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New Briefing from Burmese Rohingya Organisation UK

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‘Slow death’: ten years confined to camps for 130,000 Rohingya in Myanmar

Genocidal acts continue as military junta defies provisional measures ordered by International Court of Justice

Executive summary

June 2022 marks a decade since the State-orchestrated violence of 2012 that expelled tens of thousands of Rohingya from their homes in central Rakhine State, Myanmar. The violence against the Rohingya was planned and instigated by government officials and state security forces. It included indiscriminate extrajudicial killings, sexual violence, mass arbitrary arrests of Rohingya and torture at detention sites, the burning of homes, destruction of mosques and looting of shops.

The false narrative of ‘intercommunal violence’ constructed by the military authorities was then used as a pretext to introduce draconian restrictions on freedom of movement for the Rohingya across Rakhine State. Rohingya displaced by the violence in central Rakhine State were segregated and confined to camps, in violation of international law. The enduring impact of the violence of 2012-2013 is often overlooked in the wake of the mass killings and other atrocity crimes that took place in 2016-2017. In fact, the State-orchestrated violence in 2012-2013 laid the groundwork for the brutal ‘clearance operations’ that were to follow. The 2012-2013 violence and its aftermath are an integral part of the ongoing genocide taking place today against the Rohingya.

More than 130,000 members of the Rohingya group, over half of whom are children, continue to be confined indefinitely in camps under squalid conditions. They have been subjected to the deliberate deprivation of resources indispensable for survival – namely adequate food, water, shelter, sanitation and medical care - by the military authorities. They have endured a decade of such ‘slow death’ treatment and for a generation of Rohingya children it is the only life they have ever known.

More than two years have passed since the International Court of Justice (ICJ) ordered Myanmar to ‘take all measures within its power’ to prevent irreparable harm against the Rohingya in its provisional measures order. The purpose of the order is to protect the Rohingya, a group described by the Court as ‘extremely vulnerable’. Since the ICJ’s order, the military junta in Myanmar has progressively tightened restrictions on those confined to the camps rather than easing them. Restrictions on freedom of movement and access to healthcare also remain in place for Rohingya in northern Rakhine State. When Rohingya men, women and children have sought to flee the appalling conditions of life imposed on them by the military junta in Rakhine State, they have been arrested, detained and treated as criminals, further dehumanising them.

Acts of genocide, when committed with the intent to destroy a group in whole or in part, are not limited to mass killings. They include creating circumstances that would lead to a ‘slow death’. With this briefing, BROUK demonstrates that the genocidal act of deliberately inflicting conditions of life calculated to bring about the physical destruction in whole or in part of the Rohingya group continues to be perpetrated by the military junta. As documented by BROUK, such conditions of life have in fact led to the preventable deaths of women and children in the past two years since the provisional measures were ordered.

At the same time, the world continues to bear witness to the gross human rights violations amounting to war crimes and crimes against humanity perpetrated by the military regime against the wider population of Myanmar. The junta is undoubtedly emboldened by the international community’s failure to hold it accountable for its atrocity crimes.

The junta's abject failure to comply with the ICJ's provisional measures and the lack of transparency around reporting on its compliance with the order call into question the effectiveness of the measures. Until the ICJ case reaches its conclusion, the State of Myanmar is obliged to report to the Court every six months, with the latest report due by 23 May 2022. The Court must act decisively and without further delay to strengthen the provisional measures order by compelling reporting to be made public. Public scrutiny of the junta's compliance with the order can in turn exert pressure on the UN Security Council to adopt a resolution on Myanmar rather than issuing yet another statement of 'deep concern'.

Introduction

Since BROUK's last briefing on the military junta's noncompliance with the provisional measures ordered by the International Court of Justice in November 2021, a 'human rights catastrophe' has continued to unfold in Myanmar.ⁱ

The UN-established Independent Investigative Mechanism (IIMM) for Myanmar stated that its preliminary analysis of information collected since the February 2021 attempted coup 'indicates that crimes against humanity... including murder, persecution, imprisonment, sexual violence, enforced disappearance and torture, have likely been committed.'ⁱⁱ The latest report from the UN Special Rapporteur on the human rights situation in Myanmar echoed this and added that 'when the junta's attacks occur in the context of armed conflict, they constitute probable war crimes, including the crimes of wilful killing, torture and inhumane treatment, destruction of property, compelling service in hostile forces, unlawful transfer, pillaging, rape, sexual violence and displacing civilians.'ⁱⁱⁱ The Special Rapporteur's report describes several mass killings of civilians by the junta, including two separate incidents in December where children were among the dead, as well the widespread use of torture in military bases, police stations, prisons and other places of detention. On the first anniversary of the attempted coup in February, the UN Security Council issued yet another press statement expressing "deep concern" regarding violence in the country. It has failed to exercise its Chapter VII powers under the UN Charter to consider - let alone implement - concrete actions to address the crisis in Myanmar.^{iv}

Against this backdrop of ongoing atrocity crimes and a 'crisis born of impunity', efforts to secure accountability for the alleged crime of genocide against the Rohingya people continue. In November, the Second Chamber of the Federal Criminal Court in Buenos Aires confirmed that it would launch a case against senior Myanmar officials under the principle of universal jurisdiction, which holds that some crimes – such as genocide - are so horrific that they can be tried anywhere. BROUK first petitioned the Argentinian judiciary to open such a case in November 2019. In December for the very first time Rohingya victims gave testimony in court. BROUK's President Tun Khin said, "Today was a landmark day for Rohingya people everywhere and our long struggle to end the genocide. It is important to remember that this is not just about the Rohingya people's quest for justice, but for all people of Myanmar who have suffered at the hands of the military, not least since the coup."^{vi}

At the same time, the International Criminal Court (ICC) has continued its investigation into the crimes against humanity of persecution, other inhumane acts, and deportation or forcible transfer of population, with reference to the mass exodus of Rohingya from Rakhine State to Bangladesh, based on its territorial jurisdiction derived from Bangladesh as a State Party to the Rome Statute of the ICC.

Documents leaked earlier this year show that top officials in the Myanmar military fear international scrutiny of their crimes. Several orders and memos instruct all military personnel not to answer letters related to arrest warrants or summons from the ICC or the Argentinian judiciary. Tun Tun Oo, a former general appointed by the regime to serve as Myanmar's chief justice, also instructed all members of the judiciary to ignore any warrant or summons sent by the courts.^{vii}

In February, the National Unity Government (NUG, Myanmar's government-in-exile) announced that it withdrew all preliminary objections to the Gambia's genocide case against Myanmar at the International Court of Justice (ICJ), filed under Aung San Suu Kyi's government. In doing so, the NUG sought to 'make clear to all the people of Myanmar and the international community that it is the proper representative of Myanmar at the ICJ in the case.'^{viii} Instead, the Court allowed regime officials to represent Myanmar at public

hearings on the preliminary objections, amidst widespread criticism.^{ix} A decision on the preliminary objections has yet to be issued by the Court.

In March, the United States Department of State determined that the Myanmar military had committed genocide against the Rohingya people. Tun Khin said, “This designation lets Rohingya know that their voices have been heard amid the cruel suffering they continue to endure.”^x A joint statement issued by more than 350 Myanmar civil society organisations and regional and international partners welcomed the determination, in a powerful expression of solidarity with the Rohingya:

‘As the long-awaited recognition of the atrocity crimes being determined by the US government is here, urgent actions must be taken towards criminal prosecution for these crimes and to ensure the protection of the remaining Rohingya in Rakhine State whose situation continues to be dire. Otherwise, this determination will languish as rhetoric and only serve to further embolden the Myanmar military that not only continues to implement its policies of genocide and persecute the remaining 600,000 Rohingya in Rakhine State, but is committing war crimes and crimes against humanity against the people across the country.’^{xi}

Until the ICJ case reaches its conclusion, the State of Myanmar is obliged to report to the Court every six months on its compliance with the provisional measures ordered by the Court in January 2020, with the latest report due by 23 May 2022. The primary purpose of the order is to protect the Rohingya remaining in Myanmar from irreparable harm.

With this briefing, BROUK aims to shine a light on the often-forgotten situation of the 130,000 Rohingya in central Rakhine State expelled from their homes in State-orchestrated violence in 2012-2013, who have been confined to camps in dire conditions for the past decade. Acts of genocide, when committed with the intent to destroy a group in whole or in part, are not limited to mass killings. They include creating circumstances that would lead to a ‘slow death’ such as the ‘deliberate deprivation of resources indispensable for survival’^{xii}, like shelter, food, water, sanitation facilities and access to medical care.

The *Gambia v. Myanmar* genocide case at the ICJ

A. Background to the ICJ case

In 2016 and 2017, BROUK and many other human rights organisations documented gross human rights violations perpetrated by the Tatmadaw (Myanmar armed forces) and its proxies during ‘clearance operations’ in Myanmar’s Rakhine State, resulting in significant loss of life among the Rohingya.^{xiii} These included mass rape of Rohingya women, children burned alive, machete attacks, shooting at fleeing villagers, the use of rocket launchers to raze entire Rohingya villages to the ground, coordinated massacres, as well as landmines laid at the border to target those fleeing the violence.^{xiv}

In March 2017, the Independent International Fact-Finding Mission on Myanmar (UNFFM) was established by the UN Human Rights Council with a mandate to ‘establish the facts and circumstances of the alleged recent human rights violations by military and security forces...in Myanmar, in particular in Rakhine State...with a view to ensuring full accountability for perpetrators and justice for victims.’^{xv} It published two seminal reports of its detailed findings in 2018 and 2019.^{xvi}

The UNFFM found that Myanmar had committed four out of the five underlying acts of genocide enumerated in the Genocide Convention, namely killings members of the Rohingya group, causing serious bodily or mental harm to members of the group, deliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part, and imposing measures intended to prevent births within the group.^{xvii} It further concluded that genocidal intent to destroy the Rohingya people in whole or in part could be inferred from the State’s pattern of conduct.^{xviii}

On 11 November 2019, the Gambia filed a case against Myanmar before the ICJ, alleging that Myanmar has committed genocide against the Rohingya people. The ICJ is the principal judicial organ of the United Nations. It deals with disputes between States, *not* the individual criminal responsibility of particular perpetrators. The legal basis for the case is the Genocide Convention, to which both States are a party. The

Gambia has also accused Myanmar of *continuing* to commit genocidal acts and of violating its other obligations under the Convention by failing to *prevent* and *punish* genocide.

Establishing that genocide has taken place under the Genocide Convention requires demonstrating both the commission of genocidal acts and genocidal intent – namely the intent to destroy a national, ethnic, racial, or religious group in whole or in part.

The Gambia's initial filing primarily focused on the first three genocidal acts enumerated in the Convention perpetrated by the Myanmar military and other State actors with the intent to destroy the Rohingya in whole or in part: 1) killing members of the group, including through mass executions of men and boys, the deliberate targeting of children and infants, and the burning down of entire villages, often with women and children trapped inside their homes; 2) causing serious bodily or mental harm to members of the group by committing sexual violence against Rohingya women and girls on a massive scale and subjecting men, women and children to torture and other forms of cruel treatment on the sole basis of their identity as Rohingya; and 3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part by destroying or otherwise denying access to food, shelter and other essentials of life.^{xix}

The Gambia's case against Myanmar marks the first time that a State without a direct connection to the alleged crime of genocide has brought a case before the ICJ under the Genocide Convention.^{xx} In doing so, the Gambia has emphasised the importance of the legal concepts of *erga omnes* obligations (owed to the international community as a whole) and *erga omnes partes* obligations (owed by any State party to all the other States parties to a convention), both of which apply to the crime of genocide.^{xxi}

B. Latest developments in the ICJ case

From 21-28 February, the ICJ held public hearings on Myanmar's preliminary objections to the case, namely that the Court lacks jurisdiction to hear the case and that the Gambia's Application to the Court is inadmissible. The preliminary objections were submitted by State Counsellor Aung San Suu Kyi on 20 January 2021 in her capacity as agent for Myanmar, shortly before the military coup.^{xxii} Although the National Unity Government sought to withdraw the objections and represent Myanmar in the case, the Court instead proceeded to hear the preliminary objections with members of the military junta representing the State. Legal scholars have noted that in doing so, 'the Court risks the accusation of acting inconsistently with the trend towards legitimacy as an operative principle of international law.'^{xxiii} As the principle judicial organ of the UN, the Court's move is out of step with other organs of the UN system, which have demanded a transfer of authority back to the legitimate elected government.

In brief, Myanmar's legal team made four main arguments during the hearings. Firstly, it argued that the Gambia was not bringing the case in its own right as a State, but rather as a proxy for the Organisation of Islamic Cooperation. As only States (and not organisations) can bring a case, it sought to argue that the Application was inadmissible or that the Court lacked jurisdiction. Secondly, it argued that there was no link between the Gambia and the facts of the case, and that the Gambia needed to demonstrate individual legal interest in order to have standing (the right to bring an action) before the Court. Thirdly, it argued that Myanmar's reservation to Article VIII of the Genocide Convention should be interpreted as referring to the International Court of Justice, and therefore the Gambia cannot validly *seise* (bring a legal matter before) the Court. Finally, it argued that there was no dispute between the Gambia and Myanmar at the time the Gambia instituted proceedings.^{xxiv}

In its provisional measures order, the ICJ determined that:

'[A]ll the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention... It follows that any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end.'^{xxv}

The Gambia urged the Court to uphold this preliminary finding in its written response to Myanmar's preliminary objections. During oral proceedings Professor Philippe Sands for the Gambia argued that,

‘Myanmar’s preliminary objections are, frankly, in direct conflict with the aims which the Genocide Convention pursues. If they succeeded, in whole or in part, they would seriously undermine the value of the Convention and its protections...Because it is fundamental to the Convention – and to any functioning legal order – that its parties be equipped to hold each other to account by the institution of proceedings before this Court whenever there has been an apparent breach. Without that... [the Convention] would quickly become a dead letter; and this Court would be toothless.’^{xxvi}

The Court’s decision on the preliminary objections will be delivered at a public sitting, the date of which has yet to be announced at the time of writing. Until the case concludes, the State of Myanmar is obliged to continue reporting on its compliance with the provisional measures ordered by the Court every six months.

C. The ICJ’s provisional measures order

Provisional measures are the equivalent of a legal injunction or court order, instructing a State to immediately take certain steps prior to a final ruling on the case.^{xxvii} As part of its case filing, the Gambia included an urgent request for the Court to order provisional measures in light of ‘the ongoing, severe and irreparable harm being suffered by members of the Rohingya group.’^{xxviii}

On 23 January 2020, the ICJ issued a relatively rare unanimous order on provisional measures. The Court described the Rohingya remaining in Myanmar as ‘extremely vulnerable’. As part of its rationale for issuing the order, the ICJ made it clear that, ‘Myanmar has not presented to the Court concrete measures aimed specifically at recognizing and ensuring the right of the Rohingya to exist as a protected group under the Genocide Convention.’^{xxix} In short, the provisional measures order recognises that Myanmar’s actions prior to the order were wholly inadequate to protect the Rohingya. It creates an expectation that Myanmar must take concrete measures in order to meet its obligations under the Genocide Convention.^{xxx}

At the heart of this case there are two key legal issues. The first is whether the State of Myanmar has already committed genocide against the Rohingya. The second is whether genocidal acts *continue to take place*, with genocidal intent.^{xxxi} Without prejudging the merits of the case - i.e. whether or not genocide has already taken place - the ICJ ordered Myanmar to ‘take all measures within its power’ to prevent irreparable harm against the Rohingya. Critically assessing Myanmar’s compliance with the order is therefore of the utmost importance. In brief, the provisional measures imposed by the Court require Myanmar to prevent the commission of genocidal acts, ensure security forces and those under its influence do not commit or incite genocide, preserve evidence of alleged genocidal acts, and report back within four months on its compliance with the order and every six months thereafter until the case concludes.^{xxxii} Under the UN Charter, which includes the Statute of the Court, all member States must comply with ICJ decisions.^{xxxiii}

However, to date the State of Myanmar is not under any legal obligation to make its reports public. In June 2020, 30 Rohingya organisations including BROUK submitted an open letter to the ICJ requesting that the reports be made available to allow for full public scrutiny of Myanmar’s compliance with the order and to avoid undermining Rohingya confidence in the ICJ proceedings.^{xxxiv} There has been no response from the ICJ.

Rakhine State context

Military tensions have been rising between the Arakan Army (AA) and the Tatmadaw since November last year when BROUK published its last briefing to coincide with ICJ reporting deadlines. Local residents reported sporadic armed clashes between the two sides in the northern townships of Buthidaung and Maungdaw in late January and early February. In central Rakhine State, skirmishes were reported in Kyauktaw in January and in Myebon in April.^{xxxv} The uneasy informal ceasefire between the two sides appears to be hanging by a thread, with the AA commander-in-chief warning his soldiers to ‘prepare for war’ in April.^{xxxvi}

Since the attempted military coup, the political wing of the AA, the United League of Arakan (ULA), has established a parallel administration to rival the junta’s State Administrative Council (SAC) across most of Rakhine State. This apparatus includes its own judiciary, revenue department, public security offices and other institutions. Some analysts estimate that the ULA-AA now exerts administrative control over two-thirds

of the state.^{xxxvii} Information collected by BROUK indicates an extensive ULA-AA presence, particularly in Buthidaung, but also in Maungdaw, Rathedaung, Kyauktaw, Pauktaw, Mrauk-U and Minbya. Recent tensions between the AA and the Tatmadaw appear to be caused by the military's recent attempts to re-exert administrative control by tightening security checkpoints, conducting raids on villages and arresting those suspected of having ties to the AA, including some Rohingya.

Rohingya communities are trapped in the middle of the power struggle between the Arakan Army and the Tatmadaw. One Rohingya leader described his community as being treated like a 'football', kicked by both sides. In many areas under ULA-AA control, Rohingya Muslims have been appointed as village administrators and in other functions of their apparatus. Some communities have reported better treatment under the ULA-AA than the SAC.^{xxxviii}

However, BROUK has documented many cases of human rights abuses by the AA against Rohingya communities over the past six months. Rohingya communities have expressed abject fear over possible reprisals by the AA for speaking out about abuses they have experienced. Information which might identify specific incidents, locations or communities is therefore withheld to protect their security but is on file with BROUK.

In Buthidaung township, five separate incidents of abduction and arbitrary detention of multiple Rohingya men by the AA have been documented by BROUK since late 2021. In some cases, this was for the purposes of extortion and in other cases the AA has exacted forced labour from detainees. BROUK has documented a pattern of ill-treatment amounting to torture, including brutal beatings. The ULA-AA's administrative control in Buthidaung township currently extends to interfering with the humanitarian operations of UN agencies, NGOs and INGOs by demanding detailed information from them about their field visits. In at least one incident in March, the AA seized control of food aid intended for distribution to a Rohingya community from an NGO.

In Maungdaw township, Rohingya communities described how the AA targets wealthy Rohingya men for abduction and extortion purposes. Rohingya communities in the area live in fear of abduction and arbitrary detention at the hands of the AA. In Kyauktaw township, Rohingya communities trapped between the SAC and the AA face demands to supply both sides with rice. The junta imposed additional movement restrictions on Rohingya communities in the area, further restricting their access to livelihoods, while the AA has made repeated arbitrary taxation demands. Rohingya communities in the area report facing food shortages as a result of these combined abuses. In Minbya township, the AA burned bundles of paddy sheaf belonging to a Rohingya community in retribution after they resisted demands to supply the AA with rice.

Such abuses by the Arakan Army compound the hardships already faced by Rohingya communities in Rakhine State due to the difficult conditions of life inflicted on them by the military junta.

Analysis of breaches of the ICJ's provisional measures by the Myanmar junta

In its September 2019 report, the UNFFM found that the eight common risk factors for atrocity crimes and two specific risk factors for genocide set out by the UN Office on Genocide Prevention and the Responsibility to Protect were all present in Myanmar.^{xxxix} The two specific risk factors for genocide are 'intergroup tensions or patterns of discrimination against protected groups' and 'signs of an intent to destroy in whole or in part a protected group'. The following indicators of these two risk factors for *ongoing genocidal acts* are particularly relevant in the current context:

1. History of atrocity crimes committed with impunity against protected groups.
2. Past or present serious tensions... with the State, with regards to access to rights and resources... participation in decision making processes... expressions of group identity or to perceptions about the targeted group.
3. Denial of the existence of protected groups or of recognition of elements of their identity.
4. Past or present serious discriminatory, segregational, restrictive or exclusionary practices, policies or legislation against protected groups.
5. Targeted physical elimination, rapid or gradual, of members of a protected group, including only selected parts of it, which could bring about the destruction of the group.

6. Widespread or systematic discriminatory or targeted practices or violence against the lives, freedom or physical and moral integrity of a protected group, even if not yet reaching the level of elimination.
7. Attacks against or destruction of homes, farms, businesses or other livelihoods of a protected group and/or of their cultural or religious symbols and property.^{x1}

This briefing first describes the general conditions of life imposed on the Rohingya in Rakhine State by the military authorities, with particular attention to the above risk factor indicators for ongoing genocidal acts. It then examines the particular conditions of life inflicted on Rohingya confined to camps and analyses the junta's specific breaches of the ICJ's provisional measures order in accordance with the existing jurisprudence on genocide.

In 2022, the junta imposed new restrictions on internet access via localised internet shutdowns in conflict zones, raising taxes on sim cards and internet usage and introducing a ban on the use of secure Virtual Private Networks (VPNs) to access sites such as Facebook.^{xli} Such restrictions continue to inhibit the flow of reliable information in Myanmar and make it very challenging to document human rights violations. As such, the information set out below represents a small fraction rather than a comprehensive account of human rights violations and atrocity crimes that have taken place since 23 November 2021.

D. Provisional measure (1) – prevent the commission of genocidal acts under Article II of the Genocide Convention

'The Republic of the Union of Myanmar shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the members of the Rohingya group in its territory, **namely the order to take all measures within its power to prevent the commission of genocidal acts** within the scope of Article II of this Convention, in particular:

- a) killing members of the group;
- b) causing serious bodily or mental harm to the 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; and
- d) imposing measures intended to prevent births within the group.'^{xlii}

(i) Overview of conditions of life inflicted on the Rohingya by the military regime

The Myanmar junta has continued its long-standing denial of the existence of the Rohingya, both in rhetoric and in practice. In December 2021, the junta lodged a formal complaint with UN agency the International Organisation of Migration (IOM) over its creation of the Rohingya Cultural Memory Centre website. The junta asserted that the IOM did not have a mandate to verify the existence of the Rohingya and said, 'The term 'Rohingya' has always been rejected by the Burmese people and is not recognized by the Burmese people.'^{xliii} This is an example of the genocide risk factor indicator of 'denial of the existence of protected groups'.

The junta continues to deny citizenship to the Rohingya under the 1982 Citizenship Law and perseveres with its coercive practices to force the Rohingya to accept the National Verification Card - documentation which denies their identity as Rohingya and forces them to accept the designation of 'Bengali', implying that the Rohingya are foreign interlopers from Bangladesh.^{xliiv} Citizenship is often referred to as 'the right to have rights' as citizenship usually confers a host of other rights. The junta's continued refusal to grant the Rohingya citizenship defies the ICJ's order to 'take all measures within its power' to prevent irreparable harm to the Rohingya as a protected group.

In January 2022, the regime resumed its 'Swe Tin Sit' map-record-check investigative process in the northern townships of Buthidaung, Maungdaw and Rathedaung. This intimidating investigation is conducted by members of the military, immigration officers and border guard police and is unique to Northern Rakhine State. The process involves photographing residents outside their homes, removing or adding family members to household registration lists, and checking whether buildings match records and maps held by the military authorities. If anyone is not present on the date of the inspection, the military authorities reportedly record their name on a 'ran away' list and remove them from their household registration list. In order to

register births and obtain a birth certificate, parents must pay fees and bribes of up to 200,000 MMK (over US\$100). Only parents who hold either a National Registration Card (an identity card held by some Rohingya) or NVC card can register births. Parents are thus constrained to apply for an NVC in accordance with immigration procedures in order to register the birth of their child.

Access to healthcare for Rohingya in Northern Rakhine State remains restricted. In Buthidaung township, Rohingya living in the town and surrounding area are reportedly allowed to access the hospital. However, Rohingya living in rural areas are dependent on medical assistance provided by INGOs, who do not have access to all areas of the township. In Maungdaw, Rohingya are allowed access to the hospital but report verbal abuse and neglect by nurses and doctors working under the SAC there. In February, a 17-year-old female Rohingya patient being treated for malaria was discharged after being unable to pay her medical bills and died at home.

In Rathedaung township, the remaining Rohingya population following the military's 'clearance operations' of 2016 and 2017 is around 10,000. In March, BROUK received information that Rohingya are not allowed to seek medical attention in Rathedaung hospital. Instead, they must seek permission from the Tatmadaw to travel to another township such as Buthidaung to access medical care, which is extremely difficult to obtain. INGOs that used to deliver medical care in the area have reportedly ceased operating since a staff member of the International Committee of the Red Cross was killed during clashes between the AA and the Tatmadaw in 2020. Such restrictions on access to health care are examples of the genocidal risk factor indicators of 'discriminatory, segregational, restrictive or exclusionary practices, policies or legislation against protected groups' as well as 'targeted physical elimination, rapid or gradual, of members of a protected group.'

In its provisional measures order, the ICJ reiterated Myanmar's obligations to prevent and punish acts of genocide 'irrespective of... the fact that there may be an ongoing internal conflict between armed groups and the Myanmar military and that security measures are in place'.^{xlv}

In practice, the junta has continued to arbitrarily arrest and detain Rohingya men, a pattern of conduct identified by the UNFMM - particularly during periods of heightened tension.^{xlvi} Such violations may constitute 'causing serious bodily or mental harm to the members of the group' when there is genocidal intent. In mid-April, around 60 soldiers conducted several raids in villages in Sittwe township and arrested two Rohingya men on suspicion of supporting the AA. Their whereabouts are currently unknown. In early May soldiers from Battalion 354 conducted similar raids in the Sittwe area and arrested 9 Rohingya men on suspicion of supporting the AA. All but two were later released after spending several days in military custody.

In late April, around 100 soldiers surrounded a village in Buthidaung township and arrested a 26-year-old Rohingya man on suspicion of having ties with ARSA. Soldiers interrogated him for several hours in a nearby school before finally releasing him. In a similar incident a few days later, a group of 200 soldiers surrounded a village tract area in the township and arrested six Rohingya men on suspicion of having ties with ARSA and AA. Three were later released but the other three are currently being held at the Tatmadaw base in Buthidaung, where they are at serious risk of being tortured.^{xlvii}

In December, a 40-year-old Rohingya Imam was run over and killed by a military vehicle in Buthidaung town while returning from the market on his bicycle. In March, an 18-year-old Rohingya man was killed and his 20-year-old friend was seriously injured by a Tatmadaw landmine which exploded while they were cutting wood nearby a military outpost in the township. In January an 8-year-old Rohingya boy was also killed and a 7-year-old boy lost his legs in Mrauk Oo, after playing with a landmine which subsequently exploded.^{xlviii}

When Rohingya men, women and children have sought to flee the appalling conditions of life imposed on them by the military junta in Rakhine State, they have been arrested, detained and treated as criminals, further dehumanising them. Since 23 November 2021, BROUK has collected information about hundreds of Rohingya who have been arrested while trying to flee in multiple separate incidents.^{xlix} Cases are usually brought under the 1949 Residents of Burma Registration Act (and 1951 Resident of Burma Registration Rules), which carries a maximum penalty of two years in jail with hard labour, or under Article 13(1) of the 1947 Burma Immigration (Emergency Provisions) Act).¹ Such cases are widely reported in the local media, accompanied by photos released by the military authorities of those arrested. This furthers the junta's

narrative that Rohingya are ‘illegal Bengali’ and a threat to national security. The criminalisation and dehumanisation of the Rohingya in this way is another example of the genocide risk factor indicator of ‘widespread or systematic discriminatory or targeted practices or violence against the lives, freedom or physical and moral integrity of a protected group’.

(ii) Background to the camps where 130,000 Rohingya are indefinitely detained

2022 marks a decade of indefinite detention in appalling conditions for around 130,000 Rohingya confined to camps across Central Rakhine State, in violation of international law.^{li}

Although the Rohingya had already faced decades of what the UNFFM has described as ‘severe, systemic and institutionalised oppression, from birth to death’^{lii}, the State-orchestrated violence in 2012-13 marked a critical juncture in the military authorities’ treatment of the group. The false narrative of ‘intercommunal violence’ constructed by the military authorities was used as a pretext to introduce draconian restrictions on freedom of movement for the Rohingya across Rakhine State. Rohingya displaced by the violence in central Rakhine State were segregated and confined to camps, in violation of international law. The enduring impact of the violence of 2012-2013 is often overlooked in the wake of the mass killings and other atrocity crimes that took place in 2016-2017. In fact, the State-orchestrated violence in 2012-2013 laid the groundwork for the brutal ‘clearance operations’ that were to follow.

The military authorities’ narrative of ‘intercommunal’ violence between ethnic Rakhine and Rohingya communities in 2012-2013 was wholly discredited by the UNFFM’s 2018 report, which demonstrated that the violence against the Rohingya was planned and instigated by government officials and state security forces.^{liii} It followed a carefully-crafted hate campaign that portrayed the Rohingya and other Muslims as an existential threat to Buddhism and to Myanmar, described in detail in the UNFFM’s 2018 report.^{liv}

In addition to orchestrating the violence, security forces committed serious human rights violations against Rohingya across Rakhine State, such as indiscriminate extrajudicial killings (including of women, children and the elderly), sexual violence (including rape, mutilation, and sexual slavery), mass arbitrary arrests of Rohingya and torture carried out in police stations and Buthidaung prison, the burning of homes, destruction of mosques and looting of shops.^{lv} This campaign of violence forced 140,000 people to flee their homes.^{lvi}

Around 95 per cent of those who were displaced in the violence of 2012-13 were Muslims, most of them Rohingya and the rest Kaman. Most Rakhine displaced by the violence received assistance from the authorities to return home or resettle by the end of 2015.^{lvii} After losing family members as well as their homes, land and businesses in the violence, the Rohingya and most Kaman remain in camps.

The authorities decided on the locations of camps and denied the majority of humanitarian agency requests for sufficient land and resources to construct camps that would comply with international humanitarian standards, resulting in overcrowded, unsanitary sites prone to flooding.^{lviii} Many of the camps are surrounded by barbed wire, military camps, security guards and checkpoints, including inside the camps. Access to the camps and sites remains restricted. In 2018 the UNFFM found that the confinement of Rohingya in camps constituted ‘arbitrary and discriminatory deprivation of their liberty’.^{lix} That same year squalid conditions in the camps were described by then-United Nations Assistant Secretary-General Ursula Mueller as “beyond the dignity of any people”.^{lx}

In April 2017, the authorities announced that it would begin closing camps in response to the recommendations in an interim report from the Advisory Commission on Rakhine State led by the late UN Secretary-General Kofi Annan. Three camps (Kyein Ni Pyin, Nidin, and Taung Paw) were officially declared ‘closed’ in 2018 with a fourth (Kyauk Ta Lone) since earmarked for closure. These camp closure processes violate international human rights law. Rohingya have been denied the right to return to their places of origin, against their express wishes. They have received no compensation or reparation for their lost homes and property, and much of their land has been taken over by ethnic Rakhine.

The only change within the camps declared ‘closed’ has been the construction of poor-quality individual housing in the same locations or adjacent sites. There have been no changes to freedom of movement and severe restrictions on access to basic services remain in place. In 2020 Human Rights Watch (HRW) reported various forms of coercion, pressure and threats that Rohingya faced to accept the ‘relocation’ to individual

housing at the same locations, including coercion to accept the NVC.^{lxi} These developments raised the prospect of permanent segregation and detention of the Rohingya in the camps.

In its analysis HRW noted that,

‘Severe limitations on access to livelihoods, education, health care, and adequate food or shelter have been compounded by increasing government constraints on humanitarian aid, which Rohingya are dependent on for survival... These conditions are a direct cause of increased morbidity and mortality in the camps. Rohingya face higher rates of malnutrition, waterborne illnesses, and child and maternal deaths than their Rakhine neighbors....

...The term “detention camps” [rather than the commonly used “internally displaced persons camps”] more accurately reflects the extreme movement restrictions imposed on the Rohingya since 2012 that amount to arbitrary and **indefinite detention** and severe deprivation of liberty [emphasis added].^{lxii}

HRW found that the authorities’ creation of squalid and oppressive conditions amounted to the crimes against humanity of apartheid and persecution perpetrated against the Rohingya and called for prosecution of the State officials responsible.^{lxiii}

A decade after the violence and more than two years after the ICJ’s provisional measures order, the Rohingya remain confined in dire conditions in the camps described in detail below.

(iii) Conditions of life inflicted on the Rohingya in the camps

The genocidal act of ‘deliberately inflicting conditions of life on the group intended to bring about its physical destruction’ addresses situations in which the perpetrator does not immediately kill the members of the group, but uses other methods intended to ultimately bring about their physical destruction. Examples of possible means by which this underlying act can be carried out have been well-established by the case law in the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR):

‘Examples of such acts include, but are not limited to, subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally **creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation**, or subjecting members of the group to excessive work or physical exertion [emphasis added].^{lxiv}

The false narrative that the 2012 violence which drove tens of thousands of Rohingya from their homes was ‘intercommunal’ has unfortunately prevailed, both within Myanmar and internationally. BROUK has long maintained that the violence was State-orchestrated, based on reports from the ground at the time.^{lxv} The UNFFM concluded,

‘The 2012 and 2013 violence in Rakhine State was pre-planned and instigated...the Myanmar security forces were actively involved and complicit. They participated in acts of violence...

... [This] Actively instigated violence between the ethnic Rakhine and the Rohingya, with the involvement of State institutions and other figures of authority, result[ed] in mass arrests of Rohingya, policies of segregation and the mass displacement and confinement of Rohingya into squalid and barb-wired “displacement” sites and camps in central Rakhine, where they have been arbitrarily detained.’^{lxvi}

Although best understood as detention camps, they are officially classified as temporary camps for internally displaced persons (IDPs) and as such international minimum humanitarian standards apply. The Humanitarian Charter and Minimum Standards in Humanitarian Response (known as the Sphere Handbook) also provides guidance to humanitarian actors for setting targets for humanitarian response in protracted crises.^{lxvii}

The publicly available data for the 21 camps and camp-like settings for displaced Rohingya in Central Rakhine State from the past six months demonstrates that humanitarian actors are struggling to meet the

international minimum humanitarian standards and the targets they have set.^{lxxviii} Analysis of the data illustrates the squalid conditions in all of the camps, where more than half of those confined are children.^{lxxix} While access for all humanitarian actors – including UN agencies – has been increasingly restricted across Myanmar since the military coup, the SAC maintains obstacles which are unique to Rakhine State. In its April 2022 humanitarian update, the UN Office for the Coordination of Humanitarian Affairs (UNOCHA) in Myanmar noted that, ‘In Rakhine, cumbersome bureaucratic processes, delays and denials of TAs [travel authorisations] remain major challenges... In Central Rakhine, protection support is needed for IDPs and non-displaced Rohingya communities to address ongoing rights violations and restrictions on accessing basic services, livelihoods, and humanitarian assistance.’^{lxxx}

These restrictions have a profound impact. Within the camp settings, the military authorities in Myanmar are responsible for numerous examples of ‘creating circumstances that would lead to a slow death’, set out below. The conditions in the officially ‘closed’ camps of Kyein Ni Pyin in Pauktaw, Taung Paw in Myebon, Nidin in Kyauktaw and Kyauk Ta Lone in Kyaukpyu (earmarked for imminent ‘closure’) are of particular concern, as the segregation and confinement of Rohingya seems intended to be permanent.

‘Lack of proper shelter’

Over the past decade, overcrowding in the camps has been a significant issue. The camps fall far short of the international minimum standard of 45m² of camp area per person. On average, there is just 23m² per person across the 21 camps and camp-like settings. In Thae Chaung village, one of the largest camp-like settings which was fenced off and transformed into a militarized displacement site after the 2012 violence, there is just 7m² of camp area per person.^{lxxxi}

The vast majority of Rohingya in the camps continue to be housed in shared temporary shelters known as longhouses. Each longhouse contains 8-10 single room units with one family living in each room. The units are separated by thin bamboo partitions which afford little privacy.^{lxxxii}

Humanitarian actors established a target of six persons or less in each of the units. In practice, 45 percent of the single-room units house more than six persons. A separate target of repairing or reconstructing all of the longhouses over the past two years has also not been met. On average, just 43 percent of the longhouses across all the Rohingya camps have been repaired over the past two years.^{lxxxiii}

In its April 2022 update, UNOCHA noted that, ‘In Rakhine State...[t]here is now an additional bureaucratic layer for agencies to conduct construction and renovation activities of temporary longhouses/shelters and other humanitarian infrastructure in camps. Partners are required to obtain a written letter of land use clearance from the village administrator or authorities for work to proceed.’^{lxxxiv} The agency also issued a stark warning:

‘551 longhouses, sheltering more than 28,000 [Rohingya and Kaman] IDPs, are structurally unsound and require immediate action to ensure the safety of the residents... Of particular urgency are 140 longhouses in Say Tha Mar Gyi camp in Sittwe township, where IDPs are living in undignified conditions. **These shelters are in extreme disrepair and pose life-threatening risks to the inhabitants** [emphasis added].’^{lxxxv}

In camps that have been declared ‘closed’, such as Kyein Ni Pyin, Taung Paw and Nidin camps, the authorities have not allowed any repairs to individual houses since they were constructed in 2018. According to information received by BROUK, some individual houses in Kyein Ni Pyin have collapsed completely. Rohingya IDPs have reported that roofing materials for both individual and longhouses are of very low quality, resulting in leaks during the rainy season and overheating in the hot season.

The military authorities are pressing ahead with their plans to ‘close’ Kyauk Ta Lone in Kyaukpyu in violation of international law. While residents want to return to their places of origin, the military authorities have constructed individual housing immediately to the west of the same site, in effect creating a permanent detention camp designated as a ‘relocation’ site. In March, the UN High Commissioner for Human Rights described the military authorities’ engagement with affected communities as ‘cursory’.^{lxxxvi}

In April, UNOCHA warned that the new site was prone to flooding. According to information received by BROUK, by 11 May - early in the rainy season - the site had already flooded. UNOCHA also noted,

‘Although humanitarian partners are trying to continue providing WASH [Water Supply, Sanitation, and Hygiene Promotion], shelter and food assistance to IDPs in Kyauk Ta Lone Camp so that the decision to relocate is voluntary, partners are facing pressure to construct infrastructure in the relocation site instead.’^{lxxvii} There are two police checkpoints, one on the road leading to the temporary camp and the other at the entrance. There is also a military checkpoint manned by soldiers from Infantry Battalion 542 right next to the temporary camp and the new permanent site. Rohingya at Kyauk Ta Lone faced coercion and pressure to accept the NVC card, with the military authorities threatening to make their lives more difficult if they refused. The NVC denies the Rohingya their identity and offers negligible ‘improvements’ to the lives of cardholders. While Rohingya at the camp are permitted to visit downtown Kyaukpyu to buy food (the World Food Programme now provides cash assistance to the IDPs rather than food rations) they describe having the food frequently confiscated by the soldiers and repeated ill-treatment, including beatings.^{lxxviii} When asked by BROUK to describe life in Kyauk Ta Lone camp one Rohingya youth replied, ‘We are now living a death.’^{lxxix}

‘Subjecting the group to a subsistence diet / lack of proper food’

The Humanitarian Charter sets out that, ‘Food assistance is required when the quality and quantity of available food or access to food is not sufficient to prevent excessive mortality, morbidity or malnutrition. It includes humanitarian responses that improve food availability and access, nutrition awareness and feeding practices. Such responses should also protect and strengthen the livelihoods of affected people.’^{lxxx}

The restrictions on freedom of movement for Rohingya in camps – amounting to indefinite arbitrary detention - severely impact livelihoods, leaving the Rohingya largely dependent on food assistance. Humanitarian actors in Myanmar established a 100 percent target for households with access to food aid in the previous 3 months for the camps in Central Rakhine State. However, for the past six months the average has been 88 percent. In Kyein Ni Pyin, Nget Chaung 1 and Nget Chaung 2 camps in Pauktaw township, less than 70 percent of households have had access to food aid in the past six months.^{lxxxii}

The Humanitarian Charter sets out a minimum standard of greater than 90 percent coverage for both severe and moderate acute malnutrition cases with access to treatment services. This refers to the number of individuals receiving treatment as a proportion of the number of people who need treatment. (Sphere 175) While this target has largely been met, in Kyauk Ta Lone camp (earmarked for closure) and the officially ‘closed’ camps of Nidin and Taung Paw coverage stands at 0 percent.^{lxxxiii} The reasons for this are unclear. However, this statistic would appear to indicate issues of restricted access for humanitarian actors or failure to provide this treatment service on the part of military authorities. The potential consequences of this are far-reaching, described in more detail below.

‘Lack of water and proper sanitation facilities’

As the Humanitarian Charter sets out,

‘An environment free of human excreta is essential for people’s dignity, safety, health and well-being. This includes the natural environment as well as the living, learning and working environments. Safe excreta management is a Water Supply, Sanitation, and Hygiene Promotion (WASH) priority. In crisis situations, it is as important as providing a safe water supply. All people should have access to appropriate, safe, clean and reliable toilets.’^{lxxxiii}

The minimum humanitarian standard is 15 litres of water per person per day for drinking and domestic hygiene use. The Humanitarian Charter further clarifies, ‘It is never a “maximum” and may not suit all contexts or phases of a response. For example, it is not appropriate where people may be displaced for many years.’^{lxxxiv}

In the first quarter of 2022, less than half of the camps met this standard. Of particular concern are Maw Ti Ngar and Thet Kae Pyin camps, where Rohingya had access to less than half the daily minimum of water.^{lxxxv} The only source of fresh water in many of the camps is rain collection. This inconsistent source can leave

rainwater collection ponds empty for up to six months during the dry season (mid-February to mid-May).^{lxxxvi} In April UNOCHA reported that, ‘There remains high risk of transmission of acute watery diarrhoea (AWD) in protracted IDP camps in Rakhine amid significant WASH gaps, as well as reliance on water trucking, and potentially boating, at the peak of the dry season in some areas.’^{lxxxvii}

Rohingya in both ‘closed’ Kyein Ni Pyin and Taung Paw camps - where people are dependent on rain ponds and additional deliveries of water by INGOs in the dry season - reported shortages of drinking water to BROUK in May.^{lxxxviii}

In ‘closed’ Nidin camp, Rohingya residents reported to BROUK in May that Rakhine villagers living nearby prevented them from using a well in their village. Rohingya are dependent on water from a river and are subjected to a monthly tax by the Rakhine to access a pipeline, which is beyond the means of some Rohingya living in the camp.^{lxxxix}

The Humanitarian Charter establishes a minimum standard of one shared toilet per 20 people.^{xc} The average over the past six months across all the Rohingya camps falls short of the minimum standard. However, in very overcrowded Thae Chaung village, almost three times as many Rohingya have to share a single toilet. In other camps, including ‘closed’ Kyein Ni Pyin, more than twice as many people have to share a toilet.^{xcii} These issues are compounded by lack of effective solid waste management. Humanitarian actors established a target that latrine pits should be emptied weekly, which is dependent on access to the camps. Over the past three months, target has not been met in five out of the 21 camp settings, including the ‘closed’ camps of Nidin and Taung Paw, as well as Kyauk Ta Lone which is earmarked for closure imminently.

Rohingya in Nidin camp described the situation there to BROUK:

[During the ‘closure’ process] ‘The government built the latrine pits out of basic wood which was not strong enough and they have broken. The pits are only six feet deep and became full within two years. Emptying the pits has not been taken care of by the government or by any NGO. We want to repair the latrine pits in the camp but it will cost 130,000MMK (US\$70) per pit.’^{xciii}

Rohingya in ‘closed’ Taung Paw camp also reported that the latrine pits there are in need of repair and that INGO teams responsible for providing WASH assistance to clean the latrines are not able to visit the camp frequently enough.

‘Failing to provide adequate medical care’

The Humanitarian Charter explains that, ‘Overcrowding, inadequate shelter, poor sanitation, insufficient water quantity and quality, and reduced food security all increase the risk of malnutrition and outbreaks of communicable diseases.’^{xciiii}

In April UNOCHA warned that, ‘There is ongoing concern about the high risk of transmission of acute watery diarrhoea (AWD) in protracted IDP camps in Rakhine due to the restrictions imposed on the freedom of movement of the Rohingya IDPs and their poor access to health services.’^{xcv}

Humanitarian actors established a target of 5 days per week of open clinic in each camp in Central Rakhine State. The average across all the camp settings over the past six months has been just two days per week with no clinic at all in ‘closed’ Nidin and soon-to-be-closed Kyauk Ta Lone camps.^{xcvi} Rohingya in Nidin camp report that a mobile clinic occasionally visits the camp, but it is not sufficient to meet their needs. The military authorities deny Rohingya access to Kyauktaw hospital. Rohingya are technically allowed to access care at other SAC-run clinics in the township, but currently do not receive any support to do so, even in an emergency.^{xcvii}

In ‘closed’ Kyein Ni Pyin camp – where 58% of camp residents are children – Rohingya also reported limited access to healthcare. In Kyauk Ta Lone camp, there is no visiting mobile clinic. Rohingya report that they are allowed to access Kyaukpyu hospital and other SAC-run clinics, with the nearest one four miles away from the camp. However, they have to secure permission from the police to travel by paying extortion fees of 5,000 - 10,000MMK (US\$2-5). At times the police and military cause problems for patients by delaying permission, even in emergency situations.^{xcviii}

The restrictions on freedom of movement and access to healthcare have dire consequences for Rohingya confined to the camps, described in more detail below.

(iv) Conditions of life: genocidal intent

With regard to the question of genocidal intent, the 2016 ICTY *Karadzic* judgment held that,

‘In the absence of direct evidence of whether the conditions of life imposed on the group were deliberately calculated to bring about its physical destruction, a chamber can be guided by the objective probability of these conditions leading to the physical destruction of the group in part. **The actual nature of the conditions of life, the length of time that members of the group were subjected to them, and the characteristics of the group such as its vulnerability are illustrative factors to be considered in evaluating the criterion of probability.** [emphasis added]^{xcviii}

In 2018, the UNUNFFM found that there were reasonable grounds to conclude that this genocidal act had taken place, considering numerous illustrative factors such as the oppressive and systemic restrictions on all aspects of life over a long period of time amounting to persecution of the Rohingya; the systematic expulsion of Rohingya from their homes in repeated cycles of mass violence; and pervasive sexual violence by the Tatmadaw.^{xcix}

More than 130,000 members of the Rohingya group, over half of whom are children, *continue* to be subjected to the squalid conditions of life in prolonged arbitrary detention as outlined above. Rohingya in the camps have already endured a decade of such treatment after being expelled from their homes in State-orchestrated violence in 2012. In its 2020 provisional measures order, the ICJ recognised the Rohingya remaining in Myanmar as ‘extremely vulnerable’.^c Since the measures were ordered, the military authorities in Myanmar have progressively tightened restrictions on those in the camps rather than easing them, adding additional layers of bureaucracy that severely limit humanitarian access. These factors would appear to indicate an *ongoing* genocidal act calculated to bring about the physical destruction in whole or in part of the Rohingya group.

The jurisprudence further establishes that, ‘[T]his provision does not require proof of that a result was attained; as such, it does not require proof that the conditions actually led to death or serious bodily or mental harm of members of the protected group. When “**such a result is achieved, the proper charge will be paragraphs (a) or (b)**” [killing or serious bodily or mental harm].’ [emphasis added]^{ci}

Data collected by BROUK show that the conditions of life inflicted on the Rohingya in detention camps have in fact led to preventable deaths in the past two years since the provisional measures were ordered by the ICJ.

(v) Preventable deaths in the camps

BROUK has documented seven preventable deaths in ‘closed’ Nidin camp over the past two years. One 24-year-old Rohingya woman died in childbirth and six infants aged between 3-13 months died due to severe diarrhoea.^{cii} As previously reported by BROUK in May 2021, nine Rohingya infants and young children died in the rural hospital at Thek Kay Pyin camp during a previous outbreak of diarrhoea. In ‘closed’ Kyein Ni Pyin camp, BROUK documented the preventable deaths of ten children due to severe diarrhoea and lack of treatment for severe acute malnutrition, as well as the deaths of five women during childbirth.^{ciii} Due to the challenges of collecting information from the camps, BROUK has not been able to conduct a comprehensive assessment of preventable deaths in all the camps over the past two years. The true figures are likely to be higher.

E. Provisional measure (2) - Ensure that the military and others under its influence do not commit any of the acts punishable under Article III of the Genocide Convention

‘The Republic of the Union of Myanmar shall, in relation to the members of the Rohingya group in its territory, ensure that its military, as well as any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject to its control, direction or influence, do not commit any acts described in point (1) above, or of conspiracy to commit genocide, of direct and public incitement to commit genocide, of attempt to commit genocide, or of complicity in genocide.’

As previously reported by BROUK in November 2021, a secret order by the State Administrative Council reported to have been issued sometime after 8 June and leaked to the media in August instructed that, ‘There is no Rohingya ethnic group, they are Bengali’ and ordered civil servants to ‘courageously speak out’ on the issue.^{civ} In a press conference on 12 June, Major General Zaw Min Tun similarly reiterated the application

of the 1982 Citizenship Law, and reinforced the use of the pejorative term ‘Bengali’ to refer to the Rohingya.^{cv} As outlined above, in December the junta lodged a formal complaint with UN agency IOM over its use of the term Rohingya.

While such public statements and secret orders may not directly constitute incitement to commit genocide, ‘denial of the existence of protected groups or of recognition of elements of their identity’ is a recognised indicator of ongoing risk factors for genocide.

F. Provisional measure (3) – prevent the destruction of and ensure the preservation of evidence

‘The Republic of the Union of Myanmar shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide.’

Recently, more information has come to light about the destruction of evidence following the ‘clearance operations’ of 2016 and 2017. Military defectors have described how the military’s engineering battalion was brought in to bulldoze land to get rid of evidence of the remains of dead bodies and burned houses, on the orders of the Tatmadaw’s then-Judge Advocate General Aung Lin Dwe (now serving as Secretary of the SAC). Soldiers also poured acid on the bodies of dead Rohingya to prevent them being identified. As previously reported by BROUK and others, the military have constructed Border Guard Police outposts on the bulldozed land.^{cvi}

BROUK has continued to collect information about construction work taking place on the site of razed Rohingya villages where mass killings took place. In Maungdaw township, after the clearance operations in 2017 the whole of Myo Thu Gyi village tract in was confiscated. The whole area has been fenced off by the military. The military is building a large Border Guard Station no. 3 there as well as a two-story District Court building.

In late April, the SAC-appointed Rakhine State Chief Minister Dr Aung Kyaw Min was reported to have visited the southern Maungdaw and northern Rathedaung area as part of preparations to build a hotel zone on Alay Than Kyaw beach. Prior to the ‘clearance operation’ in 2017, Alay Than Kyaw village tract was predominantly Rohingya Muslim. Around 11,000 Rohingya were forced to flee, their homes and villages were destroyed, and 30 Rohingya were reported to have been killed by the military during the operation.^{cvi} Such actions by the military authorities risk destroying any remaining evidence of genocidal acts committed in 2017, and are in defiance of this provisional measure.

G. Provisional measure (4) – submit a report to the ICJ on all measures taken to implement the order

‘The Republic of the Union of Myanmar shall submit a report to the Court on all measures taken to give effect to this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the case is rendered by the Court.’

Both the State Administration Council and the National Unity Government are reported to have submitted reports on the implementation of the provisional measures to the Court. As the UN High Commissioner for Human Rights Michelle Bachelet notes, ‘Those submissions not having been made public, however, it is not possible externally to assess the veracity or accuracy of their contents.’^{cvi}

Conclusion

More than two years have passed since the ICJ ordered Myanmar to ‘take all measures within its power’ to prevent irreparable harm against the Rohingya. However, the evidence documented by BROUK and presented in this latest briefing (together with four previous briefings) demonstrates that in fact, genocidal acts continue to be perpetrated against the Rohingya.

More than 130,000 members of the Rohingya group, over half of whom are children, continue to be confined indefinitely in the camps under squalid conditions. They have been subjected to the deliberate deprivation of resources indispensable for survival – namely adequate food, water, shelter, sanitation and medical care - by the military authorities. They have endured a decade of such ‘slow death’ treatment after being expelled from their homes in State-orchestrated violence in 2012. As such, it is reasonable to conclude that the genocidal act of deliberately inflicting conditions of life calculated to bring about the physical destruction in whole or in part of the Rohingya group continues to be perpetrated by the military junta. As documented by BROUK,

such conditions of life have in fact led to the deaths of women and children in the past two years since the provisional measures were ordered.

Since the ICJ's provisional measures were ordered, the military authorities in Myanmar have progressively tightened restrictions on those confined to the camps rather than easing them. Restrictions on freedom of movement and access to healthcare also remain in place for Rohingya in northern Rakhine State. When Rohingya men, women and children have sought to flee the appalling conditions of life imposed on them by the military junta in Rakhine State, they have been arrested, detained and treated as criminals, further dehumanising them.

As the junta continues to build new structures on the sites of razed Rohingya villages where mass killings took place during the clearance operations of 2016 and 2017, this also defies provisional measure 3 with its explicit instruction to prevent the destruction of and ensure the preservation of evidence related to allegations of genocidal acts.

The Myanmar junta's abject failure to comply with the ICJ's provisional measures and the lack of transparency around reporting on its compliance with the order call into question the effectiveness of the measures, given their protective function. Their purpose is to protect the Rohingya, a group described by the Court as 'extremely vulnerable'. The lack of transparency underpins impunity for atrocity crimes and may embolden the junta to commit further heinous crimes, not only against the Rohingya but against the wider population of Myanmar. The Court must act decisively and without further delay to strengthen the provisional measures order.

Legal analysts have pointed out that there is no legal impediment in its Statute or the Rules of the Court which prevent the ICJ from making Myanmar's reports on compliance with provisional measures public. As Rosenberg et al have argued, in a public interest case like this - which deals with both *erga omnes* and *erga omnes partes* obligations to the whole international community - 'the norm and consistent practice should be that reports are public and that confidentiality should be justified only by compelling reasons from the Court.'^{cix} Under the Rules of the Court, the ICJ may of its own accord either issue further provisional measures, or amend the existing order by providing more specific instructions.^{cx} This should include a requirement for public reporting.

Although Article 77 of the Rules read with Article 41(2) of the Court's Statute provides that any provisional measures ordered by the Court are to be *communicated* to the United Nations Security Council (UNSC), there is no indication that the reports on compliance with the orders have been provided to the UNSC.^{cxii} If the compliance reports were made public and therefore subject to greater scrutiny, this would compel UN member States to press the UN Security Council to adopt a resolution on Myanmar. Such a resolution should include referring the situation in Myanmar to the International Criminal Court; a comprehensive arms embargo, including on jet fuel to the military; and targeted economic sanctions imposed on the Myanmar military, its leaders, and its sources of revenue.

Recommendations to the International Court of Justice

- In light of the ongoing irreparable harm being suffered by members of the Rohingya group, move to either amend the existing provisional measures order or issue further provisional measures, including, but not limited to, requirements that:
 - Myanmar makes its reporting public, to ensure transparency and rigorous scrutiny of its compliance with the order;
 - Myanmar implement policy and legislative changes as part of concrete measures it must take to comply, including the restoration of full citizenship to the Rohingya as a vital first step;
 - Myanmar end all arbitrary restrictions on freedom of movement, access to health and other resources indispensable for survival for the Rohingya and allow humanitarian actors immediate, unrestricted, and sustained access to Rakhine State and the rest of the country;
 - Myanmar cooperate with United Nations bodies and other international investigative mechanisms that seek to investigate the acts that are the subject of this case.

Recommendations to the international community

- Push for public hearings at the UN Security Council to evaluate Myanmar’s compliance with provisional measures.
- Provide support – including legal, financial, technical – to the Gambia. In particular, States parties to the Genocide Convention should apply to the ICJ to intervene in the case.
- Exert maximum pressure on Myanmar to cooperate with the International Criminal Court investigation and provide access to Rakhine State to ICC and Argentinian investigators.
- Publicly support the referral of the situation in Myanmar to the International Criminal Court or support the creation of an ad hoc international tribunal.
- Propose a UN Security Council resolution that imposes a comprehensive arms embargo on Myanmar, including on jet fuel to the military; imposes targeted economic sanctions on the Myanmar military, its leaders, and its sources of revenue, and refers the situation in Myanmar to the International Criminal Court. The prospect of a veto by a Member State in the UN Security Council should not deter other Member States from placing a resolution before the Council for consideration, debate and a vote.
- Exercise universal and other forms of jurisdiction to investigate any individual from Myanmar – irrespective of position or rank - who may be responsible for committing genocide, war crimes, and crimes against humanity under international law. Ensure such individuals are brought to justice in fair trials.
- Exert maximum pressure on Myanmar to end all arbitrary restrictions on freedom of movement, access to health and other resources indispensable for survival for the Rohingya and allow humanitarian actors immediate, unrestricted, and sustained access to Rakhine State and the rest of the country.
- Increase funding support for the 2022 Humanitarian Response Plan for Myanmar as soon as possible to bridge the current massive shortfall.^{cxii}

References

ⁱ Report of the UN High Commissioner for Human Rights, ‘Situation of human rights in Myanmar since 1 February 2021’ (15 March 2022) UN Doc A/HRC/49/72 [73].

ⁱⁱ Report of the Independent Investigative Mechanism for Myanmar (5 July 2021) UN Doc A/HRC/48/18 [30]. The IIMM has a mandate to collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 1 January 2011. Documents relating to the Rohingya genocide case at the International Court of Justice brought by the Gambia have been shared with parties to those proceedings by the IIMM.

ⁱⁱⁱ UN Human Rights Council, ‘Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews’ (March 2022) A/HRC/49/76 [10].

^{iv} UN Security Council Press Statement on the Situation in Myanmar (2 February 2022) available at <<https://www.un.org/press/en/2022/sc14785.doc.htm>> accessed 19 May 2022.

^v Statement by Deputy High Commissioner for Human Rights Nada Al-Nashif, UN Human Rights Council (12 February 2021).

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