossible to return to their homes and lands to sustain their livelihoods and carrying out their lifestyle of communal land use. The Mission's collection of facts about the human rights situation in northern Myanmar demonstrate that their concerns are fully justified. The Mission is also deeply concerned by Myanmar's restrictions on humanitarian relief in northern Myanmar, which is contributing to deteriorating living conditions for the civilian population. The Mission reminds the Government of its obligations under the ICESCR and CRC to recognize and ensure the right to an adequate standard of living, including adequate food and housing, and the highest attainable standard of health.¹⁴⁹³

F. Situation in northern Myanmar requiring further monitoring: the Kokang Self-Administered Zone

627. As a situation that requires attention, the Mission conducted preliminary research into the main human rights issues in the Kokang Self-Administered Zone (the Kokang region), home to a majority of ethnic Kokang¹⁴⁹⁴ in northern Shan State. The Kokang Self-Administered Zone is located in northern Shan State along the Chinese border. It is largely inaccessible to international humanitarian organisations, the media and human rights organisations. There is no active civil society in the Kokang region, due to insecurity resulting from the conflict. Nonetheless, the Mission obtained six first-hand accounts, supplemented with credible information from secondary sources, including open source materials. The Mission found it important to draw attention to this situation, most notably due to the participation of the Kokang-based MNDAA in the "Brotherhood Alliance" in attacks in August 2019.

628. The Kokang region has a history of struggle for power, autonomy and conflict.¹⁴⁹⁵ In 2008 the Tatmadaw proposed to incorporate the MNDAA into its Border Guard Force (BGF).¹⁴⁹⁶ The MNDAA split into two factions,¹⁴⁹⁷ with one being integrated into the BGF and the other, led by Peng Jiasheng, the leader of the MNDAA, refusing to integrate. This

¹⁴⁹³ ICESCR, art. 11 and art. 12; CRC, arts. 24 and 27.

¹⁴⁹⁴ The Kokang people constitute 30 to 40 per cent of Myanmar's ethnic Chinese population and approximately 90 per cent of the population in the Kokang Self-Administered Zone, with others resident in the Kokang region being Shan, Palaung (Ta'ang), Hmong, Wa, Lisu, Bai and Bamar. The Kokang are Mandarin-speaking Han Chinese. See Mya Than, "The Ethnic Chinese in Myanmar and their Identity", in *Ethnic Chinese as Southeast Asians*, Leo Suryadinata, ed. (Singapore, Institute of Southeast Asian Studies, 1997), pp. 119–20.

¹⁴⁹⁵ The British acquired the territory of the Kokang region in 1897 after signing the Beijing Convention with the Chinese government. During the 1950s, shortly after Myanmar gained independence, the Nationalist Chinese part of the Kuomintang took refuge in Kokang. The region was then under the control of a number of warlords. In 1968, the Communist Party of Burma (CPB), with the support of China, backed a military coup in the region led by Peng Jiasheng. The CPB army was the main military force in the region until 1989 when, due to inter-ethnic tensions, the CPB army split into four regional armies along ethnic lines: the United Wa State Army (UWSA); a Peng-led force of ethnic Kokang in Kokang region; a force in eastern Shan State led by Peng's son-in-law, Sai Leün (or U Sai Lin or Lin Mingxian); and the former CPB forces at Kambaiti and Pangwa in Kachin State. The Peng-led Kokang force became the Myanmar National Democratic Alliance Army (MNDAA). See Bertil Lintner, "Kokang: The Backstory" (The Irrawaddy, 9 March 2015).

¹⁴⁹⁶ The Border Guard Forces in northern Myanmar were formerly a non-State armed group or "ethnic armed organization". They are integrated with and subordinate to the Tatmadaw. They are armed, supplied and trained by the Tatmadaw, and the Tatmadaw assumes control over their actions during operations. See A/HRC/39/CRP.2., para. 1535; E. Han, "Geopolitics, Ethnic Conflicts along the Border, and Chinese Foreign Policy Changes toward Myanmar", *Asian Security*, vol 13(1), 2017, p. 64; BM-038.

¹⁴⁹⁷ PI-098; Myanmar Peace Monitor, "Myanmar National Truth and Justice Party".

second group was subsequently referred to as an “insurgent group” by the Government.¹⁴⁹⁸ In 2009 the Tatmadaw took over the Kokang region by force.¹⁴⁹⁹

629. After six years in exile in China,¹⁵⁰⁰ Peng Jiasheng returned to the region in 2015 with a new force, again called the MNDAA.¹⁵⁰¹ Hostilities erupted between 9 February and 10 June 2015,¹⁵⁰² leading more than 100,000 people to seek refuge in China and approximately 13,000 others to flee within Myanmar to Lashio.¹⁵⁰³ On 9 February 2015, the MNDAA issued a statement in which it “vowed to continue its fight against the Government until its demands for ethnic equality, regional development and self-determination are fulfilled”.¹⁵⁰⁴ During that period, until 17 November 2015,¹⁵⁰⁵ the Government proclaimed a state of emergency and imposed martial law in the Kokang region.¹⁵⁰⁶

630. The Mission received reports that, during the 2015 Kokang offensive, the Tatmadaw targeted people for their suspected affiliations or support to the MNDAA based on their ethnicity, by attacks on villages, arrest and detention, torture, enforced disappearances, unlawful killings and sexual violence.¹⁵⁰⁷ The Tatmadaw also denied humanitarian relief to the Kokang and attacked humanitarian convoys.¹⁵⁰⁸

631. The MNDAA’s conduct in Kokang during and after the 2015 offensive requires further investigation.¹⁵⁰⁹ For example, on 19 February 2015, members of the MNDAA

¹⁴⁹⁸ Xinhua - News Agency, “Roundup: Armed groups in Myanmar start to respond to government call for peace talks” (11 September 2011).

¹⁴⁹⁹ Tim Johnston, “China Urges Burma to Bridle Ethnic Militia Uprising at Border” (The Washington Post Foreign Service, 29 August 2009).

¹⁵⁰⁰ E. Han, “Geopolitics, Ethnic Conflicts along the Border, and Chinese Foreign Policy Changes toward Myanmar”, *Asian Security*, vol 13(1), 2017, p. 64.

¹⁵⁰¹ On 22 December 2014, Peng Jiasheng, the leader of MNDAA that was ousted in 2009, gave an interview to the Chinese newspaper “Global Times”, where he stated he was be ready to fight again, had gathered an army, and that he wanted to annex Kokang to China by referendum, which appealed to Chinese nationalists. See <http://world.huanqiu.com/exclusive/2014-12/5307556.html>

¹⁵⁰² Nang Mya Nadi and Aye Nai, “By truck, by bike, by foot – the exodus from Laogai” (ReliefWeb, 13 February 2015); Ye Mon and Lun Min Mang, “Government rejects MNDAA offer for ceasefire negotiations” (Myanmar Times, 20 February 2015); Simon Lewis, “Displaced from Kokang: The plight of Myanmar’s IDPs” (Devex, 23 March 2015).

¹⁵⁰³ Simon Lewis, “Displaced from Kokang: The plight of Myanmar’s IDPs” (Devex, 23 March 2015); OCHA Humanitarian Bulletin: Issue 2 (1-28 February 2015); OCHA Humanitarian Bulletin: Issue 3 (1-31 March 2015).

¹⁵⁰⁴ Nang Mya Nadi (DVB), “Kokang enlist allies’ help in fight against Burma army” (Democratic Voice of Burma, 10 February 2015).

¹⁵⁰⁵ K-063.23.

¹⁵⁰⁶ China Gate, “Myanmar extends state of emergency period in Kokang region for third time” 18 August 2015; The Irrawaddy, “Parliament Renews Martial Law in Kokang Territory” (18 August 2015).

¹⁵⁰⁷ PI-015, PI-098, PI-016, PI-017, PI-157, QI-092, K-064.1; K-069.3, V-158; Shan Human Rights Foundation, “Killing, beheading and disappearance of villagers instill fear of return among Kokang refugees” (11 May 2015); Shan Human Rights Foundation, “Situation Update by Shan Human Rights Foundation - Shooting, killing and torture of civilians by Burma Army during Kokang Conflict” (4 March 2015); Saw Yan Naing, “Fighting Creates Chaos, Danger for Civilians in Kokang Town” (The Irrawaddy, 16 February 2015); Shan Human Rights Foundation, “Urgent update by the Shan Human Rights Foundation” (17 March 2015); Li Tong and Qian Long, “Businessman Tied to Kokang Rebel Leader Dies in Custody of Myanmar Authorities” (Radio Free Asia, 9 March 2015); Shan Human Rights Foundation, “Burma Army expansion, abuses along Kokang-China border creating scores of “ghost villages”” (21 April 2016); Simon Lewis, “Displaced from Kokang: The plight of Myanmar’s IDPs” (Devex, 23 March 2015).

¹⁵⁰⁸ A/HRC/39/CRP.2, para. 302; Simon Lewis, “Displaced from Kokang: The plight of Myanmar’s IDPs” (Devex, 23 March 2015). K-069.3, V-158. K-063.23, K-064.1, SM-001, V-159; International Federation of Red Cross and Red Crescent Societies, “Myanmar Red Cross Society mourns the death of a volunteer” (3 April 2015); Moe Zaw, “Myanmar, Kokang Rebels Spar Over Red Cross Attack” (VOA, 18 February 2015).

¹⁵⁰⁹ PI-015; Lee Tung, “This War Has Been Disastrous For Civilians” (Radio Free Asia, 5 March 2015); The Straits Times (AFP), “Dozens injured as prison convoy attacked in Myanmar: media” (24 February 2015); Zarni Mann, “Prisoners Injured During Prison Transfer in Kokang Conflict Zone”

reportedly attacked the Tatmadaw dressed in non-combat clothing in a manner that appears to have put villagers in the area at risk.¹⁵¹⁰ The media reported that in response, because MNDA fighters were not wearing their uniform, the Tatmadaw unintentionally shot and harmed villagers.¹⁵¹¹ The MNDA also reportedly abducted people in the course of their military operations.¹⁵¹² For example, in March 2016, a media source reported that the MNDA abducted 260 hotel workers.¹⁵¹³ The Mission also received reports of arbitrary forced recruitment and forced labour by the MNDA that require further investigation.¹⁵¹⁴

632. Heavier fighting commenced again in early 2017, forcing 30,000 ethnic Kokang to flee to China and internally displacing another 2,000.¹⁵¹⁵ The Mission received credible reports that, in early March 2017, at least 30 people were killed when the MNDA launched an attack against police and military posts in the Kokang region.¹⁵¹⁶ A separate group of fighters later attacked locations in Laukkai.¹⁵¹⁷ Official Government statements, accompanied by graphic pictures of the dead and wounded, stated that at least ten people, including five local police officers, were killed in the fighting. The Government also said that a further 20 “burned bodies” had been found alongside weapons reportedly of MNDA fighters.¹⁵¹⁸

Conclusions

633. The recent escalation of hostilities in Shan State has the potential to trigger renewed violence in the Kokang region, further weakening the fragile ceasefire in northern Myanmar. The Mission was unable to make findings or draw legal conclusions on the basis of its limited research on the human rights situation in the Kokang region. However, it strongly recommends that further investigations be conducted into the situation. In the meantime, it calls on all parties to the conflicts to respect and ensure respect for international human rights and international humanitarian law and to collaborate with the United Nations and other humanitarian agencies to allow humanitarian relief to reach the most vulnerable.

(The Irrawaddy, 24 February 2015); The Straits Times (AFP), “Dozens injured as prison convoy attacked in Myanmar: media” (24 February 2015); Zarni Mann, “Prisoners Injured During Prison Transfer in Kokang Conflict Zone” (The Irrawaddy, 24 February 2015); The Straits Times (AFP), “Dozens injured as prison convoy attacked in Myanmar: media” (24 February 2015); Zarni Mann, “Prisoners Injured During Prison Transfer in Kokang Conflict Zone” (The Irrawaddy, 24 February 2015)

¹⁵¹⁰ PI-015; The Global New Light of Myanmar, “Kokang insurgents commit unlawful acts in Laukkai” (20 February 2015).

¹⁵¹¹ PI-015; Lee Tung, “‘This War Has Been Disastrous For Civilians’” (Radio Free Asia, 5 March 2015).

¹⁵¹² Democratic Voice of Burma, “Questions raised over reported Kokang kidnapping” (11 October 2016); Ann Wang, “China-linked rebels’ casino cash grab stalls Myanmar border city” (Post Magazine, 4 June 2017).

¹⁵¹³ Latin American Herald Tribune, “Rebels Abduct 260 Hotel Workers from Northern Myanmar” (3 September 2019).

¹⁵¹⁴ PI-015, QI-92; AsiaNews, “Thousands of civilians flee fighting between ethnic militias in Shan State” (11 January 2019); FFFGEN-1-86925; A/HRC/39/CRP.2, para. 339 and 344.

¹⁵¹⁵ OCHA Humanitarian Bulletin: Issue 1 (February to May 2017); Malay Mail, “China calls for ceasefire as thousands flee Myanmar border town” (7 March 2017); Kan Thar and Wai Mar Tun, “20,000 Refugees Flee Myanmar’s Kokang Conflict Across the Border Into China” (Radio Free Asia, 8 March 2017); Wai Mar Tun, “More Myanmar Refugees Seek Safety in China From Kokang Conflict” (Radio Free Asia, 13 March 2017).

¹⁵¹⁶ A/HRC/39/CRP.2, para. 332.

¹⁵¹⁷ The Global New Light of Myanmar, “Civilians, police killed in Laukkai attack by MNDA” (7 March 2017); Al-Jazeera, “Deadly clashes hit Kokang in Myanmar’s Shan state” (6 March 2017); Malay Mail, “China calls for ceasefire as thousands flee Myanmar border town” (7 March 2017); Latin American Herald Tribune, “Rebels Abduct 260 Hotel Workers from Northern Myanmar” (3 September 2019).

¹⁵¹⁸ V-302, V-303.

VII. Renewed human rights violations against the ethnic Karen

*“My whole life I have been running living in fear.”*¹⁵¹⁹

634. As a result of a notable escalation of hostilities since 2018 resulting in displacement of Karen civilians, the Mission carried out a preliminary investigation into the situation of the Karen ethnic minority. Due to time and resource constraints, a complete investigation into the many complex issues facing the Karen could not be undertaken. However, the Mission decided to focus its investigation on recent human rights violations arising from the road-building project in Karen National Union (KNU) controlled territories which began in late 2017. This limited investigation is not fully reflective of the serious human rights violations reported to have taken place, including violations that reportedly took place outside the Mission’s mandate to investigate “recent violations”.

A. Background

635. The Karen are one of the recognised ethnic minorities of Myanmar, and is the broader name of a number of sub-ethnicities residing in the south-east of Myanmar.

636. Hostilities between the Government of Myanmar and the Karen National Liberation Army (KNLA), the armed wing of the KNU, have been ongoing since 1949. During much of this time the Tatmadaw has been reported as having been responsible for a long legacy of severe and regular violations of international human rights law and international humanitarian law,¹⁵²⁰ including sexual and gender-based violence against Karen women and girls.¹⁵²¹ The conflict led to the mass displacement of Karen civilians, tens of thousands of whom remain confined in refugee camps situated along the Thai-Myanmar border.¹⁵²²

637. Whilst many Karen reside in Kayin State (formerly known as Karen State), there are also significant populations of Karen communities located in other states and divisions in south-east Myanmar, equally affected by these issues. Thus this chapter is relevant for all Karen communities affected by these developments.

638. In areas under the KNU’s control, it carries out various government-like functions, including maintaining a governance system that collects formally registered taxes; providing a basic justice system with a police force; registering, regulating and providing ownership titles for agricultural land; regulating and managing forestry and other forms of land use; and providing basic social services, including education and healthcare.¹⁵²³

¹⁵¹⁹ LI-198

¹⁵²⁰ LM-038, FFFGEN-1-84326. See also: Guy Horton, “Dying Alive: An Investigation and Legal Assessment of Human Rights Violations Inflicted In Burma, With Particular Reference to the Internally Displaced, Eastern Peoples”, 2005; Daniel Pedersen, “Secret Genocide: Voices of the Karen of Burma,” Maverick House, 2011. Human Rights Watch, *They Came and Destroyed Our Village Again: The Plight of Internally Displaced Persons in Karen State* (June, 2005).

¹⁵²¹ LM-041, FFFGEN-1-84321. See also: Karen Women’s Organisation, *Shattering Silences: Karen Women speak out about the Burmese Military Regime’s use of Rape as a Strategy of War in Karen State*, (April, 2004); Karen Women’s Organization, *State of Terror: The ongoing rape, murder, torture and forced labour suffered by women living under the Burmese Military Regime in Karen State*, (February, 2007); Karen Women’s Organization, *Walking Amongst Sharp Knives: The unsung courage of Karen women village chiefs in conflict areas of Eastern Burma* (February, 2010); Karen Human Rights Group, *Suffering in silence? Sexual violence against women in Southeast Myanmar*, (December, 2018).

¹⁵²² GM-007. See also: Asia News, “Over 97,000 refugees in Thai camps on Myanmar border” (14 January 2019)

¹⁵²³ LM-038, LM-041, Saferworlds, Security, justice and governance in South East Myanmar: A knowledge, attitudes and practices survey in Karen ceasefire areas (January 2019), The Asia Foundation, *Ceasefires, Governance, and Development: The Karen National Union in Times of Change* (December, 2016).

639. In 2012, the KNU signed the 2012 ceasefire with the Myanmar federal and state governments.¹⁵²⁴ On 15 October 2015, the KNU signed the National Ceasefire Agreement (NCA).¹⁵²⁵ This was a significant development that was envisioned as the beginning of a new era of peace for the Karen peoples. Indeed, since the signing of the NCA, the levels of violence have greatly decreased in Karen communities, but has not stopped.¹⁵²⁶ Nevertheless, by October 2018, the KNU announced its temporary suspension from the peace process due to its dissatisfaction over the negotiations.¹⁵²⁷ Nonetheless, the KNU publically stated that it will continue to engage in informal meetings with government officials in an attempt to stay engaged in the process.¹⁵²⁸

640. The KNU has said that the key reason for its suspension in the peace negotiations is the continued encroachment of Tatmadaw soldiers into KNU-controlled territory. According to the KNU, this has been occurring through a Tatmadaw-led road construction project and the consolidation of Tatmadaw bases. The KNU regards these activities to be a direct breach of the NCA, which prohibits the expansion of military infrastructure and troop reinforcements in ceasefire areas.¹⁵²⁹ The Tatmadaw reportedly claims that these activities are not a breach of the NCA because there is no clear demarcation of KNU territory. The KNU, in return, regards the lack of such demarcations to be a road block to a meaningful peace process.¹⁵³⁰

641. Despite the 2012 ceasefire, these reported incursions by the Tatmadaw on KNU-controlled territory have led to renewed military confrontations between the Tatmadaw and the KNLA.¹⁵³¹ This has included Tatmadaw offensive operations in and near to Karen villages that have resulted in civilian injuries and other human rights concerns. Moreover, according to civil society groups covering the region, the construction of Tatmadaw bases and military consolidation activities themselves, through the fortification of bases, and the import of additional troops and supplies including weaponry, are causing other significant human rights concerns against Karen civilians by the Tatmadaw.¹⁵³²

B. Recent Tatmadaw operations

642. In November 2017, Tatmadaw began the construction of a military road located within KNU-controlled territory in northern Karen State.¹⁵³³ Some Tatmadaw soldiers acted as security guards for other Tatmadaw personnel tasked with the physical construction of the road.¹⁵³⁴ Although the Tatmadaw claimed that the road would contribute to community development, the construction commenced without any consultation with the affected communities. The KNU rejected the project in multiple negotiations with the Tatmadaw, noting that the purpose of the road was entirely for the

¹⁵²⁴ LM-038, LM-052. See also: Thee Myanmar Times, "Govt, KNU sign ceasefire" (16 January 2012). BBC, "Burma government signs ceasefire with Karen rebels" (12 January 2012).

¹⁵²⁵ LM-034, LM-036, LM-038, Antoni Slodkowski, "Myanmar signs ceasefire with eight armed groups" (Reuters, 15 October 2015), Karen News, "KNU to Sign Nationwide Ceasefire Agreement" (16 August 2015).

¹⁵²⁶ Saferworlds, Security, justice and governance in South East Myanmar: A knowledge, attitudes and practices survey in Karen ceasefire areas (January 2019), The Asia Foundation, Ceasefires, Governance, and Development: The Karen National Union in Times of Change (December, 2016).

¹⁵²⁷ LM-032, LM-036, LM-050, LM-052. See also, Ye Mon, "Karen National Union suspends participation in peace talks" (Frontier Myanmar, 29 October 2018).

¹⁵²⁸ LM-032, LM-036, LM-038, LM-050, LM-052. See also, Radio Free Asia, "Karen National Union Says Myanmar Peace Process is Moving in The Wrong Direction" (3 January 2019).

¹⁵²⁹ LM-036, LM-050, LM-052

¹⁵³⁰ LM-036, LM-038, LM-040

¹⁵³¹ LM-032, LM-038, LM-050

¹⁵³² LM-040, Karen Peace and Support Network, The Nightmare Returns: Karen Hopes for Peace and Stability Dashed by Burma Army's Actions (April 2018).

¹⁵³³ LM-037, LM-052, FFFGEN-1-84322; Sally Kantar, "Military road defies Myanmar national ceasefire, fuels insecurity" (Al Jazeera, 12 September 2019)

¹⁵³⁴ LI-191, LI-193

Tatmadaw's own advantage, which included connecting two strategic military bases.¹⁵³⁵ Villagers affected by the project wrote letters, signed petitions and carried out protests rejecting the claim that the road was to their benefit.¹⁵³⁶ As one villager stated: "The road might be beneficial for the military, but for the Karen people, the road will only do harm by destroying our land. The villagers were never consulted about if they wanted the road."¹⁵³⁷

643. In May 2018 negotiations at the Union level led to an agreement by the Tatmadaw to temporarily stop the road construction and withdraw its troops after a series of clashes occurred in March 2018 between the Tatmadaw and the KNLA over the project.¹⁵³⁸ In February 2019 the potential for hostilities once again increased when Tatmadaw soldiers recommenced the road-building project.¹⁵³⁹

644. Since 2018, the Tatmadaw's consolidation of its bases in the region has included the building of new outposts, construction of helicopter landing pads and the introduction of additional soldiers and supplies including weaponry.¹⁵⁴⁰ One person described how this consolidation has caused fear in the villagers. *"We are seeing the Tatmadaw soldiers bring in military trucks full of really big weaponry, including mortar shells. These are weapons that people have not really seen before, so the villagers are so scared the fighting is going to break out soon,"* he stated.¹⁵⁴¹

645. These activities have led to direct human rights violations of villagers living alongside or near to the road constructions or military bases.

C. Human rights impact of the road construction project

646. In the context of the clashes between the KNLA and the Tatmadaw as a result of the roadbuilding and other military activities, the Mission verified instances of shelling by the Tatmadaw of Karen villages, resulting in civilian injuries, the destruction of property and displacement of civilians.¹⁵⁴²

647. Villagers described to the Mission how shells landed on their farmlands, destroying harvests, damaging houses and killing livestock.¹⁵⁴³

648. As a result of the rising tensions, including active clashes between the KNLA and the Tatmadaw, it is estimated that from January 2018 until August 2019, over 3,000 villagers have been displaced.¹⁵⁴⁴ This includes people who were actively displaced from their villages as a result of shells falling in their villages, which was located close to the road construction.¹⁵⁴⁵

649. A young Karen woman described how she was returning to her parents' village from her boarding school to find that houses in her village had been damaged by shells and discovered that her family was forced to flee and seek shelter in the jungle. She described to the Mission that when she tracked down her family in the jungle her five younger siblings, parents and other relatives did not have enough food.¹⁵⁴⁶

650. Many IDPs displaced by the current military tensions were forced to seek shelter in temporary makeshift shacks in the jungle where they lived in difficult conditions without

¹⁵³⁵ LM-037, LM-052, See also: <http://www.nmg-news.com/knus-demands-military-road-construction-halt-in-taungoo/>

¹⁵³⁶ LI-189, LI-190, LI-198, LI-201

¹⁵³⁷ LI-198

¹⁵³⁸ LM-052, FFFGEN-1-84322, FFFGEN-1-90467

¹⁵³⁹ LM-034, LM-037, LM-052, FFFGEN-1-84322

¹⁵⁴⁰ LI-189, LI-193, LI-195, LI-201, FFFGEN-1-84322

¹⁵⁴¹ LI-193

¹⁵⁴² LI-189, LI-199, LI-200

¹⁵⁴³ LI-189, LI-191, LI-196, LI-200

¹⁵⁴⁴ FFFGEN-1-90473; LM-034

¹⁵⁴⁵ LI-196

¹⁵⁴⁶ LI-200

adequate access to healthcare.¹⁵⁴⁷ Villagers described how conditions in the jungle led to various illnesses, including in particular for children, and how persons with long-term medical needs were unable to access their medication. IDP children are unable to attend school.¹⁵⁴⁸ Most Karen villagers rely on farming for their subsistence needs and their displacement restricted their access to farm lands, which in turn limited their income generating activities, leading to food security issues.¹⁵⁴⁹

651. Karen villagers who reside in affected areas also faced severe problems because of the Tatmadaw's road construction and its increased militarized presence in the area. Of particular note, is the direct impact on lands and livelihoods as a result of the road-building and other military activities.¹⁵⁵⁰

652. Road construction and increased military activities has caused direct damage to villagers' farmlands.¹⁵⁵¹ One villager stated: *"The road has destroyed the farmlands, including the stream and the waterway so villagers cannot get enough water anymore."*¹⁵⁵² Another villager who was displaced as a result of clashes between the KNLA and the Tatmadaw in March 2018 over the road building, returned to his village some months later. He described to the Mission how upon his return the road construction had destroyed his land's natural irrigation systems, which led to the flooding of a significant percentage of his farmlands, making them completely unusable.¹⁵⁵³ Others villagers reported how their lands were confiscated and used as a shooting range for Tatmadaw troops, destroying the fields.¹⁵⁵⁴

653. In other locations, the Tatmadaw appropriated the lands of Karen villagers that are situated along road's path without compensation.¹⁵⁵⁵ One villager noted how Tatmadaw actively shot towards the village located along the road in order to displace the villagers, and once the villagers fled confiscated the farmland using bulldozers to raze it.¹⁵⁵⁶

654. The increase in military presence resulting from the road building and consolidation of bases also contributed to an increased fear amongst Karen villagers.¹⁵⁵⁷ This fear is attributable to the fighting it has triggered between the Tatmadaw and the KNLA, as well as the increased presence of Tatmadaw soldiers in the region, and is heightened by the Tatmadaw's legacy of committing violations of international human rights law and international humanitarian law against the Karen. Many Karen villagers are now too fearful to tend to their farmlands, which is affecting their harvest for this year and the upcoming season.¹⁵⁵⁸ As one villager commented: *"Some of our farmlands are close to where the Tatmadaw are located, we dare not go to those areas now."*¹⁵⁵⁹

D. Killings by the Tatmadaw

655. The Mission documented two incidents of killings by the Tatmadaw, both of which required further investigation. On 5 April 2018 Tatmadaw soldiers shot and killed 42 year-old Saw O Moo in the Ler Mu Plaw area of northwest Luthaw. Saw O Moo was a respected Karen leader and human rights defender.¹⁵⁶⁰ At the time of his death he was travelling home from a community meeting to support humanitarian relief for Karen communities displaced

¹⁵⁴⁷ LI-190, LI-196, LI-197, LI-199, LI-200

¹⁵⁴⁸ LI-199

¹⁵⁴⁹ LI-200

¹⁵⁵⁰ LI-190,

¹⁵⁵¹ LI-190, LI-196, LI-199, LI-194, LI-193

¹⁵⁵² LI-190

¹⁵⁵³ LI-196

¹⁵⁵⁴ LI-193, LI-194.

¹⁵⁵⁵ LI-189, LI-197, LI-201

¹⁵⁵⁶ LI-189

¹⁵⁵⁷ LI-189, LI-193, LI-196, LI-201

¹⁵⁵⁸ LI-189, LI-199, LI-201

¹⁵⁵⁹ LI-199

¹⁵⁶⁰ LM-034, LM-037, LI-195. FFFGEN-1-90475

by the recent fighting as a result of the road building activities.¹⁵⁶¹ The media widely reported that immediately prior to the Tatmadaw's shooting of Saw O Moo, he was driving a motorcycle with a passenger known to be a KNLA commander.¹⁵⁶² The Tatmadaw has reportedly denied wrongdoing in the killing, claiming that Saw O Moo was a rebel fighter dressed in civilian clothes.¹⁵⁶³ Saw O Moo, a known human rights defender, was a known figure in the community, and it does not seem probable that he could have been mistaken as a rebel fighter. The Mission was unable to determine however the exact circumstances that led to the killings or whether the Tatmadaw knew at the time of the killing either man's identity or affiliations. Despite repeated requests to the Tatmadaw from family members and the KNU to return the body, at the time of writing family members have not received the deceased's remains which prevented them from practicing funeral rites in accordance with Karen traditions.¹⁵⁶⁴ Authorities have not undertaken an effective investigation into this killing.¹⁵⁶⁵

656. The Mission also documented the killing of seven members of a Muslim family and the wounding of one other in Seikkyi Township in Karen State on 5 April 2019.¹⁵⁶⁶ Three children were amongst the family members who the Tatmadaw soldiers killed. Tatmadaw officials publically announced that charges would be brought against those responsible.¹⁵⁶⁷ It has been reported that the two soldiers responsible were sentenced to 20 years with hard labour and were considered deserters.¹⁵⁶⁸

E. Return of Karen refugees

657. The Mission takes note of the increasing pressure on Karen refugees who have been residing for decades in Thailand in refugee camps along the border to return to Myanmar.¹⁵⁶⁹ The pressure is the result of assumptions made at the policy level by the international community that conditions are now safe for Karen refugees to return. These assumptions are based on the overall reductions in hostilities in Karen areas, the ongoing but fragile peace negotiations and expectations of democratic transition from military rule. As a result, there has been a significant reduction of funding for services for Karen refugees in the camps. This has included reductions in basic necessities such as food. Compounded by the lack of options for third-country resettlement, pressures on refugees to return to Myanmar continue to mount as life in the camps become increasingly untenable.¹⁵⁷⁰

658. The Mission's assessment of the human rights situation in many of the locations that Karen refugees call home, and in particular those refugees who come from the areas where the road construction is taking place, or scheduled to take place, is that the conditions may not be appropriate for safe, dignified or sustainable return.¹⁵⁷¹ For Karen refugees to make informed decisions about their return to Myanmar requires that they have transparent access

¹⁵⁶¹ LI-195, LM-034, LM-037, LM-059, FFFGEN-1-90479, FFFGEN-1-90475

¹⁵⁶² See for example: Jonathan Watts, "Indigenous environmental campaigner killed by Myanmar government" (The Guardian, 13 April 2018). FFFGEN-1-90479, FFFGEN-1-90475

¹⁵⁶³ <https://myawady-myawady.blogspot.com/2018/04/nca-knu.html>; Nyein Nyein, "Tatmadaw Claims Killed Karen Community Leader Was a Plainclothes Fighter" (The Irrawaddy, 11 April 2018)

¹⁵⁶⁴ LI-195, LI-196, LM-037

¹⁵⁶⁵ LI-195, LI-196, LM-037

¹⁵⁶⁶ LI-223, Nyein Nyein, "Tatmadaw Claims Killed Karen Community Leader Was a Plainclothes Fighter" (The Irrawaddy, 11 April 2018)

¹⁵⁶⁷ Lawi Weng "Soldiers Kill 7 Villagers, Including 3 Children, over Motorbike in Karen State" (The Irrawaddy, 8 April 2019)

¹⁵⁶⁸ <https://www.rfa.org/burmese/news/kyarinnssatekyi-murder-09072019020953.html>, <https://www.youtube.com/watch?v=MfopVm-IfPA&feature=youtu.be>

¹⁵⁶⁹ GM-007, LM-034, Thomas Wilkie-Black, Ei Tu Hta, "Myanmar's Karen displaced in a quagmire" (Asia Times, 27 April 2019). FFFGEN-1-90480

¹⁵⁷⁰ LM-034, LM-041

¹⁵⁷¹ GM-007, LM-034, See also: Karen News, "In Thai Border Camps, Funding Cuts Leave Refugees in Limbo" (21 November 2017); FFFGEN-1-90480; . For a more detailed legal discussion, see *Conclusions and legal findings: the impossibility of return*.

to information and that external pressures must not interfere with their right to make voluntary decisions about return.

F. Conclusions and legal findings

659. The Mission found that the fighting between the Tatmadaw and KNLA has resulted in large-scale displacement and a climate of insecurity for Karen civilians. Like other ethnic groups in northern Myanmar, the Mission found that Karen IDPs and refugees are concerned about returning to their home out of fear that they will be targeted rather than protected by Government security forces.

660. The Mission also found that the Karen, similar to other ethnic groups, have a legitimate fear of being subjected to the Tatmadaw's pattern of violations of international human rights law and international humanitarian law. Uncorroborated but credible information that the Tatmadaw fired at villages to force them to flee road construction sites indicates, if confirmed, that the attack was directed against civilians and was done to forcibly displace the civilian population. Further investigation is required to determine if the attack violated international human rights law, international humanitarian law or amounted to war crimes.¹⁵⁷² The Mission also collected information that indicates that the Tatmadaw's road and other construction projects have had a severe impact on the lands and livelihoods of Karen villagers. These issues of land insecurity are compounded by a more general pattern of land-grabbing that is facing Karen villagers and other ethnic minorities across the country.¹⁵⁷³

661. Their situation is further compounded by a sense that their very identity is being eroded by the State. For example, and as one Karen interviewee explained: *"Before the ceasefire, the KNU were running more than 1,000 schools. But presently, at the moment there are only 300 schools left that are directly managed by the Karen."* The ability of the Karen to instruct in their ethnic language and in accordance with their own culture is important for them to preserve their culture. .¹⁵⁷⁴

662. While the Mission is unable to make any legal findings on its limited investigations, it recommends that the human rights situation of the Karen be further monitored and investigated due to the potential for the situation to escalate. The Mission reiterates its view that accountability for past human rights violations and violations of international humanitarian law of the Karen must be addressed with a view to breaking the cycle of impunity.

VIII. Conclusions and recommendations

663. Myanmar's history since its independence in 1948 has been marred by decades of armed conflicts between the military, now called the Tatmadaw, and armed organisations based in Myanmar's ethnic minority regions. Each conflict has invariably entailed widespread killings and injury to civilians, torture and ill-treatment, gender-based violence, forced labour, displacement and restrictions on the use of land and livelihoods, access to education, health services and other basic services, and other severe consequences for the people of Myanmar. The victims are predominantly people from ethnic minorities: the Rohingya, Kachin, Shan, Ta'ang, ethnic Rakhine, Chin, Karen or Kokang and many more not mentioned in this report.

664. Myanmar's ethnic conflicts have consolidated the notion of a tiered-society, where the ethnic Bamar majority has been able to occupy a privileged position and minority ethnic communities have been subjugated. The Mission found that the Tatmadaw has both written and driven this narrative. The Tatmadaw has fought civil wars inside Myanmar over the span of seventy years. Decades of military rule have empowered it to act with total

¹⁵⁷² See, J.M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law. Volume I: Rules" (Cambridge, ICRC/Cambridge University Press, 2005), rule 129 (the act of displacement).

¹⁵⁷³ LI-189, LM-041

¹⁵⁷⁴ LM-041

impunity. Regrettably, the fledgling democratic transition since 2010 has failed to reverse these deeply entrenched patterns. The Mission can only reiterate once again the necessity of a full transformation of the Tatmadaw, with its complete removal from the political and economic life of Myanmar, and the urgent need for civilian oversight of the military, as essential first steps without which these long-standing patterns of abuse will not change.

665. The ethnic communities in Myanmar have common experiences of victimisation and brutality at the hands of the Tatmadaw and of discrimination and marginalisation. Nonetheless, the Mission recognises that their experiences are by no means identical.

A. The situation of the Rohingya

666. The situation of the Rohingya stands out in this regard. The arbitrary exclusion of the Rohingya from the list of 135 recognised “national races” has enabled the denial of their human rights and fundamental freedoms under Myanmar’s Constitution and laws. This formal exclusion of the Rohingya has resulted in severe inhumane suffering and persecution, thereby rising to the level of crimes against humanity. The hateful rhetoric, well-documented in the Mission’s 2018 report, which came to the fore at the height of the 2012, 2016 and 2017 violence, demonstrates the hateful, widespread and mainstream perception by Myanmar’s Bamar majority of the “sub-human” status of the Rohingya. Their continued segregation from the rest of Myanmar society through the continued imposition of movement restrictions cements this perception. It is a visible sign of their continued persecution.

667. The Mission found that the underlying structural human rights violations against this ethnic group, culminating in the 2017 “clearance operations”, have continued and that their situation remains largely unchanged from last year. On this basis, the Mission has reasonable grounds to conclude that there is a strong inference of continuing genocidal intent on the part of the State, that there is a serious risk of genocidal actions recurring, and that Myanmar is failing in its obligation to prevent genocide, to investigate genocide and to enact effective legislation criminalizing and punishing genocide.

668. The Government’s rhetoric in relation to “welcoming” back close to one million refugees can only be seen as an insincere attempt to appease the Government of Bangladesh and the international community. This is apparent, not least, by the inadequacy of the current resettlement plans, as well as the Government’s unwillingness to address the structural problems imposed on the remaining Rohingya in Rakhine State. The Mission’s findings should highlight the impossibility of the return of the Rohingya refugees under the current conditions.

669. In light of the Mission’s findings on the continued persecution of the Rohingya population in Rakhine State and the impossibility of the return of Rohingya refugees from Bangladesh under the current circumstances, the Mission deems it likely that any business or development actor operational in Rakhine is highly likely to support, directly, indirectly or inadvertently, or even consolidate the Tatmadaw’s persecutory and genocidal objectives with respect to the Rohingya population. The Mission reiterates its view that businesses and development assistance programmes in Rakhine State should take the necessary steps to ensure that their actions, first, do not enrich the Tatmadaw and, second, are of benefit to all the ethnic communities of Rakhine State on the basis of equality.

670. As a starting point, the Government should respect the fundamental freedoms of the Rohingya population, including their freedom of movement. It should close the camps and provide adequate and appropriate land and homes to the refugees and IDPs, free from segregation from the rest of Myanmar’s communities. An essential measure by which the international community can judge the Government’s stated sincerity with regard to welcoming back the Rohingya refugees is for it to implement effective guarantees to acknowledge or recognize the citizenship of Rohingya through a direct citizenship application process, with due process rights guaranteed. Such a process cannot be through the NVC procedures and requires repealing or amending the 1982 Citizenship Law.

671. The Mission concludes that a moratorium on domestic and international investment and development assistance in Rakhine State is necessary at this stage to ensure that investment and development assistance do not directly, indirectly or inadvertently

consolidate the Tatmadaw's persecutory and genocidal objectives. The moratorium should continue until the Rohingya population is able to enjoy its rights free from discrimination and on the basis of equality. The Mission concludes that a moratorium should be imposed on domestic and international investment and development assistance in Rakhine State at this time. Such moratorium could be ended once the restrictions on the remaining Rohingya population in Rakhine are lifted and they can enjoy rights free from discrimination on the basis of equality with the non-Rohingya population. This, in turn, would allow the Rohingya to benefit from investment and development assistance on an equal footing with the rest of the population in Rakhine State. In implementing a moratorium, due consideration should be given to ensure it does not have adverse socio-economic impacts on Rohingya and other communities in Rakhine State that would result in further harm. The moratorium must not prevent life-saving programmes and services from being provided.

B. The situation of the ethnic Rakhine

672. In its 2018 report, the Mission found that some ethnic Rakhine, while victims of serious human rights violations by the Tatmadaw in their own right, had also played a direct role in the 2017 "clearance operations" against the Rohingya. In the recent conflict between the Tatmadaw and the AA, ethnic Rakhine have themselves again been subjected to one of the hallmarks of the Tatmadaw's military operations, indiscriminate attacks that kill and injure civilians. The Mission found that violations of international human rights and humanitarian law have been committed in a series of Tatmadaw attacks in the past months. These have been compounded by a pattern of arrests, detention, torture and ill-treatment of ethnic Rakhine men and boys, some of which resulted in death.

673. In striking contrast to the "clearance operations" against the Rohingya, the Mission found that sexual and gender-based violence has not been used as a tactic of war by the Tatmadaw in its conflict this year with the AA. This is a marked shift in pattern and supports the Mission's previous conclusions that in 2017 the Tatmadaw used sexual and gender-based violence as a means of persecution that was also indicative of genocidal intent against the Rohingya population. It indicates that Tatmadaw commanders are able to control the perpetration of sexual and gender-based violence and that there is command responsibility for the perpetration of sexual and gender-based violence. The Mission reiterates its recommendation that instructions at the highest level of command should be given to ensure military personnel refrain from committing rape, gang rape and other forms of sexual violence. Accountability for perpetrators and justice for victims are required for past practices of sexual and gender-based violence.

674. As with all other ethnic conflicts in Myanmar examined by the Mission, the civilian populations affected by the conflict, including ethnic Rakhine, Chin and Rohingya, have suffered severe humanitarian consequences as a result of the implementation of policies consistent with the Tatmadaw's "four cuts" strategy. In this most recent conflict, the Tatmadaw has included a novel fifth cut, the "cutting of information". Through its clampdown on freedom of expression, association and information, by way of a series of legal actions against individual journalists, access restrictions for the media to conflict areas and an internet shutdown, the Myanmar Government has effectively deprived the population of the ability to communicate with the outside world and prevented the outside world from communicating about the military operations in Rakhine. This isolates the ethnic Rakhine population further. It also carries the risk of further abuse being perpetrated by the Tatmadaw without proper oversight. While the Mission welcomes initiatives to curb hate speech and incitement to violence, well-documented in its 2018 report, the strategy of cutting off information must be monitored closely for their potential to affect adversely and disproportionately not only the fundamental freedoms of the population in Rakhine, but also the protection of civilians.

C. The situation in northern Myanmar

675. Ethnic communities in northern Myanmar have endured decades of conflict-related human rights violations and abuses. These have continued despite the various ceasefires past and present. The Mission found that the human rights situation in northern Myanmar continues to raise concerns since its last report. While active hostilities may have declined

in Kachin State, the underlying violations, such as torture and ill-treatment, sexual and gender-based violence and a wide range of violations of economic, social and cultural rights, remain part of the daily lives of ethnic communities in the north. This continuing pattern testifies to the lack of sincerity on the part of the Government, including the Tatmadaw, in talking about peace, even during a relative lull in the conflict. EAOs in northern Myanmar also bear responsibility in this respect and reports of violations of international humanitarian law warrant further investigation.. The Mission concluded that the situation in northern Myanmar will likely deteriorate further if there is no genuine effort to address the continuing cycles of serious violations of human rights and violations under international humanitarian law, including war crimes.

676. The Mission identified a need for investigations in relation to the ethnic Karen and Kokang populations. Its own limited investigations confirm many of the established patterns documented in relation to other ethnic groups. The decades of conflict have produced a commonality of suffering and hardship, including widespread displacement.

D. Recommendations

677. In March 2017, the Human Rights Council gave this Mission the mandate of “establishing the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar in particular Rakhine State”. In extending the Mission’s mandate in September 2018, the Human Rights Council sought to avoid an investigative gap between the end of the Mission’s mandate and the new Independent Investigative Mechanism on Myanmar becoming operational. The Mission is grateful to the Human Rights Council for recognising the need for continued monitoring and reporting on the human rights situation in Myanmar. This has been essential to the hundreds of thousands of victims whose stories deserve to be told. The Mission has sought to discharge its mandate independently, impartially and diligently, throughout the last two and half years. It deeply regrets the lack of dialogue with the Government of Myanmar, as it remains of the view that Myanmar must acknowledge and act as part of any sustainable and long-term accountability initiative.

678. In this final report, the Mission reiterates all its previous recommendations contained in its various reports, which have been compiled in A/CRP/42/CRP.6 in particular those related to accountability and ending hostilities. It makes the following additional and final recommendations regarding the way forward.

1. To the Government of Myanmar:

679. Review the Mission’s findings contained in its reports and take necessary measures to implement its recommendations. The Government should regularly report on progress in implementing the Mission’s recommendations, including through, but not limited to, the United Nations human rights mechanisms;

680. Seek the support of the United Nations, its funds and programmes, to implement these recommendations, as necessary.

Ethnic conflicts

681. Take measures to protect civilian populations from the effects of the ethnic conflicts, including through strict adherence to international humanitarian law and international human rights law;

682. Grant unfettered humanitarian access, for UN and other inter-governmental agencies and national and international non-government agencies, to all parts of Myanmar, in particular Rakhine, Chin, Kachin and Shan States;

683. Ensure the safe, voluntary, dignified and sustainable return of refugees and internally displaced people to their original lands or places of their choice, in full consultation with the affected communities and by ensuring informed consent;

684. Minimize the use and effects of landmines, IEDs and ERW, and ensure that civilians are informed of their presence, including by marking contaminated areas and otherwise

informing the populations in affected areas, and undertake mine clearance operations as soon as hostilities abate.

Rohingya

685. Take all necessary steps to ensure and expedite the safe, voluntary, dignified and sustainable return of the Rohingya to their homes and lands, in accordance with international standards;

686. Restore their citizenship rights and suspend the NVC process, while identifying alternative ways to ensure that Rohingya can apply directly for and receive full citizenship, including from abroad, through an effective and prompt process;

687. Remove all movement restrictions in Rakhine that are specifically applicable to Rohingya and that are applied in a discriminatory manner to them;

688. Ensure to all persons in Rakhine State, including Rohingya, full enjoyment of human rights and fundamental freedoms on the basis of equality.

Accountability

689. Cooperate with all accountability mechanisms, including the International Criminal Court, the International Court of Justice and the newly-established Independent Investigative Mechanism for Myanmar, with a view to expediting accountability for serious crimes under international law and reparations for victims of those crimes;

690. Introduce complementary and credible national accountability measures to investigate and prosecute crimes under international law, including crimes of genocide, and do so in accordance with international fair trial standards;

691. Ensure that any accountability process provides full and effective remedies for victims of human rights violations in the appropriate form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Obligations under the Genocide Convention

692. Conduct effective investigations into the underlying acts of genocide documented in the Mission's 2018 report and, where appropriate, prosecute and punish those guilty;

693. Enact the domestic legislation necessary to punish the crimes of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide and to provide effective penalties for persons guilty of those crimes;

694. Repeal or amend laws, including Constitutional provisions, that permit those guilty of crimes of genocide to evade punishment;

695. Take all necessary measures, including legislative and other measures, to deter those harbouring genocidal intent and the serious risk of genocide to the Rohingya people.

2. To the United Nations and the international community:

Monitoring and reporting

696. Remain seized of the human rights situation in Myanmar, through continued close monitoring and public reporting, discussion in international human rights fora and dialogue and cooperation with the Government of Myanmar;

697. Provide the necessary mandate and allocate adequate resources to the Office of the High Commissioner for Human Rights and to the Special Rapporteur on human rights in Myanmar, for regular human rights reports, including to the Human Rights Council, on human rights in Myanmar and on follow-up to the Mission's recommendations, in particular an annual report on progress in implementation of all recommendations;

698. Mandate through the Human Rights Council and/or General Assembly further human rights investigations on the human rights situation in Myanmar to contribute towards the prevention of human rights violations and respond promptly to human rights emergencies,¹⁵⁷⁵ with appropriate resources allocated;

699. Mandate through the Human Rights Council and/or General Assembly further investigations into the human rights situation of other ethnic conflicts in Myanmar, including the situations of the ethnic Karen and Kokang, with appropriate resources allocated;

Accountability

700. Ensure that future Commissions of Inquiry and fact-findings missions contain, as part of their terms of reference, a requirement to “report back” to affected communities whose human rights situations they investigated, with a view to ensuring accountability towards victims;

701. Should the Security Council be unwilling to refer the situation of Myanmar to the International Criminal Court or to establish an *ad hoc* international criminal tribunal in respect of crimes under international law in Myanmar, the General Assembly should consider using its powers within the scope of the Charter of the United Nations to advance such a tribunal;

702. Encourage and support States parties to the Genocide Convention to bring a case to the International Court of Justice against Myanmar for breaches of its obligations under the Genocide Convention;

703. The UN country team in Myanmar should continue to assess its engagement with all government partners, to ensure the engagement is not directly or indirectly contributing to the confiscation or misappropriation of, or profiteering from Rohingya lands, indirectly or directly keeping Rohingya off their lands or from returning to their lands, or consolidating the effects of the Government’s “clearance operations” of 2016 and 2017;

704. Adopt a moratorium on domestic and international business, investment and development assistance in Rakhine State, unless and until the remaining Rohingya population is able to enjoy all human rights fully, free from discrimination and on the basis of equality. Ensure it does not have adverse socio-economic impacts on Rohingya and other communities in Rakhine State that would result in further harm. The moratorium must not prevent life-saving programmes and services from being provided.

3. To non-State armed groups in Myanmar:

705. Take measures to protect civilian populations from the effects of the ethnic conflicts, including through strict adherence to international humanitarian law;

706. Minimize the use and effects of landmines, IEDs and ERW, and ensure that civilians are informed of their presence, including by marking contaminated areas and otherwise informing the populations in affected areas, and undertake mine clearance operations as soon as hostilities abate;

707. Cooperate with international accountability mechanisms, including the International Criminal Court, the International Court of Justice and the Independent Investigative Mechanism for Myanmar.

¹⁵⁷⁵ See General Assembly resolution 60/251, para. 5 (f).

Annexes

1. Letter sent to the Permanent Mission of the Republic of the Union of Myanmar on 12 February 2019

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REFERENCE: IFFMM/CG/ha/081

12 February 2019

Excellency,

Following the extension of the mandate of the Independent International Fact-Finding Mission on Myanmar (IIFMM) by the Human Rights Council in September 2018 (HRC resolution 39/2), I have the honour to communicate a request to undertake an official visit to Myanmar.

As you are aware, the IIFMM was extended with a view to handing over information, documentation and evidence to the Independent Investigative Mechanism to be established pursuant to the Human Rights Council Resolution 39/2 and was requested to submit a final report to the Human Rights Council at its 42nd session in September 2019. The IIFMM deems it important to visit Myanmar before the completion of its mandate, to obtain first-hand information about the situation on the ground and to discuss its findings with the Government. The IIFMM would also be interested in entering into a dialogue on ways to support the Government in the implementation of the recommendations it has made, in particular with respect to delivering justice and accountability for victims.

Participating in the mission would be the three experts appointed by the Council, Ms. Radhika Coomaraswamy, Mr. Christopher Sidoti, and myself, along with members of the secretariat who would need to arrive earlier to conduct preparatory work. Should the Government of Myanmar agree to our proposal to visit the country, then we would like to seek unhindered access to both sites and persons of interest, with full respect for confidentiality, in accordance with the established methodology of United Nations human rights mechanisms. Given the geographic areas covered by our report, we would be interested in visiting, Rakhine, Kachin and Shan States, as well as Nay Pyi Taw and Yangon.

If our request meets with your approval, we will be pleased to discuss mutually convenient dates for the visit to take place.

H.E. Mr. Kyaw Moe Tun
Ambassador Extraordinary and Plenipotentiary
Permanent Representative of the Republic of the Union of Myanmar
to the United Nations and other International Organizations

Email: mission@myanmargeneva.org

2. Letter and questions sent to the Permanent Mission of the Republic of the Union of Myanmar on 27 March 2019

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REFERENCE: IFFMMY/CG/ha/087

28 March 2019

Excellency,

I have the honour to submit a list of questions addressed to the Republic of the Union of Myanmar by the Independent International Fact-Finding Mission on Myanmar (IIFMM), established pursuant to Human Rights Council resolution 34/22. The questions were prepared to enable the IIFMM to review issues of relevance in the discharge of its mandate and to provide an opportunity to the Government of Myanmar to express its views in the spirit of constructive dialogue.

I take the occasion to invite the Government to also include in its responses any other information that it believes the IIFMM should be aware of, including any follow-up actions taken by the Government to the recommendations of the IIFMM, as contained in its report to the Human Rights Council in September 2018 (A/HRC/39/64). I also enclose the list of questions that were submitted on 27 March 2018, to which no answers have been received to date.

Responses to these questions would be appreciated as soon as possible, preferably before 30 April 2019. Responses can be sent directly to the Coordinator of the Secretariat of the IIFMM, Mr. Pradeep Wagle at pwagle@ohchr.org, copied to myanmarffm@ohchr.org.

Please accept, Excellency, the assurances of my highest consideration.

A handwritten signature in dark ink, appearing to read "Marzuki Darusman".

Marzuki Darusman

Chairperson

Independent International Fact-Finding
Mission on Myanmar established
pursuant to Human Rights Council resolution 34/22

H.E. Mr. Kyaw Moe Tun
Ambassador Extraordinary and Plenipotentiary
Permanent Representative of the Republic of the Union of Myanmar
to the United Nations and other International Organizations
Avenue Blanc 47
1202 Geneva
Email: mission@myanmargeneva.org

List of questions to the Government of Myanmar

27 March 2019

Protecting the civilian population:

1. Please share any relevant policies, directives, codes of conduct, rules of engagement, regulations, military manuals, after-action reviews and any other available documentation produced by or for the security forces (including the Tatmadaw, the Border Guard Force and the Myanmar National Police) on the application of human rights and international humanitarian law. In particular, please include instructions on the implementation of the principles of precaution, distinction and proportionality by the security forces in the conduct of hostilities, including monitoring and oversight mechanisms, advance warning, the roles and responsibilities of legal advisors, target selection and verification processes, weapon selection processes, and civilian harm mitigation measures.
2. Please provide information about measures put in place to prevent harm to civilian populations and civilian property during fighting and related activities in Kachin, Shan, Rakhine and Chin States since 2011.

Children in armed conflict and forced recruitment:

3. Please provide information on whether government authorities have recorded any incidents of recruitment of children into armed forces.
4. Please provide information on whether government authorities have recorded any incidents where children directly participated in hostilities. Please also provide information on other uses of children in armed forces.
5. Please provide information on the measures the Government has put in place to prevent the recruitment of children into armed forces and to prevent them from taking a direct part in hostilities.

Protected places:

6. Please provide information on any schools, health care facilities and places of worship that were destroyed, damaged or occupied by parties engaged in fighting or conducting related operations in Kachin, Shan, Rakhine, and Chin States since 2011.
7. Please include details regarding the dates and locations of any incidents, including the nature of any harm caused, the purpose of causing such harm or occupying such facilities, the tactic that was reported to have caused the harm and the affiliation of the alleged perpetrator/s.
8. Please provide information on any measures the Government has taken to spare schools, health care facilities and places of worship from fighting and related operations.

Landmines, IEDs and UXOs:

9. Please provide information on any production and use of landmines and IEDs by Myanmar security forces, as well as non-state armed groups. How many and what kind of devices are being produced, acquired or used? Where and by whom are the devices being used? What measures have been put in place, and where, to de-mine or mark contaminated areas and clear UXUs? How has the civilian population been educated about the existence of mined areas?

Vacant, Fallow and Virgin Land Management Law:

10. Since the opening of the registration period under the Vacant, Fallow and Virgin Land Management Law, how many petitions have been received claiming ownership and from which States? Please provide disaggregated data.
11. Please provide information about how many acres or hectares of land were registered as being vacant, fallow or virgin under the Vacant, Fallow and Virgin Land Management Law. Please also provide information on the location of these lands.
12. How many people were arrested or fined for trespassing as a result of this law since 11 March 2019?
13. Please provide information on dates, locations, age, ethnicity/religion and sex of those who have been fined or arrested in relation to the implementation of the aforementioned law. How many of them were prosecuted and convicted, and where? Please provide information on the length of the sentences of those convicted, per State.
14. Please provide information about the impact of the law on individuals who have left to neighboring countries.

Arrest and detention:

15. Please provide information about the number of people arrested or detained under the Unlawful Associations Act 1908, the Right to Peaceful Assembly and Peaceful Procession Act 2011 and the Telecommunications Law 2013 and locations of those arrests in 2018 and 2019. How many persons were prosecuted and convicted, and where? Please provide information on the length of the sentences of those convicted.

Forced Labor:

16. Have government authorities recorded incidents of forced labor by state and non-state actors? If so, please provide the information collected. Please explain what measures have been taken to prevent such incidents from occurring.

Rakhine State:

17. Please provide information on any restrictions on freedom of movement in Rakhine State and to which villages or districts such restrictions apply. To whom do they apply? Please provide the domestic legal basis for such restrictions and explain how they are implemented and enforced.
18. Please provide information about the current ownership status of land in Rakhine State (either through title or customary ownership) with respect to persons who are currently in Bangladesh.

19. Please provide information about construction activities that are currently taking place in the locations of each village in Rakhine State that were partially or fully burnt or otherwise destroyed since August 2017.
20. Please provide information on any new application procedures for the National Verification Card (NVC) for Rohingya. Please provide information on whether an NVC is required to access services provided by the Government. Please also provide the processes for applying for and obtaining the NVC and the legal status of the NVC.
21. Please provide information on the 'pathway to citizenship' provided by the NVC. What is the current processing time for determining the citizenship status of a person with an NVC? How many NVC holders have been recognised as citizens in each year since the card was introduced? How many NVC holders have been denied recognition of citizenship in each year since the card was introduced?
22. Please provide information on the closure of IDP camps in Rakhine State, and the plans for IDPs currently residing in those IDP camps. Please share any relevant policies, plans and documentation.

Humanitarian access:

23. What measures has the Government put in place to ensure access by international humanitarian agencies to areas in Myanmar affected by the fighting or related operations?
24. Please provide information about measures put in place by the Government to ensure access to humanitarian aid by populations in need in Government-controlled and other areas in Myanmar.
25. Please provide information about restrictions, if any, imposed on humanitarian access in Rakhine, Shan, Kachin and Chin States and the legal basis for such restrictions. Where restrictions have been imposed, please indicate any measures taken to ensure that the basic needs of those denied humanitarian assistance, including those displaced by attacks or other operations, are being met, including affected communities that are not displaced.
26. Please provide information on the population figures of the different ethnicities who are displaced and are living outside of IDP camps, as well as in the official IDP sites and informal settlements.

Fighting between the Arakan Army and the Tatmadaw:

27. Please provide information about the dates, locations and military objectives of operations against the Arakan Army in Rakhine and Chin States since 2017.
28. Please provide information on which military commands, divisions and battalions are currently active in the fighting and related operations against the Arakan Army.
29. Please provide information about allegations of human rights abuses or other violations of international law committed by the Arakan Army.

30. In the context of the fighting between the Tatmadaw and the Arakan Army, please provide any information on the use of IEDs or landmines by either side.
31. Please provide information on the number of reported civilian casualties in Rakhine and Chin States as a result of the current clashes. Please also provide information on any Arakan Army fighters or Tatmadaw personnel killed in fighting and related operations, as well as information about any Tatmadaw personnel or Arakan Army fighters captured.
32. What assistance is being provided to people displaced by the fighting between the Arakan Army in Rakhine and Chin States? Who is providing it? Where is it being provided?

Business and human rights

33. Please provide detailed information regarding where and to whom development projects and/or concessions have been granted since 2011 in Chin, Kachin, Shan and Rakhine States.

Sexual and gender-based violence

34. Please provide information on any criminal charges or disciplinary measures against members of the Tatmadaw and its affiliated groups, other security forces and ethnic armed groups for sexual and gender-based violence that occurred from 2011 to date.
35. With respect to any such processes, please provide information on who conducted the underlying investigation, what the scope of the investigation was, how the investigation was conducted and what measures were taken to protect the security, rights and dignity of survivors of sexual and gender-based violence as well as others who participated in or were affected by the investigation.
36. Please provide information on any medical and psychosocial services afforded to survivors of such sexual and gender-based violence.

Hate speech:

37. Please provide information about any actions that the Government has undertaken to address hate speech in accordance with international human rights law.
38. Please provide information on any investigations into allegations that individuals associated with Ma Ba Tha, and successor associations, including Dhamma Vamsanurakkhita Association of Myanmar and the Association for the Protection of Race and Religion, have propagated hate speech.

Figures of deaths and injuries to civilian population:

39. Please provide information on the number of civilians injured, killed or displaced, including the age and sex of each victim where known, and the number and type of civilian objects destroyed, as a result of fighting or related activities in Kachin, Shan, Rakhine and Chin States since 2011 and any information about those responsible. Please include the dates and locations of each incident, the nature of the harm described (killing, injuring, destruction of civilian objects or displacement), the reported cause of the harm described (including landmines, Unexploded Ordnance (UXOs) and IEDs and the affiliation of the alleged perpetrator/s).

Accountability:

40. Please provide information on dates, locations, and military objectives of operations in Kachin, Shan, Rakhine and Chin States since 2011.
41. Please advise how many members of the Myanmar security force, and in particular members of the Tatmadaw and affiliated groups, as well as members of non-state armed groups, have been investigated, arrested, detained or prosecuted for human rights abuses or violations of international humanitarian law, since 2011. How many of such prosecutions resulted in convictions? With respect to any investigations conducted, who conducted the investigation, what was the scope of the investigation, how was the investigation conducted, what types of people were interviewed, and what measures were taken to protect the security, rights and dignity of those who participated in, or were affected by, the investigation?
42. Please provide an overview of each case, including the accused's position, rank, responsibilities, military affiliations (e.g. Division/Battalion) down to the smallest identifiable command unit, the current status of the case and, if applicable, the decision/sentence of the case. Please also provide any available information on whether the accused person was removed from their position, whether the person is still a member of the Tatmadaw, another part of the Government or a non-state armed group and, if so, what their current position, role and responsibilities are.
43. Please provide information on the status and current location of the Myanmar soldiers who were sentenced to 10 years hard labor at a prison in a remote area after being found guilty of the extrajudicial killings of 10 Rohingya Muslim men in Inn Din Village on or about 2 September 2017.
44. Please provide information on the detainee population in Buthidaung Prison, including the detainee population size and the number of detainees disaggregated by ethnicity and the charges against them and the duration of their sentences. Please also provide the details of the officials on duty in the Buthidaung Prison, their roles and responsibilities, and prison organigrams from June 2012 to present.
45. Please provide information on other prisons in Rakhine and Chin States with the same data as requested for Buthidaung Prison.
46. Please provide information on the "special courts" at the Township and District levels which were opened at Myo Thit Taung Ward in Buthidaung Town, including information on how many detainees have been tried and sentenced by these special courts since January 2017, details on the charges brought against them, the sentences imposed, the processes followed during the legal proceedings, and any additional safeguards in place to ensure the respect and protection of detainees' rights.
47. In the instruction on the formation of the investigation court in March 2019, it was stated that 'the Office of the Commander-in-Chief (Army) issued an instruction to the respective operation commands in order to abide by the rules of engagement in responding to the "terror attacks" on 25 August 2017'. Please provide a copy of the instruction and of the rules of engagement referred to in it.

48. Has the Government conducted any investigations into whether its security forces followed applicable military instructions, including rules of engagement, during clearance operations since 2011? If so, who conducted those investigations, what was the scope of those investigations, how were those investigations conducted, how many people (witnesses in particular) were interviewed, what measures were taken to protect the security, rights and dignity of those who participated in or were affected by the investigation, and what were the investigation outcomes, including recommendations, if any? Have all the recommendations of the investigations been implemented in full?
49. Please provide information on the promotions and awards, if any, given to military personnel for their conduct in relation to the clearance operations in Rakhine State in October 2016 and August 2017.
50. Please provide information about all individuals who were convicted of human rights abuses or international humanitarian law violations who were pardoned by the President of Myanmar under his prerogative power since 2011 or who have had their sentences reduced since 2011.
51. Please provide organigrams containing information on the names, positions and ranks of Unit Commanders in the Tatmadaw and police forces from January 2016 to December 2018, noting any changes in personnel throughout this time frame.

3. Letter sent to the Permanent Mission of the Republic of the Union of Myanmar on 31 July 2019

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REFERENCE: IFFMMY/CG/ha/139

31 July 2019

Excellency,

With reference to resolutions 34/22/, 37/32 and 39/2 of the United Nations Human Rights Council, which respectively created and extended the Independent International Fact-Finding Mission on Myanmar (IIFMM) and through the latter resolution requested it to report to the Council at its 42nd session, due to take place in September 2019, I have the honour to transmit an advance copy of our draft report (attached). In accordance with the standard practice, we invite the Government of the Republic of the Union of Myanmar to review our report and to communicate to us any corrections of a factual nature that it deems necessary, at latest by 18:00, 04 August 2019. We will consider any response carefully and submit the report for processing shortly thereafter.

Any questions regarding this letter and the official response may be directed to myanmarffm@ohchr.org.

Please accept, Excellency, the assurances of my highest consideration.

Marzuki Darusman

Chairperson

Independent International Fact-Finding
Mission on Myanmar established
pursuant to Human Rights Council resolution 34/22

H.E. Mr. Kyaw Moe Tun
Ambassador Extraordinary and Plenipotentiary
Permanent Representative of the Republic of the Union of Myanmar
to the United Nations and other International Organizations
Avenue Blanc 47
1202 Geneva
Email: mission@myanmargeneva.org

4. Letter sent to the Permanent Mission of the Republic of the Union of Myanmar on 11 September 2019



Independent International Fact-Finding Mission on Myanmar established by HRC resolution 34/22

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REFERENCE: IIFFMM/CG/ha/214

11 September 2019

Excellency,

With reference to resolutions 34/22, 37/32 and 39/2 of the United Nations Human Rights Council, which respectively created and extended the Independent International Fact-Finding Mission on Myanmar (IIFFMM). In accordance with its mandate to establish “the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State 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.”

The Mission has prepared the attached Conference Room Paper ahead of the 42nd session of the Human Rights Council, due to take place in September 2019 and is primarily based on investigation undertaken by the IIFFMM, following the extension of its mandate by the Human Rights Council in September 2019.

I have the honour to transmit an advance copy of this Conference Room Paper that will be released on 16 September 2019 in Geneva.

Any questions regarding this letter and the official response may be directed to myanmar.IIFFMM@ohchr.org.

Please accept, Excellency, the assurances of my highest consideration.

Marzuki Darusman
Chairperson

Independent International Fact-Finding
Mission on Myanmar established
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