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Session on

State Crimes Allegedly Committed in Myanmar against the Rohingyas, Kachins and Other Groups

University of Malaya, Faculty of Law
18-22 September 2017, Kuala Lumpur, Malaysia

JUDGMENT

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I. GENERAL HISTORICAL AND JURIDICAL FRAMEWORK

I.1 The competence of the Permanent Peoples' Tribunal

The Permanent Peoples' Tribunal (PPT) is an international opinion tribunal, independent from any state authority. It examines cases regarding violations of human rights and the rights of peoples.

Promoted by the Lelio Basso International Foundation for the Rights and Liberation of Peoples, the PPT was founded in June 1979, in Bologna, Italy, by a broad spectrum of legal experts, writers and other cultural community leaders from 31 countries. The PPT is rooted in the historical experience of the Russell Tribunal on Vietnam (1966-67) and on dictatorships in Latin America (1974-1976). The importance and strength of decisions by the PPT rest on the moral weight of the causes and arguments to which they give credibility, as well as the integrity and capability to judge of the Tribunal members.

While fully recognising the reference role of the institutions of the international community of states and the juridical instruments, the PPT assumed as its Statute the Universal Declaration of Peoples' Rights (Algiers, 1976), which underlines its aim: to give visibility and legitimacy to the authority of peoples when states and the international bodies fail to protect their rights, due to geopolitical reasons or other motivations.

Complaints heard by the Tribunal are submitted by the victims, or by groups or individuals representing them. The PPT calls together all parties concerned and offers the defendants the possibility to make their own arguments heard. The panel of the judges is selected for each case, combining members who belong to a permanent list and individuals who are recognised for their competence and integrity. From June 1979 to the present, the PPT has held 43 sessions whose results and judgments are available at: www.permanentpeoplestribunal.org.

The permanent and increasing challenge of the original working hypothesis has been confirmed by the spectrum of cases which have requested the competence of the PPT as the instrument which could make visible and qualify the violations of their fundamental rights to self-determination and to life, in the absence of, or denial in, responses at the institutional, juridical and political level. In this sense, the verdicts and deliberations of the PPT represent a narrative of international law as seen from the side of peoples, when their status of victims is translated into that of the only legitimate subjects to whom the public and private powers are accountable, beyond their legal impunity.

For the purpose of this case on the violations of the rights of peoples of Myanmar, it is useful to refer specifically to the doctrine developed by the PPT in the deliberations where state crimes have been committed against individuals and groups of the same countries, transformed from citizens into enemies, and/or “other” and, as such, exposed in full impunity to processes of discrimination leading to a genocide, recognised only too late, or even never: Argentina and its *desaparecidos*, 1980; East Timor, lead case of the first neo-colonial genocide, 1981; Guatemala and its indigenous populations, 1983; the determinants and the responsibility for the Armenian genocide, 1984; the peoples of the ex-Yugoslavia, 1995; victims of Islamic fundamentalism of Algeria, 2004; the communities of Colombia, 2006-08. An even more specific reference must be made to the two sessions on the case of Eelam Tamils (Dublin, 2019; Bremen, 2013) which could be considered, from a methodological and doctrinal point of view, an integral part and foundation for this deliberation.

I.2 The general context

After World War II, Burma, later to be known as Myanmar, formerly governed as part of British India, was recognised as a nation state and granted independence in 1948 by the United Kingdom. Within its borders were a large number of ethnic and religious minorities dominated by the majority Bamar, or Burmese, mainly Buddhists, who had been the primary beneficiaries of colonial rule. From 1962, when a military coup brought a repressive regime to power, the minorities began to suffer increasing discrimination and loss of human rights, including citizenship in varying degrees.

While the undemocratic nature and loss of human rights under the military junta was obvious to the international community, little action was taken to bring about a change. Much moral support was given to the oppositionists, in particular Aung San Suu Kyi, who was a political prisoner for nearly two decades.

The current situation of mass flight from the country by the Rohingya and increased human rights abuse against them and other non-Burman Buddhist minorities is not a new phenomenon. There have been similar significant, if smaller, episodes of mass flights in previous years, notably in 1978, 1992 and 2012. Nevertheless, the international community did little to avert a catastrophe although the signs were clearly there. It appears that placing an array of sanctions on the country, and supporting the National League for Democracy and its leader Aung San Suu Kyi, winner of a Nobel Peace Prize for her human rights struggle, was thought sufficient to bring about a significant change in Myanmar’s human rights record. Eventually it seemed a good result had been achieved as Aung San Suu Kyi was elected to Parliament in 2012, and made State Counsellor (effectively Prime Minister) in 2016, under

the new 2008 constitution. But that constitution essentially ensured real power remained with the military.

Despite the widely acclaimed “transition to democracy”, a visit by President Obama in 2012 and the lifting of sanctions, the human rights situation did not improve and was observed by many to be getting worse. In response, no effective action was taken by the United Nations (nor by other international institutions such as ASEAN), despite numerous warnings, e.g. from the Special Rapporteur on the situation of human rights in Myanmar (four reports from 2014-2016 and another in March 2017). To what extent the current anti-Muslim and anti-terrorism beliefs that have gained strength since 9/11 have ensured sympathy for the Myanmar government and forestalled a unity of commitment to act on behalf of the people of Myanmar is not clear. It may well be that such beliefs, along with falling support in the country due to economic failures, led the government to embark on an escalation of its repression and human rights abuses.

In these circumstances, the PPT moved to inquire into the situation consistent with its view that genocide prevention is also a matter for the peoples of the world to be aware of and thence to demand action. That it is now known that a Report by a UN commissioned expert who said the situation in Myanmar demanded urgent action to prevent a catastrophe was ignored and even suppressed, makes clear that peoples’ organisations such as the PPT, independent from states and from INGOs, have an important role to play in bringing a judicial spotlight to bear, albeit without power of enforcement, standing alongside the victims and letting their voices be heard in the unfulfilled task of preventing such future human tragedies so that we can finally say with confidence: Never again.

I.3 The specificity and the term of reference of this session

The attention of the PPT for the situation of peoples of Myanmar dates back to 2013, at a time when Myanmar’s (already ongoing) violations were hardly considered, and even less well known on the world stage. This was the hidden face of a state seen as undergoing a transformation from military to democratic control, with a woman icon of peace at the helm portrayed as an indisputable guarantee for a future in which all the citizens of the country could be recognised as inviolable subjects of their rights to a life in dignity.

A clear alarm was sounded of an impending genocide at a number of events leading up to this session, including a London conference at which the United Nations Special Rapporteur for Human Rights,

Tomás Ojéa Quintana stated “There are elements of genocide in Rakhine with respect to Rohingya”⁹. This was followed by the Opening Session of the PPT on Myanmar State Crimes against Rohingya, Kachin and Other Groups, convened in London (Queen Mary University, 6-7 March 2017)¹⁰. The reports, the Witness testimonies and in particular the closing remarks of that session, must be considered and referred to as an integral part of this Judgment. Nevertheless, the findings of the PPT, as well as of a number of other observers from various UN bodies, national and international NGOs and research teams¹¹ did not manage to draw the concerted attention of the international community nor of wider public opinion, let alone any concrete preventive action.

The preparatory phase for this session was transformed into one of urgency due to the rapidly – even if not unexpectedly – evolving situation with the dramatic “clearance” incidents of October 2016 in Rakhine state, even more so because of the absolute invisibility to the world of what had already been characterised by the PPT and others as a drastic case requiring immediate attention.

Only on the eve of this session, the suffering of the Rohingya peoples finally and belatedly seized world attention, as the increasingly perilous situation of the Rohingya burst into press coverage of hundreds of thousands of Rohingya fleeing a large-scale military build-up followed by massive attacks launched by the Myanmar and police military forces as well as paramilitary and civilians, purported to be in response to a number of coordinated assaults on Myanmar border posts on 25 August 2017. As a result, within the three weeks leading up to this session, nearly half a million people crossed the border from western Myanmar into Bangladesh, telling harrowing stories of the carnage they left behind as they crammed into open fishing boats or trudged along muddy paths carrying babies and the elderly and bundles of meagre possessions, seeing plumes of smoke soar into the air as their homes and villages were burnt to the ground.

Many of these refugees arrived in Bangladesh presenting serious injury from these burnings, from machete, knife and gunshot wounds, from rape and other sexual assault as well as from land mines apparently laid even during the immediate past along the paths to the border. Of particular concern

⁹ London Conference on Decades of State-Sponsored Destruction of Myanmar’s Rohingya, London School of Economics, 28 April 2014.

¹⁰ Opening Session of the PPT on Myanmar State Crimes against Rohingya, Kachin and Other Groups, convened in London (Queen Mary University, 6-7 March 2017). See <https://tribunalonmyanmar.org/?s=london+session> and, for the closing remarks of the panel of the judges: <http://permanentpeopletribunal.org/closing-remarks-of-the-panel-of-the-judges-opening-session-on-myanmars-state-crimes-against-rohingya-kachin-and-other-groups/>.

¹¹ For the list of some of the most notable reports, as presented by the Prosecution to this full session, see Annex 5.

was the fact that more than half of these refugees were children¹², many separated from their families, a large number of whom reported having seen their parents and siblings killed before their eyes.

The consensus of many sources on the humanitarian crisis of the population of Rakhine state, both within their land and in their search for refuge, could not have been clearer, and it was openly and repeatedly underlined even by the UN Secretary-General António Guterres in his official letter to the UN Security Council on 13 September, despite the constant denial of the civil and military authorities of Myanmar.

As clearly set out in the indictment, which synthesised the available overwhelming written, visual, factual and analytical documentation, together with requests from the three victim groups for the convening of a full PPT session, our task went beyond giving more visibility to what already known, to include the following, according to the terms of reference established in the London session:

- a) to broaden the focus from the most tragically and acutely affected population of the Rohingyas to the general policy of the Myanmar state on Kachins and other ethnic, national and religious groups;
- b) to document and qualify the historical and structural roots and causes of the events, to avoid considering them as occasional incidents and strictly internal affairs of a still young and “fragile democracy”, with no political, strategic, economic interactions with and impact on regional and global actors and interests;
- c) to qualify juridically the severity and the responsibility of the crimes not only in view of the most pertinent criminal qualification, but to stress and justify with the greatest emphasis the absolute priority for concrete responses to the urgency of the needs of the affected population.

This dramatic exodus of Rohingya widened the matters to be considered by the Tribunal to include the enormous challenge to Bangladesh in receiving these refugees, in addition to the estimated 300,000 Rohingya refugees still in Bangladesh as a result of the previous waves of violence. While the Bangladesh government initially hesitated to open the border, and reportedly even forcibly returned some people to Myanmar, this policy changed in the face of the undeniable humanitarian crisis and need to assist hundreds of thousands of desperate people, as expressed by the Bangladesh Prime Minister, Sheikh Hasina, when she visited Kutupalong camp on 12 September.

¹² Children were estimated by the International Organization on Migration (IOM) to comprise 58% of the 507,000 newly arrived refugees, “Situation Report: Rohingya Crisis”, Cox’s Bazar: Inter Sector Coordination Group, 1 Oct 2017.

The affected people are not merely victims waiting for humanitarian responses – certainly essential, though delayed and partial. They are, and must be considered first and foremost, the central subjects of rights, whose recognition and restitution should be the first, structural implication of a judgment based on the inviolable legitimacy of individual and peoples' rights.

It is hoped that the participation of the victims themselves in this Tribunal is in a small way restitutive such that they could reconstruct their lives once again.

II. THE PROCEDURE FOR THIS SESSION OF THE PPT

II.1 The Panel of Judges

The Panel of Judges was composed of:

Daniel Feierstein (Argentina), who chaired the panel

Zulaiha Ismail (Malaysia)

Helen Jarvis (Cambodia-Australia)

Gill H. Boehringer (Australia)

Nursyahbani Katjasungkana (Indonesia)

Shadi Sadr (Iran)

Nello Rossi (Italy)

Two of the judges appointed to the Permanent Peoples' Tribunal were not able to attend: Denis Halliday (Ireland), for severe and acute health reasons, and Bellur Narayanaswamy Srikrishna (India), because a visa was unable to be arranged in time. For the professional profiles of the components of the panel, see the Annex 1.

Gianni Tognoni and Simona Fraudatario assured the consistency of the procedures, the overall coordination of the session and the material editing of this text.

II.2 The Prosecution

The Indictment was drawn up and presented to the Tribunal by the Prosecution led by Ms Doreen Chen, and consisting of a team of lawyers from the Centre for Human Rights and Advocacy (Centhra) led by Mr Azril Mohd. Amin and including Dir Kheizwan Kamaruddin, Fahmi Abd. Moin, Luqman Mazlan, Dr Mohd Afandi Salleh, Rafna Farin Abdul B. Ra'far and Dato Rosal Azimin Ahmad, as well as Dr Thomas McManus from the School of Law, Queen Mary University, London (Annexe 2).

III.3 The right to defence

In strict compliance with its Statutes, all the steps and official documents related to the case of this session – from the results of the London Opening Session, to the first formal convocation of the Kuala

Lumpur Session to the official program and the Indictment – were transmitted: a) to the representatives of the Myanmar civil and military authorities; b) to directly relevant international agencies and governing bodies as shown below.

Myanmar authorities notified and invited to present a defence:

- Senior General Min Aung Hlaing, Commander in Chief, the Tatmadaw (Myanmar Armed Forces), Naypyidaw
- Daw Aung San Suu Kyi, Minister of Foreign Affairs and Myanmar State Counsellor
- Vice President Myint Swe, Chair of the Myanmar Presidential Investigation Commission on Rakhine, Former Lt-General and former Chief of Military Intelligence
- General Myat Tun Oo, Chief of Military Affairs and Security Office of the Commander in Chief
- Win Mra, Chair of the Myanmar Human Rights Commission

UN, EU and other authorities invited to participate:

- António Guterres, Secretary-General of the United Nations
- Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights
- Professor Yanghee Lee, Special Rapporteur on the Human Rights Situation in Myanmar
- Ahmed Shaheed, Special Rapporteur on Freedom of Religion or Belief
- Fernand de Varennes, Special Rapporteur on Minority Issues
- Adama Dieng, Special Adviser of the Secretary-General on the Prevention of Genocide
- Federica Mogherini, High Representative of the European Union for Foreign Affairs and Security Policy /Vice-President of the European Commission
- Kofi Annan, Chair, Rakhine Commission
- Kazi Reazul Hoque, Chairman of the National Human Rights Commission of Bangladesh.

While no answer was received from the Myanmar representatives, a formal acknowledgment of the invitation was given by a number of the above representatives of international agencies, with a request to be kept informed of the results of the session, and Mr Kazi Reazul Hoque directly addressed the Tribunal regarding the impact of the impact of Rohingya refugees on Bangladesh.

The right to defence, which is central in the Statutes of the Tribunal and has been a carefully observed practice throughout all its proceedings, was communicated to the concerned parties in this case also, in

due time. As no answer was received, at the beginning of each of the three days of public audience, the Chairperson of the Panel of Judges asked if any representative of the Myanmar Government was present in the room, and no response was received.

According to the Statutes, due to the absence of any response from the authorities, the PPT procedure of an *ex officio* defence was activated, and the resulting text was read publicly by the representative of the Secretariat of the PPT. The full text of the speech given by the State Counsellor, Aung San Suu Kyi, on 19 September 2017 in an address to the assembled diplomatic corps in Naypyidaw, which had already been listened to collectively by the Panel of Judges, and which was formally and partially replayed in front of the audience, was assumed to be the most complete and updated expression of the position of the Myanmar authorities. Because of its relevance, it is considered as an integral part of this deliberation (Annex 3).

II.4. The proceedings

The public hearings of the PPT took place in the Faculty of Law, University of Malaya in Kuala Lumpur, Malaysia. Videos of the hearings together with press coverage and some of the supporting testimony and evidence can be found on the web site www.tribunalonmyanmar.org. The program, together with essential information on the Prosecution and Experts who gave testimonies are provided in Annex 4.

II.5 Security measures

The Panel of Judges assured *in camera* hearings for those witnesses for whom it was determined desirable to provide a close protection of their identity.

III. PRESENTATION OF THE FACTS

III.1. Serious violations of human rights and allegations of war crimes and crimes against humanity against the Kachin people

“We are still birds in a cage”... in this way, the first Kachin witness before the Peoples’ Tribunal on Myanmar in Kuala Lumpur (Mr Jimmy H pang) summarised the condition of his people after reading a long list of specific cases of torture and execution suffered since the 2011 breakdown of the 17-year-long ceasefire between the Kachin Independence Army (KIA) and the Burmese Army.

Background

Since achieving independence from the UK on 4 January 1948, the state of Myanmar has been at almost ceaseless war with the approximately 40% of its 55 million people who make up the country’s 135 recognised ethnic groups as well as minority religions and other unrecognised ethnic groups.

Kachin State, the most northerly state of the country in the foothills of the Himalayas bordering China and India, “is one of the six, later to become seven, ethnic nationality states that were created when Burma became independent in 1948.”¹³ The 1947 Constitution of the Union of Burma states: “territories that were heretofore known as the Myitkyina and Bhamo Districts shall form a constituent unit of the Union of Burma and be hereafter known as “the Kachin State.”¹⁴ In the 2014 census the state’s population was reported as being 1.689 million or 3.3% of the total.¹⁵

The Kachin people in Myanmar, who consist of six major subgroups, refer to themselves collectively as Jinghpaw Wunpawng. They number between 1 and 1.5 million and are largely resident in Kachin State but also form a substantial part of the population of the northern section of Shan State. Kachin populations also exist across the borders from Kachin State in China and India. Under British colonial rule, many of these previously animist people became Christian, now predominantly Baptist.¹⁶

¹³ Mandy Sadan, “History and Ethnicity in Burma: Cultural Contexts of the Ethnic Category 'Kachin' in the Colonial and Post-Colonial State, 1824-2004”, PhD, School of Oriental and African Studies, University of London, 2004, p. 18.

¹⁴ Article 6 *The Constitution of the Union of Burma, 24 September 1947* (<http://burmalibrary.org/docs3/CONSTTTN.47>)

¹⁵ *2014 Myanmar population and housing census*. [Yangon]: Ministry of Information, 2014.

¹⁶ Mandy Sadan, *Testimony given at the London opening session of the Tribunal; see also her Being and Becoming Kachin: histories beyond the state in the borderlands of Burma*. Oxford: Oxford University Press, 2013.

War and increasing marginalisation have been the dominant features of life for the Kachin people since at least the early 1960s. The KIA was established in 1961, and the 1962 military coup by General Ne Win ushered in more than three decades of war, during which many previously Kachin towns and villages were destroyed and thousands of people were killed. One disturbing feature of this armed conflict is the extent to which child soldiers have been used along with forcible recruitment:

“Burma is believed to have more child soldiers than any other country in the world. The overwhelming majority of Burma’s child soldiers are found in Burma’s national army, the Tatmadaw Kyi, which forcibly recruits children as young as eleven. ... Children are also present in Burma’s myriad opposition groups, although in far smaller numbers. Some children join opposition groups to avenge past abuses by Burmese forces against members of their families or community, while others are forcibly conscripted. Many participate in armed conflict, sometimes with little or no training”.¹⁷

Under the national policy of Burmanisation and substantial inwards migration that took place during that period of warfare, the Kachin progressively lost many of their customs and traditions, including competence in the six Kachin languages which were, since colonial times at least, written in Roman rather than Burmese script.

The ceasefire from 24 February 1994 until 9 June 2011 brought an end to intense fighting, but led paradoxically to an ever increasing militarisation of the region with the stationing of many Burmese/Myanmar central army battalions. The introduction of an oppressive developmental model involving massive alienation of traditional lands and natural resources (notably their precious jade), accompanied by increasing dispersal and marginalisation of the Kachin through significant urban immigration of lowland Burmese people, including replacing many Kachin animist or Christian sacred places with Buddhist shrines or pagodas, generated demoralisation and a debilitating drug scourge.¹⁸ This shift is reflected in the findings of the Myanmar 2014 census that 64% of the population in Kachin state reported as Buddhist, and just 34% Christian.

¹⁷ “*My gun was as tall as me*”: *child soldiers in Burma*. New York: Human Rights Watch, 2002, p.2. See also Kai Chen, *Comparative study of child soldiering on Myanmar-China border: evolutions, challenges and countermeasures*. Singapore : Springer, 2014; and *A Dangerous Refuge: Ongoing child recruitment by the Kachin Independence Army*, London : *Child Soldiers International*, 2015).

¹⁸ *War and peace in the borderlands of Myanmar: the Kachin ceasefire 1995-2011*, edited by Mandy Sadan. Copenhagen: NIAS Press, 2016. On the economic transformation, see especially, Chapter 5, Kevin Woods, “The commercialisation of counterinsurgency: battlefield enemies, business bedfellows in Kachin State” and his article “Ceasefire capitalism: military–private partnerships, resource concessions and military–state building in the Burma–China borderlands”, *Journal of Peasant Studies*, 38:4, 2011, p.747-770.

The KIA refused to transform into a Border Guard Force (BGF) under direct control of the central Myanmar army, as stipulated in the 2008 Constitution. The KIO rejected such a process, demanding a comprehensive political dialogue prior to any disarmament or demobilisation, and this was used as the grounds for large-scale military assaults by the Myanmar Army. Since fighting resumed, it is estimated that 10% of the population has been displaced, with at least 120,000 people now in IDP camps (at least two-thirds are under KIO control and have faced numerous restrictions and denials of humanitarian aid).¹⁹

Testimony and evidence

Written and oral testimony was presented to the Opening Session of the Tribunal by the Kachin Women's Organisation (KWO). This related a number of incidents, including the aerial bombardment followed by shelling of Laiza (the de facto capital of the KIO-controlled zone of Kachin State) on 14 January 2013, killing three civilians and injuring others, as well as an attack on the same day on Kahtan village far away from any conflict zone; the shooting of 9th grade school pupil Ja Seng Ing in 2012 and the subsequent arrest and detention of her father when he tried to pursue the case of her death; the shooting of civilians sheltering in a church and seizure and enforced disappearance of Deacon Lum Hkwang in 2011; air and artillery attacks on many villages and churches and on three IDP camps near Lai Hpawng in 2016; rape, murder, looting, and blocking of humanitarian assistance to IDP camps.

The KWO's written report described destruction of indigenous cultural and religious sites in addition to Christian churches:

“In northern Kachin State, the Tatmadaw [Myanmar/Burmese military] has also shown a total disregard for Kachin cultural heritage in Putao. In 2014, at a popular site at Machyang Baw known as the ‘rock dragon’ and regarded as sacred in the folklore of spirit-worshipping Kachin, a local army commander commissioned construction work to attach a painted dragon head to the natural rock formation and built a pagoda at the top of the site against the wishes of local people. A similar incident took place the following year when a pagoda was constructed at National Jawng, an island in the Mali Hka River, famous in Kachin cultural heritage as the gathering place of ancestral spirits.”²⁰

¹⁹ Protection Sector Kachin, “Humanitarian Access in Kachin State, Protection Sector (PWG – GBV SS – CP SS) Update Note,” November 2016.

²⁰ *War crimes and crimes against humanity: voices from the Kachin people of northern Burma*. London: KWO, 2017, p. 7.

The Kuala Lumpur session likewise received both written and oral testimony from further witnesses, including from the Kachin National Organisation (KNO) and the Kachin Women's Association of Thailand (KWAT).

Mr Jimmy H pang and his colleague of the Kachin National Organisation (KNO) presented details and supporting photographs of 20 cases of alleged war crimes of "Shelling, Killing and Torturing and arbitrary arrest", and ten cases of "Burning Houses, ransacking and blocking aids for IDPs".

Ms Nang Htoi Rawng from the Kachin Women's Association of Thailand (KWAT) presented evidence on widespread sexual violence, including a detailed report on the rape and murder of two volunteer teachers in Kawng Kha village in northern Shan State on 20 January 2015 (see further below).²¹

Original video footage, including a detailed analysis of a military attack by Myanmar Army battalions 74 and 276 on Nam Lim Pa village, Shwigu District, Kachin State, from 8 to 11 October 2011, and the attack on Laiza on 14 January 2013 mentioned above, screened and was introduced as supporting evidence to his Expert testimony by Mr Ryan Roco.

In addition, a number of witnesses testified *in camera* of crimes that they had suffered personally and who had felt compelled to leave their homeland in fear for their lives, following forced labour serving as porters for the Myanmar Army, sexual violence, beatings, torture, execution or jailing and enforced disappearance of friends and relatives and/or military attack on their villages.

The direct testimony presented to the Tribunal corroborated a wealth of information given in a number of substantial written reports by various human rights organisations and researchers that were also submitted to the Tribunal by the Prosecution regarding, *inter alia*, the following acts against the Kachin people:

Arbitrary detention

One Witness [name withheld] described the arbitrary arrest of her younger brother alleged to be a KIA spy. After the family was unable to raise the demanded payment of 300,000 kyat to secure his release, he was sent to trial and sentenced to 10 years' detention. The Witness herself was then closely followed and pressed to become involved in collection of drug money on behalf of soldiers or face a similar allegation of KIA involvement. In fear of a fate similar to her brother she decided to flee Myanmar and is now resident in Malaysia.

²¹ *Justice delayed, justice denied: seeking truth about sexual violence and war crime case in Burma, with a special focus on the Kawng Kha case, in Kachin Land.* Legal Aid Network and KWAT, January 2016.

The acts detailed in her testimony were echoed by others, and support documentation in a special dossier of 36 cases brought under the 1908 Unlawful Associations Act against people accused of contact with the Kachin Independence Army researched and compiled in 2012 by independent human rights defenders in Burma.²²

Forced labour

One Witness [name withheld] told the Tribunal that she had five times been pressed into serving as a porter for Myanmar military units. This experience was recounted by a number of other witnesses, including one who reported in camera that at 15 years of age on 10 November 2015 he was seized at night and taken from his family tent in their field. Together with two other young men, he was forced to carry a heavy basket of arms and ammunition, fed only scraps of food and forced to drink from a stream which soldiers upstream had used for bathing and as a toilet. He managed to escape during a fire fight and fled to Malaysia.

At least eight men from Nam Lim Pa were unlawfully arrested, detained and forced to serve as porters for the Burma Army. Except for one who managed to escape, the fate and whereabouts of the remaining men are unknown. An additional 35 porters were alleged to have been called from neighbouring villages on 16 October 2011.²³

Torture

Even as the Tribunal's KL hearings were taking place, military officers reportedly confessed at a court martial hearing on 19 September 2017 to torturing and murdering three Kachin civilians, who were collecting firewood near their Mai Hkwang displaced persons camp in Mansi township on 25 May, when they were detained by the 319th Light Infantry Battalion. Their mutilated bodies were found three days later.²⁴

The Prosecution submitted to the Tribunal a report detailing the systematic use of torture and other cruel, inhuman, and degrading treatment or punishment ("ill treatment") of more than 60 civilians by Myanmar authorities from June 2011 to April 2014 by members of the Myanmar Army, Myanmar Police Force, and Military Intelligence.²⁵

²² *Cases under the Unlawful Associations Act 1908 brought against people accused of contact with Kachin Independence Army*. Hong Kong, distributed by the Asian Human Rights Commission & Asian Legal Resource Centre, January 2013 (http://www.burmalibrary.org/docs14/AHRC-Unlawful_Assoc_Act-Kachin.pdf).

²³ *Crimes in northern Burma: results from a fact -finding mission to Kachin State*, [n.p.], Partners, November 2011, p.25-27.

²⁴ "Tatmadaw officials admit to killing Kachin villagers", *Burma News International*, 20 September 2017.

²⁵ *"I thought they would kill me": ending wartime torture in Northern Myanmar*. Bangkok: Fortify Rights, 2016.

Enforced disappearance

A number of witnesses described how their relatives or friends have not been seen again after being arrested or taken by force to serve as porters by Myanmar military or other authorities. The well-known case of Su Ja Roi, taken in 2011, was also recounted.²⁶

In December 2016 two ethnic Kachin Baptist leaders, who had guided journalists reporting on Burmese airstrikes that allegedly severely damaged a Catholic church, were apparently forcibly disappeared in Northern Shan State, and were last seen on 24 December being taken to a military base.²⁷

Rape and other forms of sexual abuse

Witness Ms Nang Htoi Rawng reported that KWAT had documented more than 600 cases of rape and sexual violence against Kachin women and girls, including in front of their family members, also gang rape and detention with repeated rape over a period of time. She reported that these incidents have not decreased since the formation of the new NLD-led government. Two specific incidents were described in detail:

- the rape and murder of Ms Maran Lu Ra (20 years) and Ms Nan Tsin (21 years), two volunteer teachers in Kawng Kha village in northern Shan State on 20 January 2015, alleged to have been committed by a soldier from Light Infantry Battalion 503, who had occupied a house within 200 metres of the crime scene inside a church compound. Despite considerable physical and circumstantial evidence, no person has been prosecuted²⁸;
- the rape of a 73 year-old bedridden widow, on 13 April 2015 by a soldier from Light Infantry Battalion 438 who was caught by neighbours. Despite the crime not being committed as part of his active duty, the case was taken to a military court for adjudication. The perpetrator was convicted and sentenced to seven years' detention, but it is not known whether he was indeed gaoled or released as subsequent enquiries to Myanmar's National Human Rights Commission have been ignored.

Extra-judicial killing

One particularly harrowing account given by Expert Mr Ryan Roco, and summarised in the Prosecution's Closing Statement, described one incident in the aftermath of the Nam Lim Pa attack in

²⁶ Paul Vrieze, "Finding Roi Ja", *Frontier Myanmar*, 2 December 2016 (<https://frontiermyanmar.net/en/finding-roi-ja>).

²⁷ "Burma: Kachin Christians Feared 'Disappeared'" <https://www.hrw.org/news/2017/01/16/burma-kachin-christians-feared-disappeared>

²⁸ *Justice delayed, justice denied: seeking truth about sexual violence and war crime case in Burma, with a special focus on the Kawng Kha case, in Kachin Land*. Legal Aid Network and KWAT, January 2016.

which “a boy’s mother who, when she heard her son had been killed by mortar fire in the village, went to retrieve his body from a group of Burmese soldiers, and then brought the body home to clean it and prepare for burial. When she woke up the next morning, a group of 14 Burmese soldiers were in her house, and they pointed at her son’s body and told her, ‘This is because of KIA soldiers, not because of us. Instead of your husband dying, your boy died for him. Why don’t you agree to a peace agreement, why don’t you ask your leaders for peace?’

“Because of this, she had no choice but to carry her son’s body out of her house and could not return, as the Burmese soldiers remained in her house and freely helped themselves to her food. The soldiers also committed theft when they stole 800,000 kyat (approximately 590 USD) worth of gold jewellery and jade stones from her that fateful day.”

Confiscation of property and destruction of buildings

One Witness stated, “Every precious thing belongs to cronies and armies, not to us”, following his presentation of the following summary list of minimum figures for damage inflicted: 367 villages burned down or destroyed; also 254 schools, more than 70 local churches, 18 monasteries, 100 kindergartens, 42 primary schools, 15 elementary schools, 15 secondary schools, 29 high schools, 230 local clinics, 14,980 houses, 354 rice or vegetables barns, 120 rice mills, 1,289 pieces of farm machinery, 42 small generators, 107 solar panels, 17,109 power generators, 148 sewing machines, 19,241 telephones, 457 radios, 169 VCD/DVD players, 16 TV satellite dishes, 140 carts, 269 bicycles, 552 motor bikes and 33 cars.

A detailed account of the losses inflicted in the military attack on Nam Lim Pa village on 8-11 October 2011 was submitted (together with photographic and video documentation), specifying “at least 297 households, a township office, a United Nations Development Program (UNDP) clinic and a Roman Catholic church were looted and vandalized by Burma Army battalions 74 and 276. At least one house was destroyed by fire. At least seven cows, one buffalo and one chicken were killed. At least two cows, two pigs, one buffalo and one elephant were injured. Total damage to civilian property is estimated by Nam Lim Pa residents to exceed 15,000,000 kyat (15,000 USD). The scope of the destruction of vacated civilian properties, primarily homes and home storefronts, suggests the damage was not inflicted for military purpose.”²⁹

Forced displacement

The detailed account of the military attack on Nam Lim Pa village on 8-11 October 2011 reported the following:

²⁹ *Crimes in northern Burma: results from a fact -finding mission to Kachin State*, [n.p.], Partners, November 2011, p. 35.

“Victim interviews confirm there to be at least 49 people that were forcibly relocated from their homes by Burma Army battalions 74 and 276. At least 1,564 people, 767 male and 797 female, were displaced from their homes between 8 October 2011 and 11 October 2011. Although at least 49 civilians were directly ordered by soldiers to evacuate their properties, the majority of those displaced chose to flee from fear of persecution and general conflict. The sounds and sights of guns, bombs and general pandemonium were the most common reasons found as to why villagers fled. Eighty households that fled were found hiding in the surrounding jungle, living in crude shelters of bamboo, plastic and leaves.”³⁰

Denial of humanitarian aid

United Nations agencies reports that some 50% of the 120,000 Kachin IDPs are receiving very little humanitarian assistance due to restrictions, checkpoints and cumbersome travel authorisation procedures, often amounting to an effective denial of access, especially to Kachin-controlled areas in violation of humanitarian principles of humanity, neutrality and impartiality endorsed in General Assembly resolution 46/182, which was adopted in 1991.³¹

In addition to loss of life, property and livelihood, war and displacement have other serious impacts on access to education, health services etc. by the Kachin people. While Kachin are considered one of the indigenous national races of Burma/Myanmar, and appear not to have been prevented from acquiring citizenship documents, loss of papers needed to prove identity and places of residence and inability to travel across conflict zones to secure such documentation have consequential impact on their lives.³²

Persecution on ethnic and religious grounds

Witnesses testifying at both London and Kuala Lumpur sessions recounted being verbally insulted and abused. One Witness stated: “We are not considered as human beings; not even sub-humans”.

A report submitted to the Tribunal described:

“Torture sessions were also typically infused with elements of ethnic and religious discrimination. Survivors explained to Fortify Rights how soldiers, police officers, and Military Intelligence officers verbally denigrated the Kachin ethnicity and Christian religious identity during torture sessions. In several cases, these statements included

³⁰ *Crimes in northern Burma: results from a fact -finding mission to Kachin State*, [n.p.], Partners, November 2011, p.29.

³¹ Protection Sector Kachin, “Humanitarian Access in Kachin State, Protection Sector (PWG – GBV SS – CP SS) Update Note,” November 2016.

³² “Education takes a hit in Myanmar’s Kachin State,” *IRIN Humanitarian News and Analysis*, 23 April 2013.

threats that the authorities would destroy the Kachin ethnicity. A Kachin survivor described the threats he received from an army official during an interrogation session where torture was employed: “You [Kachin] are our soldiers’ leftover kids, the products of our military expeditions. We will eliminate all you Kachin.” Another survivor was told, “We will kill you, and we will burn the children in the fire and then crush them”; and another was told, “You are Kachin, and we will kill all the Kachin. Even if the women are pregnant, we will kill them.”³³

Impunity

One Witness told the Tribunal “The law is not for us”. In many cases presented to the Tribunal, no action has been taken against alleged perpetrators, even when detailed circumstantial and physical evidence has been presented to the authorities. Indeed, in some cases those reporting the crimes were instead themselves detained. The widespread practice of trying any military or police under military rather than civilian courts (often closed to the public) and then detaining any convicted persons under military control also effectively shields alleged perpetrators.

Forced exile

All the Kachin personal witnesses who testified before the Tribunal indicated that they had left their native country of Myanmar due to a well-founded fear of persecution and indeed in many cases fear for their life.

III.2. Serious violations of human rights and allegations of crimes against humanity and genocide against Rohingya

Background

The Rohingya are an ethnic, linguistic and religious minority of Myanmar that has been subjected to prolonged, institutionalised and systematic denial of identity, suffering serious violations of their human rights for many decades. Indeed, they have been widely referred to as the world’s most persecuted people.

The integral and fundamental parts of their identity, such as language, culture, religion and history have been criminalised by the government and banned from the education curriculum, generally suppressed and contradicted and refuted in public discourse. The word Rohingya is not officially

³³ “*I Thought They Would Kill Me*”: *Ending Wartime Torture in Northern Myanmar*. [Bangkok] : Fortify Rights, 2016, p. 14.

recognised by the government nor used in general discourse in Myanmar. Even the Annan Rakhine Commission was prohibited from using the word Rohingya.

The Rohingya mainly live in the north of Rakhine State which borders Bangladesh. They represent about one-third of the population of that state. The majority of them are Muslim with a minority of Hindus. In Myanmar's diverse population of about 51 million the Rohingya are a small minority. Their number is impossible to verify since they were not allowed to participate in the 2014 census unless they registered themselves as 'Bengali', which many people refused to do, either on principle or because they feared this would automatically disqualify them from eligibility for citizenship. It is estimated that well over a million Rohingya were living in Myanmar prior to 1978, but that pogroms in 1978, 1991-92, 2012-15, 2016-early 2017 and now in the latter half of 2017, have reduced the current population of Rohingya in Myanmar to about 500,000, while 1.5 million have been driven outside the country, according to the testimony to the Tribunal by Expert Dr. Maung Zarni (See Annex 6).

The government of Myanmar has progressively denied the right to nationality of Rohingya through different laws and policies which have caused the deprivation of almost all civil, political, economic, social and cultural rights. In particular, the 1974 Emergency Immigration Act and the 1982 Burmese Citizenship Law (which classified citizens of Burma as 1. Full citizens 2. Associated citizens 3. Naturalised citizens) have been used to strip the Rohingyas of their nationality and render them, in the eyes of the government and the majority Buddhist population, merely foreigners. As a result of the above-mentioned laws and policies, the Rohingya people have been subjected to different and arbitrary verification processes which have gradually turned them into mere residents with few rights. However, until the last general election in 2015, the Rohingya population were eligible to vote and in the 1990s, they enjoyed the right to form political parties and elect their representatives.

Witnesses told the Tribunal that the denial of the Rohingya the right to nationality has caused institutionalised deprivation or restriction of other basic rights. The 1988 Rohingya Extermination Plan outlines a government policy to deny the Rohingya any access to higher education, the right to property and to own land, buildings and shops, as well as other economic rights. It stated that "any such properties under their existing ownership must be confiscated for distribution among the Buddhists." Moreover, the Rohingyas' right to worship has been subjected to many restrictions such as the prohibition of construction or renovation of mosques, Islamic schools (*madrassa*) as well as the deliberate destruction of places of religious gatherings.

As a result of a military offensive in 2012, as reported to the Tribunal by Expert Dr. Zarni, the Rohingya were driven from public visibility in the cities and towns of Rakhine State. Some 100,000

fled across the border into Bangladesh, while an estimated 120,000 people were forcibly detained in internal camps suffering food deprivation and very poor living conditions³⁴. The denial of humanitarian aid has been also widely reported against the Rohingya IDPs, and is continuing in the present crisis.

According to the UN Special Rapporteur on the situation of human rights in Burma, since 1996 the government has imposed severe restrictions on travel by the Rohingya population (restrictions which have gradually included other Muslims), violating their basic rights to freedom of movement and making their villages and places of living into virtual detention centres. The Tribunal heard from a Witness that due to the restrictions on movement, the way to Rakhine State for Muslims is “a one-way street”. In other words, Muslims can travel from the other parts of the country to Rakhine but they are not permitted to return (Witness Testimony of Myanmar Muslim: Thuzar Maung, session 2, Day 3, 20 September 2017, Kuala Lumpur hearing).

The findings of the Tribunal on the crimes against Rohingya under International Law will be addressed in the following section. However, before examining them, the Tribunal would like to stress that these crimes have occurred in a political context full of hate speech and what is essentially supremacist propaganda produced by both state and national officials and Buddhist leaders. Such Buddhist nationalist discourse denies the very existence of a Myanmar ethnic group called Rohingya, and labels them as ‘Bengali illegal immigrants’ despite the fact that they have lived in Myanmar for generations. Furthermore, the government, taking the advantage of the global discourse of the ‘war on terror’, dehumanises the Rohingya and desensitises the international community towards the victims by framing them as ‘Islamic terrorists’. This has been exemplified by the use of the terrorist label to explain the military crackdown in mid-August after the alleged attacks on military outposts by the Arakan Rohingya Salvation Army (ARSA), apparently a small group, poorly armed, that has sought to protect the Rohingya from attacks on them by the military and other armed forces loyal to the state.

Expert Dr. Razia Sultana provided the Tribunal with a report of an attack in October 2016 by the military, in which they raped women, killed some of the residents and burned a Rohingya village in Maungdaw. Surviving villagers were called to the police station and forced by the military to falsely testify before the camera that the Rohingya Solidarity Organisation (RSO) had burned their houses in October 2016. Such narratives are often picked up by the media and used as fabricated news reports and propaganda, supplementing the official narrative which has alleged that Rohingya women are too dirty and unattractive to be raped by the Myanmar soldiers.

³⁴ *Towards a peaceful, fair and prosperous future for the people of Rakhine: final report of the Advisory Commission on Rakhine State*, [n.p.]: Advisory Commission on Rakhine State, August 2017, p.35; *Mixed movements in South-East Asia*. [n.p.]: UNHCR Office for South-East Asia, 2016.

The gross human rights violations in Myanmar have been massively documented by the UN, International NGOs and Myanmar human rights and civil society organisations. The Prosecution presented several fact-finding reports to the Tribunal as evidence (See Annex 5). They confirm the testimonies which were heard by the Tribunal in London and Kuala Lumpur hearings as the following crimes:

Arbitrary arrest, detention and torture

The Tribunal both in London and Kuala Lumpur sessions heard several accounts of the frequency of arbitrary arrests of civilians by government armed forces. They included children and young people. Several witnesses testified before the Tribunal about the different types of physical and mental torture which they had been subjected to while in detention. During the 2016 crackdown, introduced by the government as a “clearance operation”, the security forces arrested more than 600 civilians accused as terrorists. The government said later that eight of them had died in custody. Their bodies showed clear signs that they had been tortured. None of their families were notified. (Testimony of U Ba Sein, London hearing).

Enforced disappearances

Both Experts and Witnesses testified before the Tribunal about many cases of those who had been arrested by the government forces who have been disappeared in recent years and the families still do not know their fate or whereabouts. The survivors of the recent crisis have also reported many thousands of cases of missing family members.

Rape and other forms of sexual abuse

The Tribunal heard first-hand horrific accounts of Rohingya women who had been raped in their homes, their villages and the IDP camps by the military forces. They also witnessed other women being raped or gang-raped in front of their eyes.

Many incidents were reported in which a group of young girls have been selected, kidnapped and gang-raped by the military forces. The evidence presented at the London hearing confirmed a case of 15 girls of a Rohingya village murdered after being taken into the forest and gang-raped. (Muhammad Faris Bin Hussain Ahmed testimony, London hearing). Four survivors of rape gave *in camera* testimony to the Tribunal on their ordeal, adding that the perpetrators usually used vulgar terminology and sexual insults, while combining such words with calling them as ‘*kalar*’ which is a derogatory word referring to their so-called non-Burmese and foreign origin. One woman said: “when they were raping me, they kept saying bad words which I cannot repeat and then something like you, *kalar*, you do not belong to this country, go away!”

The memories of the victims of rape are usually combined with horrendous stories of the killings, disappearances and injuring of their family members, often including babies and young children, and neighbours, as well as the burning of their homes, and destruction of their belongings.

The use of rape and gang-rape is a widely practiced military tactic historically and in many parts of the world and is today being used in Rakhine State, taking place in front of the eyes of the relatives or even neighbours in public. It clearly aims to terrorise the community and create an atmosphere of fear, part of the plan to eliminate the Rohingyas' presence in the country. It is an instrument of terror, as the Tribunal found its scars on both minds and bodies of the Witnesses even years after the incident. These Rohingya women also reported being subjected to other forms of physical and psychological sexual violence such as violation of their bodies' integrity by groping of their private parts during body searches as well as forcing them to undress in public.

The four survivors' testimonies also presented a horrific pattern of physical abuse as they tried to flee. Having been raped by the soldiers of the Myanmar army, they were raped again several times, in some cases many times over a period of months, by smugglers and others who took advantage of the situation as they travelled from Rakhine to Thailand and Malaysia. Furthermore, they reported that, traumatised and impaired, they often do not receive the support they are in desperate need of.

Evidence presented to the Tribunal by the Prosecution, including the expert testimony of Dr Razia Sultana, as well as the UN Office of the High Commissioner of Human Rights' report, demonstrated clearly that in Rakhine State, rape has been used against Rohingya women and girls in a widespread and systematic manner, particularly since the 2016 crisis.

Extra-judicial killing and causing bodily harm

The survivors of the Rohingya persecution shared with the Tribunal unimaginable experiences of their relatives, friends and neighbours being severely injured or even shot dead, slaughtered with knives or burned alive. Several massacres in different villages across Rakhine State were reported to the Tribunal by the Experts. These reports also included some details of throwing the bodies of the victims into mass graves, namely at Kyauk Pyin Seik and Kanyin Tan Myoma villages during the 2016 offensive "clearance" operation. (Testimony of U Ba Sein, London hearing).

In a video testimony, obtained by an Expert a few days before the Kuala Lumpur hearing, a survivor of the Tola Toli village massacre said she saw 200-250 women and children being killed. Her husband having been killed, she escaped alone with their children. She said many had already been shot dead,

and those lying on the ground were picked up, chopped, and later thrown into the river. Mutilated bodies were piled up and set on fire, while bodies of many small children were thrown into the fire.

Expert Professor Chowdhury Abrar drew the attention of the Tribunal to the fact that among the refugee flows that have been recently arriving in Bangladesh, one major component of the population was missing. This missing component was young people and the middle-aged, with a particular emphasis on men, which would be a sign to that the Rohingya male people had been more targeted for extra-judicial killing.

Confiscation of property and destruction of buildings

Several accounts presented to the Tribunal described looting, confiscation of property and destruction of homes, shops, workplaces, mosques and other buildings and numerous entire villages in the locations where Rohingya people had lived.

In many cases that were brought to the Tribunal, armed government forces or non-state actors were reported to have taken all valuable belongings of the Rohingya people and subsequently burned or destroyed the buildings. There were several accounts of confiscation of land and other properties by either the government or ultra-religious Buddhist groups. (Testimony of U Ba Sein, London hearing).

The video evidence showed Rohingya villages all along the western shore of Rakhine State in flames, while satellite imagery gave graphic before and after images revealing total destruction of these villages, with adjacent Rakhine villages intact. In addition to causing terror among the population, causing their flight, these arson attacks may serve an ulterior motive, as openly declared by the responsible Myanmar government minister: "According to the law, burnt land becomes government-managed land," Minister for Social Development, Relief and Resettlement Win Myat Aye told a meeting in the Rakhine state capital of Sittwe, the Global New Light of Myanmar newspaper reported.³⁵

Internal displacement and forced exile

Over the course of only three weeks in August-September 2017, more than 400,000 Rohingya, mostly women, children and elderly had to flee their homes and entered Bangladesh. However, the number of Rohingya refugees who have had to escape persecution over the past few decades is even higher, in the several significant waves of Rohingyas fleeing their homeland in 1978 (290,000), in 1992 (260,000), again in 2012 (100,000 refugees and 120,000 IDPs) and 2016 (100,000), as Expert Dr. Maung Zarni presented to the Tribunal in his testimony (see Annex 7).

³⁵ Simon Lewis, *Reuters*, 27 Sept, 2017, 10:11 AM.

The Tribunal heard several testimonies of Rohingya refugees forced to leave their homes and their country by border guards and other army forces accompanied by Rakhine Buddhist mobs, sometimes including, and even led by, Buddhist monks. According to the testimonies and other evidence, forced exile from Myanmar occurs as a result of direct physical pressure on Rohingya communities and villages, often terrorising them by burning their homes, seizing their belongings, killing their relatives and other villagers, or indirectly through imposing severe and intolerable hardship on them.

In 2012, “the military and the border police suddenly came and forced us from our home. We had to go without carrying anything with us.” (Testimony of Jamilah, London hearing).

“They even forcibly drag us to board a boat. One of the boats is already overloaded with people. There were 180 people on that boat”. (Testimony of Hidayat bin Abdul, London hearing)

Impunity

According to witness testimonies and other evidence brought before the Tribunal, the perpetrators of crimes against Rohingya people enjoy absolute impunity. Paragraph 10 of the 1988 Rohingya Extermination Plan states: "whenever there is a case between Rakhine and Muslim, the court shall give verdict in favour of Rakhine; when the case is between Muslim themselves, the court shall favour the rich against the poor Muslim so that the latter leaves the country with frustration." In such situation, the Rohingya victims of human rights violations are left completely unprotected by the legal system from “law enforcers” through to courts and upward to those in positions with supervisory responsibility such as Cabinet ministers.

The witnesses identified for the Tribunal two categories of perpetrators:

State perpetrators

State perpetrators of the crimes in violation of International Law in Rakhine State mainly consist of government armed forces including the Myanmar Army, the Myanmar Border Force Guards and the Police. However, it is noteworthy that almost all government offices are involved with the wide range of denial and deprivation of the basic rights of Rohingya people.

Non-state perpetrators

The Witnesses repeatedly referred to the monks, the Buddhists and Rakhine people as non-state perpetrators. Describing events prior to the latest wave of the crackdown, the non-state actors reported as unarmed people who would usually follow the military operation by acts such as beating people, looting, destructing the building etc. In recent statements obtained in the aftermath of the August 2017 events, witnesses testified about non-state perpetrators who were not uniformed but were armed and participated in military operations alongside regular troops.

The dramatic escalation of the persecution, with mass reprisals wreaked on the Rohingya population, purportedly in response to the 25 August 2017 attacks, was outlined in the Prosecution's Opening Statement, which provided a substantial amount of real-time testimony, video and other evidence to the Tribunal to support the evidence prepared in advance for the Kuala Lumpur hearings. This video testimony focused on the extent of the damage inside Rakhine State, including notably satellite imagery of the burned out villages and interviews on the manner in which this destruction was caused, including the use of incendiary rocket launchers. There were also individual accounts of massacres and rapes. All these violations continued to occur long after the statement of State Counsellor Daw Aung San Syu Kyi of 18 September 2017 in which she declared that so-called "clearance operations" had ceased on 5 September.

The Chairman of the National Human Rights Commission of Bangladesh, Mr Kazi Reazul Hoque, responded positively to the invitation issued by the PPT to participate in the Kuala Lumpur hearings, addressing the Tribunal and providing information on the extent of the challenges faced by Bangladesh in carrying the burden of the Rohingya genocide. He informed the Tribunal that on 12 September 2017, the Bangladesh Prime Minister, Sheikh Hasina, visited Kutupalong camp, saying "We gave them shelter in our country on humanitarian grounds. Our houses were also burnt down in 1971. Our people fled to India when they had nowhere to go. So we are doing everything in our power to help the Rohingya". "If we can feed 160,000,000 people we can also feed an additional 500,000 to 700,000 people at their time of distress. If necessary, we will eat one meal a day and share another meal with these distressed people."³⁶ At the same time she pressed for urgent international assistance in this task, and for pressure to be put on Myanmar.

The Commissioner reiterated Bangladesh's urgent call for assistance in meeting these needs, and concluded by saying: 'human dignity and respect is the very fabric of human rights - each one of us, as a member of humanity must continue to weave this fabric to make it stronger so human rights will not fall through its loops'.

III.3. Serious violations of human rights and allegations of crimes against humanity against Myanmar Muslims

Background

The PPT received its third complaint from the Myanmar Muslim community in July 2017, and while allegations of persecution have been somewhat less catastrophic, tragic and severe in intensity

³⁶ "PM Hasina stands up for the Rohingya", and "Bangladesh PM: if necessary we will eat one meal a day to feed the Rohingya", *Dhaka Tribune*, 12 September 2017.

compared to the Rohingya community, they nevertheless demonstrate a purposeful institutional strategy of outright abuse towards other Muslims in Myanmar.

Records of human rights abuses of the Muslim community in Myanmar became conspicuous with the coup under General Ne Win in 1962, which established the superiority of the Burman (Bamar) Buddhists over other groups. Since 2012 the situation has deteriorated further and, much to the disappointment of the Muslim community, the transition to the joint NLD-military rule in 2015 has seen instead the acceleration of human rights abuses plus documented evidence of crimes against humanity towards Muslims in general. The Burma Human Rights Network, BHRN has documented compelling evidence of the ongoing institutional persecution of Muslims under the new civilian government since March 2016.²⁹

In the closing session of this Tribunal hearing in London in March 2017, the panel of judges found identity framing by exclusion – the process of creating Myanmar as a supreme Burman Buddhist entity – to be the prime ideological cause of ensuing allegations of war crimes and crimes against humanity towards other ethnic communities in Myanmar. From a historically pluralistic society of diverse ethnicities and religions, Myanmar underwent a demographic transformation process that was buttressed by the passing of its Citizenship Law in 1982. In targeting the Muslim community, which had traditionally been accorded equal citizenship rights, the new law required all Muslims to show proof of ancestry dating back to 1824. Those who held National Registration Cards (NRC), had to surrender them when the enforced renewal deadlines (at ages 12, 18 and 35) came up as it was an unwritten law that a ‘full citizen’ cannot be a Burmese and a Muslim at the same time. In return they were asked to obtain National Verification Cards, signalling a lower status ID that does not acknowledge full citizenship, rendering the holder ineligible for passports and the loss of freedom of movement.

Alienation cum rejection of the Burmese Muslims in the political, economic and social sectors has then become a corollary to their much reduced status. Currently there are no Muslims in Parliament. Neither the military-allied Union Solidarity and Development Party (USDP) nor Aung San Suu Kyi’s NLD fielded a single Muslim candidate in the 2015 election, and many Muslims (including non Rohingya) were disenfranchised. Further, according to a number of testimonies given to the Tribunal by both Experts and Witnesses, Muslims are reportedly being effectively excluded from senior levels of the civil and military services, including the police and academia. This picture of the situation of the Burmese Muslims is corroborated in the *Justice Delayed Justice Denied* report which documents

²⁹ *Persecution of Muslims in Burma: BHRN Report*. Burma Human Rights Network, 2017.

the pattern of police and judicial operations³⁰. Instead of enforcing the ‘Rule of Law’ in which they exercise neutrality, they practise ‘Rule by Law’ in which government authorities are above the law or even, as remarked by Expert Dr Maung Zarni, mock the rule of law. The expert testimonies revealed a calculated strategy with intent and knowledge to persecute the Muslims. The absence of adequate accountability mechanisms has resulted in gross impunity, thereby eroding further the rule of law and making the road to sustainable peace an impossible goal.

From the research reports as well as testimonies of five Experts and Witnesses, this systematic and institutionalised persecution of Burmese Muslims can be demonstrated in numerous ways:

1. Increased difficulties in securing an NRC

As mentioned earlier, this forms the crux of all ensuing abuses since failure to provide proof of the NRC subjects the individual to harassment and the possibility of a penalty, consisting of a fine or arrest or both.

Such institutional denials of the right to nationality, which is a fundamental human right, further translate into much reduced exercise of civil and political rights, as well as job opportunities and much reduced financial standing for the individual, and fundamentally contravenes the Universal Declaration of Human Rights and Myanmar’s treaty obligations under the United Nations Convention of the Rights of the Child since the individual is thereby placed in a situation that is interpreted as being rendered “stateless”.

2. Increasingly acute restrictions on access to education and healthcare

Following the violence in Rakhine state in 2012, all Muslims in Myanmar faced severe restrictions on access to education and healthcare. The inability to produce the NRC compounded the problem even further in the case of tertiary education and access to emergency and life-saving care in public hospitals.³¹

3. Institutionalised forms of religious intolerance

The testimonies received clearly attest to cases of outright religious intolerance, and in many instances, verging on religious persecution.

a) Restrictions on building and repairing mosques

³⁰ *Justice delayed, justice denied : seeking truth about sexual violence and war crime case in Burma, with a special focus on the Kawng Kha case, in Kachin Land.* Legal Aid Network and KWAT, January 2016.

³¹ *Convention on the Rights of the Child, art. 24; Convention on the Elimination of All Forms of Discrimination against Women, art. 12; Convention on the Rights of Persons with Disabilities, art. 25.*

Prohibition on building new places of worship for both Muslims and Christians, along with targeted destruction of mosques and confiscation of such properties have seen the Muslims facing reduced access to communal prayer services, in contravention of Article 18 of the Universal Declaration of Human Rights. The testimonies of both the Expert and one Witness corroborated the findings of available documentation on the subject, which noted that this had been carried out to some extent in the wake of Cyclone Nargis in 2008, but seems to have been employed more widely since the 2012-2013 anti-Muslim attacks. The Witness, who kept meticulous personal records with photographs that were shown to the Tribunal, added that when mosques were destroyed or confiscated, they were either sealed off, the land resold for profit or converted into another facility. She reported that in one town, some 11 of the existing 14 mosques had been shut down, and only four mosques were allowed to operate, and that several madrasah (religious schools) were sealed off, while the communities were prohibited from performing their communal daily prayers in places other than the existing mosques.

b) Creation of ‘Muslim-free zones’

The concocted perceived threat of Muslims to the majority Buddhist community has seen the creation of Muslim-free villages by various local authorities. Some 21 such villages have been identified with signboards warning Muslims from entering. Some of the signboards displayed derogatory remarks about the Muslims, referring to them as ‘*kalar*’.

c) Ongoing highly organised boycott of Muslim owned businesses

This rigorous campaign, led by several Buddhist monks using various forms of social media, has even infiltrated the public school system with the slogan “Do not buy from Muslim shops”. Muslim retail businesses in the cities of Yangon and Mandalay have been severely affected.

d) Increased evidence of hate speech and discriminatory campaigns

Two siblings who have since fled to Malaysia, testified to the barrage of discrimination and referred to continual verbal harassment as ‘*kalar*’. They also reported their difficulties in securing ID cards. Unlike other students in their high school, one had to travel some distance to the regional capital of Mandalay and, since the other could not afford to pay the stipulated ‘fine’ of 50,000 kyats, he was denied an ID card.

4. Evidence of Religious Persecution

Since the 1990’s ultra nationalist Buddhist organizations like the Ma Ba Tha have actively promoted messages of intolerance against Muslims and other religious minorities. On 15 May 2001, anti-Muslim riots broke out in Taungoo, Pegu division, resulting in the deaths of about 200 Muslims, in the

destruction of 11 mosques and the setting ablaze of over 400 houses. After the violence, many local Muslims moved away from Taungoo to nearby towns and to Yangon.³²

From March 2013, violent riots have flared up in various cities in central and eastern Myanmar. The violence has coincided with the rise of the 969 movement, a Buddhist nationalist movement opposed to what it sees as the influx of Islam into traditionally Buddhist Myanmar. The sporadic cases of violence between Muslims and Buddhists led by ultra-nationalist monk Sayadaw U Wirathu of 969 appear to have given the monks additional license to pursue their acts of impunity. The common trigger event is frequently an allegation of rape or other honour crime by Muslim perpetrators against Buddhist victims, as was the case with Mandalay riots of July 1-2 2014.³³ Reports of such allegations are disseminated rapidly through 969's extensive social media network. A Witness testified that Wirathu continues to enjoy patronage of the highest levels of authority in Myanmar, particularly the military.

Two instances of religious persecution were specifically presented to the Tribunal:

- a) Forced evacuation of an entire village to a Buddhist cemetery after a mosque was bulldozed, February 2000

One Witness testified about the forced elimination of the Muslim part of Ta Khwet Hpo village which consisted of 400 households. The community religious leader received a notice on 23 February 2000 from the most influential monk in the area which gave only two choices: to evacuate the village or risk being attacked by outraged religious followers and militia (See Annex 8). Abbot Reverend Thuzana reasoned his notice with the fundamental difference between the two faiths, the fact that the Muslims eat beef and that their mosque is very close to the Buddhist temple in the village.³⁴ The Muslim community leaders sent an appeal to the government but the reply was that nothing could be done, and that the Muslim villagers should comply with the chief monk's order.

A few days after that, the Buddhist militia troops entered the village, bulldozed the mosque overnight and threatened the Muslim villagers that if they did not evacuate their homes, they would face the same fate as the mosque. They were eventually forced to leave the village and move to the other side of the river to a designated plot for them, as directed by the monk. That area was a former Buddhist cemetery. The Buddhist monk then distributed the lands and farms of the Muslims in Ta Khwet Hpo among Buddhist families and gave no compensation whatsoever to the Muslim villagers. The monk's

³² *Burma, planned religious and Racial Riots Against Muslims: A Historical Overview.* www.thestateless.com, 25 July 2012

³³ *Hidden Hands Behind Communal Violence in Myanmar: Case Study of the Mandalay Riots.* Justice Trust Policy Report, March 2015.

³⁴ See Annex 8 for the translated version of the letter from the Chief Monk.

people then put the sign 'No *Kalar* allowed here' in all public places of the village and the river became the border between the new location of the Muslims and their old village.

This forced transfer shattered the community as they were forced to stay in cramped living conditions and had lost their heritage. Some families remained in the designated area and sought ways to make a living since they were deprived of their farmlands; some went to other places where they had relatives. Some, like the Witness, decided to leave the country and went to Malaysia. It has been reported that they were have been denied permission to build a mosque in their new location.

b) The Meikhtila Massacre, March 2013

The episode that has been widely documented, and known as the Meikhtila Massacre in Mandalay, was further elaborated by an eye Witness who saw an argument between a Muslim couple who owned a jewellery store and a Buddhist deteriorating into a fist fight. In a matter of minutes a mob came running down the street calling for the killing of all '*Kalar*'. This eye Witness saw a woman and her baby being killed in full view of police officials. He also saw Buddhist monks killing students, and observed police standing by watching the attacks but doing nothing to stop them or to protect the victims. He had to run for his life after being injured by a machete, managing to escape only by saying "I am Burmese, not Muslim". His testimony was corroborated by that of his brother who concluded that sooner or later they would be exposed as Muslims, so they took a train bound for Yangon. From there they had to subject themselves to profiteering by traffickers before they finally arrived in Malaysia more than a year later.

While the Witnesses believed that the number of Muslims slaughtered was much higher, Reuters reported that up to 44 Muslims were killed, and their corpses set on fire or butchered in a swamp, with a further 13,000 driven from their homes and businesses. It was further reported that the bloodshed here was followed by Buddhist-led mob violence in at least 14 other villages, fitting a pattern of Buddhist-organised violence and governmental inaction.³⁵ BBC news also released video footage of such atrocities.³⁶

5. Forced exile

All the five witnesses who gave testimony before the Tribunal reported that they fled the country fearing persecution and retaliation from the Myanmar authorities. They are all now seeking refugee status and support abroad, but reported that this is frequently denied. They see access to justice as

³⁵ "Special Report: Buddhist Monks Incite Muslim Killings in Myanmar", www.reuters.com, 8 April 2013.

³⁶ BBC news, <http://dai.ly/x2u6nez>, 16 June 2015.

victims of human rights violations and religious persecution as almost impossible, given the widespread negligence of international bodies to impose accountability on perpetrating states.

IV. THE STATE OF MYANMAR AND THE QUESTION OF IDENTITY

The state of Myanmar: purported to be a limited democracy under military guardianship, but displaying continuing extreme intolerance, persecution and lack of justice

Even after the notional return of the country to democracy, the 2008 Constitution has preserved a dominant and privileged role for the military, guaranteeing them 25 per cent of the seats in Parliament, creating what is presented to the world as a developing democracy under military guardianship. However, on closer scrutiny a different picture emerges.

The heads of the Myanmar/Burmese Army – who have spent the last 70 years at war with the country’s ethnic minorities – retain effective control over the economy, natural resources and the riches of the country, and appear strongly interested in maintaining a degree of internal conflict in order to legitimate the idea that only the military can preserve the state and, consequently, their dominant position.

Furthermore, these ongoing conflicts give the rationale for these same military leaders (whether still in uniform, or as newly minted civilians) to present themselves in the international arena as the only true representatives of the country.

Therefore most observers stress that the Myanmar/Burmese military remains the major obstacle to achieving key democratic and human rights reforms and to carrying out the perspective of becoming a state that acknowledges its ethnic diversity, chooses to be really federal in structure and favours religious tolerance.

The misleading picture of Myanmar as an emerging democracy can be seen not only in specific provisions in the 2008 Constitution but in the day to day life of its citizens who are not Bamar Buddhists, as documented in some detail above with regard to the three groups who brought their cases to the Tribunal. In the much-touted 2015 “democratic election”, for example, it is estimated that some 1 million people were disenfranchised (500,000 from recognised ethnic/national groups and a further 500,000 Muslims, mainly but not exclusively, Rohingya)³⁷.

The framework of a limited democracy is completed by the absence of an independent and authoritative judicial power. During its 31st Session (March 2016), the Asian Legal Resources Centre

³⁷ *The 2015 General Election in Myanmar: What Now for Ethnic Politics?* Amsterdam: Transnational Institute, 17 December 2015 (Myanmar Policy Briefing), esp. p.5

stated that Myanmar and its people are “for all practical purposes still under the influence of militarisation that has gripped the country since 1959” and recalled that “the people of Myanmar and their institutions do not have a memory of independent justice institutions. Concepts like presumption of innocence, right to silence, and independent adjudication of disputes have never been given a chance to take root in the country”. This state of affairs contributes strongly to the abuse of power and to the crimes against minorities and guarantees the impunity of the powerful.

Identity and citizenship

The 2008 Constitution³⁸ keeps alive Myanmar’s incredibly restrictive approach to citizenship, inspired by the idea that only those ethnicities which are considered nationals of Myanmar (namely, Arakanese, Burmese, Chin, Kachin, Karen, Kayah, Mon or Shan as enumerated in the Election Act of 1948) are able to have citizenship and to give that citizenship to their children, and that any other group outside those nationalities has to prove their presence in the territory of Burma back to 1823, even if in 1990 an official list of 135 different ethnic groups in Myanmar was made public.

The Advisory Commission on Rakhine State (led by Kofi Annan, whose report was issued in August 2017) also drew attention to this question, stating:

The 1982 Citizenship Law explicitly states that those who prior to its enactment were already citizens would retain their citizenship rights. But the law – and the way it was implemented – significantly narrowed the prospects of citizenship for the Muslims in Rakhine. In 1989, a citizenship inspection process was carried out across Myanmar, and those found to meet the new requirements had their National Registration Cards (NRCs) replaced with new “Citizenship Scrutiny Cards” (CSCs). The majority of Muslims in Rakhine with NRCs surrendered their documents, but were never issued with CSCs, rendering them de facto stateless.

From 1995, the authorities began issuing Temporary Residency Card (TRCs, or “white cards”) to Muslims in Rakhine State who did not have identity documents, as well as to returning refugees. In early 2015, the Government invalidated all TRCs, and the Constitutional Tribunal ruled that TRC-holders were ineligible to vote. In the so-called democratic elections in November 2015, Muslims from Rakhine were neither allowed to participate as candidates, nor as voters – unlike in all previous elections since independence in 1948.

³⁸ *Constitution of the Republic of the Union of Myanmar (2008)*. [Yangon]: Ministry of Information, September, 2008, especially Chapter VIII: “Citizen, fundamental rights and duties of the citizens”.

Through this process of gradual marginalization, Muslims in Rakhine have ended up in a particularly vulnerable position, almost entirely deprived of political influence or representation and living under severe restrictions which affect basic rights and many aspects of their daily lives. While some of these restrictions are based on legislation, others derive from local orders and regulations, often issued by local security officials. Some 120,000 members of the community – including some who hold valid citizenship documents – remain confined to IDP camps.

The 1982 law and the accompanying 1983 procedures define a hierarchy of different categories of citizenship, where the most important distinction is that between “citizens” or “citizens by birth” on the one side, and “naturalised citizens” on the other. “Citizenship by birth” is limited to members of “national ethnic races”, defined as the Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine and Shan and ethnic groups which have been permanently settled in the territory of what is now Myanmar since before 1823 (in 1990, an official list of 135 “ethnic races” was made public).

For both categories, the transmission of citizenship to a child depends on the status of both parents. However, while the child of a “citizen” automatically qualifies for “citizenship” unless the other parent is a foreigner, the child of a “naturalised citizen” only acquires “citizenship” if the other parent is a “citizen”, or if this parent is the child of two “naturalised citizens”. In all other circumstances, the child of a “naturalised citizen” will have to apply for “naturalised citizenship”, for which the applicant needs to fulfill the following criteria: being over the age of 18; being able to speak one of the national languages well; being of good character; and being of sound mind. However, children’s names may be added to a parent’s naturalized citizenship certificate when the child’s birth is registered. Even with this possibility, the distinction remains that eligibility for “naturalized citizenship” is not automatic. Moreover, “naturalized citizenship” may be revoked more easily than “citizenship”, for instance for committing offences involving “moral turpitude” (such as theft, adultery, rape or drugs offences).

Although Myanmar is not the only country that has different categories of citizenship, in other countries more than one category is only allowed for very specific circumstances. Having just one citizenship category is generally preferable. It meets the important objective of equal rights for all citizens.

Unlike previous citizenship legislation, the law of 1982 provides limited possibilities of acquiring citizenship based on residence. Individuals who do not have at least one citizen parent can only acquire citizenship if they or their ancestors entered the country prior to 1948, or they were legal residents in Myanmar and married to a citizen before the law came into force.³⁹

On this basis, full membership of the country has been denied until now to the Rohingya, exemplified by the use of the name “Muslims of Rakhine” in the Annan Rakhine Commission Report. Indeed, the use of the name Rohingya was forbidden by the government when the Commission was established. The government’s policy has been, and remains, to refuse to name the Rohingya according to the name that they, and others, have used for decades and which they rightfully recognise as their own.” The policy ignores the substantial documentation of their presence in the area now known as Rakhine State from at least the 18th century⁴⁰ (other sources assert their presence even from the 8th century). Such a policy is certainly lacking in reasonableness and is in violation of the 1961 United Nations Convention on the Reduction of Statelessness, which states in Article 1: “A Contracting State shall grant its nationality to a person born in his territory who would otherwise be stateless”.

These laws and governmental decisions on identity have also affected other Muslim groups. The Tribunal was informed by several different Witnesses of their experience that to be accepted as citizens of the country they were given the choice of either keeping their Muslim religion and recording a foreign ethnicity (such as Malay, Bengali or Indian or another of the recognised nationalities like Shan or Karen) or renouncing their religion and being recorded as Buddhist with Burmese ethnicity.

Even if the Rohingya are the ones in the worst position, the whole question of managing identities in the state of Myanmar is a matter of deep concern and, in the opinion of this Tribunal, is one of the main causes of the conflicts and atrocities which are under scrutiny and which we will analyse below. Two different analyses of genocidal social practice both establish the construction of identity as its first stage (“stigmatisation and construction of negative otherness” in Feierstein’s model,⁴¹ “classification” in Stanton’s model⁴²).

³⁹ *Towards a peaceful, fair and prosperous future for the people of Rakhine: final report of the Advisory Commission on Rakhine State*, [n.p.] : Advisory Commission on Rakhine State, August 2017, p. 30-31.

⁴⁰ Francis Buchanan, “A comparative vocabulary of some of the languages spoken in the Arakan Empire”, *Asiatic Researches*, vol. 5, 1799, p.219-240, reprinted in SOAS Bulletin of Burma Research, Vol. 1, No., 1, Spring 2003 (<http://eprints.soas.ac.uk/8050/1/BuchananComparativeVocabulary.pdf>).

⁴¹ Daniel Feierstein, *Genocide as social practice*. New Brunswick NJ and London : Rutgers, 2014, p.109-121, and Daniel Feierstein “The concept of genocide and the partial destruction of the national group”, *Logos: a journal of modern society & culture*. Winter 2012 (http://logosjournal.com/2012/winter_feierstein)

⁴² Gregory H. Stanton, Expert testimony at the Kuala Lumpur Session of the People’s Tribunal on Myanmar. Also at: <http://genocidewatch.org/genocide/tenstagesofgenocide.html>

In the state of Myanmar there is a permanent process of classification, stigmatisation and construction of negative otherness against different groups: firstly, the various groups that were not recognised as nationals of the country, if they cannot prove their presence back to 1823, which is an almost impossible task. Then, even other Muslims who were previously considered members of the accepted nationalities. And later, even with the non-Burmese accepted nationalities, as testified in evidence before this Tribunal regarding the case of the Kachin group, and probably also the case regarding other non-Burmese groups that did not have a chance to present their cases before this Tribunal but for which some information was provided during the proceedings, albeit not in an explicit and documented way.

Ethnicity and religion have played a very important role in this construction of negative otherness as a tool to divide the population. The state of Myanmar has more and more developed a nationalistic and racist understanding of its constituency as a Burmese Buddhist community instead of the original Union of Burma plurinational and multireligious community. In our analysis, this was the first step for legitimising and fuelling the atrocities described in the previous section and that will be qualified below regarding the alleged commission of war crimes, crimes against humanity and genocide.

Following the 1982 Citizenship Law, a whole process of persecution has been advanced in recent years, as described in the Final Report of the Advisory Commission on Rakhine State:

Based on the 1982 Citizenship Law, a citizenship verification process has been advanced by both the former and current governments. According to government figures, approximately 4,000 Muslims (as well as 9,000 Kamans⁴³) have been recognized as citizens or naturalized citizens – out of a population of around one million stateless Muslims in the state. Around 10,000 Muslims have also received National Verification Cards (NVC), considered a preparatory step for applying for citizenship. For the benefit of all communities in Rakhine – and in order to provide clarity on the legal status of all – the verification process should be accelerated. The process was first introduced in the shape of a pilot project in Myebon Township in 2014, where Temporary Resident Card (TRC)-holders were allowed to apply for citizenship on the condition that they listed their ethnicity as “Bengali”. The process was suspended following protests from both communities, but was restarted and expanded to all of Rakhine State in January 2015. After announcing the cancellation of the TRCs in February 2015, the Government started issuing its replacement – Identity Cards of National Verification (ICNV) – in June 2015.

⁴³ Kaman are another Muslim minority predominantly living in Rakhine State. Unlike Rohingya, Kaman are among the 135 officially recognised ethnic groups mentioned above.

To obtain this card, applicants were again required to register as “Bengali” in the application form. A year later, the NLD Government restarted the process, issuing National Verification Cards (a renaming of the ICNV), which no longer required applicants to indicate their ethnicity or religion in the application form (although the Commission has received complaints that ethnic references have still been included on some occasions).

The sporadic implementation of the process – as well as the general lack of communication, consultation and outreach from the Government – has undermined public trust in the exercise within both communities. On the Rakhine side, many fear that corrupt officials may allow a high number of unqualified Muslims to obtain citizenship – a fear strengthened by alleged reports of non-Kaman Muslims posing as Kamans in the verification process.

Some fear that the Government may eventually succumb to pressure from the international community, which they see as biased in favour of Muslim citizenship.

Muslims, on the other hand, object to the NVC as an interim step that will subsequently qualify holders to apply for citizenship at some point in the future. They are worried that this procedure follows a familiar pattern of successive Myanmar governments issuing documents with a promise that citizenship will follow, with the latter repeatedly failing to materialize. Many are also reluctant to hand in their existing documents for fear of being left undocumented. Others have lost their previous identification documents, and are apprehensive that a process which is not based on bona fide will simply be used against them. Trust is also undermined by the lack of tangible benefits for those who successfully go through the process, as verified Muslim citizens continue to face travel restrictions and other forms of discrimination.⁴⁴

Even if the Commission accepted as valid the fear that the process could result in identity cards being given to “unqualified Muslims” (one wonders what else could be meant by the term “unqualified Muslim” than a way to legitimate negative otherness?), the description of the process and the numbers recognised by the government (a couple of thousand people verified among a population of more than one million) make clear that the objective of the system is not to give citizenship to the people who are being persecuted but, on the contrary, to make them stateless, without any possibility to enjoy any kind of rights.

⁴⁴ Rakhine Commission Report, *op cit*, p. 26-27.

Moreover, the growing anti-Muslim understanding of identity was quickly brought into the picture in the widespread connection made in the media between Islam and terrorism. Indeed, Aung San Suu Kyi's speech made during the proceedings of the Tribunal (included as a part of the Defence Case) qualified attacks against police and outpost stations as "terrorist attacks" and invoked the Antiterrorist Act to persecute them. Use of that label has served to justify forced displacement, massive attacks on civilians, burning of villages and other actions committed by Myanmar security forces, other paramilitary groups or by Rakhine nationalists, which were on two separate occasions (October 2016 and August 2017) presented only as a consequence of those attacks even if many of those persecutions were committed long before the attacks took place.

It is clear that amongst the Burman Buddhist majority there is a long standing antipathy toward the Rohingya that has been instrumentalised through the military and its paramilitaries, as well as nationalist Buddhist gangs. But it would be wrong to ignore the economic conditions that also enter into the complex of motives and other causes of the social process of genocide to which the Rohingya, and others, are being subjected. Social conditions are not uni-dimensional. They are overdetermined, arising from multiple causes. To understand why a pogrom of genocidal proportions occurs in a certain period, it is unlikely to be an adequate analysis that sees the situation as resulting from a "natural" enmity toward a group with an ethno-religious background differing from the perpetrators. Such an analysis is just descriptive; furthermore, it is for the perpetrators -- and perhaps in the minds of many watching from afar -- a justifying explanation, it being "only natural" that like should live amongst like. Such analyses are not only highly misleading, they are dangerous.

However, we learn from history that diverse populations have lived peacefully for long periods in the past. In the specific case before the Tribunal, we received convincing evidence that the Rohingya, as well as other minority groups, have lived in the area now known as Myanmar, for several centuries and in some cases much longer. Certainly they suffered discrimination, and were largely relegated to the over-whelming number of poor in the country by the operation of an economic system that produced massive inequality between a very small elite and the vast majority. But they have only recently been targeted as a group deserving elimination.

As we have seen in recent decades, when authoritarian states begin to open up their economies and attempt a degree of democratisation, internal conflicts often follow, including attacks on minorities accompanied by an upsurge of extreme nationalism and supremacist ideology. This process seems to have occurred in recent years in Myanmar.

In times of national economic hardship and political tensions such as exist in contemporary Myanmar, governments have generally found it extremely useful to target the “Other” as the cause of problems afflicting the majority. Given the situation in Myanmar, with an authoritarian government challenged to provide democracy and an effective economic performance failing to meet either challenge, it is not surprising that extreme measures have been put in place by the government to target minorities, thereby diverting attention from its own failures.

It is important to consider that the failure of the NLD-military government to solve the country’s social, political and economic problems has resulted in placing groups already discriminated against such as the Rohingya, other Muslims and the Christian Kachin in the position of scapegoats. In this way, not only do they seek to divert attention from their failings but also to divide opposition to and mobilise support for, its continuance in power.

V. QUALIFICATION OF THE FACTS

Preliminary Note on the term “ethnic cleansing”

In this judgment we have not used the term “ethnic cleansing” for several reasons. In general, it is a euphemistic expression used to avoid the use of the term genocide when it (and other terms recognised in law) are appropriate in the circumstances of mass violations of human rights that meet the requirements of international law. The expression “ethnic cleansing” has no formal status in international law. It has been and still is used by perpetrators of genocide (*inter alia*), most notably by President Milosevic in the former Yugoslavia, to rationalise and justify acts in the hope of avoiding the stigma and potential sanctions that adhere to committing genocide, war crimes and crimes against humanity.

The term “ethnic cleansing” has been used to qualify the current persecution of the Rohingya by the United Nations, nation states and international civil society organisations. This avoids confronting the reality on the ground: a social process of genocide and commission of crimes against humanity. In such cases the use of language is political. “Ethnic cleansing” misleads and allows those who use it to describe a genocidal situation to do little or nothing in response. For the use of the term genocide would, indeed should, necessitate absolute condemnation of the perpetrators, strong action to prevent further human rights violations and a commitment to undertake costly and politically awkward programs for rehabilitation and reparations.

The Tribunal also rejects the expression “ethnic cleansing”, in that it implies that a society having a diversity of ethnic and/or religious minorities is somehow dirty and needs to be cleansed. It thereby appeals to extremist nationalism and supremacist ideology. The importance of avoiding such usage is manifest in a Tribunal concerned with the actions of the Myanmar government against the Rohingya, non-Rohingya Muslims and the predominantly Christian Kachin. Accordingly, we present our findings below qualified in terms of war crimes, crimes against humanity and genocide.

V.1. War crimes

From the full and detailed documentation admitted during the Tribunal session and described in Part III above, in the presentation of the cases, the accusations advanced in the indictment regarding war crimes against the Kachin people of northern Burma, as defined by Article 8 c) of the Rome Statute

for armed conflicts not of an international character, have been fully proved, including the following acts:

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) Taking of hostages (such as the use of prisoners as “human shields”);
- (iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.

The Rome Statute (Article 8 d) also includes other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities (such as the murder of Kachin civilians by military forces);

...

- (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives (such as the destruction of houses, churches and other monuments, that is, the human and cultural heritage of Kachin);
- (v) Pillaging a town or place, even when taken by assault;
- (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and other forms of sexual violence, also constituting a serious violation of article 3 common to the four Geneva Conventions (reported in many Kachin testimonies);
- (vii) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to actively participate in hostilities;
- (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- (ix) Killing or wounding treacherously a combatant adversary;
- (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

In particular, the Tribunal believes that systematic targeting of civilians and other acts committed by the Burmese/Myanmar Army must be qualified, for all legal purposes, as war crimes committed as part of a plan or policy or as part of a large-scale commission of such crimes.

The course of historical events demonstrates that for many years in the state of Kachin there has been an ongoing internal armed conflict – war of self-determination – to which is applicable the Geneva Convention of 12 August 1949, according to the explicit recognition of the 1973 General Assembly Resolution 3103.

The perpetrators of the crimes above enumerated are combatants; the victims are not combatants; the criminal acts of military soldiers may be said to serve the ultimate goal of a wide military campaign.

In other words, the attack is intentionally directed against the civilian population or against individual civilians not taking direct part in hostilities and against civilian objects, that is, objects which are not military objectives. The Tribunal watched on the screen the shelling of Kachin villages, was shown photographic evidence of dead bodies and of tortured persons and heard accounts of violence from witnesses and victims.

From the foregoing testimonies and documents submitted, the Tribunal is of the view, beyond reasonable doubt, that the state of Myanmar is guilty of war crimes perpetrated against the Kachin people.

V.2. Crimes against humanity

From the full and detailed documentation admitted during the Tribunal session and described in Part III above, the accusations advanced in the indictment regarding crimes against humanity against the Rohingya, other Muslim civilian populations in Myanmar and the Kachin people have been fully proved, including the following acts, as defined by the Rome Statute:

(a) Murder: the Tribunal heard testimony from a number of witnesses that they had witnessed murders and received reports that murders had been carried out by the Myanmar military and Buddhist gangs against the Rohingya, Kachin, and non-Rohingya Muslims;

(b) Extermination: such as the 2013 Meikhtila massacre of Muslims; the numerous extrajudicial killings of Kachin and Rohingya; several massacres of Rohingya people in different villages across

Rakhine state, with a dramatic escalation starting in August 2017; the extermination or murder of Kachin civilians, including women, children and the elderly, by military forces;

...

(d) Deportation or forcible transfer of population: as in the case of the Kachin people, the creation of a large number of IDP, now estimated at over 120,000; the internal displacement and forced exile of more than 400,000 Rohingya, mostly women, children and elderly, who had to flee their homes and entered Bangladesh only during the last three weeks, joining hundreds of thousands forcibly displaced in several earlier waves;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law: such as the forcible confinement of Rohingya in camps, suffering from starvation and very poor living conditions, denial of citizenship rights which had earlier been accorded to them, arrests of Rohingya civilians, including children and young people, by armed government forces without providing any reason;

(f) Torture: such as the different types of physical and mental torture which the Rohingya have been subjected to while in detention;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity: as reported in numerous Rohingya and Kachin testimonies;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court: such as the persecution against the Burmese Muslims on ethnic and religious grounds during the Meikhtila massacre, the confiscation of property and destruction of buildings;

(i) Enforced disappearance of persons: as reported in the case of the Kachin and the Rohingya;

(j) The crime of apartheid (such as the project to create “Muslim-free villages”), as well as the different practices of discrimination against the Rohingya and other Muslim groups.

From the foregoing testimonies and documents submitted, the Tribunal is of the view, beyond reasonable doubt that crimes against humanity were committed against the Rohingya, other Muslim civilian populations in Myanmar and the Kachin.

V.3. Genocide

The term genocide was coined by the Polish jurist Raphael Lemkin, who wrote, “By genocide we mean the destruction of a nation or an ethnic group”. Lemkin went on to argue that “Genocide has two phases: one, the destruction of the national identity of the oppressed group, the other, the imposition of the national identity of the oppressor.”⁴⁵

The concept of genocide was codified in the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (approved in 1948 and ratified by the state of Myanmar in 1956, later included in the Rome Statute for the International Criminal Court in 1998) which defines genocide as any of enumerated acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such (as outlined below in section V.3.2). :

The distinctive feature of genocide, according to Lemkin and to the Convention, is that it aims to destroy a group rather than the individuals who make up the group. The ultimate purpose of genocide is to destroy the group’s identity and impose the identity of the oppressor on the survivors. This idea gives us a useful insight into the workings of power systems in the modern era and, particularly, in the case of the state of Myanmar, which is under scrutiny in this judgment.

Lemkin also wrote that nation states have tended to destroy the identities of ethnic and religious minorities within their boundaries and impose a new identity on them: the national identity of the oppressor. That is the intent of the process which started in Myanmar decades ago regarding the different non-Burmese groups, even if it has not developed at the same pace with all of them.

V.3.1. General intent

Many sociological works have shown that genocide is a process that involves different kinds of actions and, so, different stages, even if they are neither linear nor exclusive. Professor Gregory Stanton, founding president of Genocide Watch and former president of the International Association of Genocide Scholars, testified in this Tribunal analysing that process in ten different stages. The report *Countdown to Annihilation*⁴⁶ referred explicitly to the case of the Rohingya population in Myanmar and presented before the Tribunal in the London hearings (and provided to the Judges by the Prosecution in the current procedures) applied Feierstein’s six-stage model of the genocide process

⁴⁵ Raphael Lemkin, *Axis rule in occupied Europe*. Washington, DC : Carnegie Endowment for International Peace, 1944, Chapter IX Genocide, p. 79-95.

⁴⁶ Penny Green, Thomas McManus and Alicia de la Cour Venning, *Countdown to annihilation: genocide in Myanmar*. London : International State Crime Initiative, School of Law, Queen Mary University, 2015.

to the case of the Rohingya group. It found that the first four stages had been reached in the then current situation of the Rohingya in Myanmar: stigmatisation, harassment, isolation and systematic weakening, and that the stages of extermination and symbolical enactment could happen at any moment.

Moreover, the 1988 Peace and Development Council (SPDC)'s Rohingya Extermination Plan, also submitted by the Prosecution in evidence and cited by the International State Crime Initiative, precisely articulated a government policy not to provide Rohingya with citizenship cards.⁴⁷

The Tribunal found that the denial of the Rohingyas' right to nationality has caused institutionalised deprivation or restriction of their other basic rights, such as the right to education and health services. The 1988 Rohingya Extermination Plan outlined the government policy of denying the Rohingya any access to higher education, right to property and other economic rights, stating "any such properties under their existing ownership must be confiscated for distribution among the Buddhists".

From all of these analyses and from the other evidence presented before this Tribunal, it is clear that the general intent of the government of Myanmar has been to destroy (and in the case of the Rohingya population and the Burmese Muslims also to deny) the identity of these different groups as a part of the Myanmar community. That intent applied not only to the three groups under scrutiny (Kachin, Rohingya and other Muslims of Myanmar) but also probably to other groups that were not part of these proceedings (some references about their situation were provided to the Tribunal).

The stages of the execution of that general objective of identity destruction have been different, but it is important to highlight that all the "non-Burmese" groups and the Muslim Burmese are suffering a common process. The stages which that process has reached at present are not the same, which only means that some groups could suffer in the near future the same process other groups are suffering today. Accordingly, we believe that combining in a single Tribunal the analysis of these various genocidal practices developed by the state of Myanmar against different parts of its community could be a way to strengthen the ties among those communities in order to confront the genocidal aims of the state of Myanmar.

⁴⁷ "SPDC Rohingya Extermination Plan", English translation reproduced in *Countdown*, p.36, described as having been "adopted in 1988 on the basis of the proposals submitted by Col. Tha Kyaw (a Rakine), Chairman of the National Unity Party."

V.3.2. Implementation of genocide

Even if the general objective of destruction of the group is applied to all the non-Burmese groups, the implementation of it is in different stages regarding each of the groups.

First of all, even in the legal structure of the state of Myanmar, the Rohingya group has been deleted and is now excluded entirely. In the current situation, the Rohingya cannot be Myanmar citizens as Rohingyas. That group is not recognised as part of the community, and it is even prohibited to use the word Rohingya to refer to them. That is the last stage in any analysis of genocidal social processes as either “denial” or “symbolical enactment”, which means not only that the group is attacked in a material form with the intention to annihilate it, but even its symbolic existence is also denied.

In the case of other Muslims, if they state their religion as Muslim, that is recognised and recorded, but then is interpreted to mean they cannot be recognised as ethnic Burmese and are forced to add a second qualifying ethnicity/nationality, such as Karen, Shan, Indian, Pakistani, Bangladeshi, regardless of whether they have any such ancestry. Moreover, if the group is not one of the recognised ethnic groups, they have to prove their origins in the land back to 1823.

In the case of the Kachin, because they are one of the recognised nationalities, they seem not to have experienced denial of their identity to the same extent. Nevertheless, the Tribunal was informed that Kachin identity, especially as revealed in names, has over time gradually led to increasing discrimination, such as blocking of employment, appointments and promotion.

After proving the general intention of destruction of the three groups under scrutiny (even if at different stages) and qualifying the facts as genocide under the Genocide Convention, the Tribunal went on to identify three of the five practices of the UN Genocide Convention applied with the specific intent to destroy the Rohingya population in whole or in part, namely:

- (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.

On the strength of the evidence presented, the Tribunal reached the consensus ruling that the state of Myanmar has the intent to commit genocide against the Kachin people and the other Myanmar Muslims. Further, the state of Myanmar is guilty of the crime of genocide against the

Rohingya. Moreover, that genocide against the Rohingya is now taking place with ongoing acts of genocide. There is a strong possibility that the number of casualties of that genocide will be even higher in the future if nothing is done to stop it.

Regarding the other Myanmar Muslims and the Kachin, even if the implementation of the genocide is not yet taking place, the Tribunal hereby issues a clear alert that the continuation of the persecution, together with the crimes against humanity and war crimes, could amount to the implementation of genocide in the near future.

To make matters worse, the wholesale lack of justice leads to systematic impunity of perpetrators of the crimes so far specified, since it is impossible or useless to make a complaint to police, judiciary or military authorities.

All these unpunished crimes have been committed and are currently being committed – with an intent to commit the same – by the Myanmar/Burmese Army and by the regime in power in the state of Myanmar, and seem to be part of a plan: to deny every expression of autonomy and self-government of the people of Kachin state and, more generally, to humiliate and to destroy the ethnic and cultural identity of minorities living in the country.

The limited and incomplete democracy of a Myanmar still heavily dependent on military power, shows intolerance and lack of respect of human rights, revealing its negative and dark side which conflicts with the principles of civilisation and with the religious beliefs of most of its people.

This unacceptable and dangerous state of things can no longer be described and justified as the inevitable result of a difficult transition to a full and mature democracy, as claimed by State Counsellor Aung San Suu Kyi as recently as 19 September 2017, but must be defined as a regime of oppression and of denial of fundamental rights of the Kachin people, Rohingya and other Muslim groups.

Even an imperfect form of democracy requires an adequate protection of ethnic and religious minorities, of all minority groups and of the weak, that now does not exist in the state of Myanmar.

This absence of protection and of respect for fundamental human rights of minorities living in Myanmar appears to be the common denominator among the different conditions of Kachin, Rohingya and other Muslim groups of that country.

VI. RECOMMENDATIONS

Numerous reports on the situation in Myanmar have appeared in recent months, each making significant recommendations. It is not the intention of the PPT simply to repeat what is already a substantial list of well-informed and valuable recommendations.

In making our recommendations we intend to indicate what in our view, based on the evidence we have considered, needs to be done under conditions that exist currently, as well as longer term actions that need to be taken to heal the wounds suffered by the people of Myanmar and to prevent further injury to them.

We do this, cognisant of the State Counsellor's invitation to "friends of Myanmar", as we consider ourselves, to join with her government in helping to restore peace, to achieve reconciliation and to point the way to social, political and economic development toward a fair, just and prosperous Myanmar under the rule of law.

We also are aware that, despite the best intentions of the international community in establishing the United Nations and bringing forth the Universal Declaration of Human Rights in the shadow of dreadful events such as the Holocaust in World War II, genocide and other atrocious crimes have been repeated time and again since 1948. Therefore, we have taken this opportunity to make some general suggestions that we believe will aid in the universally desired end, unfulfilled since 1948: Never Again.

The recommendations that follow are articulated with attention to their potential for being implemented in the current intense period of international debates and proposals accompanying the events of Myanmar:

- 1) to stress the urgency of and the need for concreteness to face effectively the immediate-short term needs of the humanitarian crisis;
- 2) to protect and promote the struggles for democracy of the communities most affected by discriminatory and persecutory measures and policies;
- 3) to assert that the failure of key national and international actors to assume effective measures in this instance would contribute to the growing crisis of credibility on the role of international laws and principles in providing peaceful solutions for conflicts where regional or global political and economic

interests prevail over fundamental rights universally recognised as indicators of a sustainable democracy.

Measures for the government and people of Myanmar

Urgent measures to minimise further harm

1. A ceasefire package and de-militarisation should be negotiated by government and ASEAN representatives with all armed groups in Rakhine State and the Myanmar military, including a de-militarised zone along the border in the northern region of Rakhine State.
2. The “verification process” proposed by Aung San Suu Kyi and others should, without any further delay, guarantee that all persons born or naturalised in Myanmar are considered full citizens of Myanmar and are issued national identity cards, with all the rights of full Myanmar citizenship.
3. Myanmar must grant visas and full access to the fact-finding mission of the UN Human Rights Council and others in order to investigate and document human rights abuses against the Rohingya, other Myanmar Muslims, Kachin and other groups.

Democracy, participation and citizenship

4. Myanmar must end its official discrimination and persecution of the Rohingya, Kachin, Myanmar Muslims and other groups. Myanmar must repeal or amend the 2008 Constitution, the 1982 Citizenship Law and other discriminatory law and policies in order to extend full citizenship to the Rohingya and other groups, ensuring all rights guaranteed by the treaties and conventions to which Myanmar is a party as well as the Universal Declaration of Human Rights.
5. Military representation in Parliament should be abolished, and all members of Parliament should be democratically elected. Minorities should not be barred from representation in Parliament.
6. The 2008 Constitution should be amended in order to place the armed forces and police under full civilian authority.

Justice and the rule of law

7. Myanmar must prosecute in its courts perpetrators of human rights abuses, hate crimes, genocidal massacres, rape, torture, arson and ethnic and religious violence against the Rohingya,

Kachin, Myanmar Muslims and other groups. There must be no more impunity for military personnel, police or militias.

Human rights and accountability

8. An independent, non-governmental Commission should be established to develop a program for rehabilitation and compensation to all those injured through violation of human rights.

Transformation, inclusion and equality

9. Recognition of the capacity of the peoples in the different states to administer their own affairs consistent with commitment to a united, federal Myanmar. The reality of internal colonialism and the policy of Burmanisation need to be confronted and transformed.

Measures for the government of Myanmar and its neighbouring countries

10. Myanmar and neighbouring nations must allow humanitarian, human rights and religious organisations as well as journalists unobstructed access to Rakhine State and Rohingya refugees, and to areas with Kachin and other national groups.

11. There is a tendency to view the refugee flow through a security lens. Such a perception is not only flawed but may also result in improper policy responses. We urge all concerned to view refugees with compassion and humanity, and thus to highlight threats to the human security of refugees rather than viewing them as a national security threat. We recognise and applaud the efforts of the Bangladesh authorities in dealing with the unprecedented challenge of receiving almost half a million people in just over three weeks, and which appears to be continuing. As it discharges its stated commitment to provide sanctuary for those people, we urge the Bangladesh government to:

- a) issue a temporary identity document that will protect the Rohingya refugees, including those arriving in previous years, from detention for illegal entry.
- b) ensure treatment of the wounded and in due course put in place psychological support to the refugees, especially affected children and abused women.

Measures for ASEAN and other members of the international community

12. ASEAN nations are encouraged to share responsibility for the emigration crisis and open their borders to Rohingya asylum seekers in accordance with the ASEAN Charter, and permit them to settle in refugee camps until Rohingya are granted full citizenship rights in Myanmar.

13. The EU, USA, Japan, China and other prosperous nations should provide the financial and material resources necessary to support the burden borne by Bangladesh, Malaysia and other nations that welcome Rohingya refugees.

14. The hosting countries' law enforcement agencies and community organisations must remain vigilant, while NGOs and the media should be encouraged to raise awareness about traffickers' methods and the consequences of trafficking. Women and unaccompanied children are particularly vulnerable to both internal and cross-border trafficking.

Measures for international and regional institutions

15. Impose an immediate arms embargo on the government of Myanmar.

16. Targeted sanctions should be imposed on Myanmar government officials and perpetrators of human rights abuse, e.g. freezing of overseas bank accounts, a ban on travel outside Myanmar and a plan to escalate sanctions should the government fail in its general duty to protect its people and to stop the human rights violations by the military and by private persons and organisations.

17. An independent, international non-governmental Commission should be established in order to investigate the causes of and responsibility for the harms about which the world has now been made aware.

Annex 1
Panel of the Judges
Brief biographical details



Daniel Feierstein (Argentina), who chaired the Panel.

A researcher at CONICET (National Council for Scientific and Technical Research), based at the Universidad Nacional de Tres de Febrero (Third of February National University), Argentina, where he founded and runs the Centre for Genocide Studies. He holds a chair in the Faculty of Social Sciences of Buenos Aires University, teaching analysis of genocidal social practices. He is the former President of the International Association of Genocide Scholars (IAGS, 2013-2015).



Zulaiha Ismail (Malaysia)

A retired Professor in graduate business programs, she is currently a Trustee of the Perdana Global Peace Foundation, an NGO committed to energising peace and criminalising wars. As past Executive Director, she organised international conferences, and participated in humanitarian aid projects as well as engaging with fellow activists around the world. She also serves in the KL Foundation to Criminalise War, and sits on its Commission in investigating war crimes. This has resulted in three International Tribunals being held, one of which addressed Israeli war crimes. She continues to work in a personal capacity with NGO's in Lebanon, specifically on the plight of Palestinian refugee camps, with a focus on their right of return.



Helen Jarvis (Cambodia-Australia)

She holds a PhD from the University of Sydney in Indonesian studies. Since the mid-1990s, she has worked on issues relating to crimes against humanity and genocide, mainly focusing on Cambodia, including service as Chief of Public Affairs and then Chief of the Victims' Support Section of the Extraordinary Chambers in the Courts of Cambodia (ECCC). She is a Vice-President of the Permanent People's Tribunal and a member of the International Advisory Committee of UNESCO's Memory of the World program and of the Advisory Board of the Center for the Study of Genocide and Justice in Dhaka, Bangladesh.



Gill H. Boehringer (Australia)

Former Head of Law School, Macquarie University, Sydney, Australia, he has also taught and researched in universities of the USA, Northern Ireland, England, and Tanzania. He has taught many subjects in law as well as sociology of education, sociology of deviance, anthropology, and criminology. Has served as a panel member on the Permanent People's Tribunal in Cambodia and Indonesia inquiring into the garment industry and in Mexico inquiring into globalization and the social crisis. Current research includes corporate crime and regulatory capture in the Philippines; alternative justice systems (Kurdistan; Brazil); people's lawyers and people's struggles (Turkey and the Philippines); local people's tribunals and social movements. He served as an International Election Observer in the Philippines in 2007, 2010 and 2013.



Nursyahbani Katjasungkana (Indonesia)

She graduated from Law Faculty of Airlangga University with a specialization in Criminal law (1978) and has a post graduate diploma on Comparative Sexual Orientation Law from Leiden University (2012) and on Bridging the Research-Policy Divide from the National Centre of Epidemiology of the Australian National University. She is a human rights lawyer, working at several NGO's mainly committed to human and women's rights. She was Director of the Jakarta Legal Aid Institute (1987-1993), co-founder of APIK, Indonesian Women Association for Justice. She was member of the Peoples' Consultative Assembly (1999-2004) and member of Parliament (2004-2009). She served as prosecutor of The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery (Tokyo, 2000) and General Coordinator of the International People's Tribunal on Crimes against Humanity and Genocide 1965-1966 in Indonesia. Currently she is the National Coordinator of the Indonesian Association of Legal Aid Societies for Women.



Shadi Sadr (Iran)

She is an Iranian human rights lawyer who has a Masters of International Law from the University of Tehran. She is the founder and director of Raahi, a legal centre for women, which was closed down by the Iranian authorities in 2007 in a wave of repression against civil society. She has received several awards such as the Human Rights Tulip and Alexander Prize of the Law School of Santa Clara University. In 2010, she established the organisation Justice for Iran (JFI). As its Executive Director, she has overseen the creation and implementation of several research projects on the rights of ethnic and religious minorities, LGBTs, women, and those who are persecuted because of their political beliefs. She served as a member of the panel of judges for the International People's Tribunal on Crimes against Humanity and Genocide 1965-1966 in Indonesia.



Nello Rossi (Italy)

He is currently Solicitor General at the Supreme Court of Cassation, Italy. Since 2007 until 2015 he was the Chief Public Prosecutor's Deputy in Rome, coordinator of the departments specialised in economic crimes and computer crimes. From 2002 to 2007 he was a Justice at the Court of Cassation, in the criminal division of the Court. Until 2016 he was also the Ministry of Justice delegate to the Financial Action Task Force on money laundering (FATF) set up by the OECD. For nearly 15 years, to 2012, he co-edited the legal journal "Questione Giustizia" under the auspices of Magistratura Democratica.



Denis Halliday (Ireland), Judge in absence

He was the United Nations Humanitarian Coordinator in Iraq from 1 September 1997 until 1998. He was previously Deputy Resident Representative to Singapore of the United Nations Development Programme. He holds an M.A. in Economics, Geography and Public Administration from Trinity College, Dublin. After a 34-year career at the United Nations, where he had reached Assistant Secretary-General level, he resigned in 1998 over United Nation sanctions that cut off food supplies to Iraq, characterizing them as "genocidal". Laureate of the Gandhi International Peace Award.

Annex 2

Prosecution Team and Experts testifying at the Kuala Lumpur Session

Brief biographical details

Prosecution Team

Doreen Chen (Chief Prosecutor)

Doreen holds LLB (Hons) and B Ec Soc Sc (Hons) from the University of Sydney and LLM (Hons) from Columbia Law School, and is admitted to practice in Australia and Cambodia.

She is a social changemaker and a human rights lawyer who has worked previously with Amnesty and Oxfam and is currently a leading member of the defence team for Nuon Chea at the Extraordinary Chambers in the Courts of Cambodia. Doreen is co-founder and director of Destination Justice, through which she supports persecuted human rights defenders, particularly in Southeast Asia.

Azril Mohd Amin

Azril Mohd Amin is a Kuala Lumpur-based lawyer and a human rights campaigner. He holds LL.B (with Honours), Ahmad Ibrahim Kuliyyah of Laws, International Islāmic University Malaysia (1999), and was admitted as an Advocate & Solicitor of the High Court of Malaya, Kuala Lumpur (2000). As the founder and chief executive of the Centre for Human Rights Research & Advocacy (CENTHRA) in 2014, he has worked particularly on the plight of refugees, especially access to health and education for Rohingya, Syrian and Palestinian refugees in Malaysia and Indonesia since 2010.

Azril led a 6-member delegation of Malaysian investigative lawyers to present expert views at the Opening Session of the Permanent Peoples' Tribunal on Genocide Against Rohingya, Kachin and other minorities held by the International State Crime Initiative (ISCI) University of Queen Mary, London in March 2017.

The Prosecution team also included Malaysian lawyers: Dir Kheizwan Kamaruddin, Fahmi Abd. Moin, Luqman Mazlan, Dr Mohd Afandi Salleh, Rafna Farin Abdul B. Ra'far and Dato Rosal Azimin Ahmad, as well as Dr Thomas McManus from the School of Law, Queen Mary University, London.

Experts who testified at the Kuala Lumpur Session

(in order of appearance)

Dr. Chandra Muzaffar

Malaysian intellectual and human rights activist. Actively campaigned on issues of human rights and intercivilisational dialogue. Founder of Malaysian human rights NGO Aliran and president 1977–91; president of International Movement for a Just World beginning in 1991; deputy president of the National Justice Party (KeADILan) beginning in 1999; member of the "Global Compassion Council.

Author of *Universalism of Islam* (1979), *Islamic Resurgence in Malaysia* (1987), *Human Rights and the New World Order* (1993), and *Alternative Politics for Asia: A Buddhist-Muslim Dialogue* (1999). Awarded the Rockefeller Social Science Fellowship in Development Studies for Southeast Asia (1984–85) and the Harry J. Benda Prize for distinguished scholarship on Southeast Asia (1989).

Dr Maung Zarni

A long-time Burmese human rights activist, Maung Zarni is a non-resident research fellow with the Documentation Centre of Cambodia. He has written extensively on the Burmese affairs including democratic transition, peace process, transnational activism, Islamophobia and Rohingya genocide, including most recently, with Alice Cowley, “The Slow Burning Genocide of Myanmar’s Rohingya,” *Pacific Rim Law and Policy Journal* (Spring 2014), “An Evolution of Rohingya Persecution in Myanmar: From Strategic Embrace to Genocide”, the Middle East Institute, American University (April 2017) and “Reworking the Colonial-Era ‘Indian Peril’: Myanmar’s State-directed Persecution of Rohingyas and Other Muslims”, *Brown Journal of World Affairs* (Forthcoming, December 2017). He has organized international conferences on the plight of Rohingyas at the London School of Economics (2014), Harvard University (2014), Norwegian Nobel Institute and Oxford University (2015), and initiated the Permanent Peoples’ Tribunal on Myanmar in 2013. Maung Zarni holds a PhD from the University of Wisconsin at Madison and an MA from the University of California at Davis. As a student, he founded and led the then pioneering Internet-based Free Burma Coalition out of Madison, Wisconsin in 1995-1998.

Dr. Gregory Stanton

Greg Stanton is Research Professor in Genocide Studies and Prevention at the School for Conflict Analysis and Resolution, George Mason University, Arlington, Virginia. He is a former President (2007 – 2009) of the International Association of Genocide Scholars (IAGS); the founder (1999) and chairman of Genocide Watch (<http://www.genocidewatch.com>), the founder (1981) and director of the Cambodian Genocide Project, and is the founder (1999) and chairman of the Alliance Against Genocide, which has 65 member organizations in 24 countries. Dr. Stanton served in the State Department (1992-1999), where he drafted the United Nations Security Council resolutions that created the International Criminal Tribunal for Rwanda, and won the 1994 American Foreign Service Association’s prestigious W. Averell Harriman award for “extraordinary contributions to the practice of diplomacy exemplifying intellectual courage,” based on his dissent from U.S. policy on the Rwandan genocide.

Dr. Razia Sultana

Razia Sultana is a Rohingya lawyer who practices law in Chittagong Court System, Bangladesh. She holds a BA and LLB from Bangladesh and has received training in humanitarian law and human rights at the diploma level from Canada. Based on her interviews with Rohingya rape victims in 2017, she authored the report entitled “No need to cover our faces: the Rohingya Rape Victims of the Burmese Military”, (Burma Task Force, USA, 2017).

Ryan Roco

A London-based photographer, filmmaker, and researcher, Ryan Roco holds graduate degrees from the Department of Politics and International Studies at SOAS, University of London. He has worked

extensively in Southeast Asia, especially Myanmar, and his work has appeared in numerous international news publications and human rights reports.

Tin Soe

Born in Maungdaw, northern Arakan on May 20, 1995, Tin Soe studied in Maungdaw until high school and graduated from Rangoon University in 1977. For two decades, Tin Soe worked with Rohingya organizations, documenting human rights abuses, helping people access services – Education for Rohingya refugee children and Humanitarian access to Refugee, and building networks of international solidarity. It was sometimes dangerous work, and he was jailed three times for his efforts. In 2003, he joined Kaladan Press Network, and he is currently an Executive Editor of this first news agency by and for Burma's Rohingya people. As journalists covering an area strictly controlled by the regime, he and Kaladan Press team are uniquely placed to show the rest of the Burma and the outside world the repression that Rohingya people face.

Professor Chowdhury R. Abrar

C. R. Abrar teaches International Relations and directs the Refugee and Migratory Movements Research Unit (RMMRU) at the University of Dhaka, Bangladesh. He has done research on Rohingya refugees, Bihari stateless people, labour migration and recruitment industry issues. Abrar was instrumental in the movement for citizenship rights of the camp dwelling Bihari people and civic campaign for allowing admission to Rohingya refugees. He also successfully filed public interest litigation for the release of several Rohingya asylum seekers who served out their sentence but were still languishing in prisons. Dr. Abrar is President of a leading rights organisation Odhikar (Rights) of Bangladesh. He studied at the Universities of Dhaka and Sussex, and Griffith University, Australia. He is a regular contributor on migration and rights issues to English dailies.

Mr Kyaw Win

Kyaw Win is a human rights activist, born and brought up in Rangoon, Burma (Myanmar). Kyaw Win graduated with a BA (Hons) in Business Management with an Accounting pathway from the University of Westminster in London. In 2014 he founded the Burma Human Rights Network (BHRN) in London, of which he is Executive Director, which is documenting human rights violations, breaches of religious freedom and the spread of hate speech and anti-Muslim violence. BHRN is operating throughout Myanmar including in Rakhine State. Kyaw Win is the author of several articles on Burmese politics and religious issues, including several features in The Asia Times and New Mandala, which examined the spread of religious persecution in Myanmar and its root causes.

Annex 3

Defence

As stated in the introductory speech of the Secretary General of the Permanent Peoples' Tribunal, Gianni Tognoni, the Myanmar civilian and military authorities were invited to submit their defence.

In view of the absence of any response or appearance by these authorities and in accordance with the procedures established by its Statute, the Permanent Peoples' Tribunal has the option to adopt one of two modalities: the first is to nominate an independent expert in the role of *amicus curiae* to prepare a report; the second is to undertake a formal collection of the official documents and statements that respond to the allegations and the charge submitted to this panel of the Judges. In this way, the panel of the judges could have direct access to them in their deliberations.

The dramatic and rapidly evolving character of this case did not allow for a timely and professionally reliable preparation of a formal defence, as it would simply register the absence of any formal legislative or official document of real relevance for the issue considered in the Indictment presented and assessed in the London Opening Session, which took place in London in March 2017, and in the update and formal indictment presented in the current final Session.

The many full-scale reports from various sources – from various UN bodies, to the Rakhine Commission headed by Kofi Annan and to those by Fortify Rights, Human Rights Watch, Amnesty International, et al – have been available for the panel of the Judges in the dossier updated to the last events. The official position of the Myanmar state has been one of denial of the facts in a series of declarations, which although widely commented in the world press, cannot be assumed by the PPT as formal indication of a policy.

Such denial is particularly relevant in the case of Rohingyas. As declared by Aung Aung San Suu Kyi “Claims of abuse are false and fabricated”⁴⁸ and the United Nations and international journalists wrongly accused Myanmar of ethnic cleansing and crimes against humanity. In addition to this, other authorities have consistently declared categorically that “Myanmar country has no Rohingya race, rather illegal Bengali immigrants and terrorists who are attempting to threaten the national unity”.⁴⁹

⁴⁸ <https://www.bbc.com/news/world-asia-40011437>

⁴⁹ <https://www.facebook.com/seniorgeneralminnaunghlaing/posts/1698274643540350>

The formal speech of Aung San Suu Kyi⁵⁰, which by chance coincided with the second day of the hearing of the PPT and was widely expected and hailed worldwide as the official break in her silence and the expression of the formal position of Myanmar on the crisis, represents *de facto* the most appropriate and reliable document to be taken by the Tribunal as the defence of the Government, both in respect to the general considerations regarding their policy towards the different groups who have requested the PPT to convene the present Session, and to the most recent events and perspectives.

This speech is therefore deemed to be considered an integral part of the material submitted to this Tribunal. Its main points relevant for to the deliberation by the Panel of Judges can be summarised as follows:

1. despite its fragility, the democratic Government of Myanmar has made substantial progress over its first 18 months in advancing inclusive and non-discriminatory policies;
2. the Government is totally open to all collaboration or inspections targeted to support its programs seeking development in peace and harmony;
3. there are no major conflicts in the country despite the diversity of positions and beliefs;
4. in the events of October 2016 and August 2017, the Government was obliged to counter the attacks on posts of the Border Guard Forces conducted by armed terrorists. These attacks did not affect the civilian population. Indeed, 50% of the villages remain intact;
5. the Government is ready and willing to be an active and collaborative member of the international community.

⁵⁰ *Speech by State Counsellor on Government's efforts with regard to National Reconciliation and Peace:* <https://www.youtube.com/watch?v=4QnZpAhsSW0>.

Annex 4

Session on State Crimes Allegedly Committed against the Rohingyas, Kachins and Other Groups in Myanmar

University of Malaya School of Law

Malaysia, 18-22 September 2017

Program

Day 1: Monday 18 September 2017

| | | |
|------------------|--|---|
| | Welcome Message | Dr Chandra Muzaffar |
| | Introductory Speech of the PPT and Presentation of the Panel of the Judges | Gianni Tognoni |
| Session 1 | Presentation of the Indictment | |
| | Presentation of the Prosecution Case | |
| | Prosecution Opening Statement: General Remarks | Prosecutors |
| | Prosecution Opening Statement: Group Evidence Overview | |
| Session 2 | Expert Evidence on General Context | Expert: Dr. Maung Zarni |
| | | Expert: Dr. Gregory H. Stanton |
| | | Expert: Dr. Razia Sultana |
| Session 3 | Kachin Evidence | Witness: Jimmy H pang |
| | | Witness: Identity confidential |
| Session 3 | Rohingya Evidence | Special Guest: Kazi Reazul Hoque, Chairman of Bangladeshi Human Rights Commission |
| | | |
| Session 4 | Kachin Evidence | Witnesses: Jimmy H pang and and Witness with Identity confidential |
| | | Victim: Identity confidential |
| | | Victim: Identity confidential |

Day 2: Tuesday 19 September 2017

| | | |
|---|--|---|
| Session 1 [IN CAMERA] | Kachin Evidence | Victim: Identity confidential Victim: Identity confidential Victim: Identity confidential |
| | Kachin Evidence | Expert: Expert: Ryan Roco |
| Session 2 | Rohingya Evidence | Expert: Tin Soe Expert: Dr. Razia Sultana |
| Session 3 | Rohingya Evidence | Expert: Dr. Maung Zarni Expert: Prof. Chowdhury Abrar |
| Session 4 Hearing Room 1 [IN CAMERA] | Rohingya Evidence | Victim 1: Identity confidential Victim 2: Identity confidential Victim 3: Identity confidential |
| Session 4 Hearing Room 2 [IN CAMERA] | Kachin Evidence Rohingya Evidence | Victims, Witnesses and Experts: Identities confidential Victim 4: Identity confidential |

Day 3: Wednesday 20 September 2017

| | | |
|--|--------------------------|---|
| Session 1 [IN CAMERA] | Myanmar Muslim Evidence | Victim: Identity confidential |
| | | Expert: Kyaw Win |
| Session 2 | Myanmar Muslim Evidence | Witness: Thuzar Maung Witness: Barakat |
| Session 3 | Myanmar Muslim Evidence | Witness: Arafat Witness: Maung Maung |
| Session 4 | Experts' Recommendations | Expert: Dr. Gregory H. Stanton Expert: Prof. Chowdhury Abrar |

Day 4: Thursday 21 September 2017

Deliberation of the Jury

Day 5: Friday 22 September 2017

Presentation of the Preliminary Judgment by the Panel of the Judges

Press conference

Concluding Remarks by Dr Chandra Muzaffar, Chair, Malaysian Organising Committee

Annex 5

Index of Selected Documents Provided to the Tribunal for the Kuala Lumpur session

Documents on the overall situation in Myanmar:

United Nations Special Rapporteur on the Situation of Human Rights in Myanmar, *End of Mission Statement by Special Rapporteur on the Situation of Human Rights in Myanmar*, Statement, July 2017.

Amnesty International, *All the Civilians Suffer: Conflict, Displacement and Abuse in Northern Myanmar*, Report, 2017.

United Nations Human Rights Council, Resolution adopted by the Human Rights Council on 24 March 2017: 34/22. *Situation of Human Rights in Myanmar*, March 2017.

United Nations Special Rapporteur on the Situation of Human Rights in Myanmar, *Report of the United Nations Special Rapporteur on the Situation of Human Rights in Myanmar*, March 2017.

United Nations Special Rapporteur on the Situation of Human Rights in Myanmar, *Report of the United Nations Special Rapporteur on the Situation of Human Rights in Myanmar*, 2016.

Documents on Rohingyas case:

Final Report of the Advisory Commission on Rakhine State, *Towards a peaceful, fair and prosperous future for the peoples of Rakhine*, August 2017

Amnesty International, *Myanmar: Scorched Earth Campaign Fuels Ethnic Cleansing of Rohingya From Rakhine State*, Press release, September 2017

Human Rights Watch, *Burma: Rohingya Describe Military Atrocities*, Press release, September 2017

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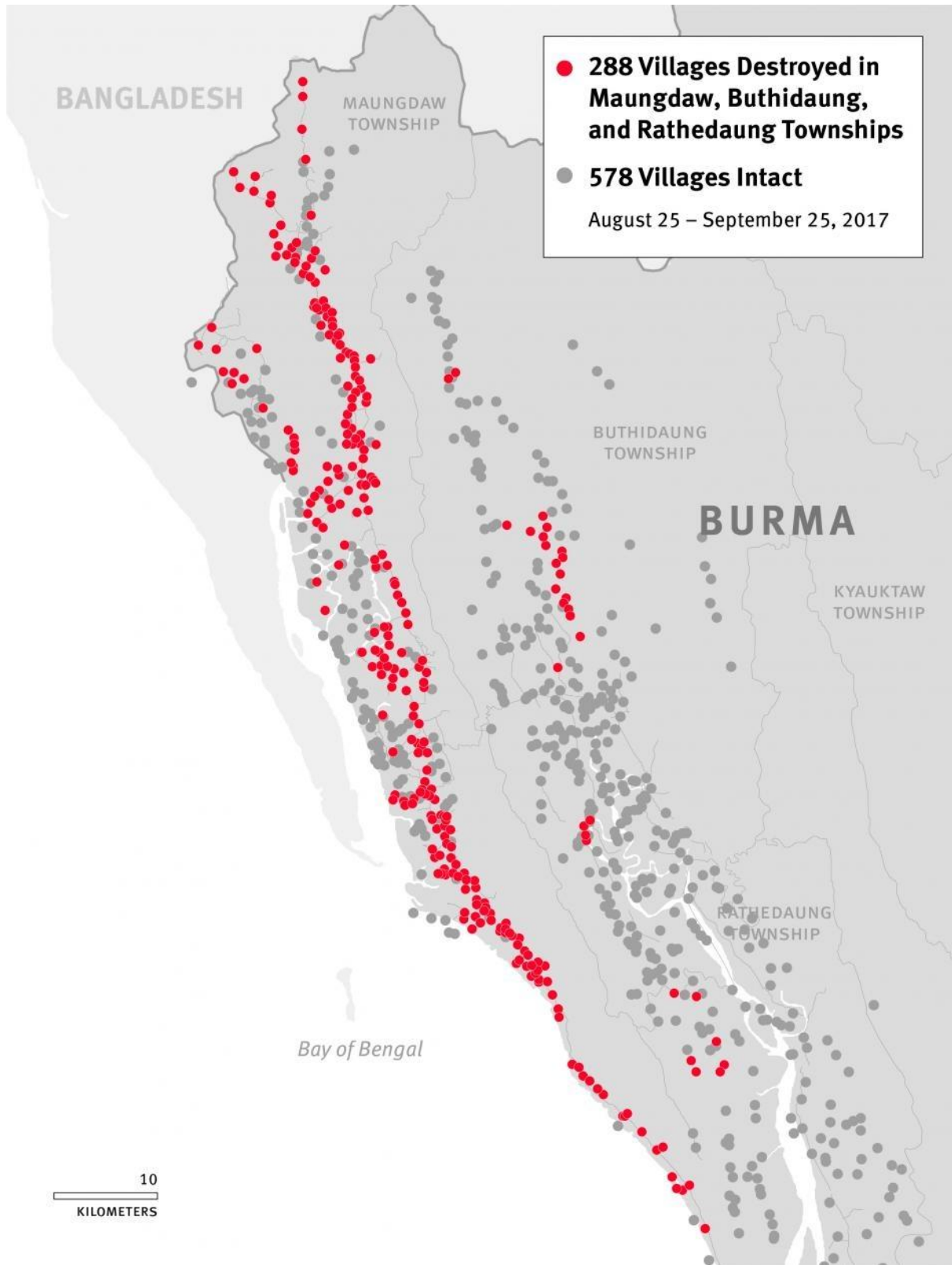
The Constitution of Burma (1947)

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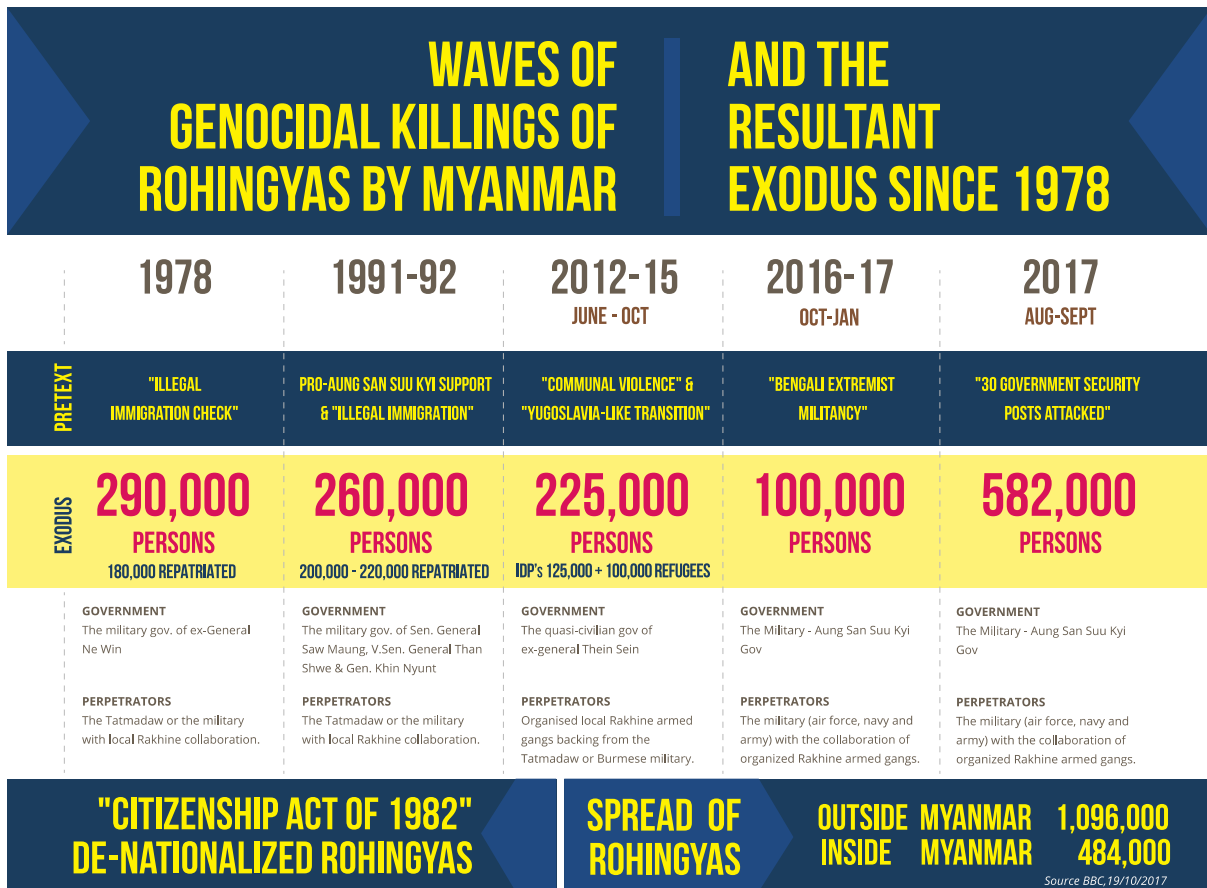
Myanmar's Constitution of 2008

Examples of old citizenship cards and historical documents on the Rohingya citizenship

Annex 6



Annex 7



Sources 1) Former Head of Myanmar Military Intelligence; 2) UN; and 3) Media

Annex 8
Monk's letter⁵¹

Abbot Reverend Thuzana
Nang Oo Bay Mae Taw Ya Kyaung (Monastery)
Myaing Gyi Ngu Special Region
(Karen State)

23/02/2000

Attn: Ta Khwet Hpo Mosque Leader and Villagers

I have heard on the grapevine that a rumour is circulating that I have begun a campaign to expel all Muslims (*Kalars*) from the village since my return from BodhGaya in India, that is correct.

I thought about this expulsion idea over the last 3 years and 2 months before going to India.

I thought about whether it is right or wrong, (to expel you all). I have universal compassion and kindness. I can imagine that no one would wish to (be forced) abandon one's birthplace.

However, though we are all humans our faiths are different.

For instance, in my Special Region anyone who takes refuge is vegetarian. But your mosque leaders and fellow Muslim villagers eat meat and fish daily. Not only that. For Eid Festivals your faith requires that you slaughter the most beautiful and the healthiest of cows. A sharp contrast.

But you and I as religious leaders know each other personally very well. Although we have mutual understanding and forgiveness, our respective youth and our followers are bound to come into conflict with one another in due course.

The year we had massive floods Muslim villagers tied up the cows to be slaughtered at the Kei La Thar Pagoda height, at the Lin Lwin Myaing Quarter. In addition (to slaughtering the cows there) your villagers were going around and selling meat.

I came across the sellers myself.

⁵¹ Translation by Dr. Zarni.

Well, that was a good thing. If my soldiers (from the Democratic Karen Buddhist Army) had run into you and killed the meat sellers it would have resulted in a major problem.

Therefore, I had to instruct my people to put the "No Muslims and Non-Buddhists must enter" sign.

I am writing this notice to you from a long term perspective.

Even if I did not ask you, the Muslim leaders, to relocate your village when the town expansion project begins, in accord with the local history you would be obliged to relocate anyway.

That's why you should relocate peacefully and without resistance to the new designated place where you build a village which will be named "Nyinyar Aye Chan" (Unity and Peace), and live accordingly peacefully.

Near Ta Khwet Hpoe Village (Buddhists will move in and build a new village named Nan Hay Myaing. This is a win-win situation.

During the immediate period of relocation you will hold resentment towards me, the Abbot. In due course, you will come to appreciate my good intentions.

Out of compassion, I am donating to your relocation efforts, out of my meagre savings, the amount of 20,000,000 Kyat (500,000 is earmarked for the building a mosque and the rest is for the villagers).

I heard some of your villagers thought it was too little a compensation and they wanted to refuse the offer. If that is the case, I will happily rescind the offer.

I am not a narrow-minded bigot. If I were, I would have barred Kalars from walking on any road that I paved, by erecting "no Kalars may walk on this road" signs.

I extend my metta to all. In this life we are different peoples as Kalar, Bama, Karen, etc. But in the cycle of lives we are all relatives! I hope that you will understand me and that you will forgive me for this action.

With much loving kindness for all,

Abbot Rev Thuzana

Myaing Gyi Ngo Special Zone

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