

INTERNATIONAL COURT OF JUSTICE

THE GAMBIA'S OBSERVATIONS ON
MYANMAR'S REPORT OF 20 MAY 2021

REPUBLIC OF THE GAMBIA

v.

REPUBLIC OF THE UNION OF MYANMAR

16 August 2021

1. In accordance with the Court’s letter of 16 July 2021 (ref: 155141), the Republic of The Gambia (“The Gambia”) submits these Observations on the Third Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020 (the “Third Report”).¹

2. These Observations, like those The Gambia submitted in response to the First² and Second³ Reports, filed on 22 May 2020 and 23 November 2020 respectively, are intended to highlight the principal shortcomings in the Third Report and the obvious ways in which the Republic of the Union of Myanmar (“Myanmar”) is failing to fulfill its obligations under the Court’s Order of 23 January 2020 (“Provisional Measures Order” or “Order”). The Gambia has not attempted to document all of the inaccuracies and inadequacies of Myanmar’s Third Report. Instead, in supplement of its observations herein, The Gambia respectfully refers the Court to the relevant portions of its Memorial, filed on 23 October 2020, for a fuller treatment of the subjects discussed by Myanmar in its Third Report.⁴

3. Myanmar has once again attempted to shroud its failure to comply with the Court’s Order with irrelevant and/or misleading information. Like the First and Second Reports, much of the Third Report is devoted to assertions that are either irrelevant to the Provisional Measures Order or impossible to verify because Myanmar continues to prohibit international and non-governmental organizations and journalists 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, which continues to deny the Rohingya even the most basic human rights, has failed to meaningfully implement the Court’s Order.

¹ *Third Report of the Republic of the Union of Myanmar Pursuant to Paragraph 86(4) of the Order of 23 January 2020* (20 May 2021) [**hereinafter** the “Third Report”].

² *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”].

³ *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”].

⁴ In its Third Report, Myanmar lists nineteen categories of “Measures taken to implement the Provisional Measures Order”. Third Report, pp. 6-25. The Second Report listed twenty-four categories of actions, Second Report, pp. 8-43, and the First Report identified twenty, First Report, pp. 23-53. 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.

4. The reality is that conditions for the Rohingya have deteriorated following the Tatmadaw's coup of 1 February 2021,⁵ leaving the Rohingya even more vulnerable to additional acts of genocide. In a Presidential Statement on 10 March 2021, the UN Security Council warned, "the current situation has the potential to exacerbate existing challenges in Rakhine state and other regions."⁶ In a briefing to the UN General Assembly on 26 February 2021, the Special Envoy of the UN Secretary-General on Myanmar (the "UNSG Special Envoy") asked, "how can we rely on a military regime when the very same led the security operations leading to the human rights violations and forced displacement of Rohingya people and others from their homes?"⁷ It is thus unsurprising that Myanmar still refuses to take the steps necessary to prevent further genocidal acts and hold perpetrators accountable. The continued discrimination against the Rohingya and impunity accorded to those who committed genocide during the "clearance operations" of 2016 to 2018, especially members and leaders of the Tatmadaw, further reinforce the conclusion that those acts were carried out with the intent to destroy the Rohingya as a group.

A. Ongoing Violence and Discrimination against the Rohingya as a Group

5. The Third Report refers to Directives from April 2020 issued by the Office of the President on compliance with the Convention on the Prevention and Punishment of the Crime of Genocide.⁸ However, notwithstanding the Directives, which do not so much as even mention the Rohingya, state-sponsored violence and discrimination against the Rohingya persist. According to the UN Special Rapporteur on the situation of human rights in Myanmar ("UN Special Rapporteur"):

"From 23 January 2020 to 22 January 2021, at least 33 Rohingya civilians were killed as a result of the conflict, with at least 39

⁵ See UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. A/HRC/46/56 (4 March 2021), available at https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session46/Documents/A_HRC_46_56.pdf [hereinafter "Special Rapporteur March 2021 Report"], paras. 4-15.

⁶ UN Security Council, *Statement by the President of the Security Council [on "The situation in Myanmar"]*, UN Doc. S/PRST/2021/5 (10 March 2021), available at <https://undocs.org/S/PRST/2021/5>.

⁷ UN General Assembly, *Briefing by Special Envoy of the Secretary-General on Myanmar, Christine Schraner Burgener, to the Informal Meeting of the General Assembly on Myanmar* (26 February 2021), available at <https://dppa.un.org/en/informal-meeting-of-general-assembly-myanmar-0>.

⁸ See Third Report, paras. 26-27.

others injured. According to information received by the Special Rapporteur, in the year following the ICJ’s Provisional Measures Order, 19 Rohingya men, women and children were killed as a result of targeted or indiscriminate attacks by the Myanmar military; one was killed in a targeted kill[ing] by police; ten were killed as a result of landmines or unexploded ordnance; and two were killed in targeted killings by other unidentified armed groups. The 33 killed included 15 children and three women. ...

In addition to the killings of Rohingya by the Myanmar military, scores more were injured as a result of incidents similar to those described above and Rohingya are among the thousands of people who have been internally displaced by the conflict.”⁹

6. The UN General Assembly, in a resolution dated 31 December 2020, expressed “grave concern at continuing reports of serious human rights violations and abuses by the military and security forces as well as violations of international humanitarian law in Myanmar against Rohingya and other minorities.”¹⁰ Myanmar’s self-serving and unsubstantiated claim that the Union Ministries and State and Region Governments have received no cases or complaints of violence does not reflect the reality that members of the Rohingya community continue to be targeted, and perpetrators of genocidal acts remain in positions of authority.¹¹

7. Myanmar’s discriminatory laws and policies that target the Rohingya remain in full effect. Like the First and Second Reports, the Third Report conspicuously avoids discussing these discriminatory laws and policies, even though the UN Fact-Finding Mission identified them as one of seven indicia of genocidal intent.¹² As explained at length in Chapter 6 of The Gambia’s Memorial, Myanmar has implemented pervasive restrictions on movement, marriage, births, and access to livelihoods.¹³ Such policies and practice remain in place. The UN General

⁹ Special Rapporteur March 2021 Report, paras. 31, 34.

¹⁰ UN General Assembly, *Resolution adopted by the General Assembly on 31 December 2020 on the Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN Doc. A/RES/75/238 (31 December 2020), available at <https://undocs.org/en/A/RES/75/238> [hereinafter “UNGA 2020 Resolution”], para. 1.

¹¹ See *infra* Section B; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Memorial of The Gambia (23 October 2020) [hereinafter “Memorial”], Chapter 11.

¹² 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. MG, Vol. III, Annex 49.

¹³ Memorial, paras. 6.1-6.89.

Assembly noted on 31 December 2020 that “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.”¹⁴

8. The UN Special Rapporteur similarly reported in March 2021:

“The Rohingya remain cut off from livelihoods, education, and basic services due to ongoing, severe movement restrictions. Reports note impediments to accessing quality medical care were especially problematic during the COVID-19 pandemic. The inability of IDPs to temporarily return to their lands at harvest time has further undermined their self-reliance. Displaced communities have recently described being afraid of going back to their villages due to the presence of landmines within and around their villages. This creates substantial barriers to durable solutions for this oppressed community. ...

An estimated 600,000 vulnerable, stateless Rohingya still live in Rakhine State, including some 130,000 whom the government has confined to IDP camps in central Rakhine since 2012. The cumulative effect of the armed conflict, COVID-19, and attendant measures comprising curfews and other movement restrictions as well as mobile data/internet shutdowns, exposes already vulnerable populations (including IDPs in protracted situation and ongoing new displaced populations), to even greater risks, and significantly impacts access to livelihoods and essential services. While restrictions on movement affected all communities, the Rohingya faced additional obstacles/threats—for instance, when seeking safety or accessing life-saving services at night—due to pre-existing movement restrictions. The pandemic exacerbated longstanding prejudices and negative rhetoric against the Rohingya in Rakhine State (i.e. in relation to ‘illegal’ cross-border movements) accompanied by increased calls for the Government to control the country’s borders.”¹⁵

9. The 1982 Citizenship Law continues to place significant restrictions on the rights of members of the Rohingya group. Senior General Min Aung Hlaing¹⁶ reiterated that the

¹⁴ UNGA 2020 Resolution, preamble.

¹⁵ Special Rapporteur March 2021 Report, paras. 44, 47.

¹⁶ As of 1 August 2021, the *de facto* military government declared General Hlaing to be Prime Minister. Hannah Beech, “Top Myanmar General Says Military Rule Will Continue Into 2023”, *The New York Times* (1 Aug. 2021), available at <https://www.nytimes.com/2021/08/01/world/asia/myanmar-state-emergency.html>.

military government would continue to issue Citizenship Scrutiny Cards “in accordance with the Citizenship Law”.¹⁷ As described in The Gambia’s Memorial, the 1982 Citizenship Law stripped the Rohingya of citizenship and continues to prevent them from regaining it.¹⁸ The Special Rapporteur’s March 2021 report to the UN Human Rights Council explained:

“Rohingya continue to be subject to severe restrictions on movement within Myanmar and efforts continue to enforce members of the community to accept the National Verification Card, a form of identification which may preclude future efforts by individuals to access their citizenship....

Virtually all Rohingya ... require authorization to leave Rakhine State and to travel outside of their villages or townships within Rakhine State. This time-limited authorization is exceedingly difficult to obtain, considering the administrative and financial requirements, making it unattainable for most. Permission and documentation are needed even to travel short distances from their township and/or village tracts (including to urban areas within townships), severely restricting access to livelihoods as well as basic and life-saving services. Further movement restrictions in some locations were observed with the introduction of new requirements for people to hold National Verification Cards, including for travel within townships. Rohingya can only obtain such a card if they identify themselves as ‘Bengali’ and self-identify as nonindigenous to Myanmar. ...

No tangible progress was reported in improving the situation of the Rohingya with regard to their legal status and right to a nationality, or restoring citizenship in line with the Government of Myanmar’s endorsed Advisory Commission on Rakhine State recommendations. Without reform of the 1982 Citizenship Law, discrimination based on an applicant’s ethnicity—in both law and practice—continues to impede the acquisition of citizenship

¹⁷ Office of the Commander-In-Chief of Defence Services, “Chairman of State Administration Council Commander-in-Chief of Defence Services Senior General Min Aung Hlaing delivers address at meeting (9/2021) of State Administration Council” (27 April 2021), *available at* <https://cincds.gov.mm/node/12111?d=2>; *see also* Senior General Min Aung Hlaing, “State Administration Council Chairman Senior General Min Aung Hlaing addresses coordination meeting of State Administration Council, Nay Pyi Taw Council, region/state administration councils, self-administered division or zone administration bodies” (9 February 2021), *available at* <https://www.seniorgeneralminaugnhlaing.com.mm/en/24331/state-administration-council-chairman-senior-general-min-aung-hlaing-addresses-coordination-meeting-state-administration-council-nay-pyi-taw-council-regionstate-administration-councils-self-adm/> (“For the repatriation of displaced people in Bangladesh, measures will be taken in accord with the bilateral agreements and the 1982 Citizenship Law.”).

¹⁸ Memorial, paras. 6.13-6.21.

documentation among minority groups, with the Rohingya being the most affected.

Citizenship remains inaccessible to almost all Rohingya. The citizenship process continues to lack transparency and involve prohibitively high unofficial fees and burdensome evidentiary and administrative requirements. Recent trends also indicate that the Rohingya are being issued Naturalized citizenship even when eligible for full citizenship.”¹⁹

10. Far from making progress on implementing the Court’s Provisional Measures Order, Myanmar continues to restrict the Rohingya’s freedom of movement by requiring National Verification Cards for travel within townships. Reflecting the military government’s animosity toward the Rohingya, on 24 May 2021, Senior General Hlaing—who currently holds the positions of Chairman of the State Administration Council, Commander-in-Chief of Defence Services, and Prime Minister—publicly stated, “After we gained our independence, the census also registered the words ‘Bengali’, ‘Pakistani’ and ‘Chittagong’, but never the word ‘Rohingya’, thus we never accepted it.”²⁰ On 12 June 2021, Major General Zaw Min Tun, lead spokesman for the State Administration Council, said Rohingya is “just an imaginary name”.²¹ Senior General Hlaing made similar statements both during the Tatmadaw’s “clearance operations” and before the coup. For example, on 8 November 2020, he stated: “Our official records recognize only 135 indigenous ethnic groups. Bengalis or Rohingyas are not among these indigenous groups. The term Rohingya has been formulated by the same people to distinguish themselves from Bengali.”²²

¹⁹ Special Rapporteur March 2021 Report, para. 34, 45, 55-56.

²⁰ Matthew Tostevin, “Myanmar junta leader casts doubt on return of Rohingya”, *Reuters* (24 May 2021), available at <https://www.reuters.com/world/asia-pacific/myanmar-junta-leader-casts-doubt-return-rohingya-2021-05-24/>.

²¹ “Myanmar junta raises doubt over citizenship for Rohingya”, *The Straits Times* (12 June 2021), available at <https://www.straitstimes.com/asia/se-asia/myanmar-junta-raises-doubt-over-citizenship-for-rohingya>.

²² Senior General Min Aung Hlaing, “Written Interview by the Asahi Shimbun of His Excellency Senior General Min Aung Hlaing, Commander-in-Chief of Defence Services of Myanmar: Questions and Answers” (8 November 2020), available at <https://www.seniorgeneralminaugnhlaing.com.mm/en/23181/written-interview-asahi-shimbun-excellency-senior-general-min-aung-hlaing-commander-chief-defence-services-myanmarquestions-answers/#content>.

11. Myanmar's claims in the Third Report that access to citizenship has improved demonstrate the opposite. Awareness-raising sessions and mobile teams²³ are irrelevant if the 1982 Citizenship Law remains unmodified and the Rohingya remain ineligible for citizenship. According to the Third Report, only 11 Muslims from northern Rakhine State (who may not even be Rohingya) were issued Citizenship Scrutiny Cards from 1 November 2020 to 15 April 2021. While 3,465 Muslims are reported to have received National Verification Cards, these force Rohingya applicants to self-identify as Bengali non-citizens and confer far fewer rights than that accorded by citizenship.²⁴ In fact, as The Gambia described in its Memorial, Myanmar uses coercive and violent methods to force Rohingya to accept NVCs.²⁵ Thus, rather than indicating progress, Myanmar's continued issuance of these cards demonstrates the persistence of its discrimination against the Rohingya.

12. Indeed, Myanmar continues to discriminate in regard to matters as basic as the issuance of birth certificates. For instance, although the Third Report claims that "4,022 children from Muslim communities in northern Rakhine State were issued with birth certificates",²⁶ the number of birth certificates is significantly lower than would be expected. For example, according to the Third Report, only nine birth certificates were issued to Muslims in Pauktaw Township,²⁷ even though over 23,000 Rohingya and Kaman are confined in internally displaced person ("IDP") camps there. Likewise, no birth certificates whatsoever are reported to have been issued in Kyauktaw Township, despite the presence of an IDP camp with over 500 Rohingya detainees.²⁸

²³ Third Report, para. 60.

²⁴ Memorial, para. 6.25-6.27.

²⁵ Memorial, para. 6.28-6.35.

²⁶ Third Report, para. 59.

²⁷ Third Report, p. 15.

²⁸ Human Rights Watch, *An Open Prison without End: Myanmar's Mass Detention of Rohingya in Rakhine State*, (8 October 2020), available at <https://www.hrw.org/report/2020/10/08/open-prison-without-end/myanmars-mass-detention-rohingya-rakhine-state>.

B. Continuing Impunity for Acts of Genocide and Pervasive Sexual Violence against the Rohingya

13. The Third Report fails to identify any genuine progress regarding accountability for the acts of genocide committed during the “clearance operations”. As noted in The Gambia’s Observations on Myanmar’s First²⁹ and Second Reports,³⁰ Myanmar has been unable or unwilling to penetrate the veil of impunity. While the so-called Independent Commission of Enquiry (“ICOE”) and the Criminal Investigation and Prosecution Body (“CIPB”), which were created before the Tatmadaw’s February 2021 coup, may have been intended to create the appearance of a process for holding those responsible accountable, there has been no meaningful effort to do so. And Myanmar’s post-coup military government, which is dominated by those most responsible for the genocide, including Senior General Min Aung Lang, appears to have dispensed with even that pretense. To the contrary, the current military government appears committed to investigating *those who have advocated for accountability*. In February 2021, the UNSG Special Envoy reported to the General Assembly that recent reports indicated that:

“the military will launch investigations into the work of Advisory Commission on Rakhine State initiated by Kofi Annan and take action against those who acted – I quote [the military leadership]– ‘in the self-interest of an individual without taking national interests into consideration’ is deeply concerning. The same has been announced for the activities of the Independent Commission of Enquiry (ICOE). So all who worked to protect Rohingyas and were in favour of accountability are now under threat.”³¹

14. Despite the massive scale of the violence perpetrated against the Rohingya during the “clearance operations”, the Third Report states that only 139 individuals have been investigated or prosecuted by the CIPB Task Force. None is a member of the Tatmadaw. Indeed,

²⁹ *The Gambia’s Observations on Myanmar’s Report of 22 May 2020* (5 June 2020) [hereinafter “The Gambia’s Observations on the First Report”], paras. 16-19.

³⁰ *The Gambia’s Observations on Myanmar’s Report of 23 November 2020* (7 December 2020) [hereinafter “The Gambia’s Observations on the Second Report”], para. 15.

³¹ UN General Assembly, *Briefing by Special Envoy of the Secretary-General on Myanmar, Christine Schraner Burgener, to the Informal Meeting of the General Assembly on Myanmar* (26 February 2021), available at <https://dppa.un.org/en/informal-meeting-of-general-assembly-myanmar-0>.

87 are supposed members of “ARSA and their collaborators” and 29 are of “local people”.³² Senior General Min Aung Hlaing has refused to acknowledge that the “clearance operations” were perpetrated by the Tatmadaw, instead blaming the violence on “ARSA terrorist and extremist Bengalis”.³³

15. Only 23 of those individuals the Third Report claims have been investigated or prosecuted are members of the Myanmar Border Police. A mere two of those cases resulted in sentences. The Third Report, however, provides no information about what crimes the defendants may have been charged with or what their sentences may have been. In fact, of the 12 cases concerning members of the Border Police that Myanmar’s Second Report listed as either being on hold or under investigation, 10 have now been closed due to lack of evidence. There are also significant discrepancies between the Second and Third Reports. The Second Report stated that of the 23 cases against members of the police, seven resulted in punishment. The Third Report, however, indicates that the number is only two. Myanmar provides no explanation for why five members of the police are evidently no longer convicted, or credible evidence that even two were convicted.

16. In regard to holding members of the Tatmadaw accountable, the Third Report demonstrates that Myanmar’s record is even worse. The Special Court of Inquiry has not advanced at all in the investigations of the Chut Pyin or Taung Bazar massacres. In regard to the atrocities committed during the “clearance operation” at Maung Nu, which involved, among other things, the systematic killing of children and elderly and widespread sexual violence,³⁴

³² As noted in The Gambia’s Observations on Myanmar’s Second Report, “local people” is a vague category that could include Rohingya, Rakhine and other ethnic groups. The Third Report provides no further clarity of what “local people” means. *See* The Gambia’s Observations on the Second Report, para. 16. Likewise, investigations into alleged members of “ARSA and their collaborators” do not address the perpetrators of the genocide.

³³ Senior General Min Aung Hlaing, “Written Interview by the Asahi Shimbun of His Excellency Senior General Min Aung Hlaing, Commander-in-Chief of Defence Services of Myanmar: Questions and Answers” (8 November 2020), *available at* <https://www.seniorgeneralminaughlaing.com.mm/en/23181/written-interview-asahi-shimbun-excellency-senior-general-min-aung-hlaing-commander-chief-defence-services-myanmarquestions-answers/#content> (“Buthidaung and Maungtaung townships in Rakhine State were the scene of conflicts in 2012, 2016 and 2017. Those conflicts were initiated by ARSA terrorists and extremist Bengalis. Those affected by this violence were other Bengalis, and indigenous peoples such as Rakhine, Mro, Khamee and Thet communities who were killed by ARSA and extremist Bengalis. Entire villages were displaced. Also killed were Bengalis of the Hindu faith.”).

³⁴ For a full description, *see* Memorial, paras. 8.121-8.136.

only three members of the Tatmadaw—one officer and two soldiers—have been convicted, but only for such offenses as disorderly conduct and failure to operate military rules for the officer, and robbery and use of criminal force for the other two soldiers.³⁵ Their sentences included just forfeiture of one year’s military service for pension purposes for the higher-ranking officer and 1-2 years imprisonment with hard labor for the soldiers, a further confirmation of the pervasive impunity, particularly for senior ranking officers most responsible for these atrocities.

17. The Gambia documented at length in Chapter 9 of its Memorial how the Tatmadaw engaged in massive, systematic and extremely brutal rape, gang rape, sexual assault, and genital mutilation of Rohingya women and girls across northern Rakhine State.³⁶ Despite repeated appeals by, among others, the UN Security Council, urging Myanmar to address this pervasive impunity,³⁷ Myanmar continues to refuse to do so. The Third Report recounts only superficial and seemingly performative attempts to address the situation. As with the First and Second Reports, Myanmar has neglected to pursue accountability for the perpetrators of sexual violence. Instead, Myanmar describes the sentencing of only three soldiers convicted of sexual assault of an ethnic Rakhine woman.³⁸ It also cites a “National Action Plan”, but provides no information regarding the plan’s contents or implementation.³⁹ Myanmar’s failure in all three reports to describe any legitimate efforts to hold accountable those responsible for rape and other forms of sexual violence against the Rohingya during the “clearance operations” further highlights its refusal to address this issue.

18. In addition to the lack of accountability for the perpetration of sexual violence, Myanmar provides a highly misleading account of the support that it supposedly provides to survivors of sexual violence. Myanmar mentions having established “One Stop Women Support Centers”, but these are located far from Rakhine State in places where few, if any, Rohingya

³⁵ Third Report, para. 36.

³⁶ Memorial, Chapter 9.

³⁷ See Memorial, para. 11.32; The Gambia’s Observations to the Second Report, paras. 13-14.

³⁸ Third Report, para. 58.

³⁹ Third Report, paras. 54-55.

live.⁴⁰ The Third Report references only a single temporary safe house in Rakhine State, which, by its own admission, has treated *one* Muslim girl.⁴¹

C. Inadequate Efforts for Repatriation and Resettlement

19. Myanmar claims to be working in good faith with Bangladesh to repatriate the hundreds of thousands of Rohingya who fled the acts of genocide committed during the “clearance operations”. The Third Report asserts that, as of 19 April 2021, of the 829,001 names that Bangladesh has provided Myanmar for verification, Myanmar had reviewed no more than 46,181 and verified only 30,842 as having been residents of Rakhine State.⁴² One hundred seventy days earlier (31 October 2020), Myanmar had reviewed 40,138 names and verified 26,814.⁴³ Thus, in just under six months, Myanmar scrutinized only an additional 6,043 names and verified only 4,028. This means that Myanmar has thus far reviewed only 5.6% of the names submitted by Bangladesh, and has verified only 3.7% of them.

20. This is partly due to the fact that Myanmar’s verification process relies upon discriminatory registration systems. In the Third Report, Myanmar notes that the repatriation lists are cross-referenced with Rakhine State household lists.⁴⁴ However, since at least 2016, Myanmar has systematically refused to register Rohingya and has deleted them from these lists.⁴⁵ For example, in northern Rakhine State, those who are not present during the annual population checks risk being deleted from their household list.⁴⁶ As described by Amnesty International, “Rohingya who leave Myanmar, whether fleeing violence or persecution or in search of

⁴⁰ Third Report, para. 56.

⁴¹ Third Report, para. 57.

⁴² Third Report, para. 44.

⁴³ Second Report, para. 71.

⁴⁴ Third Report, para. 44 (“[Of the 42,484 scrutinized,] 28,307 persons were verified as former residents of Rakhine State, and 14,177 persons were not found in household lists of Rakhine State.”).

⁴⁵ Since the start of 2016, authorities in northern Rakhine stopped adding newborn babies’ names to the household lists and instead required families to apply, which Amnesty International describes as an “extremely cumbersome and onerous” process. The Rohingya villages in central Rakhine have not had their household lists updated since 2012. Amnesty International, “*Caged without a Roof*”: *Apartheid in Myanmar’s Rakhine State* (November 2017), available at <https://www.amnesty.org/download/Documents/ASA1674842017ENGLISH.PDF>, pp. 34-37.

⁴⁶ *Ibid.*, p. 38.

livelihood and educational opportunities, find it extremely difficult, if not impossible, to legally return” for this reason.⁴⁷ Moreover, Myanmar’s repatriation process remains constrained by the 1982 Citizenship Law, which excludes the Rohingya from full citizenship.⁴⁸ After the coup, Senior General Min Aung Hlaing reiterated this policy, remarking that:

“It is necessary to grant [permanent residency] to foreigners who can contribute to the benefit of the country and to carefully examine whether they stay here in accordance with the law. In granting citizenships to former Myanmar citizens from other countries, it is necessary for them to be loyal to the country and not to hold dual citizenship and scrutinization must be carried out carefully in accordance with the 1982 Citizenship Law.”⁴⁹

The Senior General and coup leader stated on another occasion that Myanmar would not repatriate people it does not consider citizens under the law.⁵⁰

21. In any event, northern Rakhine State is not safe for the Rohingya to return. In January 2021, UNHCR reported, “Progress has not been sufficient to enable the voluntary return of Rohingya refugees or IDPs. The most basic needs of Rohingya in Rakhine State — freedom of movement, access to basic services and a pathway to citizenship — remained unfulfilled.”⁵¹ In March 2021, the UN Security Council “expresse[d] concern that recent developments pose particular serious challenges for the voluntary, safe, dignified, and sustainable return of

⁴⁷ *Ibid.*

⁴⁸ Memorial, paras. 6.13-6.21.

⁴⁹ Senior General Min Aung Hlaing, “Chairman of State Administration Council Commander-in-Chief of Defence Services Senior General Min Aung Hlaing addresses meeting (4/2021) of council’s management committee” (1 April 2021), available at <https://www.seniorgeneralminaugnhlaing.com.mm/en/25121/chairman-of-state-administration-council-commander-in-chief-of-defence-services-senior-general-min-aung-hlaing-addresses-meeting-42021-of-councils-management-committee/>.

⁵⁰ “Bangladesh Relying on World Community to Press Myanmar Junta on Rohingya Repatriation”, *Radio Free Asia* (25 May 2021), available at <https://www.rfa.org/english/news/myanmar/relying-05252021165631.html>.

⁵¹ UN High Commissioner for Refugees, *The Displaced and Stateless of Myanmar in the Asia-Pacific Region* (January 2021), available at <https://reporting.unhcr.org/sites/default/files/The%20Displaced%20and%20Stateless%20of%20Myanmar%20in%20the%20Asia-Pacific%20Region%20-%20January%202021.pdf>, p. 3.

Rohingya refugees and internally displaced persons” and emphasized that it is “vital that the rights of minorities are fully protected”.⁵²

22. Further obstructing the return of the Rohingya, Myanmar continues to confiscate and construct government facilities on Rohingya-owned land. The UN Special Rapporteur reported in March 2021:

“In northern Rakhine State, the right of refugees to return to their original places and recover their house, land, and property further deteriorated in 2020, with reports of bulldozing and the clearing of homes and land, encroachment and confiscation of the house plots/land left behind. Additionally, Rohingya villages were subjected to reclassification, in some cases being removed from official maps. As widely reported, including a report to the Human Rights Council by the Special Rapporteur, refugee land has been used by various actors for different purposes including the development of security compounds, government buildings, and development projects in new villages/settlements. Moreover, an apparent shift in policy was observed since the escalation of the COVID-19 cases, as ‘spontaneous’ refugee returnees from Bangladesh previously processed under the Union Enterprise for Humanitarian Assistance, Resettlement and Development framework and permitted to return to their original or other places, instead faced charges and were sentenced for illegal entry.”⁵³

23. The Third Report’s claims regarding the resettlement of Rohingya who are confined to IDP camps are misleading. For example, Myanmar states that it has closed the Taung Paw IDP camp and plans to close the Kyauk Ta Lone camp.⁵⁴ However, according to the UN Special Rapporteur, “This closure is not in line with international standards as it will not allow

⁵² UN Security Council, *Statement by the President of the Security Council [on “The situation in Myanmar”]*, UN Doc. S/PRST/2021/5 (10 March 2021), available at <https://undocs.org/S/PRST/2021/5>. See also Human Rights Watch, “*An Island Jail in the Middle of the Sea*”: Bangladesh’s Relocation of Rohingya Refugees to Bhasan Char (7 June 2021), available at https://www.hrw.org/report/2021/06/07/island-jail-middle-sea/bangladeshs-relocation-rohingya-refugees-bhasan-char#_ftn20 (“The Rohingya are at even greater risk since the February 1, 2021 military coup in Myanmar, given that the country is now under the full authority of the commander-in-chief, Sr. Gen. Min Aung Hlaing, who oversaw the military responsible for crimes against humanity and genocidal acts against them.”).

⁵³ Special Rapporteur March 2021 Report, para. 68.

⁵⁴ Third Report, paras. 48-49.

IDPs to return to their homes or their places of origin. Rather, the authorities will simply move residents to housing at the same location while barring them from work.”⁵⁵

24. In a briefing to the UN Security Council, the UNSG Special Envoy warned about “concerning reports that the IDP camp closure is about to resume but without due consideration for durable solutions for the displaced”.⁵⁶ Human Rights Watch likewise reported that Myanmar’s plans in actuality “entail constructing permanent structures in current camp locations, further entrenching the Rohingya’s status as permanent detainees. In 2020, the government began ‘closing’ Kyauk Ta Lone camp in Kyaukpyu, constructing shelters on isolated and flood-prone land, again rejecting the requests of Rohingya and Kaman displaced people to return home.”⁵⁷

D. Denial of Humanitarian Assistance and Adequate Healthcare

25. Myanmar’s systematic discrimination against the Rohingya continues to prevent them from receiving humanitarian assistance and accessing healthcare. Since the February coup, humanitarian groups report extreme difficulty traveling within Rakhine State to deliver aid. Amnesty International described:

“UN agencies and international NGOs delivering humanitarian aid and supplies faced significant impediments in their efforts to conduct activities. The authorities restricted access to conflict-affected areas and where governance was contested by the government and ethnic armed groups. Restrictions on humanitarian actors were particularly acute in Rakhine State, where a cumbersome bureaucracy and government-imposed travel bans prohibited access to at-risk populations, including in conflict and displacement settings.”⁵⁸

⁵⁵ Special Rapporteur March 2021 Report, para. 106.

⁵⁶ UN Security Council, *Briefing of Special Envoy of the Secretary-General on Myanmar Ms. Christine Schraner Burgener* (5 March 2021), available at <https://twitter.com/SchranerBurgen1/status/1367900242566410240>.

⁵⁷ Human Rights Watch, *World Report 2021, Myanmar* (January 2021), available at https://www.hrw.org/sites/default/files/media_2021/01/2021_hrw_world_report.pdf, p. 478.

⁵⁸ Amnesty International, *Amnesty International Report 2020/21* (April 2021), available at <https://www.amnesty.org/download/Documents/POL1032022021ENGLISH.PDF>, p. 258; Human Rights Watch has made similar observations: “Aid agencies report extremely difficult circumstances in which their ability to deliver aid is frequently impeded.” Human Rights Watch, *Statement: Impacts of Covid-19 on Internally Displaced People in*

26. Such restrictions caused the UN General Assembly, on 31 December 2020, to express “grave concern about the ongoing restrictions on humanitarian access in all conflict areas, in particular in Rakhine and Chin States, as well as the limited steps taken to ensure access to health care for the Rohingya, particularly in the time of COVID-19”.⁵⁹ The General Assembly further expressed “deep concern that international access to affected areas of northern Rakhine State remains severely restricted for the international community, including for United Nations agencies, humanitarian actors and international media”.⁶⁰ Myanmar’s Third Report does nothing to assuage these concerns. Nearly all of the information mentioned in the Third Report concerning the provision of food dates from before the military coup. Moreover, the Third Report does not specify the timing, frequency or extent of health care services that are claimed to have been made available to Rohingya in Rakhine State. It is therefore unclear what, if any, such resources are actually being provided, especially since Myanmar does not allow any international observation or verification.

27. The Third Report’s claims regarding Myanmar’s response to COVID-19 is also misleading. While Myanmar touts the supposed absence of confirmed COVID-19 cases in IDP camps, reports by independent observers describe a different the reality. In December 2020, Human Rights Watch reported:

“Factors such as a lack of testing resources and services, fears of stigma in crowded camps, and fear of officials is likely contributing to severe underreporting of Covid-19 cases among IDP populations. Government blocks on humanitarian access for international organizations and aid agencies make it difficult to investigate further on the ground. However, the failure to provide an adequate health response is exemplified by Myanmar’s nationwide ‘Action Plan for the Control of COVID-19 Outbreak at

Myanmar (10 December 2020), available at <https://www.hrw.org/news/2020/12/14/human-rights-watch-statement-impacts-covid-19-internally-displaced-people-myanmar>.

⁵⁹ UNGA 2020 Resolution, para. 5.

⁶⁰ *Ibid.*

IDP Camps,' which does not include testing or plans for the country's internally displaced people."⁶¹

28. Even more troubling, Myanmar has "used Covid-19 response measures as a pretext to harass and extort Rohingya in the detention camps in central Rakhine State"⁶² COVID-19 restrictions and curfews, combined with other movement restrictions, "expose[] already vulnerable populations (including IDPs in [a] protracted situation and ongoing new displaced populations), to even greater risks, and significantly impacts access to livelihoods and essential services".⁶³ The Rohingya have also been systematically excluded from Myanmar's vaccination efforts, yet another pernicious effect of their denial of citizenship.⁶⁴ U Hla Thein, spokesman for the military's Rakhine State Administrative Council, said on 13 August 2021, "They [Rohingya] are not on the vaccination list for the time being. Priority is given to citizens under state policy. ... As vaccines are bought with public funds, citizens have to be given priority".⁶⁵ A local administrator in Sittwe confirmed on 11 August 2021 that "[t]here were no current plans for vaccinating any of the Muslims living in camps in Sittwe".⁶⁶

E. Inadequate Efforts to Curtail Hate Speech Against the Rohingya

29. The Third Report's description of Myanmar's purported efforts in regard to hate speech come nowhere close to showing that it has made meaningful efforts to address pervasive

⁶¹ Human Rights Watch, *Statement: Impacts of Covid-19 on Internally Displaced People in Myanmar* (10 December 2020), available at <https://www.hrw.org/news/2020/12/14/human-rights-watch-statement-impacts-covid-19-internally-displaced-people-myanmar>.

⁶² Human Rights Watch, *World Report 2021, Myanmar* (January 2021), available at https://www.hrw.org/sites/default/files/media_2021/01/2021_hrw_world_report.pdf, p. 478.

⁶³ Special Rapporteur March 2021 Report, para. 47.

⁶⁴ "Rohingya excluded from Myanmar's COVID-19 vaccination rollout", *The Japan Times* (12 August 2021), available at <https://www.japantimes.co.jp/news/2021/08/12/asia-pacific/rohingya-vaccination-myanmar/>.

⁶⁵ "Rohingya Without Myanmar ID Not Being Given COVID-19 Jab: Junta", *The Irrawaddy* (13 August 2021), available at <https://www.irrawaddy.com/news/burma/rohingya-without-myanmar-id-not-being-given-covid-19-jab-junta.html>.

⁶⁶ "Myanmar COVID vaccination rollout leaves Rohingya waiting", *Reuters* (11 August 2021), available at <https://www.reuters.com/world/asia-pacific/myanmar-covid-vaccination-rollout-leaves-rohingya-waiting-2021-08-11/>.

anti-Rohingya propaganda.⁶⁷ Tellingly, nothing in the Report indicates that Myanmar has made the slightest effort to address discrimination and violence against the Rohingya group.

30. Indeed, the Tatmadaw continues to propagate hate speech. On 24 February 2021, the Tatmadaw and military-controlled state and media entities were banned from Facebook and Instagram due in part to “[o]ngoing violations by the military and military-linked accounts and Pages since the February 1 coup, including efforts to reconstitute networks of Coordinated Inauthentic Behavior that we previously removed, and content that violates our violence and incitement and coordinating harm policies”.⁶⁸ As detailed in Chapter 7 of The Gambia’s Memorial, those Tatmadaw networks of “coordinated inauthentic behavior” were created specifically to propagate anti-Rohingya hate speech.⁶⁹

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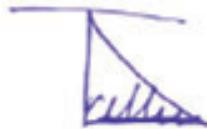
31. For these reasons, it is The Gambia’s view that the Third Report provides no reason to conclude that Myanmar is fully discharging its obligations under paragraphs 86(1), 86(2), or 86(3) of the Court’s Order of 23 January 2020 or has taken the needed steps to depart from its genocidal state policy.

⁶⁷ See Third Report, paras. 40-42; 62-67.

⁶⁸ Rafael Frankel, “*An Update on the Situation in Myanmar*”, Facebook (14 April 2021), available at <https://about.fb.com/news/2021/02/an-update-on-myanmar/>.

⁶⁹ Memorial, paras. 7.24-7.26.

32. 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.



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16 August 2021