

INTERNATIONAL COURT OF JUSTICE

**THE GAMBIA'S OBSERVATIONS ON**  
**MYANMAR'S REPORT OF 23 NOVEMBER 2020**

REPUBLIC OF THE GAMBIA

v.

REPUBLIC OF THE UNION OF MYANMAR

7 December 2020

1. In accordance with the Court’s letter of 23 November 2020 (ref: 154112), the Republic of The Gambia (“The Gambia”) submits these Observations on the Second Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (the “Second Report”).<sup>1</sup>

2. These Observations, like those of The Gambia in response to Myanmar’s First Report, filed on 22 May 2020,<sup>2</sup> are intended to highlight the principal shortcomings in Myanmar’s Second Report, and the most obvious ways in which it fails to fulfill the obligations imposed by the Court’s Order of 23 January 2020. Given the limited time available in which to respond, The Gambia has not attempted to document all of the inaccuracies and inadequacies of Myanmar’s Second Report. Instead, in supplement of its observations herein, The Gambia respectfully refers the Court, as indicated below, to the relevant portions of its Memorial, filed on 23 October 2020, for a fuller treatment of the subjects addressed by Myanmar in its Second Report.

3. Despite its length, nothing in the Second Report demonstrates that Myanmar has faithfully complied with the Court’s Order. Much of the Report is devoted to making unsubstantiated assertions that are impossible to verify, because Myanmar prohibits independent international and nongovernmental organizations from accessing the areas where the Rohingya who remain in the country are confined. Where the Report does provide verifiable information, it confirms that Myanmar has failed to fully implement the Court’s Order by continuing to deny even the most basic human rights to members of the Rohingya group, on the basis of their ethnicity and religion, and by refusing to take the necessary steps to avoid further genocidal acts against them. Above all, Myanmar’s failure to end the impunity which it accords to those responsible for the genocidal acts committed from 2016 to 2018, especially members and leaders of the Tatmadaw, reinforces the conclusion that those acts were carried out with the intent to destroy the Rohingya as a group.

---

<sup>1</sup> *Second Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020*, (23 November 2020) [hereinafter the “Second Report”].

<sup>2</sup> *Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020* (22 May 2020) [hereinafter the “First Report”].

## **A. Ongoing Discrimination against the Rohingya as a Group**

4. In its Second Report, Myanmar lists twenty-four categories of “Measures taken to implement the Provisional Measures Order”.<sup>3</sup> The Gambia agrees with Myanmar that these categories represent some, though not all, of the subject areas in which effective measures must be taken by Myanmar in order to comply with the Court’s Order.<sup>4</sup> Unfortunately, Myanmar has failed to take many of the measures it considers necessary to protect the Rohingya remaining in Myanmar from further genocidal acts.

5. One category of measures that is conspicuously absent from Myanmar’s Second Report is the repeal of the discriminatory laws and policies targeting the Rohingya group, one of the seven indicia of genocidal intent identified by the UN Fact-Finding Mission and addressed at length in Chapter 6 of The Gambia’s Memorial.<sup>5</sup> None of those laws or policies – including restrictions on movement, marriage, births, and access to livelihoods – has been modified or repealed. The UN Special Rapporteur on the situation of human rights in Myanmar confirmed this in his 1 September 2020 report to the UN General Assembly:

“restrictions on freedom of movement, access to livelihoods, access to citizenship, health and education continue to be enforced against Rohingya and other Muslims in Rakhine State. Myanmar officials continue to deny the existence of Rohingya, and restrictions on freedom of movement in Rakhine State are imposed indefinitely, outside of domestic law, and in a discriminatory fashion, putting them in violation of international human rights law....

To fully comply with its presidential directives on the prohibition of genocide, as well as the provisional measures of protection indicated by the International Court of Justice in January 2020, the Government should lift the draconian restrictions arbitrarily imposed and enforced on Rohingya, including restrictions on

---

<sup>3</sup> Second Report, pp. 8-43. There is a similar list of 20 categories of purported measures taken to implement the Provisional Measures Order listed in Myanmar’s First Report. First Report, pp. 23-53.

<sup>4</sup> See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar)*, Memorial of The Gambia (23 October 2020) [hereinafter “Memorial”], paras. 13.35-13.36.

<sup>5</sup> See UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/CRP.5 (16 September 2019), para. 224, Memorial Vol. III, Annex 49; Memorial, paras. 6.1-6.89.

freedom of movement, health, education, livelihoods and equal access to citizenship. These systematic, severe, ongoing restrictions have devastating consequences on the Rohingya, threatening their very survival.”<sup>6</sup>

6. The Third Committee of the UN General Assembly expressed similar concerns on 18 November 2020 when it adopted, by an overwhelming margin of 131 votes in favour to nine votes against, Resolution A/C.3/75/L.34 on the “Situation of human rights of Rohingya Muslims and other minorities in Myanmar”. The Third Committee concluded that:

“contrary to the fact-finding mission’s recommendations, laws, orders, policies and practices at all levels of Government limiting freedoms of movement, expression, association and assembly, or which are discriminatory in their application or impact, have not been reviewed, amended or repealed”.<sup>7</sup>

7. In an extreme example of discriminatory restriction of movement, as well as other restrictions of basic human rights, more than 120,000 Rohingya continue to be confined in internment camps in Myanmar, where they are forbidden to return to their former homes or live anywhere outside these crowded, unsanitary and closely-guarded camps. The UN Special Rapporteur observed in September 2020: “eight years after their initial displacement, Rohingya civilians confined to internment camps in Rakhine State are no closer to returning to their places of origin”.<sup>8</sup>

8. For the Rohingya who are forced to remain in these camps, denial of rights and imposition of unsustainable living conditions continue to be, as Human Rights Watch reported in October 2020, “beyond the dignity of any people”.<sup>9</sup> In particular, Human Rights Watch found,

---

<sup>6</sup> UN General Assembly, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. A/75/335 (1 September 2020) [hereinafter “Special Rapporteur September 2020 Report”], paras. 32, 93.

<sup>7</sup> UN General Assembly, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN Doc. A/C.3/75/L.34 (30 October 2020) [hereinafter “UNGA Third Committee 2020 Resolution”]. The text was approved by the Third Committee of the UN General Assembly on 18 November 2020. UN General Assembly, *Third Committee Approves 7 Drafts on Human Rights in Myanmar, Iran, Democratic People’s Republic of Korea, as Delegates Denounce ‘Intrusive’ Demands*, UN Doc. GA/SHC/4312 (18 November 2020).

<sup>8</sup> Special Rapporteur September 2020 Report, para. 42.

<sup>9</sup> Human Rights Watch, “*An Open Prison without End*” *Myanmar’s Mass Detention of Rohingya in Rakhine State* (October 2020), p. 5, available at [https://www.hrw.org/sites/default/files/media\\_2020/09/myanmar1020\\_web.pdf](https://www.hrw.org/sites/default/files/media_2020/09/myanmar1020_web.pdf) (last accessed 4 December 2020) (quoting former United Nations Assistant Secretary-General Ursula Mueller).

based on interviews with dozens of Rohingya living in and around the camps as well as officials from various UN agencies and local and international humanitarian and civil society organizations, that:

“Rohingya in the camps are denied freedom of movement through overlapping systems of restriction—barbed-wire fencing, checkpoints, and other physical barriers; widespread extortion and bribes; restrictive and arbitrary permission procedures; denial of documentation; security force presence and abuse; and an environment of threats and violence that instills fear and self-imposed constraints. These restrictions are carried out through formal government policies, written and oral local orders and regulations, and informal and ad hoc practices implemented by local authorities. Together, they serve to arbitrarily deprive Rohingya of their liberty and disproportionately limit their movement in violation of international law. In addition, the severe restrictions on movement sharply hinder their access to other rights, notably health care, livelihoods, shelter, and education.”<sup>10</sup>

9. Myanmar’s Second Report acknowledges the existence of 18 of these camps.<sup>11</sup> Remarkably, by Myanmar’s own admission, only one of these 18 camps has been closed since the Provisional Measures Order was issued, meaning that Myanmar admits that 17 of them still exist in which up to 122,073 Rohingya remain confined.<sup>12</sup> Myanmar reports that it has “plans” to close another camp, at Kyauk Ta Lone, but its proposed resettlement of the inhabitants would further discriminate against the Rohingya because the “persons of the Kyauk Ta Lone camp maintain that they wish to return to their areas of origin”, which Myanmar will not allow.<sup>13</sup>

10. Despite its ongoing discriminatory treatment of the Rohingya, Myanmar asserts in the Second Report that it is “committed to ensuring equal participation of all its citizens without any discrimination based upon ethnicity or religion”.<sup>14</sup> This self-serving statement is contradicted by the facts described above, and by the Office of the UN High Commissioner for Human

---

<sup>10</sup> *Ibid.*, pp. 41-42.

<sup>11</sup> Second Report, para. 75.

<sup>12</sup> *Ibid.*

<sup>13</sup> Special Rapporteur September 2020 Report, para. 85.

<sup>14</sup> Second Report, para. 151.

Rights, which reported on 27 October 2020: “Myanmar’s discriminatory citizenship and electoral laws confer different sets of political rights to different classes of citizens, affecting most clearly the Muslim minorities who are largely excluded from citizenship.”<sup>15</sup> The UN Special Rapporteur on the human rights situation in Myanmar similarly found, in his September 2020 report, that “the wholesale disenfranchisement of the Rohingya people appears grounded in their ethnic identity”.<sup>16</sup>

11. Myanmar continues to deny the Rohingya not only these fundamental rights of citizenship, but citizenship itself. This is confirmed in the Second Report, where Myanmar states that it “has been assiduously conducting the citizenship verification process throughout Myanmar, including in northern Rakhine State, *in accordance with Myanmar’s 1982 Citizenship Law*”.<sup>17</sup> It is this 1982 law that stripped the Rohingya of their citizenship in Myanmar, and still prevents them from regaining it. Notwithstanding the protests of various United Nations agencies and numerous human rights organizations, Myanmar defiantly refuses to amend or modify the 1982 Citizenship Law so as to allow the Rohingya to become citizens or enjoy the rights associated therewith.<sup>18</sup> As explained by the UN Special Rapporteur:

“The Government of Myanmar has long denied Rohingya access to full citizenship rights, most recently through the national verification card process. While national verification cards are not intended solely for Rohingya, they effectively identify Rohingya as foreigners and strip them of full citizenship rights. The Special Rapporteur received reports that various authorities continue to force or coerce Rohingya to accept the cards. Rohingya and human rights defenders have commented that this appears to be a systematic campaign to erase Rohingya identity. Additionally, the 1982 Citizenship Law, which hinges access to citizenship rights on race and ethnicity, continues to effectively deny Rohingya equal access to full citizenship rights, thus contributing to the problem of statelessness. *The Special Rapporteur notes that the denial of citizenship is historically a common feature in the commission of*

---

<sup>15</sup> UN Office of the High Commissioner for Human Rights, *Press briefing notes on Myanmar* (27 October 2020), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26431&LangID=E> (last accessed 4 December 2020).

<sup>16</sup> Special Rapporteur September 2020 Report, para. 13.

<sup>17</sup> Second Report, para. 97 (emphasis added).

<sup>18</sup> See Memorial, paras. 6.25-6.35.

*the crime of genocide. In this regard, ensuring that the 1982 Citizenship Law is brought into line with international standards should be a matter of urgency.”*<sup>19</sup>

12. Nevertheless, Myanmar has taken no steps to create a path to citizenship for its Rohingya population. Despite the Court’s Order, Myanmar obstinately refuses to allow the Rohingya to become citizens.

### **B. Continuing Impunity for Pervasive Sexual Violence against the Rohingya**

13. Equally disturbing, if not more so, is Myanmar’s persistent refusal to address the widespread and systematic sexual violence perpetrated by the Tatmadaw against Rohingya women and girls during the “clearance operations”, as described in Chapter 9 of The Gambia’s Memorial.<sup>20</sup> The UN Fact-Finding Mission considered this to be another indicator of Myanmar’s genocidal intent.<sup>21</sup> As noted by the UN High Commissioner for Human Rights on 3 September 2020:

“Impunity regarding sexual and gender-based violence continues. No safe, effective, accessible and gender-sensitive reporting mechanisms for these crimes are in place and the Government continues to flatly deny their occurrence in both conflict and non-conflict settings. The national commission also excluded evidence of sexual and gender-based violence that had been documented by the fact-finding mission.”<sup>22</sup>

14. Much like its First Report,<sup>23</sup> Myanmar’s Second Report offers no indication that it is making any efforts to identify or hold accountable those responsible for rape, gang rape and other forms of sexual violence against the Rohingya during the “clearance operations”. The

---

<sup>19</sup> Special Rapporteur September 2020 Report, para 31 (emphasis added).

<sup>20</sup> Memorial, paras. 9.1-9.66.

<sup>21</sup> UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/CRP.5 (16 September 2019), para. 224, Memorial Vol. III, Annex 49.

<sup>22</sup> UN Human Rights Council, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar, Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/45/5 (3 September 2020) [hereinafter “High Commissioner September 2020 Report”], para. 30, Memorial Vol. III, Annex 56.

<sup>23</sup> See *The Gambia’s Preliminary Observations on Myanmar’s Report of 22 May 2020* (5 June 2020) [hereinafter “The Gambia’s Observations to First Report”], para. 20.

section of the Report on sexual violence consists of only two paragraphs.<sup>24</sup> The only prosecution for sexual violence mentioned relates to the rape of an ethnic *Rakhine* woman by Tatmadaw soldiers on 30 June 2020, for which the soldiers confessed and a court-martial proceeding has been announced.<sup>25</sup> But that case only serves to highlight the total impunity for the sexual violence committed against *Rohingya* women and girls during the “clearance operations” of 2016-2018.

**C. Ongoing Impunity for Tatmadaw Soldiers and Officers for Genocidal Acts against the Rohingya**

15. The pervasive impunity afforded to Tatmadaw soldiers and officers, especially senior commanders – which the UN Fact-Finding Mission considered another indicator of Myanmar’s genocidal intent<sup>26</sup> – protects them not only from accountability for rape, gang rape, mutilation of sexual organs and other sexual offenses, but also from prosecution for other genocidal acts, including killing, torture, infliction of serious bodily and mental injuries, burning of homes and villages, and confiscation of property. As described in The Gambia’s Memorial<sup>27</sup> and its Observations on Myanmar’s First Report,<sup>28</sup> neither Myanmar’s Independent Commission of Enquiry (“ICOE”) nor the Criminal Investigation and Prosecution Body (“CIPB”) that is purportedly investigating the 139 cases identified by the ICOE, can reach any member of the Tatmadaw.<sup>29</sup> These bodies, which seem to have been created to provide the appearance of accountability without actually having the authority to hold accountable anyone in the Tatmadaw, let alone the senior commanders responsible for the genocidal acts committed in 2016-2018, are fundamentally flawed in their composition, powers and activities. As the High Commissioner explained in her September 2020 report:

“A full assessment of the factual and legal analysis underpinning the findings and recommendations, as well as of the national

---

<sup>24</sup> Second Report, paras. 93-94.

<sup>25</sup> *Ibid.*, para. 94.

<sup>26</sup> UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/CRP.5 (16 September 2019), para. 224, Memorial Vol. III, Annex 49.

<sup>27</sup> Memorial, paras 11.87-11.103.

<sup>28</sup> The Gambia’s Observations to First Report, paras. 16-19.

<sup>29</sup> Second Report, paras. 46-48, fn 10.

commission's methods of work – including the type and selection of sources, access to and protection of witnesses, and particularly the failure to interview any Rohingya victims and witnesses in Bangladesh, is not possible on the basis of the information made available. Previous significant concerns about the structure, mandate, timing, independence and impartiality of this mechanism persist. As the national commission's mandate was focused narrowly on specific events that took place in Rakhine during a short period of 12 days, there was no investigation of broader patterns of violation, or of crimes committed in other parts of the country.”<sup>30</sup>

16. As to the 139 cases purportedly under investigation and prosecution by the CIPB, according to Myanmar's Second Report, none involves members of the Tatmadaw.<sup>31</sup> The majority, 87, involve alleged members of the Arakan Rohingya Salvation Army (ARSA) or its “collaborators” – in other words, members of the Rohingya group.<sup>32</sup> Twenty-nine cases involve “local people”, a vague category that could include Rohingya as well as Rakhine and members of other ethnic groups.<sup>33</sup> Only 23 cases – ten of which are either closed with no charges or “on hold” – involve members of the Border Guard Police. Of the 13 remaining cases, six are still under investigation.<sup>34</sup> Thus, out of the 139 total cases identified by the ICOE, only seven – *five percent of the total* – resulted in the conviction of a Myanmar State official. Moreover, other than a single conviction for looting, the Second Report provides no information regarding the crimes committed by the other six members of the Border Guard Police, or whether any of the victims were Rohingya.<sup>35</sup> Nor does the Report disclose the sentences imposed (if any). In short, Myanmar's handling of these cases, as described in the Second Report, fails entirely to dispel the conclusion reached by the UN Fact-Finding Mission, other UN agencies and reputable human rights organizations that the perpetrators of the “clearance operations” against the Rohingya in 2016-2018 continue to enjoy impunity for the genocidal acts that they committed or authorized.

---

<sup>30</sup> High Commissioner September 2020 Report, para. 24.

<sup>31</sup> Second Report, paras. 46-48.

<sup>32</sup> *Ibid.*, para. 46.

<sup>33</sup> *Ibid.*, para. 48.

<sup>34</sup> *Ibid.*, para. 47.

<sup>35</sup> *Ibid.*

17. Fundamental inadequacies also characterize the Tatmadaw’s courts-martial proceedings. Myanmar acknowledges in its Second Report, as it has done previously,<sup>36</sup> that civilian courts have no authority over members of the Tatmadaw, and that crimes committed by military personnel can be prosecuted only by the Tatmadaw itself.<sup>37</sup> The Gambia’s Memorial describes the serious flaws in the proceedings that have been undertaken by military authorities in regard to the genocidal acts committed at Inn Din and Gu Dar Pyin, two of the hundreds of Rohingya villages where the Tatmadaw carried out “clearance operations.”<sup>38</sup> In its Second Report, Myanmar concedes that the only Tatmadaw soldiers who have been prosecuted for the “clearance operation” carried out in Gu Dar Pyin are a non-commissioned officer (a warrant officer II), who was sentenced to a year’s imprisonment for having “violated the Rules of Engagement,” and two officers who were charged only with “supervision failures”.<sup>39</sup> One of these officers, Myanmar reports, received a year’s imprisonment; the more senior officer’s punishment consisted of nothing more than “forfeiture of one year’s military service for pension purposes”.<sup>40</sup> As related in The Gambia’s Memorial, Gu Dar Pyin was the site of a particularly brutal “clearance operation”; the UN Fact-Finding Mission estimated that 243 persons were killed, and cited eyewitness testimony of mass killings, systematic rape and gang rape, targeted killing of children and those trying to flee, and the burning of the entire village, corroborated by satellite imagery.<sup>41</sup> As with the Inn Din court-martial, where the soldiers were pardoned just seven months after being sentenced, the extremely light sentences given by the Gu Dar Pyin court-martial send – and could only have been intended to send – an unmistakable message of impunity for the authors and perpetrators of these horrific crimes.

18. The Second Report also refers to an allegedly planned but not yet constituted court-martial for the crimes committed in Chut Pyin and Maung Nu, for which neither the

---

<sup>36</sup> See The Gambia’s Observations to First Report, paras. 16-19.

<sup>37</sup> Second Report, paras. 46-48, 56.

<sup>38</sup> Memorial, paras. 11.16-11.28.

<sup>39</sup> Second Report, para. 53.

<sup>40</sup> *Ibid.*

<sup>41</sup> UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/39/CRP.2 (17 September 2018), paras. 818-833, Memorial Vol. II, Annex 40; Memorial, paras. 1.23, 8.15-8.16, 8.63, 11.43.

names, ranks or offenses of the intended accused are provided.<sup>42</sup> The absence of specific information, as well as the lack of transparency and entrenched impunity evident in the two previous courts-martial, cast significant doubt that these purported efforts will truly seek to hold anyone, let alone any commanding officers, accountable. As noted by the Special Rapporteur:

“Court martial proceedings have been sporadic and few and remained unreasonably secretive and inadequate to render justice to victims. The Tatmadaw has sole jurisdiction over crimes committed by military personnel and the ability to institute pardons without civilian oversight. This highlights the need to ensure greater transparency and independence of the Myanmar judiciary.

The Special Rapporteur notes the convictions by court martial of three members of the Tatmadaw for the massacre of Rohingya civilians in the village of Gu Dar Pyin in August 2017. The proceedings were unreasonably secretive. The absence of credible, impartial and reasonably transparent prosecutions for such incidents underscores the need for the engagement of international justice mechanisms.”<sup>43</sup>

The Third Committee of the UN General Assembly, in its vote on 18 November 2020, expressed its own “deep concern at the limited progress on the fact-finding mission’s recommendations to conduct prompt, effective, thorough, independent and impartial investigations and to hold perpetrators accountable for crimes committed across Myanmar”.<sup>44</sup>

#### **D. Inadequate Efforts To Curtail Hate Speech against the Rohingya**

19. While many pages of the Second Report are devoted to purported efforts to discourage hate speech, what they show instead is the lack of real and effective progress in curtailing hate speech against the Rohingya, whether propagated by the Tatmadaw and other security forces, or by influential members of civil society, including Buddhist monks. Myanmar’s official hate speech, especially during 2016-2018, and its tolerance of hate speech by

---

<sup>42</sup> Second Report, para. 55.

<sup>43</sup> Special Rapporteur September 2020 Report, paras. 88-89.

<sup>44</sup> UNGA Third Committee 2020 Resolution.

influential non-governmental actors, constitute further evidence of its genocidal intent,<sup>45</sup> as described in Chapter 7 of The Gambia’s Memorial.<sup>46</sup> Although the Second Report describes various workshops and seminars on hate speech,<sup>47</sup> none are said to have focused specifically on combating anti-Rohingya hate speech. Nor are any described as having addressed hate speech emanating from the Tatmadaw, government officials, or Buddhist monks.

20. Nor, indeed, has anti-Rohingya hate speech by Myanmar State entities been curtailed. The enforcement activities of Facebook demonstrate that the Tatmadaw and related entities, such as the Myanmar Police Force, continue to spread anti-Rohingya propaganda online through coordinated means. On 8 October 2020, for example, Facebook announced the removal of 38 Facebook accounts, 15 Pages, and six Instagram accounts that it determined were linked “to members of the Myanmar military” who had “attempted to conceal their identities and coordination”.<sup>48</sup> Those accounts, which spread anti-Rohingya messages, reached approximately 480,000 other Facebook users.<sup>49</sup> Similarly, in April 2020, Facebook was compelled to remove three Pages, 18 accounts, and one Group, all of which it found were linked to “members of the Myanmar Police Force” who had “attempted to conceal their identities and coordination”.<sup>50</sup> The pages reached approximately 19,000 other Facebook users and included what Facebook characterized as “anti-Rohingya content”.<sup>51</sup>

21. The Second Report seeks to minimize these abuses of the Facebook platform by Myanmar’s security forces by falsely claiming that an analysis by the Atlantic Council’s Digital Forensic Research Lab (“DFRLab”) found that only “four posts from 2017” included anti-

---

<sup>45</sup> UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/CRP.5 (16 September 2019), para. 224, Memorial Vol. III, Annex 49.

<sup>46</sup> Memorial, paras. 7.1-7.76.

<sup>47</sup> Second Report, paras. 62-66.

<sup>48</sup> Facebook, *October 2020 Coordinated Inauthentic Behavior Report* (October 2020), ch. 12, PDF p. 40, available at <https://about.fb.com/wp-content/uploads/2020/11/October-2020-CIB-Report.pdf> (last accessed 4 December 2020).

<sup>49</sup> *Ibid.*

<sup>50</sup> Facebook, *April 2020 Coordinated Inauthentic Behavior Report* (April 2020), ch. 6, PDF p. 21, available at <https://about.fb.com/wp-content/uploads/2020/05/April-2020-CIB-Report.pdf> (last accessed 4 December 2020).

<sup>51</sup> *Ibid.*

Rohingya content.<sup>52</sup> In fact, DFRLab determined that “[m]any of these assets inflamed anti-Rohingya sentiment before, during, and after the ethnic cleansing of Rohingya Muslims by the Myanmar military in 2017.”<sup>53</sup> DFRLab’s report concluded, in particular, that such accounts “present[ed] the Rohingya as terrorists, den[ied] that atrocities against the Rohingya took place, amplify[ed] reports of violence by the Rohingya on other groups, and dismiss[ed] the existence of the Rohingya in Myanmar”.<sup>54</sup>

22. The Second Report seeks to sow doubt that these Facebook accounts were actually controlled by the Myanmar security forces by selectively quoting DFRLab’s observation that “little open source evidence conclusively linked these assets to the Myanmar military beyond imagery deployed in their profiles”.<sup>55</sup> Myanmar, however, omits to mention the fact that it was Facebook’s own internal investigation, which had access to *non*-public data, that concluded that the accounts were linked to the Myanmar Police Force (“MPF”).<sup>56</sup> Indeed, DFRLab reported that it “found no evidence that would cause it to doubt the company’s [*i.e.*, Facebook’s] attribution, which likely relied on back-end information not available to open source researchers”.<sup>57</sup> DFRLab also found that “the assets it had access to did demonstrate a heavy pro-MPF bias”, and that “they displayed behavior intended to hide their identities while driving the anti-Rohingya narratives”.<sup>58</sup>

23. Nor does the Second Report mention that investigative reporting by independent media concluded that anti-Rohingya hate speech was spreading “like wildfire” in the lead up to Myanmar’s 8 November 2020 election, with some candidates and parties employing anti-

---

<sup>52</sup> Second Report, para. 68.

<sup>53</sup> DFRLab, *Inauthentic anti-Rohingya Facebook assets in Myanmar removed* (5 May 2020), available at <https://medium.com/dfrlab/inauthentic-anti-rohingya-facebook-assets-in-myanmar-removed-39eb7e069d9> (emphasis added).

<sup>54</sup> *Ibid.*

<sup>55</sup> Second Report, para. 68.

<sup>56</sup> Facebook, *April 2020 Coordinated Inauthentic Behavior Report* (April 2020), ch. 6, PDF p. 21, available at <https://about.fb.com/wp-content/uploads/2020/05/April-2020-CIB-Report.pdf> (last accessed 4 December 2020).

<sup>57</sup> DFRLab, *Inauthentic anti-Rohingya Facebook assets in Myanmar removed* (5 May 2020), available at <https://medium.com/dfrlab/inauthentic-anti-rohingya-facebook-assets-in-myanmar-removed-39eb7e069d9> (last accessed 4 December 2020).

<sup>58</sup> *Ibid.*

Rohingya slogans and rhetoric.<sup>59</sup> One such report observed that “[s]upporters of Myanmar’s military-aligned opposition party have been spreading hate speech at increasing levels on the campaign trail”, and that there has been no government action to stop it.<sup>60</sup>

**E. Failure To Adequately Preserve Evidence of Genocidal Acts against the Rohingya**

24. In its Second Report, Myanmar describes efforts it claims to have made to preserve evidence of crimes committed against the Rohingya during the “clearance operations” of 2016-2018, in purported fulfilment of its obligation under paragraph 86(3) of the Provisional Measures Order.<sup>61</sup> However, its assertions in this regard are either irrelevant or unsubstantiated. Myanmar claims, for example, that certain squatters in Myebon Township were evicted from structures that they had built upon land originally belonging to Rohingya. But this is not one of the townships where the “clearance operations” against the Rohingya were carried out in 2016-2018. In any event, Myanmar presents no documentary evidence to support its claim.<sup>62</sup> Moreover, in contrast to the image of itself that Myanmar seeks to present, in Sittwe Township, an order of 14 May 2020 requiring Rakhine Buddhist families to vacate land originally belonging to Rohingya families was revoked barely five days later, on 19 May 2020.<sup>63</sup>

25. Myanmar objects to the UN High Commissioner’s 3 September 2020 report that “the Tatmadaw had burned large swathes of Buthidaung township where between five and more

---

<sup>59</sup> Fanny Potkin and Poppy McPherson, “‘Spreading like wildfire’: Facebook fights hate speech before Myanmar poll”, *Reuters* (6 November 2020), available at <https://www.reuters.com/article/myanmar-election-facebook/spreading-like-wildfire-facebook-fights-hate-speech-before-myanmar-poll-idUSL4N2HQ3QU> (last accessed 2 December 2020). See also “Hate Speech Against Rohingya in Myanmar Election Has Worrisome Precedents”, *Radio Free Asia* (13 October 2020), available at <https://www.rfa.org/english/news/myanmar/hate-speech-10132020192900.html> (last accessed 4 December 2020).

<sup>60</sup> “Hate Speech Among Military Party’s Supporters on The Rise Ahead of Myanmar Election”, *Radio Free Asia* (4 November 2020), available at <https://www.rfa.org/english/news/myanmar/hate-speech-11042020181704.html> (last accessed 4 December 2020).

<sup>61</sup> Second Report, paras. 82-92.

<sup>62</sup> *Ibid.*, paras. 82-84.

<sup>63</sup> “Myanmar’s Rakhine State Revokes Order Evicting Squatters From Rohingya Land”, *Radio Free Asia* (26 May 2020), available at <https://www.rfa.org/english/news/myanmar/revokes-05262020163840.html> (last accessed 4 December 2020).

than a dozen Rohingya villages once stood”,<sup>64</sup> claiming that Myanmar was not “given an opportunity to respond in advance”.<sup>65</sup> However, correspondence from the Office of the High Commissioner for Human Rights demonstrates that Myanmar was, in fact, afforded the opportunity to comment.<sup>66</sup> Moreover, OHCHR offered to conduct an on-site investigation, but Myanmar refused to grant permission.<sup>67</sup> Indeed, Myanmar has refused to cooperate with, or allow on-site visits to northern Rakhine State by, among others, the UN Fact-Finding Mission, the UN Special Rapporteur, and OHCHR.<sup>68</sup>

26. Regardless, Myanmar does not even attempt to dispute the High Commissioner’s conclusion in the same September 2020 report that:

“satellite imagery unequivocally confirms that physical structures built since October 2017 for the return of the Rohingya, including Taung Pyo Let Yar Reception Centre, Nga Khu Ya Reception Centre and Hla Poe Khaung Transit Centre, were constructed where Rohingya villages had previously stood, thereby potentially destroying any evidence that may have previously existed at those sites. There is evidence that similar reconstruction has occurred since 2017 in multiple villages in Maungdaw township, as well as in Paung Zar village in Rathedaung township.”<sup>69</sup>

Myanmar likewise does not contest that such construction has taken place in Kan Kya, in Maungdaw Township. Nor could it, as the Special Rapporteur on 22 September 2020 presented satellite imagery showing construction of security structures on land that had previous been inhabited by Rohingya.<sup>70</sup>

---

<sup>64</sup> High Commissioner September 2020 Report, para. 29.

<sup>65</sup> Second Report, para. 92.

<sup>66</sup> *Ibid.*, Annex 26.

<sup>67</sup> *Ibid.*

<sup>68</sup> Special Rapporteur September 2020 Report, para. 94 (“International monitors, prosecutors and humanitarian actors continue to be denied access to areas of northern Rakhine State affected by military ‘clearance operations’ in 2016 and 2017.”).

<sup>69</sup> High Commissioner September 2020 Report, para. 28.

<sup>70</sup> Memorial, para. 13.38 and Figure 13.1.

27. Myanmar’s ongoing construction of security facilities, or housing for other ethnic groups, on lands occupied by Rohingya communities before the “clearance operations” of 2016-2018 contradicts its assertions that it is making preparations for the repatriation of Rohingya refugees who escaped destruction by fleeing to Bangladesh. As observed by the UN Special Rapporteur in September 2020, “the conditions for the voluntary, safe, dignified and sustainable return of Rohingya refugees to Myanmar are not in place”.<sup>71</sup>

\* \* \*

28. For these reasons, it is The Gambia’s view that the Second Report provides no reason to conclude that Myanmar is fully discharging its obligations under paragraphs 86(1), 86(2) or 86(3) of the Court’s Order of 23 January 2020.

29. The Gambia appreciates the opportunity the Court has afforded it to submit these Observations, and it reserves the right to present further evidence of Myanmar’s non-compliance with the Court’s Order, as such evidence becomes available.



---

**H.E. Mr. Dawda Jallow**

**Attorney General and Minister of Justice  
of the Republic of The Gambia**

**Agent of the Republic of The Gambia**

**7 December 2020**

---

<sup>71</sup> Special Rapporteur September 2020 Report, para. 32.