



General Assembly

Distr.: General
8 August 2019

Original: English

Human Rights Council

Forty-second session

9–27 September 2019

Agenda item 4

Human rights situations that require the Council's attention

Report of the independent international fact-finding mission on Myanmar*

Summary

The present report, submitted to the Human Rights Council pursuant to Council resolution 39/2, contains the findings of the independent international fact-finding mission on Myanmar since its previous report (A/HRC/39/64). The mission provides an overview of its activities and the consolidation of its findings with a view to its handover to the Independent Investigative Mechanism for Myanmar. It details its findings on conflict-related human rights developments in Rakhine, Chin, Shan and Kachin States, and also provides an update on the situation of the Rohingya. The mission concludes the report with its assessment of the situation of impunity and accountability, and a road map and recommendations for the way forward beyond the mandate of the mission.

* Agreement was reached to publish the present report after the standard publication date owing to circumstances beyond the submitter's control.



Contents

	<i>Page</i>
I. Introduction	3
II. Mandate and follow-up to Human Rights Council resolution 39/2.....	3
A. Interpretation of the mandate	3
B. Complementary information.....	4
C. Advocacy	4
III. Handover to the Independent Investigative Mechanism for Myanmar	5
IV. Consolidation of findings	5
A. Confidential list of suspected perpetrators.....	5
B. Contextual and linkage information.....	6
V. Conflict-related human rights developments.....	8
A. Methodology and legal framework.....	8
B. Conflict between the Tatmadaw and the Arakan Army.....	8
C. Situation in northern Myanmar.....	10
D. Kayin State and ethnic Karen communities.....	11
VI. Situation of fundamental freedoms	12
VII. Situation of the Rohingya.....	13
VIII. Impunity and accountability	15
A. Domestic accountability	15
B. International accountability	17
IX. Conclusions and recommendations	19

I. Introduction

1. The present report is submitted pursuant to Human Rights Council resolution 39/2, in which the Council extended the mandate of the independent international fact-finding mission on Myanmar until the new Independent Investigative Mechanism for Myanmar is established and becomes operational. The Council requested the mission to present its final report on its activities to the Council at its forty-second session. The present report focuses on the mission's activities since September 2018, including consolidated findings from its previous report to the Council (A/HRC/39/64),¹ and new findings on developments in the situation of human rights in the country.²
2. In view of its commitment to justice for victims and its handover to the Independent Investigative Mechanism for Myanmar, the mission presents a number of options for the way forward in the pursuit of accountability for gross violations of human rights and serious violations of international humanitarian law. The mission will also submit further detailed findings and recommendations on the situation in Myanmar to the Council at its present session in the form of four conference room papers.
3. The mission comprised three experts: Marzuki Darusman (Indonesia, chair), Radhika Coomaraswamy (Sri Lanka) and Christopher Sidoti (Australia).
4. 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 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 either communication. The present report was shared with the Government prior to its public release. No response has been received.

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

A. Interpretation of the mandate

5. In extending the mandate of the fact-finding mission, 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 is therefore two-pronged. First, the mission continues 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.
6. Second, the Human Rights Council, in its resolution 39/2, mandated the mission to ensure that the large and continually increasing amount of evidence of human rights violations and abuses it has collected is fully documented, verified, consolidated and preserved in order for the material to be effectively shared, accessed and used by the mechanism. The mission interpreted this to mean that it must take all reasonable and appropriate measures for its materials to be effectively shared with the Independent Investigative Mechanism for Myanmar. The Mechanism was not yet deemed operational at the time of reporting.

¹ See also the detailed findings of the fact-finding mission (A/HRC/39/CRP.2), available from www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/ReportoftheMyanmarFFM.aspx.

² The detailed findings of the mission are contained in conference room paper A/HRC/42/CRP.5, available from www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/ReportoftheMyanmarFFM.aspx.

B. Complementary information

7. The mission will also submit further detailed findings and recommendations on the situation in Myanmar to the Human Rights Council at its present session in the form of four conference room papers, in which it addresses key issues that required more detailed investigation since its previous report.³

8. In the first paper (A/HRC/42/CRP.3), the mission addresses the economic interests of the Myanmar military (the Tatmadaw), building upon its recommendation in which the mission called for financial disengagement from the Tatmadaw. The ability of the Tatmadaw to generate revenue through its conglomerates, Myanmar Economic Holdings Ltd. and Myanmar Economic Corporation, and their subsidiaries, and its close relations with State-owned enterprises and crony companies allow it to bypass civilian oversight and evade accountability. Economic activities and commercial relations, including business donations to finance Tatmadaw operations, joint ventures with foreign companies and arms sales and transfers, have all contributed to the country's human rights crisis. In Kachin and Shan States, the Tatmadaw dominates the jade and ruby mining industry. In northern Rakhine, the Government has enlisted the assistance of private corporations to implement its policies under the guise of economic development and reconstruction to alter the demographic landscape and prevent the displaced Rohingya population from returning to their land. The paper provides a basis for further investigation and seeks accountability and targeted sanctions.

9. In the second paper (A/HRC/42/CRP.4), the mission addresses sexual and gender-based violence and the gendered impact of ethnic conflicts in the country. It consolidates some of the previous findings made by the mission and provides additional information, including on the direct consequences of sexual and gender-based violence in Rakhine and northern Myanmar. It also contains recommendations on accountability, rehabilitation and redress.

C. Advocacy

10. The mission prioritized informing the people of Myanmar, in particular affected ethnic communities, of its findings. It had its previous report (A/HRC/39/64) translated into the Myanmar language, and provided a summarized audio version in the Rohingya language. The mission released thematic factsheets and press statements in both languages, posted them on its website and disseminated them widely through community networks.

11. In May 2019, the experts met with representatives of refugees from Myanmar whose testimonies formed part of the basis of the mission's previous findings. The experts deemed it their moral obligation to report back to these communities, as a matter of accountability to the people who trusted the mission with their most personal stories. The experts also briefed victims and witnesses on developments since the mission's previous report, including the mission's relationship with the incoming Independent Investigative Mechanism.

12. The mission also undertook numerous advocacy initiatives in pursuit of the protection of human rights and accountability in Myanmar. The experts participated in many international conferences and meetings with representatives of Member States and regional organizations, including representatives of the Association of Southeast Asian Nations Inter-Governmental Commission on Human Rights, the Myanmar Independent Commission of Enquiry, international financial institutions and the United Nations system, and also with a wide range of civil society representatives, think-tanks and academic institutions.

13. 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.

³ Available from www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/ReportoftheMyanmarFFM.aspx.

III. Handover to the Independent Investigative Mechanism for Myanmar

14. In fulfilling its mandate to hand over its materials to the Independent Investigative Mechanism for Myanmar, the mission was guided by the Mechanism's terms of reference (see A/73/716, annex), United Nations policies and practices, and international standards regarding criminal evidence, as well as best practices and lessons learned from similar entities. The mission's approach was to ensure that, to the fullest extent possible, its materials were shared with the Mechanism and that the organization and presentation of the material was accessible and useful, particularly for potential future criminal prosecution.

15. To this end, the mission developed and implemented guidelines and modalities to store evidence so as to maximize its use in future court proceedings. The mission also considered preservation and transfer of the institutional knowledge accumulated through the experience of its investigators, analysts, interpreters and intermediaries to advance future investigations conducted by the Mechanism.

16. In order to ensure that its material can be effectively used by the Mechanism, the mission conducted an extensive review of its database for quality control and completeness in order to, *inter alia*, include and verify linkage evidence against alleged perpetrators.

17. It is important to note that, to maintain its commitment to the security and privacy of those providing information, the mission will ensure that the Mechanism is aware of the conditions of confidentiality that information providers placed on the information they shared with the mission.

IV. Consolidation of findings

18. The mission has consolidated its findings in relation to individuals suspected of being involved in crimes under international law, including genocide, crimes against humanity and war crimes. It affirms, and elaborates on, its conclusion that Myanmar incurs State responsibility under the prohibition against genocide and crimes against humanity, as well as for other violations of international human rights law and international humanitarian law.

19. The mission applied the "reasonable grounds to conclude" standard of proof.

A. Confidential list of suspected perpetrators

20. The mission has compiled a confidential list of persons suspected of involvement in crimes under international law, including genocide, crimes against humanity and war crimes, since 2011 in Rakhine, Kachin and Shan States. The list goes far beyond the mission's initial list of six high-ranking Tatmadaw generals published in 2018. It includes more than 100 names, including those of members and commanders of the Tatmadaw, the police, the border police and other security forces, including prison officials, as well as civilian authorities, including district-, state- and Union-level representatives, private individuals and members of non-State armed groups. The list is based on the information available to the mission at the time of reporting, and is therefore not an exhaustive list of suspected perpetrators.

21. The list also includes numerous entities with which alleged perpetrators were affiliated, including specific security force units, non-State armed groups and businesses. The mission has provided the list to the Mechanism, together with its linkage materials. A copy of the list will be held in the custody of the United Nations High Commissioner for Human Rights and can be shared, with the appropriate approvals and under the conditions set out by the mission and in coordination with the Mechanism, with competent and credible bodies pursuing accountability in line with recognized international norms and standards. The High Commissioner can also use the list, with the appropriate approvals and under the conditions set out by the mission, to manage the human rights due diligence policy on United Nations support to non-United Nations security forces, the Policy on Human Rights Screening of United Nations Personnel and other similar policies.

B. Contextual and linkage information

22. The mission also focused on consolidating and collecting additional contextual and linkage information from Rakhine, Kachin and Shan States, which may assist the Mechanism in its assessment of potential individual liability for crimes under international law.

1. Rakhine

23. The mission's further investigations have strengthened its findings that the circumstances and context of the "clearance operations" against the Rohingya that began on 25 August 2017 gave rise to an inference of genocidal intent, and that those attacks were pre-planned and reflected a well-developed and State-endorsed policy aimed at the Rohingya.

24. The mission affirms its finding that, prior to the "clearance operations" conducted in 2017, government officials threatened Rohingya villagers to force them to accept national verification cards. The said officials called meetings, instructed Rohingya village representatives to attend and told them to accept the cards, or else face violent consequences, in a manner that indicated genocidal intent. The fact that the officials were addressing the participants as Rohingya village representatives and not as individuals indicates that the officials were issuing their threats against the Rohingya people as such, based on their ethnicity, religion or race, or a combination thereof.

25. The mission conducted interviews with non-Rohingya, including ethnic Rakhine, Mro and Khumi, to obtain new information about the "clearance operations". These non-Rohingya sources substantiated the mission's findings about the targeted and violent nature of the "clearance operations". They strengthen the mission's conclusion that these groups of non-Rohingya villagers fell under the effective control of the Tatmadaw. The Tatmadaw commanders therefore had command responsibility obligations in relation to them under international law (see A/HRC/39/64).⁴

26. As part of its consolidation activities, the mission also copied and archived online government materials that reflected statements and decisions of government officials, including both military and civilian authorities, relevant to the crimes under international law that the mission documented. The mission was also able to consolidate findings regarding attacks by the Arakan Rohingya Salvation Army against non-Rohingya communities.

27. In its previous investigation, the mission concluded on reasonable grounds that beatings, sexual violence, including rape, burning of genitals and nudity, and other egregious acts of violence, some of which resulted in death, had been committed against Rohingya prisoners detained in Buthidaung prison following the 2012 violence and that these acts amounted to the crimes against humanity of torture, inhumane acts and persecution.⁵ The mission now concludes on reasonable grounds that those crimes committed in Buthidaung prison continued until at least 2018.

28. The mission has found that the acts of violence committed against Rohingya prisoners also amount to torture pursuant to customary international law.⁶ The prison guards who perpetrated acts of violence against the Rohingya detainees are public officials, and the mission also found that the ethnic Rakhine detainees who inflicted severe pain or suffering on Rohingya detainees acted with the consent or acquiescence of the prison authorities.

29. The mission collected information concerning the identity of potential individual perpetrators, namely authorities present at Buthidaung prison. They have been added to the confidential list of suspected perpetrators. The mission notes, in particular, that States that are parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment have an obligation to extradite or prosecute alleged perpetrators of torture.

⁴ See also A/HRC/39/CRP.2.

⁵ Ibid.

⁶ Myanmar is not a State party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; article 1 of the Convention, however, reflects customary international law.

2. Kachin and Shan

30. The investigations conducted by the mission have furthermore substantiated patterns and trends of serious violations of international human rights law and international humanitarian law in Kachin and Shan States from 2011 to 2018. The mission collected additional information on potential security units and individuals who may have contributed to those violations. The violations included the failure by the Tatmadaw to respect the right to life by means of acts of murder, including in the context of forced labour, and its use of unlawful detention, as well as apparent enforced disappearances, acts of torture or other cruel, inhuman or degrading treatment or punishment, and the perpetration of sexual and gender-based violence, including rape and gang rape of women and girls. In many cases, the violations committed by the Tatmadaw were directed at men and women suspected of being members of, or being associated with, ethnic armed organizations. The mission collected additional information on human rights abuses and violations of international humanitarian law, including unlawful forced recruitment, by those organizations.

31. The mission collected significant new information on Tatmadaw attacks in Tanai Township, Kachin State during the operations conducted from November 2017 to April 2018. It concluded that the Tatmadaw intended to make civilians who remained in the mining area the object of an airstrike on 26 January 2018, launch indiscriminate attacks against them or attack them without taking all feasible precautions to avoid, or at least minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects, all of which are violations of customary international humanitarian law.

32. The mission also corroborated the facts and circumstances of the attack by the Tatmadaw on 11 April 2016 on Awng Lat village, Kachin State, and the killing of two residents of the Maing Hkawng camp for internally displaced persons in Mansi Township, Kachin State, last seen on 31 January 2018 in the custody of the Tatmadaw.

33. The mission also received further information on the Tatmadaw attacks in Laiza from 2012 to early 2013, including incidents in mid-April 2012, when Tatmadaw soldiers violently interrogated a woman about the whereabouts of her husband and placed a man in forced labour. The man, together with seven others, was accused of being a member of the Kachin Independence Army and was beaten with his hands and legs tied.

34. The mission's investigations into the conduct of the Kachin Independence Army also raised serious concerns that it might not be taking all feasible precautions to protect the civilian population and civilian objects under its control against the effects of attack, or be taking measures to the extent feasible to avoid locating military objectives within or near densely populated areas.

35. The mission collected new information on the military units and the commander potentially responsible for the murder of two teachers on 19 January 2015 in Kawng Kha Shabuk village in Kutkai Township, Shan State.

V. Conflict-related human rights developments

A. Methodology and legal framework

36. The mission continued to base its factual findings on the "reasonable grounds" standard of proof (A/HRC/39/64, para. 6). Between February and June 2019, the mission conducted more than 400 interviews with victims and eyewitnesses, 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.

37. 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 diplomats, in person and remotely.

38. The mission adhered strictly 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.

39. The mission assessed facts under international human rights law, international humanitarian law and international criminal law, as applicable in Myanmar. It also assessed facts in the light of general rules of State responsibility.

B. Conflict between the Tatmadaw and the Arakan Army

40. On 4 January 2019, as Myanmar celebrated Independence Day, the Arakan Army launched coordinated attacks on four border police outposts in northern Buthidaung Township, Rakhine State, killing 13 police officers. While there had been clashes between the Arakan Army and the Tatmadaw since 2015, the conflict intensified in October 2018, with a significant escalation in hostilities in January 2019, affecting nine townships in Rakhine State and Paletwa Township in Chin State.

41. On 7 January 2019, the spokesperson of the Office of the President’s reported that the Government had ordered the military to carry out “counter-insurgent operations”. By July 2019, several Light Infantry Divisions, notorious for their disregard for international human rights and humanitarian law, were deployed to the region from across Myanmar to bolster the units stationed there.

42. The Rakhine people have long felt politically disenfranchised, economically marginalized and subjected to discrimination because of their ethnicity. The Arakan Army has a political agenda of Rakhine self-determination through a “confederacy”. It has been excluded from the National Ceasefire Agreement and the unilateral ceasefire declared by the Tatmadaw, extended until 31 August 2019.

43. The mission documented attacks by the Tatmadaw with indications that they were indiscriminate or where commanders failed to take appropriate precautionary measures, leading to the death and injury of civilians as well as the destruction of civilian property. In some of these attacks, the Tatmadaw used weaponry with wide-area effect in close proximity to the civilian population, without advance warning.

44. In 2019, the Tatmadaw has been increasing the rounding up and interrogating male ethnic Rakhine villagers, including minors, accusing them of belonging to the Arakan Army. They are often subjected to violent interrogations, at times amounting to torture or other cruel, inhuman or degrading treatment or punishment.

45. The mission corroborated two incidents of deaths of ethnic Rakhine men in Tatmadaw custody. On 2 May 2019, in Kyauk Tan village, Rathedaung Township, Tatmadaw soldiers, including members of Light Infantry Division 22 and Battalion 537 and members of the border police, detained 275 men suspected of links to the Arakan Army in a school. On the first night of the detention, Tatmadaw soldiers shot into the unarmed crowd, killing six villagers and injuring eight others. Over the course of two weeks, the Tatmadaw gradually released most of the men. Approximately six men remain detained, charged with terrorism offences. The bodies of the deceased were not returned to their families but were buried.

46. On 10 April 2019, in Let Ka village, Mrauk-U Township, Tatmadaw soldiers from Light Infantry Divisions 22 and 55 detained 27 males, including at least one minor, suspected of being Arakan Army members. Taken first to a military detention facility, the detainees were severely tortured over a period of weeks. Three detainees died in custody. Although the Government claimed the men’s deaths were due to illness and suicide, the autopsy report was never made public and their bodies were cremated, not returned to their families. The 24 survivors, including the minor, were forced to sign confessions and were subsequently moved to police detention, where (at the time of writing) they are still being held on terrorism

charges. The mission calls upon the Government to effectively investigate these two incidents as potential war crimes.

47. The mission documented cases where the Tatmadaw took over schools and monasteries to use them as a base for their military operations. Fighting between the Tatmadaw and the Arakan Army in Mrauk-U Township also puts civilians and civilian objects in danger. Artillery shells have landed in close proximity to buildings and structures in the ancient city, raising additional concerns that those buildings and structures could face damage from direct attack or from vibrations from explosions. Mrauk-U qualifies as cultural property under the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, to which Myanmar is a party.

48. The mission received credible reports of members of ethnic Rakhine and Chin communities being forcibly used by the Tatmadaw as porters, under conditions amounting to forced labour. This practice was often accompanied by violent acts that sometimes amounted to torture or other cruel, inhuman or degrading treatment or punishment.

49. The brunt of the conflict has been borne by civilians, regardless of ethnicity or religion. Since October 2018, more than 32,000 people have been displaced, predominantly ethnic Rakhine but also Chin and other ethnic groups, many of whom are now living in makeshift temporary displacement sites with minimal access to humanitarian assistance or basic services.

50. The situation of internally displaced persons has been exacerbated by restrictions imposed by the Myanmar authorities on humanitarian access to Kyauktaw, Ponnagyun, Buthidaung, Maungdaw and Rathedaung Townships. The World Food Programme and the International Committee of the Red Cross are the only humanitarian agencies to which the Government has formally granted access, and even their access is intermittent. Movement restrictions have also been imposed, including a curfew from 9 p.m. to 5 a.m., in Ponnagyun, Rathedaung, Kyauktaw, Mrauk-U and Minbya Townships since 2 April 2019.

51. The humanitarian and movement restrictions are purportedly for security reasons. They are consistent, however, with the Tatmadaw “four cuts” policy to limit the access of insurgent groups to food supplies. These restrictions have undeniably led to food insecurity for displaced and vulnerable populations.

52. The mission found no evidence of the Tatmadaw engaging in widespread sexual violence against civilians as a part of its military strategy to combat the Arakan Army. This is in striking contrast to the widespread and systematic sexual violence perpetrated against the Rohingya during the “clearance operations” conducted in 2017. 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. The mission also concludes that the soldiers used sexual violence against the Rohingya as a strategy to degrade the population during their “clearance operations”.

53. Although the Tatmadaw is responsible for the majority of the violations documented by the mission, the Arakan Army has also committed human rights abuses and violations of international humanitarian law against civilians, including the unlawful forced labour of Chin minorities, at times accompanied by humiliating and degrading treatment. The Arakan Army has also engaged in looting of Chin property, usually foodstuffs, often making promises of future repayment that were never kept.

54. The mission remains deeply concerned that the current protracted situation, already grave, could deteriorate further into a crisis, with wide-reaching implications for the country and the region.

C. Situation in northern Myanmar

55. The unilateral ceasefire declared by the Tatmadaw came into effect in December 2018, and at the time of writing had been extended until 31 August 2019. It covers five regional commands in the east and north and effectively includes conflicts with the Kachin Independence Army, the Myanmar Democratic Alliance Army and the Ta’ang National

Liberation Army, none of which have signed the National Ceasefire Agreement of 2015. The Tatmadaw has now turned much of its attention to Rakhine and Chin States, even though the situation in northern Myanmar remains volatile.

56. Although the unilateral ceasefire has resulted in a marked reduction in hostilities in Kachin State, fighting between the Tatmadaw and ethnic armed organizations has continued in northern Shan State. Northern Myanmar remains heavily militarized, contributing to continuing insecurity for the populations. Fighting continued between the Shan State Army-South and the Ta'ang National Liberation Army. In Shan State, fighting between the Shan State Army-South and the Shan State Army-North began to decline in May 2019, when both sides agreed to cease hostilities after talks aimed at promoting unity among Shan.

57. Throughout the ceasefire, the Tatmadaw and, in one documented case, a militia group have continued to detain men and boys on suspicion of supporting or being members of ethnic armed organizations, and have subjected them to torture and other cruel, inhuman or degrading treatment or punishment. Some detainees have been released to return to their homes, while the mission received reports that others have been charged under the Unlawful Associations Act, having been forced under torture to say that they are affiliated to such groups. The Tatmadaw also detained people for periods of several days to several weeks to work as porters or in other functions, under conditions amounting to forced labour. The mission also received credible accounts that the whereabouts of persons arrested by the Tatmadaw remain unknown. The Government has the responsibility to investigate such cases and to ensure that they do not amount to enforced disappearances.

58. The mission identified attacks by the Tatmadaw in Shan State that should be further investigated for having been indiscriminate and for precautionary measures not having been taken, such as making every feasible effort to ensure that targets were military objectives. One case involved the killing by the Tatmadaw of one person and the injuring of others when it opened fire on two suspected Ta'ang National Liberation Army fighters in June 2018. Another incident involved the Tatmadaw shooting at two young men in civilian clothing in February 2019, resulting in the death of one of them.

59. Men and boys of fighting age are particularly targeted by Tatmadaw as suspected members of ethnic armed organizations, based on their ethnicity. They have been arrested, detained, tortured or ill-treated, taken for forced labour or killed. Women and children are left vulnerable and displaced in a situation of humanitarian crisis. The recruitment practices of ethnic armed organizations have had a similar adverse gender impact.

60. There are continued concerns regarding conflict-related sexual violence. The mission identified cases between April 2018 and July 2019 where Tatmadaw soldiers subjected women and, in one case, a girl to sexual violence, including rape, gang rape and attempted rape, as well as forced nudity, leading to them being ostracized by their communities and government authorities. The mission also received reports of Tatmadaw soldiers raping and subsequently killing a woman in northern Shan State. In cases verified by the mission, despite the complaints lodged with the authorities, no effective investigations were conducted or sanctions applied against the perpetrators.

61. The mission received credible but limited information that some ethnic armed organizations were responsible, to varying degrees, for the arbitrary deprivation of liberty and the failure to protect the civilian population under their control against the effects of attacks. The mission also received reports of forced recruitment of men and women by some ethnic armed organizations operating in northern Myanmar.

62. The situation of internally displaced persons remains of grave concern in the context of restrictions on humanitarian support. More than 106,500 people have been living in 169 camps in Kachin and Shan States since 2011, 36 per cent of them in contested areas and areas controlled by ethnic armed organizations. United Nations agencies have not been permitted by the Government to deliver assistance in contested areas since June 2016. Access to people within Government-controlled areas continues to decline. There is no effective access to almost 20,000 people in remote areas, as the Government has denied travel authorizations for United Nations humanitarian agencies. Effective humanitarian access has not been granted to 55 per cent of displaced persons, affecting the population's livelihoods, food security and access to education and health care. The shrinking humanitarian space has heightened the

vulnerability of internally displaced persons, with an acute impact on women and children, who are exposed to landmines, arbitrary arrests and sexual violence while looking for food or farming their land in conflict-affected areas.

63. The mission received reports that, despite the unilateral ceasefire and government efforts to close internally displaced person camps in northern Myanmar, very few internally displaced persons have returned to their land. Information received by the mission indicates that fear of renewed hostilities, lack of guarantees of non-recurrence, landmine contamination and the lack of infrastructure and services are among the key impediments to safe and voluntary returns. In northern Myanmar, civilians remain trapped by fighting between the Tatmadaw and the ethnic armed organizations on the one hand, and the continued fighting among the organizations on the other.

64. Amendments to the Vacant, Fallow and Virgin Land Management Act that came into force in September 2018 have exacerbated pre-existing tensions relating to land tenure in ethnic areas. The mission received information that farmers in ethnic rural areas, where most fallow and virgin lands are located, had limited awareness of the amendments made in 2018 to the law, and many of those who did know about them perceived them as illegitimate. The amended law disproportionately disadvantages internally displaced persons in northern Myanmar by concentrating ethnic communities that rely on communal usage of land. Residents in camps for internally displaced persons, especially those residing in areas controlled by the Kachin Independence Organization/Kachin Independence Army, told the mission that they feared being arrested if they left to register their lands with the authorities. The mission recalls that lack of access to land and livelihoods has long been considered one of the drivers of the country's ethnic conflicts.

D. Kayin State and ethnic Karen communities

65. The Tatmadaw has been responsible for a long legacy of severe and regular violence against civilians, including sexual and gender based violence in its hostilities with the Karen National Liberation Army (KNLA). Since the signing of the 2012 ceasefires, the levels of violence and abuse greatly declined in Karen communities. Since early 2018, however, Tatmadaw encroachment on territory controlled by the Karen National Union, which the latter considers to be a breach of the National Ceasefire Agreement, has resulted in military skirmishes that have seriously affected civilians.

66. The mission collected preliminary information on allegations of the Tatmadaw firing on and shelling villages, destroying property, injuring civilians and committing violent acts in connection with road construction. Further investigation is required to determine the existence and extent of any international human rights violations and abuses, as well as compliance with applicable international humanitarian law.

VI. Situation of fundamental freedoms

67. In the context of the mission's mandate to address conflict-related human rights issues, journalists and activists who investigate and report on the Tatmadaw's operations and violations of international human rights law and international humanitarian law continue to face criminal charges, threats and intimidation because of their work. The mission found that the Tatmadaw has become increasingly intolerant of criticism, resorting to more punitive legal measures against those reporting on their operations. In this the Tatmadaw has the active support of the civilian side of the Government.

68. To silence its critics, the Tatmadaw has made frequent use of criminal defamation under section 505 (b) of the Myanmar Penal Code and of section 17 (1) and (2) of the Unlawful Associations Act, which provides for at least five years of imprisonment for any person who manages, promotes or assists an unlawful association.

69. In the context of reporting on the conflict between the Tatmadaw and the Arakan Army, editors and publishers of three publications have been subject to criminal charges under these laws. In addition, the Government has restricted journalists' access to Rakhine

State, effectively preventing reporting on the conflict. Collectively, these measures have resulted in a heightened reluctance to report on the Tatmadaw, or the conflict more generally, for fear of reprisals. This has a chilling effect on the media.

70. On 20 June 2019, the Myanmar Ministry of Transport and Communications instructed mobile telephone operators in Myanmar to suspend Internet access in nine townships in Rakhine and Chin States. The shutdown created an information blackout in an area where, as documented by the mission, the Tatmadaw has been committing serious violations. The Internet is essential for documenting and sharing information, including on human rights violations and abuses. Without Internet access, people revert to non-Internet-based forms of communication, such as telephone calls and text messages, heightening the risk of surveillance and arrest. On 9 July 2019, the Office of the President indicated that there would be no time frame for the end of the shutdown.

71. The mission found similar incidents of restrictions on freedom of expression in the context of reporting on Tatmadaw operations in northern Myanmar. In December 2018, three activists were imprisoned in Kachin State for “defamation” of the Tatmadaw under section 505 of the Penal Code. They were released in April 2019, following international pressure.

72. The mission found that hate speech directed at ethnic Rakhine has increased considerably on social media, as has hate speech against ethnic Bamar by Rakhine supporters. Hate speech against the Rohingya also continues to be disseminated on social media platforms. Facebook is the leading platform for hate speech in Myanmar. In August 2018, Facebook removed the pages of 20 individuals and organizations, including that of the Commander in Chief. However, unofficial pages, with virtual identities, supporting the Tatmadaw remain active. In February 2019, Facebook shut down the official pages of the Arakan Army, the Kachin Independence Army, the Myanmar Democratic Alliance Army and the Ta’ang National Liberation Army, which were identified as “dangerous organizations”, in an effort to “reduce the likelihood that Facebook will be used to facilitate offline harm”. The ethnic armed organizations have also set up new pages with virtual identities and continue to post on Facebook.

73. The combination of restrictions on freedom of expression with respect to reporting on the Tatmadaw and the proliferation of hate speech against ethnic Rakhine and other ethnic groups feeds a one-sided narrative that provides fertile ground for incitement to violence. The mission raised these issues with Facebook, which responded positively to removing content amounting to hate speech. However, much more is required, especially in preventing and removing hate speech far more quickly and in addressing the spread of removed content that has been reposted prior to removal.

74. The Government has the obligation and the ability to ensure protection of fundamental freedoms. The release of Reuters journalists Wa Lone and Kyaw Soe Oo in May 2019 demonstrated the influence of international pressure on the Government in exercising its responsibility.

75. The responsibility for tackling hate speech lies both with the Government and with Facebook and other social media outlets. In May 2019, Ashin Wirathu, a radical monk who leads the Ma Ba Tha movement, was charged with sedition following what were considered to be “defamatory remarks” against State Counsellor Aung San Suu Kyi. The mission documented a consistent pattern of incendiary hate speech by Ashin Wirathu against the Rohingya community since 2012. However, he has not faced legal repercussions for his speech, nor has its relationship to the violence against the Rohingya been investigated.

VII. Situation of the Rohingya

76. Some 600,000 Rohingya are estimated to remain in Rakhine State. They continue to be subjected to discriminatory policies and practices, including segregation and severe restrictions on their movements; deprivation of citizenship; denial of economic, social and cultural rights; physical assaults constituting torture or other cruel, inhuman or degrading treatment or punishment; arbitrary arrest; and, in some areas, hostility from members of ethnic Rakhine communities that the mission found also to constitute persecution and other

prohibited crimes against humanity. The Government of Myanmar claims that it would welcome back Rohingya returnees from Bangladesh. In the light of the continuing persecution of remaining Rohingya, the legal conditionalities placed on return and the unacceptable living conditions that await returnees, the mission regards these statements and associated measures as lacking sincerity.

77. The continued restrictions on the freedom of movement of Rohingya in Rakhine is one of the clearest indicators of their chronic persecution. The restrictions began during the violence in 2012 and have been gradually tightened since then. Following the “clearance operations” that began on 25 August 2017, the Government enforced more severe movement restrictions on the Rohingya through increased security and patrols and a larger number of security checkpoints across Rakhine State. Individuals risk arrest, detention and imprisonment if they fail to produce required travel documents at checkpoints.

78. The mission documented cases of security forces and ethnic Rakhine beating, extorting money and confiscating livestock or other valuables from Rohingya villagers in and around their villages. At the time of writing, the Government continued to impose curfews from 6 p.m. to 6 a.m. in Maungdaw, Buthidaung, Kyauktaw, Ponnagyun, Rathedaung, Minbya and Mrauk-U Townships. While restrictions affect the freedom of movement of all Muslims in Rakhine State, a discriminatory system of local orders has a disproportionate impact on Rohingya communities in northern Rakhine due to their lack of documentation. There have been no changes to tight restrictions on inter-township and inter-State travel of Rohingya. In central, northern and southern parts of Rakhine State, verbally issued instructions and threats by Rakhine elements pressure Rohingya to remain in their villages.

79. The conflict with the Arakan Army may account for some of the current restrictions, especially since January 2019, when heavy fighting between the Arakan Army and the Tatmadaw began. However, in its previous report, the mission documented similar restrictions targeting the Rohingya well before that date. The continuing denial of humanitarian access for United Nations agencies since 10 January 2019 is also a continuation of the Government’s humanitarian restrictions that purposefully and severely affect the rights of the Rohingya. These restrictions on access have a direct and severe impact on the lives of all communities, including in rural areas of Maungdaw, Buthidaung and Rathedaung Townships; the situation for the Rohingya is, however, further exacerbated by their dependence on humanitarian assistance due to movement restrictions, lack of documentation and arbitrary treatment by security forces.

80. The movement restrictions also affect access by the Rohingya to economic, social and cultural rights, particularly basic services for health care and education, and livelihoods. New Rohingya arrivals in Bangladesh reported lack of access to sustainable livelihood activities, such as farming, fishing, bamboo cutting and collecting firewood, as a major reason for their recent departure. The Tatmadaw and ethnic Rakhine continue to prevent farmers from cultivating their lands and deliberately target their sources of food, including by burning paddy fields, confiscating farming and fishing tools, confiscating rice and other food stocks, and deliberately killing or confiscating livestock, such as cows, goats and chickens. A result is a dramatic rise in food prices. Some have reported that Rohingya lands have been used by the Tatmadaw for their own commercial purposes.

81. Some 4,000 displaced Rohingya remain trapped in Konarpara, on the Myanmar-Bangladesh border, a “zero-point” (no man’s land) zone. Despite being predominantly on Myanmar territory, they are unable to return to their villages as Myanmar has not permitted their return. This is a further indication of the Government’s insincerity with regard to the proposed repatriation process.

82. At the time of writing, some 128,000 persons, including 126,000 Rohingya and 2,000 Kaman Muslims, remained in camps for internally displaced persons in central Rakhine, living in appalling conditions, with no foreseeable or sustainable plan for their return to their villages. This is the situation two years after the Advisory Commission on Rakhine State called upon the Government of Myanmar, with the support of international partners, to improve living conditions in the camps pending the development of sustainable solutions for the displaced and to develop a comprehensive strategy for the closure of camps in accordance with international standards.

83. The Government has a new draft policy on the closure of the camps that, in principle, is a positive development towards the implementation of the Commission's recommendations. It should be recalled, however, that, in the past, the Government had also claimed to have taken steps towards the implementation of the Commission's recommendations on camp closure, but in ways that fell short of international human rights norms and standards. Rohingya continued to live in camps declared closed and to depend on humanitarian assistance due to the lack of access to livelihood opportunities and basic services, and continued to be subjected to restrictions on their freedom of movement. The policy of camp closure was described to the mission thus: "Rohingya are still detained in the same area; it is just not called a camp anymore."

84. According to satellite imagery and witness testimony about the construction of new camps for displaced Rohingya refugees, the Government seems to be continuing its plan to keep the Rohingya off their lands to further segregate them from the rest of the population.

85. In May 2019, the tripartite memorandum of understanding between the Office of the United Nations High Commissioner for Refugees, the United Nations Development Programme and the Government of Myanmar aimed at creating conducive conditions for the voluntary, safe, dignified and sustainable repatriation of refugees from Bangladesh was extended for one year. The mission concludes, however, that the Government has not taken the steps necessary to put the requisite conditions for the return of the refugees in place.

86. The Government has also made little progress in repealing or amending the laws that institutionalize the persecution of the Rohingya. It has not implemented the recommendation made by the Advisory Commission on Rakhine State on setting in motion a process to review the 1982 citizenship law, nor its recommendations relating to the citizen verification process. On the contrary, the mission found that the authorities had intensified efforts, through threats and intimidation, to force the Rohingya to accept national verification cards. The mission found that the authorities had also forced Rohingya to accept the cards as a condition of release from prison. The mission received no reliable evidence that the cards had resulted in the relaxation of restrictions and improvement of rights for Rohingya cardholders.

87. The mission also received reports that the limited number of displaced Rohingya who had been returned to Myanmar from India were forcibly issued national verification cards as part of the administrative procedures enabling their return.

88. Forced labour remains deeply entrenched and prevalent in Rakhine State. The mission continued to document credible accounts of forced labour, including of the Tatmadaw forcing Rohingya to carry heavy packs and military and non-military equipment, work on construction projects and clear land for military bases. Rohingya were also being forced to build new camps that seemed destined for them in Buthidaung Township. The Tatmadaw would beat or slap forced labourers if they slowed the pace of their work, and would often not provide them with adequate food.

89. Having considered the Government's widespread use of movement restrictions against the Rohingya, its physically abusive behaviour towards the Rohingya, its severe restrictions on humanitarian access, its failure to provide safe and sustainable opportunities for displaced Rohingya to return to their homes and its failure to amend or repeal laws that are foundational to the persecution of the Rohingya, the mission has reasonable grounds to conclude that the situation of the Rohingya remains largely unchanged since its previous report. If anything, the situation of the Rohingya in Myanmar is worse after another year of living in deplorable conditions. It also has reasonable grounds to conclude that the Government's acts continue to be part of a widespread and systematic attack that amounts to persecution and other crimes against humanity against the remaining Rohingya in Rakhine State.

90. Furthermore, having considered the Government's hostile policies towards the Rohingya, the living conditions to which it subjects them, its continued denial of their citizenship and ethnic identity, 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 "clearances operations" of 2016 and 2017, the mission also has reasonable grounds to conclude that there is a strong inference of genocidal intent on the part of the State, that there is a serious risk that genocidal actions may

recur, and that Myanmar is failing in its obligation to prevent genocide, to investigate genocide and to enact effective legislation criminalizing and punishing genocide.

Situation of the Rohingya in Bangladesh

91. The number of new Rohingya arrivals in Bangladesh decreased significantly in 2019. However, the future of the more than 1 million Rohingya refugees there remains uncertain.

92. The mission found that, while most refugees wish to return home, the vast majority are unwilling or unable to do so under the current circumstances. They are well aware of the continuing persecution of the remaining Rohingya in Rakhine and of the prevailing situation there. The vast majority are unlikely to return until and unless the gross violations of international human rights end and the Government of Myanmar implements effective guarantees to acknowledge or recognize their citizenship.

93. Nonetheless, the camps in Cox's Bazaar are not a long-term solution. The absence of formal education and of livelihood opportunities raises serious human rights issues that are beyond the mission's mandate. Trafficking and other forms of illicit activities have been reported to the mission.

94. The onus is on Myanmar to establish swiftly the necessary conditions for the voluntary, safe, dignified and sustainable return of refugees, including by providing guarantees of citizenship.

VIII. Impunity and accountability

A. Domestic accountability

95. 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. The Prosecutor of the International Criminal Court, in her request for authorization of an investigation pursuant to article 15, concluded much the same.⁷ The Government of Myanmar is simply unwilling to end impunity for these violations, especially those committed by security forces. Impunity is also structural; it is built into the legal framework and the system of governance, including the Constitution, article 343 (b) of which stipulates that decisions of the Commander in Chief concerning military justice matters are "final and conclusive", with no right of appeal. The Government's outright rejection of the mission's findings is also indicative of its unwillingness to pursue accountability at the domestic level.

96. There has been no effective criminal investigation into the violations documented by the mission in its previous report. Instead, of the six people publicly named by the mission, two highest-ranking military officials remain in their command positions. According to media reports quoting Commander in Chief Senior General Min Aung Hlaing, Major-General Maung Soe, Commander of Western Regional Military Command, was removed not for human rights violations but for "shortcomings in timely response to the early warnings of the use of force and lawless acts". According to media reports, the Tatmadaw also announced that Lieutenant-General Aung Kyaw Zaw had resigned in mid-2018 due to poor health and "weakness in serving duty".

97. The Government's unwillingness to pursue accountability was demonstrated graphically by the release of seven Tatmadaw soldiers in November 2018. The seven had been convicted and sentenced to 10 years of imprisonment for the killing of 10 Rohingya civilians in Inn Din village, Maungdaw Township, on 2 September 2017. They were pardoned by Senior General Min Aung Hlaing and released after less than a year in detention. By contrast, two Reuters journalists whose investigation of the incident had led to the

⁷ See www.icc-cpi.int/CourtRecords/CR2019_03510.PDF, para. 235.

soldiers' convictions were themselves imprisoned for 18 months, significantly longer than the time served by the actual perpetrators of the crimes.

98. The mission found that victims from a diverse range of ethnicities have little trust in the authorities' ability and willingness to ensure justice.

Independent Commission of Enquiry

99. In June 2018, shortly before the mission released its report, the Government of Myanmar established the Independent Commission of Enquiry to examine the events of 2017 in Rakhine State. The Commission was to publish an interim report in April 2019 and its final report by 30 July 2019.⁸ At the time of writing, neither report had been released. In July 2019, the Government extended the Commission's mandate for an additional six months to continue its work. Under its mandate, the Commission's recommendations can only be directed to enhancing peace and stability and ensuring law enforcement and the rule of law. The chair has emphasized that it is not an accountability mechanism for human rights violations and abuses and violations of international humanitarian law. The Commission relies on the Office of the President for financial, administrative, technical and logistical support.

100. In March 2019, the mission met with the Commission chair, Rosario Manalo, in Geneva. The chair reported that the Commission had a secretariat with clerks and one staff, and an investigation team with two local legal experts supported by two foreign experts. The limited information the chair provided about the Commission's resources and methodology raised serious concerns for the mission; the Commission's mandate provides that it "may undertake study/investigative visits to relevant areas to obtain direct and first-hand information". The Commission has made no public statement of methodology, and did not provide the mission with a detailed description of its methodology. The Commission undertook one mission to Rakhine State, in August 2018, during which it met with government officials and interviewed between 8 and 10 victims. The chair confirmed that the interviews held during the field mission were undertaken in the presence of security forces.

101. At the time of writing, the Commission had not visited Cox's Bazaar, and the Rohingya with whom the mission spoke feared reprisals for speaking to Myanmar government officials about Tatmadaw brutality in Rakhine.

102. Under international law, Myanmar has a duty to investigate, prosecute and punish gross human rights violations and serious violations of international humanitarian law, in particular where they amount to crimes under international law. The establishment of a commission could have been a positive step towards fulfilling these obligations; however, the Commission's lack of a clear mandate, its opaque methodology and its questionable operating procedures, as well as its dependence on the Government of Myanmar, undermine the possibility that its investigations would lead to the identification of perpetrators, the promotion of accountability and justice, and redress for victims.

B. International accountability

103. Against such a background of domestic impunity, the mission reaffirms its conclusion that accountability can only be advanced by the international community. The mission has assessed the options available.

1. International Criminal Court

104. On 6 September 2018, following a request submitted by the Office of the Prosecutor of the International Criminal Court pursuant to article 19 (3) of the Rome Statute, Pre-Trial Chamber I decided by majority vote that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar, which is not a State party to the Statute, to Bangladesh. The Chamber urged the Office to supplement the investigation of the crime

⁸ See www.icoe-myanmar.org/key-terms and www.moi.gov.mm/ppd/sites/default/files/Vol-71%2CNo-44.pdf.

against humanity of deportation with the crime against humanity of persecution and other inhumane acts. On 4 July 2019, having completed its preliminary examination, the Office filed a request to initiate an investigation.

105. The mission is in close cooperation with the Office of the Prosecutor, and strongly supports its work and any opportunity for international criminal accountability. It is noteworthy, however, that the Office will only examine the events in northern Rakhine State. It does not have jurisdiction to investigate the many other serious crimes under international law that the mission has documented in other areas of Myanmar. Further, if authorized, while the Office may examine a broad range of crimes committed against the Rohingya, it will only be able to specifically prosecute crimes that involve the crossing of an international border (namely, the border between Myanmar and Bangladesh). The mission therefore reiterates its recommendation that, in the interests of justice for victims and accountability of perpetrators, the Security Council refer the situation of Myanmar to the International Criminal Court or establish an ad hoc tribunal.

2. Ad hoc international criminal tribunal

106. In the absence of a referral by the Security Council to the International Criminal Court, the mission strongly encourages the Council to adopt a resolution, under Chapter VII, to create an ad hoc international criminal tribunal without delay. Such a tribunal would be free from the Court's current jurisdictional constraints, and its temporal, territorial, personal and subject matter jurisdiction could be shaped to meet the specific context and requirements, including the needs of victims. An ad hoc international criminal tribunal could also serve as a repository of information and evidence, and facilitate other justice initiatives, including domestically. It could be specifically mandated to engage actively in outreach to communities across Myanmar, enabling much-needed awareness-raising, participation and education with regard to human rights and justice issues. An ad hoc international criminal tribunal for Myanmar would involve a long-term commitment from the international community, including sustained financial and political support. Should the Council be unwilling to establish such a tribunal, the General Assembly should consider using its powers within the scope of the Charter of the United Nations to advance such a tribunal.

3. International Court of Justice

107. The mission welcomes the efforts of States, in particular Bangladesh and the Gambia, and the Organization of Islamic Cooperation to encourage and pursue a case against Myanmar before the International Court of Justice under the Convention on the Prevention and Punishment of the Crime of Genocide. Elected officials in Canada and the Netherlands have also called on their Governments to pursue such a case. A case before the International Court of Justice would not displace individual criminal accountability through the International Criminal Court or an ad hoc tribunal; rather, it is directed towards the obligations and accountability of Myanmar as a State party to the Convention on the Prevention and Punishment of the Crime of Genocide. Both avenues can and should be pursued in parallel.

108. A successful case before the International Court of Justice could result in the Court ordering Myanmar to pursue effective criminal accountability. It would focus on perpetration by Myanmar of genocide and the State's failure to prevent and punish genocide. It also has the potential to result in orders for provisional measures and reparations that could aim to reform genocide-related laws and policies. Reparations, if ordered, should include restitution, compensation and satisfaction with the purpose of reversing, to the extent possible, the consequences of the State's unlawful acts and re-establishing the situation that would likely have existed if the acts had not been committed.

4. Hybrid tribunal

109. A hybrid model, with both national and international participation, would offer a degree of national ownership over the accountability process and proximity to victims. Such tribunals have been used successfully in other situations. The mission, however, reiterates its view that the current conditions in Myanmar are not conducive for a hybrid accountability model.

110. The persistent refusal by the Government of Myanmar to acknowledge and condemn past human rights violations, the heavy influence of the military in the administration of justice and the lack of an independent judiciary, prosecutors and police force for the past 60 years demonstrate the country's basic incapacity to join in a hybrid tribunal. In addition, the military benefits from extensive constitutional protections, while current civilian government and military officials are among the alleged perpetrators of gross violations of human rights and serious violations of international humanitarian law. A hybrid model would face enormous legal obstacles and the certainty of being subjected to strong political interference. The Government's continuing perpetration of violations of international law is an additional factor that makes a successful hybrid judicial process impossible in the circumstances prevailing in Myanmar.

111. A successful hybrid model would be possible only with, at a bare minimum, public acknowledgement by the Government that gross violations of human rights and serious violations of international humanitarian law have been committed. It would require substantial legal and institutional reform, including capacitating the police, prosecution and forensic sectors, in particular the administration of justice system. Most notably, guarantees and an understanding of the independence of judiciary and the legal profession and a firm commitment to independence are essential. In addition, any hybrid accountability mechanism would need to be designed through a process of genuine, informed and participatory consultation, in particular with victims and their families. A functioning victim and witness protection scheme would also need to be established to ensure that testimonies may be taken without reprisal or fear of reprisal.

5. Responsibility of the international community

112. The mission reiterates its call upon Member States to exercise jurisdiction to extradite or investigate and, if appropriate, prosecute alleged perpetrators of crimes under international law committed in Myanmar. Given that, at this stage, the jurisdiction of the International Criminal Court is limited, States must exercise universal jurisdiction to this end.

113. The mission also recalls that States have additional responsibilities and obligations under applicable international human rights law, international humanitarian law, arms transfer law and general rules of State responsibility. As a general matter, States must not knowingly 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, including 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. The Convention on the Prevention and Punishment of the Crime of Genocide also specifically requires all States parties to prevent and punish genocide. This includes a duty to make use of the means they have available to deter those suspected of preparing genocide or reasonably suspected of harbouring specific intent to do so.

IX. Conclusions and recommendations

114. Almost four years since the victory by the National League for Democracy in November 2015 and a year from the next parliamentary elections scheduled for 2020, Myanmar is at a critical juncture. The democratic transition has barely begun. It has been tainted by the gravest crimes under international law committed against the Rohingya and other ethnic groups, a plethora of unresolved and deeply entrenched conflicts, and a weak and deteriorating record on the protection of fundamental freedoms. Accountability remains elusive. The military is out of control.

115. In its previous report, the mission made a number of observations on the way forward. One year on, there has been little progress.

116. Essential security sector reform has not even been discussed. The Tatmadaw retains an unrelenting grip on the country's political and economic life, permeating all sectors of Myanmar society. Without the transformation of the Tatmadaw into a modern, professional national defence force and a complete overhaul of the

Constitution to ensure civilian oversight and control, genuine democratization is impossible.

117. The new parliamentary committee tasked with reviewing the Constitution has an opportunity to pursue a clearer separation of powers and guarantees of fundamental freedoms. Its success hinges largely on the Tatmadaw conceding its political and economic privileges, willingly or under domestic and international pressure. Financial and political isolation of the Tatmadaw is essential to encourage and support domestic action to break its stranglehold on the country's future.

118. Democratization must be accompanied by the settlement of 70 years of conflict. The Rohingya in Rakhine continue to be persecuted. This does not bode well for the 1 million Rohingya refugees yearning to return to their lands. The mission has concluded that equitable, sustainable economic development in Rakhine is impossible unless and until all restrictions on the Rohingya are lifted. The Government of Myanmar must guarantee their most basic fundamental human rights. It must implement effective guarantees to acknowledge or recognize the citizenship of the Rohingya through a direct citizenship application process, with the rights of due process guaranteed. Such a process cannot be followed through the national verification card procedures; 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. In the absence of certainty over their status, the Rohingya cannot, and simply will not, return. Consideration should be given to enabling Rohingya to apply for citizenship from Bangladesh and elsewhere.

119. The mission found many commonalities in the experiences of ethnic groups in Myanmar. Discrimination and marginalization are the common thread. As the latest conflict between the Tatmadaw and the Arakan Army demonstrates, the counter-insurgency strategy of the Tatmadaw remains consistent with its "four cuts" policy, with another ethnic group falling victim to its brutal tactics. Indeed, the domination of one ethnic group over others is preventing the development of Myanmar as a unified nation State.

120. The mission has concluded that, despite the structural and systemic challenges, the Government led by the National League for Democracy can do far more to move the democratic transition forward. The National League for Democracy has an absolute majority of seats in both houses of the parliament, even when the military seats are counted; it has full control over all Myanmar laws, apart from the Constitution, and is able to repeal or amend the country's most discriminatory laws, including those pertaining to citizenship and the four laws for the protection of race and religion enacted in 2015. It can repeal or amend the repressive laws governing freedom of expression and association. The National League for Democracy requires only the moral courage and the political will to do so.

121. The Government has yet to condemn its human rights violations, past and present. Pursuing genuine accountability either at the domestic or international level remains as urgent a priority today as it was in 2018. Myanmar should cooperate with the ongoing proceedings in the International Criminal Court, and expand the Court's jurisdiction through a formal declaration.

122. The mission welcomes international efforts to advance accountability, including the decision by the Human Rights Council to establish the Independent Investigative Mechanism for Myanmar, the initiatives taken by the International Criminal Court to investigate and possibly prosecute those responsible for the alleged deportation and other crimes against Rohingya, the moves to bring a case to the International Court of Justice and the Secretary-General's independent review of the role of the United Nations in Myanmar. The Independent Investigative Mechanism will play a crucial role in facilitating accountability; States must, however, work with it to initiate prosecutions. Similarly, the United Nations must institute the cultural change necessary to address the systemic failures of its past engagement in Myanmar.

123. Despite these important efforts, the mission deeply regrets the continuing inability of the Security Council to act by referring the situation of Myanmar as a whole

to the International Criminal Court. The mission again recommends that the Council resolve to refer the Myanmar situation to the Court or to establish an ad hoc international criminal tribunal. The Council should also impose an arms embargo and targeted sanctions, including asset freezes and travel bans against alleged perpetrators of international human rights law and international humanitarian law. It is incumbent upon the Council, as the United Nations body with primary responsibility for peace and security, to act.

124. Myanmar should turn to the international community for assistance, and the international community should continue to provide its support for genuine efforts to address impunity and to promote justice in Myanmar.

125. The mission reiterates the recommendations it made in its previous report, as well as those made in its complementary papers on the economic interests of the military and on sexual and gender-based violence, and the gendered impact of ethnic conflicts in Myanmar.⁹

126. In addition, the mission is cognizant of the fact that with the termination of its mandate, an important investigation, monitoring and reporting function will be left unfulfilled. It therefore calls upon the Human Rights Council to exercise its prevention role, to contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies.¹⁰

127. In this spirit, the mission also calls upon the Human Rights Council to continue to monitor the situation in Myanmar, including progress on accountability, to react promptly and decisively to early warning signs of impending human rights crises, and to take all steps necessary to prevent violations of international human rights law and international humanitarian law, including by creating new mandates or expanding existing ones. Similarly, the mission calls upon the United Nations High Commissioner for Human Rights to continue to monitor the situation in Myanmar closely, to advocate for accountability and to consider issuing regular public reports, in accordance with the global mandate of the High Commissioner.

⁹ A compilation of all the recommendations made by the fact-finding mission will be circulated in document A/HRC/42/CRP.6.

¹⁰ See General Assembly resolution 60/251, para. 5 (f).